

RECEIVED

Mar 30 2023

SC Court of Appeals

EXHIBIT A

RECEIVED

Mar 30 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Docket No. 21-ALJ-30-0084-CC

Glenn C. Odom,

Petitioner,

v.

South Carolina Public Employee Benefit
Authority, South Carolina Retirement Systems,

Respondent.

FINAL ORDER

APPEARANCES: For the Petitioner: Reginald W. Belcher, Esquire
For the Respondent: Justin R. Werner, Esquire

STATEMENT OF THE CASE

The above-captioned case is before the Court pursuant to S.C. Code Ann. section 9-21-60 (2019) for a contested case hearing. In this matter, Glenn C. Odom (Petitioner) challenges Final Agency Determination No. 21-004 issued by Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (PEBA), on February 12, 2021, in which PEBA determined that certain payments made to Petitioner from the Alligator Rural Water and Sewer Company (Alligator) were not earnable compensation that may be credited to him for the purposes of the South Carolina Retirement System. After timely notice to the parties, a contested case hearing on this matter was held on November 9 and 15, 2022, at the South Carolina Administrative Law Court (ALC or Court) in Columbia, South Carolina.

FINDINGS OF FACT

Having carefully considered the testimony and the arguments of both sides, the Court makes the following Findings of Fact, taking into consideration the burden of proof and the credibility of the witnesses:

Notice of the date, time, place, and subject matter of the hearing was provided to all parties in a timely manner and both parties attended the hearing.

Petitioner is a seventy-three-year-old retired member of the South Carolina Retirement System (SCRS) and the South Carolina Police Officers' Retirement System (PORS) who retired



from those systems effective January 6, 2022. Prior to 2006, Petitioner accrued approximately seven years and nine months of earned and purchased service credit in SCRS in connection with his service as mayor and a municipal judge in the Town of McBee during the 1990s and early 2000s. Petitioner accrued approximately three-and-a-half years of service credit in PORS in connection with his service as a magistrate in Chesterfield County beginning in 2002.

During March, 2006, Petitioner contacted PEBA to obtain estimates of the monthly retirement benefits he would be eligible to receive from SCRS and PORS under several retirement scenarios, including scenarios where he had no further covered employment after June 30, 2006, and scenarios where he worked in covered employment for an additional three years. The estimates produced in response to his inquiries reflected that, if he did not have any further covered employment after June 30, 2006, the maximum benefit he would be eligible to receive upon retirement from SCRS would have been approximately \$161.86 per month and his maximum monthly benefit from PORS would have been approximately \$130.23, for a combined total of about \$292.09 per month, with both benefits based upon an average final compensation of about \$18,257.20.

As part of those communications, on March 28, 2006, a PEBA customer service representative explained to Petitioner that, if he wanted a retirement benefit based upon an average final compensation of \$125,000, he would need to work for three years at the salary with an employer that participates in the retirement systems. During a follow-up call on March 30, 2006, Petitioner indicated he would be working an additional three years with an employer that would be joining the retirement systems and requested benefit estimates based upon earning a salary of \$150,000 per year for those three years. Pursuant to that request, PEBA provided the requested benefit estimates to Petitioner by facsimile on March 31, 2006. As reflected on those estimates, if Petitioner worked for an additional three years in SCRS-covered employment at a salary of \$150,000 and retired on July 1, 2009, his estimated maximum monthly SCRS benefit would increase to \$1,843.31 and his PORS benefit would increase to \$1,069.98 per month, for a monthly total of about \$2,913.39. This new monthly total estimate is approximately ten times greater than the benefit Petitioner would have been eligible for without that additional employment at \$150,000 per year. In his testimony at the hearing, Petitioner acknowledged that, based upon the information he received in 2006, he understood how his SCRS and PORS

benefits would be calculated and how an increased average final compensation would increase those benefit amounts.

By a Retirement Plan Enrollment form received by PEBA on September 20, 2006, Petitioner was reported to PEBA as an employee of Alligator for the purposes of participation in SCRS, effective on September 1, 2006, the date Alligator joined SCRS as a participating employer. On the enrollment form, Petitioner executed both as the employee and as the employer representative, Petitioner listed his position title with Alligator as “General Manager” and his annual salary as \$120,000.

