

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DST 09960

PHILLIP L. WATSON,)
Petitioner,)
v.)
NORTH CAROLINA DEPARTMENT OF)
STATE TREASURER, RETIREMENT)
SYSTEM DIVISION,)
Respondent.)

DECISION

On August 7, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On September 26, 2012, the parties filed their respective proposed Decisions.

APPEARANCES

For Petitioner: David G. Schiller, Schiller & Schiller, PLLC,
5540 Munford Road, Suite 101
Raleigh, North Carolina

For Respondent: Susannah P. Holloway
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699

ISSUE

Whether Respondent erroneously determined that Petitioner had received an overpayment of disability service retirement benefits because Petitioner had exceeded his Earnable Allowance for 2006 through 2010, and that Respondent could recoup that amount from Petitioner?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §§ 128 – 27, and 128 – 31, N.C. Gen. Stat. § 143 – 64.80

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 2, 4, 6.

For Respondent: 1-11

WITNESSES

For Petitioner: None

For Respondent: Garry Austin, Petitioner

FINDINGS OF FACT

Procedural Background

1. By letter dated June 13, 2011, Respondent notified Petitioner that based on a review of Petitioner's disability retirement benefits account, his employer's report of Petitioner's earnings for 2006 – 2010, and Petitioner's Earnable Allowance for 2006 – 2010, Respondent had determined that Petitioner had received a \$14,539.23 overpayment of his monthly disability benefits as a result of exceeding his Earnable Allowance for 2006 through 2010. Respondent advised Petitioner that Respondent would seek recoup of such overpayment by deducting \$243.00 per month from Petitioner's monthly disability benefit check, beginning with Petitioner's July 2011 monthly benefit check.

2. On August 5, 2011, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent's June 13, 2011 decision. In his petition, Petitioner contended the following three basis for such appeal:

a. First, Petitioner contended that Respondent breached a fiduciary duty owed to Petitioner by failing to provide him with an accurate and complete statement about qualifying for retirement benefits.

b. Second, Petitioner argued that Respondent is barred by the statute of limitations from recovering any monies that were purportedly due earlier than 3 years from the date of the filing of the contested case petition.

c. Third, Petitioner asserted that Respondent is unlawfully attempting to recover retirement benefits previously paid to Petitioner in violation of Chapter 135 of the NC General Statutes, the Contract Clause of US Constitution, Art. I § 10, cl. 1, and the Due Process Clauses of US Constitution, Amendments V and XIV and NC Constitution, Art. I, Sec. 1 & 19.

3. Less than twenty-four hours before this hearing, Garry Austin, special assistant to Respondent's director for thirty-five years, found his calculations in his Final Agency Decision

letter were inaccurate by \$5,553.32, so that the actual amount of overpayment of disability retirement benefits was \$8985.91.

Adjudicated Facts at Hearing

4. From 1982 until 2004, Petitioner was employed by the Fayetteville Police Department, completing almost twenty-three years of service. Petitioner acted as the sergeant in charge of the drug squad for approximately twelve years, and worked in the homicide squad for two years thereafter. (T. pp. 87-88)

5. In 2004, Petitioner was diagnosed with Tarsal Tunnel, a condition in which the nerves in his ankle and feet were severely constricted. After extensive surgery and physical therapy, doctors determined the damage was too severe for recovery and the Petitioner was deemed totally disabled. (T. p. 89)

6. Effective October 1, 2005, Petitioner retired from the Fayetteville Police Department, and began receiving disability retirement benefits under the Local Governmental Employees' Retirement System ("LGERs"). (T. p. 87-88)

7. On October 10, 2005, Petitioner became a full-time employee with the Administrative Office of the Court, and began working for the Cumberland County District Attorney's office. Petitioner also became a contributing member in the North Carolina Teachers' and State Employees' Retirement System ("TSERS"). (T. pp. 97-98) (Resp. Exh. 3) Before taking that position, Petitioner turned down a position as an investigator, a higher paying position, because he understood that he could only earn a certain amount and still claim disability retirement. (T. p. 96)

8. From October 2005 until July 2011, Petitioner worked a 40-hour workweek in the Cumberland County District Attorney's Office.

