

STATE OF NORTH CAROLINA  
COUNTY OF ONSLOW

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
22 DST 00046

<p>Mark Andrew Perrigo Petitioner,</p> <p>v.</p> <p>NC Dept of State Treasurer, Retirement Systems Division Respondent.</p>	<p><b>FINAL DECISION SUMMARY JUDGMENT FOR PETITIONER</b></p>
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**THIS MATTER** is before the undersigned on the *Respondent's Motion for Summary Judgment*, with an accompanying *Memorandum of Law in Support of Respondent's Motion for Summary Judgment*, supported by an affidavit, all filed April 19, 2022. Petitioner has not responded to the Request for Response to Motion issued that date, but the arguments in his Petition and Prehearing Statement are considered here.

1. The pertinent facts in this case are not in dispute. The Petitioner was employed by the Onslow County Sheriff's office for 25 years when he retired on August 10, 2018. At that time, he was serving as a school resource officer ("SRO") for an unidentified school. By "purchasing" credit for his military service, and with the addition of his unused sick leave, he retired with "a total of 30 years and 1 month of creditable service" in the Local Governmental Employees' Retirement System ("LGERS"). On June 15, 2018, Petitioner applied for retirement effective September 1, 2018. Respondent's *Memorandum*, pg. 1.

2. On November 5, 2019, Petitioner was indicted on three counts of viewing pornographic depictions of underage girls that he found on the internet while at his home on August 7, 2018. While he was still then employed with Onslow County in August 2018, his contention that "none of the materials he allegedly viewed originated from or depicted any student, faculty or staff at the school where he worked," is not disputed. On July 29, 2020, Petitioner plead guilty to all three counts of "third-degree sexual exploitation" of a minor, in violation of N.C. Gen. Stat. § 14-190.17A. See Petitioner's *Prehearing Statement*, pg. 1-2; Respondent's *Memorandum*, pg. 2. He was given a sentence of 6 to 17 months, suspended for 60 months, and "community punishment," with no fine, but paid \$ 392.50 cost of court. *Affidavit of Patrick Kinlaw*, Exhibit 1, pg. 1.

3. The parties agree that the case turns on an interpretation of N.C. Gen. Stat. § 128-38.4A – and specifically subpart (a)(2) -- reproduced in full below, as it was on the date of the offenses.<sup>1</sup>

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<sup>1</sup> Subsection (b) was repealed effective June 26, 2020. See 2020 N.C. Sess. Laws 48, § 4.3(b), Senate Bill 719, pg. 20 & 24.

**§ 128-38.4A. Forfeiture of retirement benefits for certain felonies related to employment or holding office.**

(a) Except as provided in G.S. 128-26(x), the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony under federal law or the laws of this State if all of the following apply:

(1) The offense is committed while the member is in service.

**(2) *The conduct resulting in the member's conviction is directly related to the member's office or employment.***

(b) Subdivision (2) of subsection (a) of this section shall apply to felony convictions where the court finds under G.S. 15A-1340.16(d)(9) or other applicable State or federal procedure that the member's conduct is directly related to the member's office or employment.

(c) If a member or former member whose benefits under the System were forfeited under this section, except for the return of member contributions plus interest, subsequently receives an unconditional pardon of innocence, or the conviction is vacated or set aside for any reason, then the member or former member may seek a reversal of the benefit forfeiture by presenting sufficient evidence to the State Treasurer. If the State Treasurer determines a reversal of the benefit forfeiture is appropriate, then all benefits will be restored upon repayment of all accumulated contributions plus interest. Repayment of all accumulated contributions that have been received by the individual under the forfeiture provisions of this section must be made in a total lump-sum payment with interest compounded annually at a rate of six and one-half percent (6.5%) for each calendar year from the year of forfeiture to the year of repayment. An individual receiving a reversal of benefit forfeiture must receive reinstatement of the service credit forfeited. (2012-193, s. 3; 2020-48, s. 4.3(b).)

(Emphasis added.) The Respondent decided that because “the conduct resulting in the [Petitioner’s] convictions was directly related to his employment,” Petitioner should forfeit the seven years and eight months of his retirement since the statute went into effect on December 1, 2012.

4. In his Petition and Prehearing Statement, Mr. Perrigo argues that, “The charges and conviction were unrelated to my job,” and “not directly related to Petitioner’s employment.”