For 2007, the first full calendar year of Alligator’s participation as an employer in SCRS, Alligator reported Petitioner’s earnable compensation from employment with the company was \$112,000. However, the compensation reported to PEBA by Alligator for Petitioner’s work for the company declined over time. For calendar year 2008, Alligator only reported compensation for Petitioner for the first two quarters of the year, for a total compensation for the year of \$36,000. In subsequent years, the earnable compensation reported to PEBA by Alligator for Petitioner’s work decreased further to an annual amount of \$12,000. In particular, Alligator first reported Petitioner’s compensation as \$1,000 per month for the quarter of January through March 2009.¹ With the exception of a slight uptick, in the first half of 2011, Alligator reported Petitioner had earnable compensation of \$3,000 per quarter for every quarter between July, 2010 and March, 2016.

During this period, Petitioner visited PEBA on June 16, 2015, to discuss his retirement benefits. During the visit, PEBA’s customer service representative generated benefit estimates for Petitioner for the proposed retirement date of July 1, 2019. The average final compensation used to prepare those benefit estimates was the system-generated estimated average final compensation of \$75,500, based upon the compensation reported for Petitioner’s first three years of participation in SCRS with Alligator. After reporting Petitioner’s earnable compensation at \$3,000 per quarter for over six years, Alligator reported that Petitioner’s compensation for the single quarter ending June 30, 2016, was \$103,000.

¹ During 2009 and 2010, Alligator failed to report any compensation for Petitioner for several quarters. Alligator subsequently submitted supplemental reporting to retroactively report compensation for Petitioner for those quarters. On the forms, Alligator noted the “funds were not sent by mistake of a former employee.” In a letter enclosed with the reports, Alligator’s office manager stated “[i]t has been brought to my attention by the compan[y]’s CPA: [Petitioner] did not receive a monthly check for nine months in 2009 & 2010.”

For the subsequent quarters of 2016 and early 2017, Alligator resumed reporting Petitioner's earnable compensation at \$3,000 per quarter, but again reported a disproportionately large earnable compensation of \$303,000 for the quarter ending in June, 2017. Since the amount of this reported compensation exceeded the maximum amount of a member's compensation that could be taken into account for the purposes of SCRS in 2017 pursuant to section 401(a)(17) of the Internal Revenue Code,² PEBA emailed Alligator on July 21, 2017, to notify the company the amount of compensation reported for Petitioner would have to be reduced to comply with the \$270,000 limit. PEBA also notified Alligator the excess contributions attributable to amounts above the limit would be returned to Alligator. In a response email on July 25, 2017, Petitioner wrote to PEBA to request more information about the compensation limit. In his email, Petitioner explained "[s]ince I plan to start drawing retirement later this year (2017) it would be in my best interest to have additional wages reported in the next few months." By additional emails on July 25 and 26, 2017, PEBA provided Petitioner with further information regarding the IRS compensation limit and the exclusion of bonuses and other special payments from the earnable compensation includable for the purposes of SCRS. In reply to those explanatory emails, Petitioner indicated he was "[g]lad we talked as the bonus is due in July but I can't put any in till Jan so point is moot" and instead of reporting additional compensation in 2017, "I will wait till Jan 2018."

Given the size of these reporting variances in Petitioner's compensation, PEBA's retirement finance staff reviewed the earnable compensation reported for Petitioner for the June quarters of 2016 and 2017. By a letter dated August 8, 2017, PEBA wrote to Alligator to explain the compensation reported for those quarters appeared to include special payments that were not part of Petitioner's regular annual salary and would not be included in his earnable compensation for the purposes of SCRS. Accordingly, PEBA notified Alligator in the letter it would be returning the contributions Alligator remitted based on earnable compensation for Petitioner in excess of \$3,000 for those quarters. The letter also explained that Petitioner could appeal the determination regarding his earnable compensation to PEBA's Executive Director within one year of the date of the letter.

² See 26 U.S.C. section 401(a)(17) (Westlaw Edge through Pub. L No. 117-262); S.C. Code Ann. § 9-1-1970 (2019). This compensation limit does not restrict the amount of compensation an employee may actually receive from an employer; rather, it limits the amount of such compensation that can be "taken into account" for calculating benefits under a qualified retirement plan. Id.

