

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11DST04675

<p>William R Tate, Petitioner, v. North Carolina Department of State Treasurer Retirement Systems Division, Respondent.</p>	<p>ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT</p>
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THIS MOTION was to be heard before the Honorable Julian Mann, III, Chief Administrative Law Judge, on August 24, 2011. The undersigned, after considering the entire record in this case, including written Motions and Responses of the parties, including careful review of the Honorable Paul G. Gessner's Order Adopting The Final Agency Decision of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement system in Martin H. Beach v. North Carolina Department of Treasurer, Retirement System Division, dated and filed in the Wake County Superior Court on August 24, 2012, and hearing oral arguments, hereby enters the following Order granting summary judgment in favor of Respondent. A brief summary of the material uncontested facts is set forth as follows:

UNCONTESTED FACTS

1. Petitioner retired in the LGERS effective January 1, 2008. At the time of his retirement, he was employed by the Greensboro ABC Board.
2. The Greensboro ABC Board is a covered employer in the LGERS.
3. Petitioner returned to work for the Greensboro ABC Board on January 2, 2008, and continued to work for the Greensboro ABC Board every month thereafter through February 2011.
4. Following his retirement January 1, 2008, Petitioner performed work every month for the Greensboro ABC Board during the periods January 2, 2008, through February 2011 and April 2011 through the present. Since his retirement in January 2008, Petitioner has worked for more than one thousand hours during each successive 12-month period for the Greensboro ABC Board.
5. In the year 2008, Petitioner worked approximately 1200 hours for the Greensboro ABC Board; in 2009, Petitioner worked approximately 1700 hours for the Greensboro ABC

Board; in 2010, Petitioner worked approximately 1700 hours for the Greensboro ABC Board; in 2011, Petitioner had worked approximately 800 hours for the Greensboro ABC Board as of the date this matter was heard by the presiding ALJ.

6. Petitioner has been paid on a regular basis for all work he performed for the Greensboro ABC Board since the effective date of his retirement in January 2008.
7. Petitioner received the sum of \$39,679.08 in retirement benefits from the Retirement System from January 2008 through January 2011.
8. Respondent has widely and consistently communicated--in writing--its interpretation that "rendering no service" during the month following the effective date of retirement means "rendering no work." The importance of this one-month break in service is discussed in numerous written communications available to LGERS employers and employees. During all periods relevant to this case, the Retirement System has consistently published its interpretation of the statute that "service" in the second sentence of G.S. § 128-21(19) means any work at all for a covered employer. It has communicated this interpretation both on its website and in its manuals. Significantly, the 2007 Employee Handbook "Your Retirement Benefits" states on page 23: "Please note that retirement law requires your retirement date to be on the first day of the month, and for your retirement to become effective on the first day of the month, you must do no work for a covered employer at any time during that month."
9. Petitioner submitted a second application for retirement in February 2011 to the LGERS with a new effective retirement date of March 1, 2011.
10. Petitioner did not perform work for the Greensboro ABC Board in March of 2011.

#### CONCLUSIONS OF LAW

1. At the time of Petitioner's retirement, N.C.G.S. § 128-21(19), the statute governing the definition of retirement in the LGERS, stated in pertinent part:

`Retirement' shall mean withdrawal from active service with a retirement allowance granted under the provisions of this Article. In order for a member's retirement to become effective in any month, the member must render no service at any time during that month.
2. During all periods relevant to this case, Respondent has widely and consistently communicated--in writing--its interpretation that "rendering no service" during the month following the effective date of retirement means "performing no work." The importance of this one-month break in service is discussed in numerous written communications available to LGERS employers and employees. During all periods relevant to this case, the Retirement System has consistently published its interpretation of the statute that "service" in the second sentence of G.S. § 128-21(19) means any work at all for a

covered employer. It has communicated this interpretation both on its website and in its manuals. Significantly, the 2007 Employee Handbook "Your Retirement Benefits" states on page 23: "Please note that retirement law requires your retirement date to be on the first day of the month, and for your retirement to become effective on the first day of the month, you must do no work for a covered employer at any time during that month." An agency's interpretations of its governing statutes are accorded some deference. *See Rainey v. N.C. Dept of Public Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007) ("*Subsection (c)* [of N.C.G.S. § 150-51] refers only to the agency's decision in the specific case before the court. It does not bar the trial court from considering the agency's expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case")

3. Petitioner worked for the Greensboro ABC Board, a covered employer in the LGERS, in the month in which he retired, the month of January 2008.
4. Having returned to service post-retirement in a position for which Petitioner worked over 1000 hours in each succeeding twelve-month period, Petitioner was regularly employed from January 2008 through February 2011 by the Greensboro ABC Board.
5. N.C.G.S. § 128-24(5)(d), the statute governing return to service at the time of Petitioner's retirement, stated in pertinent part:

Should a beneficiary who retired on an early or service retirement allowance be restored to service as an employee, then the retirement allowance shall cease as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter[.]

6. N.C.G.S. § 128-21(10), the statute governing the definition of "employee" at the time of Petitioner's retirement, stated in pertinent part: "'Employee' shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section[.]"
7. The North Carolina Administrative Code provision which defines the term "regularly employed" in the Local Governmental Employees' Retirement System provides: "An officer or employee in a regular position, the duties of which require not less than 1000 hours of service per year shall be an employee as defined in G.S. 128-21(10)." 20 N.C.A.C. 02C .0802.
8. Petitioner violated the provisions of N.C.G.S. § 128-21(19) by working for a covered employer in the LGERS in the month in which his retirement became effective. He and his employer also violated the requirement that regular employees be enrolled as members of the LGERS.

9. Petitioner's January 2008 retirement in the LGERS became null and void as a result of Petitioner's having performed work for the Greensboro ABC Board in the month in which he retired; and Petitioner has, thereby, received an overpayment in benefits in the amount of \$39,679.08, measured by the amount of retirement benefits he was paid from January 2008 through January 2011.
10. Respondent is entitled to receive the overpayment from Petitioner's retirement benefits.
11. Judge Paul G. Gessner's rationale expressed in his Conclusions of Law in the previously referenced *Martin H. Beach v. North Carolina Department of Treasurer, Retirement System Division* is found by the undersigned to be persuasive and is adopted by the undersigned.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Petitioner's Motion for Summary Judgment is hereby denied
2. Respondent's Motion for Summary Judgment is hereby granted, there being no genuine issue of material fact that Petitioner returned to work for the Greensboro ABC Board in January 2008, the same month in which his retirement became effective, and that, therefore, Respondent is entitled to recover the amount of \$39,679.08 from Petitioner.

#### NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B 36(b), (bl) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina Department of State Treasurer Retirement Systems Division.

This the 7<sup>th</sup> day of September, 2012.

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Julian Mann, III  
Chief Administrative Law Judge