9. In 2011, the Retirement System staff performed an audit of Petitioner's account, and determined that Petitioner had violated his Earnable Allowance for the years 2006 through 2010. After that audit, Respondent mailed its June 13, 2011 letter to Petitioner.

10. After receiving Respondent's June 13, 2011 letter, Petitioner adjusted his work schedule, and began working a 32-hour workweek to comply with the Retirement System's salary requirements regarding disability retirement benefits. (T. pp. 96, 98)

11. Petitioner acknowledged that he called the Retirement System in October and November of 2005 to inquire as to what his maximum Earnable Allowance would be should he continue working with the District Attorney's Office. (T. pp. 80-81, 82, 94) Mr. Watson's file with the State Retirement System established the dates in October and November of 2005 when Petitioner contacted the Retirement System, wherein Petitioner advised he had received his "ea" or Earnable Allowance, and he "has questions about the max amt." (Resp. Exh. 12, p. 8 of 10)

12. Petitioner admitted that at all times since his October 1, 2005 retirement based on his disability, he knew he would be subject to the Earnable Allowance if he were employed. (Resp. Exh. No. 7, Admission No. 36) That is, Petitioner knew that he could not earn more than his highest twelve consecutive months' wages, so he contacted the Fayetteville Police Department to attempt to gather an estimate for his maximum allowance. He estimated his gross salary to be approximately \$25,000 in 2005. (T. p. 92)

13. For the years of 2006 and 2007, Petitioner received no correspondence either affirming or contradicting his belief that his wages fell within the limits of his earning allowance. (T. p. 93-94) In both 2008 and 2009, Petitioner received letters from the Retirement Systems affirming that his gross wages fell within acceptable limits. Petitioner asserted that he relied on the Retirement System's silence in 2006 and 2007, and 2008 and 2009 letters to assure him that his earnings with the District Attorney's office remained within his Earnable Allowance.

14. At hearing, Mr. Garry Austin explained that Respondent issued the 2008 and 2009 letters to Petitioner in error. The evidence at hearing showed that Respondent's 2008 and 2009 letters were based upon the Annual Statements of Income that Petitioner had submitted to Respondent, wherein Petitioner inaccurately self-reported his gross wages. Those self-reported amounts for 2008 and 2009 were above Petitioner's Earnable Allowance for 2008 2009. (Pet. Exh. 6; Resp. Exh. 5)

15. Each year, from 2006 to present, Petitioner used his W-2 forms to complete his Form 237 Statement of Income, and used the handbook he received as a resource for how to answer questions. (Resp. Exh. 5)

16. Earnings in 2006: Petitioner reported to the Retirement System that his gross salary for 2006 was only \$25,112.10. (Resp. Exh. No. 5, p. 1) Contrary to the earnings he reported to the System, Petitioner's gross salary for 2006 was \$26,715.00. (Resp. Exh. No. 3)

17. Petitioner admitted that his gross income from employment for the year 2006 was actually \$26,715.00, as reported by his employer. (See Resp. Exh. No. 7, Petitioner's Responses to Respondent's First Requests for Admissions, Admission No. 7; Resp. Exh. No. 2; T. pp. 83-84)

18. Pursuant to N.C. Gen. Stat. § 128-27(e), Petitioner's Earnable Allowance for 2006 was \$26,537.59. (Resp. Exh. No. 2; Testimony of Garry Austin, T. p. 7-13)

19. Earnings for 2007: Petitioner reported to the Retirement System that his gross income for 2007 was \$26,572.37. (Resp. Exh. No. 5) Contrary to the earnings he reported to the System, Petitioner's gross salary for 2007 was in fact \$28,581.84. (Resp. Exh. No. 6)

20. Petitioner admitted that his gross income from employment for the year 2007 was actually \$28,581.84, as reported by his employer. (See Resp. Exh. No. 7, Petitioner's Responses to Respondent's First Requests for Admissions, Admission No. 14; Resp. Exh. No. 2; T. pp. 83-84)