Although neither Alligator nor Petitioner sought review of PEBA's initial determination regarding Petitioner's earnable compensation, Alligator continued to report excessive compensation for Petitioner. Starting with the 2017-2018 fiscal year, and continuing into the 2018-2019 and 2019-2020 fiscal years, Alligator reported Petitioner's quarterly compensation as \$270,000 (the maximum allowed under the compensation limit) for each year. Consequently, by letters dated August 8, 2018, August 8, 2019, and August 11, 2020, respectively, PEBA returned to Alligator all contributions remitted each fiscal year based on earnable compensation for Petitioner in excess of the \$12,000 annual salary previously reported to PEBA as Petitioner's regular compensation base.

In March, 2017, PEBA received an anonymous report that Alligator was no longer directly employing its personnel, but had contracted its staff out to a private management company, such that its personnel would no longer be eligible to participate in SCRS. The report included a copy of Alligator's 2014 Form 990 filed with the IRS, with a note on page 10 of that form pointing out that Alligator did not report any salaries or payroll taxes on the form. PEBA conducted a separate review during 2017 and 2018 of whether Alligator was continuing to employ personnel who would be eligible to participate in the employee benefit plans administered by PEBA or whether its personnel had been entirely outsourced.

After a period of correspondence between PEBA and Alligator's accountant in late 2018 and early 2019, PEBA completed its review of Alligator's participation in the benefit plans administered by PEBA and notified Alligator, by a letter dated March 26, 2019, that it would allow Alligator's continued participation in those plans. However, PEBA further explained in the letter that, although Alligator would be permitted to continue participation in the benefit plans, its review did not reveal any basis to revisit its prior determinations of August, 2017 and August, 2018 regarding the earnable compensation reportable for Petitioner for the purposes of SCRS. Accordingly, PEBA stated it would "not be able to accept contributions for compensation in excess of the \$12,000 annual compensation reported for the position since 2009 without further documentation that substantiates any increased compensation as earnable compensation from covered employment."

By correspondence received March 25, 2020, Petitioner sought further review of PEBA's initial determination regarding his earnable compensation for the purposes of SCRS before PEBA's Executive Director. Petitioner submitted additional documentation in support of his

request for review on June 5, 2020, and October 7, 2020. On February 12, 2021, PEBA issued Final Agency Determination No. 21-004 in response to Petitioner's request for review. Petitioner requested this contested case hearing before the Court to seek review of PEBA's determination regarding his earnable compensation.

Alligator Rural Water and Sewer Company

Alligator is a non-profit rural water and sewer company incorporated in 1987 that provides water and sewer services in Chesterfield County, South Carolina. Petitioner was one of the original incorporators of Alligator and served on its first board of directors as the company's president. Petitioner has purchased land from, and has sold land to, Alligator over the years. As a tax-exempt entity, Alligator is required to annually file a Form 990, Return of Organization Exempt from Income Tax, with the IRS. The Form 990 requires a tax-exempt entity to report the number of its employees, list the names and compensation of its officers, directors, and key employees, report the independent contractors it works with, and list its expenditures, including wages, payroll taxes, and fees for management services for non-employees.

Odom & Associates, Inc.

Odom & Associates, Inc. (O&A) is a South Carolina corporation incorporated in 1998. Petitioner serves as the president and sole officer of O&A and is the sole owner of the corporation. Petitioner uses O&A's funds for his personal expenses. As reflected in O&A's general ledger, between December 31, 2007, and December 18, 2020, Petitioner drew \$4,492,389.83 in personal expenses from O&A's account, for an annual average of approximately \$345,568 per year in personal expenses. These personal expenses included itemized expenses for matters such as personal travel and meals, alimony payments, and personal vehicle taxes, as well as uncategorized transfers to Petitioner in amounts as large as \$50,000 and \$80,000. At the hearing of this matter, Petitioner stated the president of the Alligator Board of Directors considered owing funds to O&A and owing funds to Petitioner personally as a "similar thing."

Relationship Between Alligator and O&A

On November 19, 2002, Alligator and O&A entered into a Management Agreement under which Alligator outsourced the management and operation of its water and sewer facilities and services to O&A. In the preamble of that Management Agreement, the parties indicated that "the Water Company [i.e. Alligator] desires to avail itself of the services of [O&A] to manage

and operate its water production and sewer facilities and [O&A] desires to provide such services to the Water Company.” The Management Agreement requires O&A to “[p]rovide a general manager, office manager, administrative assistant along with a properly equipped office necessary to carry out its functions under th[e] agreement.” The Management Agreement also requires O&A to cover all office overhead expenses except for telephone costs.

