

STATE OF NORTH CAROLINA
COUNTY OF ALEXANDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DST 10875

RUSSELL E. GREENE,
Petitioner,

v.

NC DEPARTMENT OF STATE
TREASURER RETIREMENT SYSTEMS
DIVISION,
Respondent.

DECISION

THIS MATTER was heard before the Honorable Joe L. Webster, Administrative Law Judge at the Haywood County Courthouse in Waynesville, North Carolina.

APPEARANCES

For Petitioner: John W. Crone, III, Esq.
Thomas Gaither & Gorham
P.O. Box 2507
Hickory, N.C. 28603

For Respondent: Susannah P. Holloway
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

ISSUE

Whether Respondent's calculation of Petitioner's credible service for retirement in the System for sick leave hours accumulated with the City of Lenoir deprived the Petitioner of property, ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule

APPLICABLE STATUTES

N.C.G.S. Section 128-22 and N.C.G.S. 128-26(e)

EXHIBITS

Petitioner's Exhibits: 1-8
Respondent's Exhibits: 1-3

WITNESSES

For Petitioner: Russell Greene
 Crystal Smith
 Kim Stine

For Respondent: Garry Austin

BASED UPON consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the Court makes the following **Findings of Fact**. In making these Findings of Fact, the Court has weighed all evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. Petitioner disputes how the Retirement System calculated his creditable service towards retirement based on his unused accumulated sick leave hours he had earned while employed by the City of Lenoir.
2. Petitioner earned 4,110 hours of unused sick leave, with one day of sick leave being the equivalent of 24 hours, through his employment as a firefighter with the City of Lenoir.
3. Respondent's Exhibit No. 1, the Personnel Policy for the City of Lenoir, was the Personnel Policy for the City of Lenoir in effect while Petitioner was employed by the City of Lenoir.
4. While employed by the City of Lenoir, the Petitioner earned one day of sick leave per month with no limitation on accumulation.
5. For firefighters, one day of sick leave per month, which the Petitioner earned with the City of Lenoir, was equivalent to 24 hours of sick leave because firefighters work 24-hour shifts.
6. Petitioner had accumulated 171.25 days of unused sick leave while employed by the City of Lenoir. (*See* Respondent's Exhibit No. 2)

7. Petitioner's 171.25 days of accumulated sick leave was the equivalent of 4,110 hours of unused sick leave based on his earning one 24 hour day per month of sick leave with the City of Lenoir.

8. Petitioner separated from employment with the City of Lenoir in 1999 and began working with Alexander County.

9. Petitioner continues to be employed by Alexander County and has not yet retired.

10. It is not within the witness Crystal Smith's authority, employed as the human resources specialist with the City of Lenoir, to calculate creditable service towards a member's retirement in the Local Governmental Employees' Retirement System. Instead, the Retirement System is vested with such authority, by statute.

11. Therefore, the undersigned gives little weight to Crystal Smith's testimony, and her affidavit submitted as Petitioner's Exhibit 8, stating that: "for the purposes of determining unused sick time for retirement purposes this 24-hour shift equals three days of creditable service towards sick time. . . . [H]e [Petitioner] should receive 513.75 days of creditable service towards the calculation of his sick time."

12. Witness Kim Stine, employed as the assistant human resources director for Alexander County, does not calculate creditable service for retirement in the Local Governmental Employees' Retirement System as part of her job.

13. Therefore, the undersigned gives little weight to any testimony from Kim Stine regarding her calculation of creditable service for Petitioner's retirement in the Local Governmental Employees' Retirement System; and, more specifically, little weight is given to her testimony that Petitioner's accumulated sick leave hours, while he was employed by the City of Lenoir, should be divided by 8 for determining his creditable service in the Local Governmental Employees' Retirement System upon his retirement.

14. The Retirement System is vested with statutory authority to calculate the creditable service of a member towards retirement in the Local Governmental Employees' Retirement System. (*See* N.C.G.S. § 128-22 *and* § 128-26(e))

15. It is a proper exercise of its statutory authority for the Retirement System to convert Petitioner's sick leave hours, accumulated during his employment with the City of Lenoir, into days of creditable service at retirement by dividing the total number of hours Petitioner accumulated with the City of Lenoir, 4,110 hours, by 24 hours (the length of his shift as a firefighter and the equivalent of the one 24 hour day per month of sick leave which he earned), which is the equivalent of 171.25 days of creditable service towards retirement. (T. pp. 61-63; Respondent's Exhibits No. 1 and No. 2)

CONCLUSIONS OF LAW

1. Under N.C.G.S. §§ 128-22 and 128-26(e), it is the Retirement System alone which is vested with the authority granted by the Legislature to calculate a member's creditable service towards retirement in the System for unused sick leave hours.

2. N.C.G.S. 128-22 states in pertinent part:

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Article for employees of those counties, cities and towns or other eligible employers participating in the said Retirement System.

3. N.C.G.S. § 128-26(e) states in pertinent part:

Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of the service certified on his prior service certificate; and if he has sick leave standing to his credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof, but not less than one hour[.]

....

Creditable service for unused sick leave shall be allowed only for sick leave accrued monthly during employment under a duly adopted sick leave policy and for which the member may be able to take credits and be paid for sick leave without restriction.

4. In order to implement the statute, the Retirement System must convert the member's accumulated sick leave hours at retirement into days in order to determine his creditable service at retirement.

5. Pursuant to N.C.G.S. Section 128-26(e), the Retirement System correctly calculated the number of days of creditable service the Petitioner would have towards retirement for his 4,110 hours of sick leave accumulated during his employment with the City of Lenoir, where he earned one 24 hour day of sick leave per month by virtue of his 24-hour shift, by dividing 4,110 by 24 to obtain the figure of 171.25 days of creditable service towards his retirement.

DECISION

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

The Retirement System correctly projected a calculation of Petitioner's creditable service at retirement based on the sick leave he accumulated during his employment with the City of Lenoir; he earned one 24 hour day per month for a total of 4,110 hours and, therefore, the Retirement System was correct to divide the 4,110 hours by "24" to determine the number of days which Petitioner would receive in creditable service towards his retirement based on this accumulated sick leave; the Retirement System correctly determined, under N.C.G.S. § 128-26(e) and the sick leave earning policy of the City of Lenoir, that Petitioner should receive 171.25 days of creditable service for retirement in the System for sick leave hours he accumulated with the City of Lenoir.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision regarding the calculation of Petitioner's credible service for retirement in the System for sick leave hours accumulated with the City of Lenoir is affirmed.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

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)(b1) 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 argument to those in the agency who will make the final decision. G.S. 150B-36(a).

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 _____ day of June, 2012.

Joe L. Webster
Administrative Law Judge