21. Petitioner's Earnable Allowance for 2007 was \$27,204.88. (Resp. Exh. No. 2)
22. Earnings for 2008: Petitioner reported to the Retirement System that his gross income for 2008 was \$27,919.70. (Resp. Exh. No. 5, p. 3) Contrary to the earnings he reported to the System, Petitioner's actual gross salary for 2008 was \$30,901.61. (Resp. Exh. No. 6; Resp. Exh. No. 3; Resp. Exh. No. 7, Admission No. 21)
23. Petitioner admitted that his gross income from employment for the year 2008 was actually \$30,901.61 as reported by his employer. (Resp. Exh. No. 7, Admission No. 21; T. pp. 83-84; Resp. Exh. No. 2)
24. Petitioner's Earnable Allowance for 2008 was \$28,334.14. (Resp. Exh. No. 2)
25. Earnings for 2009: Petitioner reported to the Retirement System that his gross income for 2009 was \$27,895.46. (Resp. Exh. No. 5, p. 4)
26. Petitioner's Earnable Allowance for 2009 was \$28,359.80. (Resp. Exh. No. 2)
27. Petitioner's employer reported to the Retirement System that Petitioner's gross salary for 2009 was \$31,342.46. However, this report included funds that Petitioner did not receive due to the mandatory furlough for that year. (Resp. Exh. No. 6, T. p. 23)
28. Contrary to the earnings he had reported to the System, Petitioner acknowledged in his Responses to Interrogatories that his gross income from employment for the year 2009 was actually \$31,186.62. (See Resp. Exh. No. 7, Petitioner's Responses to Respondent's First Set of Interrogatories, Response No. 2)
29. Respondent agrees, and Garry Austin acknowledged on Respondent's behalf, that \$31,186.62 is the actual amount of the gross salary income Petitioner received for 2009 from AOC. (T. p. 23; Resp. Exh. No. 2)
30. Earnings for 2010: Petitioner reported to the Retirement System that his gross income for 2010 was \$28,096.92. (Resp. Exh. No. 5) Contrary to the earnings he reported to the System, Petitioner's gross salary for 2010 was in fact \$31,167.00. (Resp. Exh. No. 6)
31. Petitioner admitted that his gross income from employment for the year 2010 was \$31,167.00 as reported by his employer. (See Resp. Exh. No. 7, Petitioner's Responses to Respondent's First Requests for Admissions, Admission No. 35; T. pp. 83-84)
32. Petitioner's Earnable Allowance for 2010 was \$29,129.75. (Resp. Exh. No. 2)
33. Petitioner did not contact the Retirement System in 2007, 2008, 2009, or 2010 to ascertain his exact Earnable Allowance. "I had calculated I could make a little bit more than \$25,000, because I was just guessing at it." (T. p. 92) He admitted that he made an error when completing his Statements of Income for 2006 - 2010. He explained that this was due to a lack of guidance, not a malicious act. (T. p. 92)

34. Petitioner admitted, and the evidence established that, Petitioner did not accurately report his annual gross earnings to the Retirement System for each of the years 2006, 2007, 2008, 2009, and 2010. (T. p. 79; Resp. Exh. No. 5, the statements of income submitted by Petitioner to Respondent; Resp. Exh. No. 3, the ORBIT Reports)

35. The preponderance of the evidence showed that Petitioner's inaccurate reporting for those years was not intended to deceive or mislead the LSGERS.

36. Petitioner exceeded his Earnable Allowance in each year for the years 2006, 2007, 2008, 2009, and 2010, and earned \$8,985.91 above his Earnable Allowance for the years 2006-2010.

37. As of July 31, 2012, Petitioner has repaid \$3,259.00 to Respondent, through a monthly offset on his disability retirement benefit check.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The statutes governing the North Carolina Local Governmental Employees' Retirement System provide for ongoing oversight over a disability recipient by the Board of Trustees and Respondent's administrative staff.

3. N.C. Gen. Stat. §128-27(e)(1) provides the following limitations on the post-retirement income of a beneficiary who is receiving disability retirement benefits:

The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. This difference shall be increased on January 1 each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent (1/10 of 1%). Should the earning capacity of the disability

beneficiary later change, the portion of his disability retirement allowance not provided by his contributions may be further modified. In lieu of the reductions on account of a disability beneficiary earning more than the aforesaid difference, he may elect to convert his disability retirement allowance to a service retirement allowance calculated on the basis of his average final compensation and creditable service at the time of disability retirement and his age at the time of conversion to service retirement. This election is irrevocable.