In the “Compensation” section, the Management Agreement provides that, “[f]or all services hereunder,” O&A would receive a base sum of \$60,000 per month, with additional amounts payable based upon the volume of water and sewer services handled by O&A as well as based upon increased sales revenues. The Management Agreement provided for an initial term of twenty years from its effective date. However, at the hearing of this matter, Petitioner testified the Management Agreement had been revised approximately halfway through the initial term to extend the Agreement for an additional twenty years. Thus, the Agreement remains in effect to the current date.

In a bond disclosure document prepared in connection with a \$26 million bond issuance through the South Carolina Jobs-Economic Development Authority, Alligator described its arrangement under the Management Agreement as follows:

Since November 2002, [O&A] (the “Manager”), has managed and operated the System under the direction of the Board of Directors pursuant to the terms of the Management Agreement, dated November 19, 2002 (the “Management Agreement”), between the Manager and the Borrower. The Management Agreement has a stated term ending on November 19, 2022. The Manager provides financial services, office operations and management, and operation and maintenance services for the System, including billing, collection, repairs, as well as grant and loan applications. Pursuant to the terms of the Management Agreement, the Manager provides all essential licensed workers.

The bond disclosure further noted, “[d]uring the past three fiscal years, the Manager’s compensation under the Management Agreement has been \$1,672,937, \$1,489,372, and \$1,510,307, plus expenses pursuant to the terms of the Management Agreement.”

Consistent with the Management Agreement, Alligator has reported on its Form 990s that it has “delegate[d] control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person,” explaining that “[t]he Organization contracts with a management company for the day to day operations.” Pursuant to its outsourcing of management services, Alligator has reported to the IRS, on its Form 990s, that it expended approximately \$13,101,237 in fees for

management services for non-employees for the period between 2006, the year Alligator joined SCRS, and 2019, the most recent year for which federal reporting was available, for an average of about \$935,802 per year for such services.

Although O&A also has some rental property dealings, the majority of its income is derived from its payments under the Management Agreement with Alligator. At the hearing, Petitioner testified the operation of the Alligator water and sewer system is the primary business activity of O&A. Over the years, O&A loaned substantial sums of money to Alligator for purposes ranging from providing operating expenses, paying off existing loans, and making improvements to the water and sewer systems. Alligator's financial statements reflect that the company owed a total of \$1,347,940 to O&A as of December 31, 2014.

By a letter dated June 8, 2017, Karen Currin (Currin), a CPA who performs accounting work and tax filings for Alligator and O&A as corporate entities and for Petitioner in his individual capacity, wrote to Petitioner to explain how certain bookkeeping is handled in connection with the Management Agreement between Alligator and O&A. In the letter, Currin confirmed that, under the Management Agreement, O&A was responsible for providing the personnel to manage and operate the systems. She confirmed that O&A was responsible for approving the hiring of all staff, including those that were reported as Alligator employees. She further explained that, at the end of the year, the general manager would calculate the amounts that were reported as compensation for the staff listed as Alligator employees and deduct those amounts from the management fee payable to O&A.

Similarly, the minutes of the meeting of the Alligator Board of Directors from August 15, 2006, state that, upon Alligator joining SCRS, "[O&A] will pay the premiums" for the workers that are reported as Alligator employees for the purposes of the system. In the 2007 audit of Alligator's financial statements, the auditor found a significant deficiency in how Alligator was handling its contract with O&A. The auditor found that "[i]nternal controls over the management contract payable are absent," such that Alligator "is unable to make meaningful determination of the management contract payable." To correct the deficiency, the auditor recommended that Alligator "implement controls that ensure the management contract payable is calculated and recorded on a monthly basis according to the terms of the contract."

Petitioner's Relationship with Alligator

Petitioner did not have a written or oral employment contract with Alligator. Similarly, there were no written performance reviews made, no job description prepared, no compensation plan or salary schedule created, no written confirmation or statement of Petitioner's salary prepared, no record of sick or annual leave maintained, no hiring or termination actions documented, nor any other similar employment documentation maintained in connection with Petitioner's work with Alligator. The personnel file produced by Petitioner in this matter for his relationship with Alligator consists solely of documents related to his retirement and insurance benefits through PEBA. Petitioner's personnel file includes no records prior to 2006, when Alligator joined PEBA's benefit programs. Alligator has also been inconsistent in reporting Petitioner's status with Alligator on its Form 990s. Between 2006 and 2019, there were five years during which Alligator did not identify Petitioner as a "key employee" of Alligator and did not report compensation for him as a "key employee."