5. The Respondent contends that “[b]y virtue of engaging in the conduct leading to his felony convictions ... Petitioner rendered himself unfit to continue his employment as a law enforcement officer [and was] precluded from maintaining the necessary certification for his

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employment. Therefore, Petitioner's conduct was related in unmistakable terms to his employment, and thus, his conduct is directly related to his employment." Respondent's *Memorandum*, pg. 6.

6. The Sheriffs' Education and Training Standards Commission would very likely have permanently revoked Petitioner's justice officer certification pursuant to 12 NCAC 10B .0204(a)(1) and .0205(1)(a) if he had not previously resigned his position with the Sheriff's office and retired. However, being "unfit to continue his employment" is not the criteria set by N.C. Gen. Stat. § 128-38.4A. That would vastly expand the possibility of forfeitures due to conduct wholly unrelated to State service. N.C. Gen. Stat. § 128-38.4A requires that "***the conduct resulting in the member's conviction is directly related to the member's office or employment.***"

7. In the leading case concerning this statute, cited by both parties, the Court of Appeals stressed that the State employee "had ***embezzled public funds entrusted to her by virtue of her office*** and while serving as the Wake County Register of Deeds." (Emphasis the Court's.) *Treasurer v. Riddick*, 274 N.C. App. 183, 188, 852 S.E.2d 376, 383 (2020). The Legislature has addressed and meticulously determined the punishments, including monetary ones, applicable to all offenders. See, e.g., N.C. Gen. Stat. § 15A-1340.17. The language of the statute at issue suggests that the Legislature did not intend to single out public employees for additional punishment solely due to their employment. With N.C. Gen. Stat. § 128-38.4A, it sought to prevent the outrageous situation of an unfaithful public servant who corruptly and feloniously abuses his office being rewarded with taxpayers' funds upon retirement.

8. It is undisputed that Petitioner's offense was viewing pictures that had no connection to his workplace on the internet at his home. There is no evidence in the record that the "***conduct resulting in the member's conviction*** [was] directly related to the member's office or employment," within the meaning of N.C. Gen. Stat. § 128-38.4A(a)(2).

9. "N.C. Gen. Stat. § 1A-1, Rule 56(c) provides that pleadings may be considered on a motion for summary judgment, and G.S. 1A-1, Rule 11(a) indicates that as a general rule, pleadings need not be verified." *Beverly v. Beverly*, 43 N.C.App. 60, 257 S.E.2d 682, 683-64 (1979). In a contested case under Article 3 of the Administrative Procedure Act contested case, "the pleadings ... includ[e] both the petition and the prehearing statement," for the purpose of assessing the parties' allegations. *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006). "Rule 56 does not require that a party move for summary judgment in order to be entitled to it." *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501 (1985), *disc. review denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). "Summary judgment, when appropriate, may be rendered against the moving party." *Erthal v. May*, 223 N.C. App. 373, 387, 736 S.E.2d 514, 523 (2012). Judgment "shall be rendered forthwith" if the pleadings and evidence of record show "that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "Although a party does not have to move for summary judgment to be entitled to it, the nonmovant must be entitled to the judgment as a matter of law." *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999).

## FINAL DECISION

Consequently, it appearing that there is no genuine issue of material fact, and that the **PETITIONER** is entitled to **SUMMARY JUDGMENT** as a matter of law, the Respondent's motion is denied, and the Petition is **GRANTED**. N.C. Gen. Stat. §§ 1A-1, Rule 56(b); 150B-34(e).

Respondent shall pay the Petitioner's Local Governmental Employees' Retirement System ("LGERS") benefits without forfeiture or reduction, refund money withheld as "overpayments," and otherwise restore the benefits of Petitioner's 30.0833 years of creditable service to the extent of its authority to do so.

### NOTICE OF APPEAL RIGHTS

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**SO ORDERED.**

This the 29th day of June, 2022.



J Randolph Ward  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Mark Andrew Perrigo  
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Petitioner

Katherine Adele Murphy  
North Carolina Department of Justice  
[kmurphy@ncdoj.gov](mailto:kmurphy@ncdoj.gov) (served electronically on June 29, 2022)  
Attorney For Respondent

This the 30th day of June, 2022.



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