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N.C. Gen. Stat. § 128-27(e)(1)

4. Pursuant to N.C. Gen. Stat. § 128-31, the LGERS is entitled to recoup payments from a recipient's ongoing benefits. That statute provides:

Notwithstanding any provisions to the contrary, any overpayment of benefits to a member in a State-administered retirement system, the Disability Salary Continuation Plan, or the Disability Income Plan of North Carolina may be offset against any retirement allowance . . . or any other right accruing under this Chapter to the same person[.]

5. Respondent seeks recoupment in this case, pursuant to N.C. Gen. Stat. § 128-31.

6. Each year, N.C. Gen. Stat. § 128-27(e)(1) requires that the Retirement Systems Division adjust a disability retiree's Earnable Allowance upward in comparison to the ratio of the Consumer Price Index to the Index one year earlier. "Earnable Allowance" is the amount that Petitioner was allowed to earn without affecting his disability retirement benefits.

7. At all times that Petitioner received disability retirement benefits from the LGERS, he was subject to the Earnable Allowance provisions of N.C. Gen. Stat. § 128-27(e)(1).

8. A preponderance of the evidence showed that Petitioner exceeded his Earnable Allowance in each year for the years 2006, 2007, 2008, 2009, and 2010.

9. A preponderance of the evidence established that Petitioner received an overpayment of benefits in the total amount of \$8,985.91, for having exceeded his Earnable Allowance for each of the years 2006 through 2010.

10. In this case, Respondent erred in issuing the 2008 and 2009 letters to Petitioner that Petitioner's earnings for those years were within acceptable limits. (Pet. Exh. 6) However, Respondent's 2008 and 2009 letters were based on Petitioner's own Annual Statement of Income for those years, wherein Petitioner estimated, and inaccurately reported his annual income for 2008 and 2009, although not done maliciously. Since Respondent's 2008 and 2008 letters were based on Petitioner's own inaccurately reported information, Respondent's issuance of those letters was excusable.

11. The preponderance of the evidence established that Respondent acted in accordance to its authority in N.C. Gen. Stat. § 128-27(e)(1), and § 128-31 in seeking to recoup, and in recouping, overpayments of disability retirement benefits from Petitioner. Respondent did not breach any alleged fiduciary duty owed to Petitioner in pursuing such recoupment.

12. Petitioner's argument that Respondent is barred by a statute of limitations from recouping any overpayment in benefits, is not persuasive. Our Supreme Court has held that statutes of limitations do not run against the State when it is carrying out its governmental functions. *Rowan County Board of Education v. United States Gypsum co.*, 332 N.C. 1, 418 S.E.2d 648 (1992) N.C. Gen. Stat. § 128-31 specifically provides that the LGERS may recoup overpayments from a recipient's ongoing benefits. Furthermore, N.C. Gen. Stat. § 143-64.80 provides:

No State department, agency, or institution, or other State-funded entity may forgive repayment of an overpayment of State funds, but shall have a duty to pursue the repayment of State funds by all lawful means available, including the filing of a civil action in the General Court of Justice.

(N.C. Gen. Stat. § 143-64.80)

13. As the Office of Administrative Hearings lacks the requisite jurisdiction to hear Petitioner's constitutional arguments, the undersigned cannot address such arguments in this decision.

14. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner must repay \$8,985.91 to the Retirement System for the overpayment of disability retirement benefits he received for the years 2006, 2007, 2008, 2009, and 2010. Credit shall be given to Petitioner for \$3259.00 in benefits that Petitioner has already paid as of the date of this Order, so that Petitioner only owes \$5726.01 to the Retirement System.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to recoup, and subsequent monthly recoupment, of an overpayment of disability retirement benefits from Petitioner, should be **AFFIRMED**. Giving credit to Petitioner for the \$3259.00 in benefits he has already repaid Respondent, Petitioner owes \$5726.01 to the Retirement System for the remaining overpayment in disability retirement benefits.

ORDER AND NOTICE

The Board of Trustees of the Teachers' and State Employees' Retirement System will make the Final Decision in this case. That Agency is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail, the evidence in the record relied upon by the agency in making the finding of fact.

The Board is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties, furnish a copy to the parties' attorneys of record, and furnish a copy to the Office of Administrative Hearings.

This the 1st day of November, 2012.

Melissa Owens Lassiter
Administrative Law Judge