Although Petitioner was initially enrolled in SCRS with Alligator at an annual salary of \$120,000, that salary was reduced by 90% within the next four years to an annual reported compensation of \$12,000. In his testimony at the hearing, Petitioner confirmed there are no records of how the Alligator Board of Directors arrived at this reported 90% reduction in Petitioner's salary. Petitioner also testified that, even though his reported salary was reduced by 90% to \$12,000 per year, he continued to work full-time for Alligator during that period. Additionally, there was a period of nine months during 2009 and 2010 when Petitioner did not receive any monthly paycheck from Alligator.

In response to PEBA's August 7, 2018, letter returning excess contributions to Alligator, Wade Huggins (Huggins), the President of Alligator's Board of Directors, wrote to PEBA on August 30, 2018, to provide further information regarding Petitioner's reported compensation from Alligator. In the letter, Huggins acknowledged that Petitioner "received \$1000 a month as his wage base for the past nine years," but explained that "[Alligator] has owed [Petitioner] a large sum for years since the inception of the company" and that "[t]his debt was being paid down in lieu of compensation." Huggins further stated in the letter that, because "[t]he amount owed to [Petitioner] has been drastically reduced," Alligator was then able to pay Petitioner an increased salary of \$24,545 per month and \$294,545 annually. At the hearing of this matter, both Petitioner and Currin confirmed there was no documentation reflecting how the Alligator

Board of Directors arrived at that amount. Neither Petitioner nor Currin provided an explanation of how the amount was determined.

Despite this August, 2018 letter stating Petitioner's salary from Alligator was \$294,545, Petitioner's reported compensation from Alligator was reduced to \$282,272 for calendar year 2018 and further reduced to \$247,500 for calendar year 2019. Notably, these reductions resulted in Petitioner's reported compensation from Alligator equaling exactly \$270,000 per year for three fiscal years. These three fiscal years corresponded to July, 2017 through June 2020, which followed Petitioner's notification by PEBA that the maximum amount the IRS would allow for inclusion in his retirement benefit calculations in 2017 was \$270,000 and that special, single-sum payments were also excluded from his retirement benefit calculations. At the hearing, Petitioner stated he had no documentation to support, and could not explain, why his reported salary from Alligator was reduced by over \$24,000 from \$294,545 to \$270,000. During this three-year period when Petitioner's salary was reported at exactly \$270,000 per fiscal year, his compensation was paid in monthly installments rather than in common payroll cycles such as weekly or bi-monthly pay periods. Additionally, there was also a period between November 21, 2019, and February, 27, 2020, when no payments were issued to Petitioner at all, resulting in catch-up payments being reported on February 27, 2020, and March 12, 2020.

Alligator also reported Petitioner received bonus payments of \$100,000 in June, 2016 and \$300,000 in June, 2017. However, the bank and accounting records produced for Alligator do not reflect that these amounts were actually paid to Petitioner from Alligator, but instead reflect that amounts already paid to O&A were reclassified as these reported payments to Petitioner. The check number referenced in Alligator's general ledger for the \$100,000 payment (\$67,190 net of tax and retirement withholding) in June, 2016 is shown in Alligator's actual bank records as a \$456 payment to a separate individual and no check for \$67,190 is shown in the June checks or for the remainder of 2016. Similarly, Alligator's general ledger shows that, in July, 2017, Petitioner paid Alligator \$125,000 to cover federal taxes on the bonus payment that was reported for him and \$60,000 to cover state taxes and retirement contributions for that payment. Notably, the federal tax payment is listed in the ledger as being "From Glenn Odom (from O&A)," and when those excess contributions were returned to Alligator by PEBA, Alligator refunded those member and employer contributions directly to Petitioner two days later. As with the \$100,000

payment in 2016, Alligator's bank records do not show a check for the \$300,000 bonus, either in gross or net, being issued to Petitioner in 2017.

In this matter, Petitioner contends the increased compensation Alligator reported for Petitioner beginning in 2016 was intended to be commensurate with industry averages for other rural water system general managers. However, in a salary survey conducted the same year, the South Carolina Rural Water Association, a group in which Alligator is a member, found the average salary for the general manager of a participating rural water and sewer company in 2016 was \$79,530. Further, the average salary for general managers of the largest systems in the survey with more than 10,000 taps was approximately \$133,000. This is less than half the compensation claimed by Petitioner.

The records in this matter reflect there is an inverse relationship between the contract management fees Alligator reported to the IRS and the compensation Alligator reported to SCRS for Petitioner's salary. For the period between 2008 and 2011, when the contract management fees reported by Alligator on its Form 990s nearly doubled from \$635,194 to \$1,255,534, Petitioner's reported compensation from Alligator decreased to the \$12,000 annual salary that was reported between 2009 and 2016. Similarly, between 2015 and 2017, when Alligator reported that Petitioner's compensation from employment increased from \$12,000 in 2015 to \$428,727 in 2017, it reported on its Form 990s that its contract management fees fell from \$1,182,187 to \$363,629, an amount below the compensation reported for Petitioner.³ Finally, when Alligator reported Petitioner's compensation dropped back down to the IRS compensation limit for 2018 and 2019, the contract management fees reported on its Form 990s increased correspondingly. Petitioner's personal income tax records also reflect a similar inverse relationship between the amounts he reported as corporate income from O&A and the amounts he reported as wages from employment with Alligator. In 2014, when Petitioner reported his wages from employment as \$11,222, he reported corporate income from O&A of \$366,286. However, by 2017, when Petitioner reported wages in the amount of \$471,684, Petitioner reported an income loss of \$65,252 from O&A.

Petitioner stated he terminated employment with Alligator on June 30, 2020. Alligator has not reported any compensation or remitted any retirement contributions for Petitioner to

³ This reduction in management fees is particularly surprising, given that the increases in water and sewer services and revenues that Petitioner asserts as a basis for his reported compensation increases during this period would also have resulted in additional compensation to O&A under the Management Agreement.

PEBA since June 30, 2020. Despite the reported termination of Petitioner’s employment with Alligator, Petitioner testified at the hearing that, over two years later, Alligator had not hired another general manager. The record reflects that, in lieu of a general manager, Petitioner is listed as a “consultant” on Alligator’s website. The minutes of the Alligator Board of Directors’ meetings between Petitioner’s reported termination in June, 2020 and the end of 2021 show that Petitioner attended every in-person meeting of the Board during that time and had a role in canceling the meetings that were not held. There is no reference in any of those meeting minutes to a termination of Petitioner’s employment for Alligator or any other acknowledgment of a change in his employment status. Additionally, Petitioner continues to use his Alligator email address for his personal email address on file with SCRS for his retirement benefits.

Based upon careful consideration of the testimony and exhibits presented at the hearing of this matter, the Court finds by a preponderance of the evidence that the compensation reported by Alligator to SCRS for the work performed by Petitioner for Alligator for the period between September, 2006 and June, 2020 was not earnable compensation for the purposes of SCRS. Although some of the compensation was reported as compensation from employment for certain purposes, the evidence in this matter shows the substance and true character of the compensation was as payments made to an independent contractor pursuant to the Management Agreement between Alligator and O&A rather than as wages for employment for the purposes of SCRS.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court concludes the following as a matter of law:

This Court has jurisdiction over this contested case pursuant to S.C. Code Ann. section 9-21-60, S.C. Code Ann. section 1-23-600(A) (Supp. 2022), and S.C. Code Ann. sections 1-23-310 to -400 (2005 & Supp. 2022).

A contested case hearing before the ALC is a *de novo* proceeding in which the Court is the sole finder of fact. See EAGLE v. S.C. Dep’t of Health & Env’tl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014) (“[T]he ALC conducts a *de novo* hearing in contested cases, complete with the presentation of evidence and testimony . . . [and] presides as the fact-finder.”); see also § 9-21-60 (providing that, under the Retirement Systems Claims Procedures Act, the Administrative Law Court must conduct its review “*de novo* in accordance with its rules of procedure”). “A trial *de novo* is one in which ‘the whole case is tried as if no trial whatsoever

had been had in the first instance.” Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Because a contested case is a *de novo* proceeding, this Court is not bound to the agency’s factual findings or decision below, but conducts its own contested evidentiary hearing and makes its own findings of fact. See EAGLE, 407 S.C. at 344, 755 S.E.2d at 449.

“Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence.” § 1-23-600(A)(5); see also, Sierra Club v. S.C. Dep’t of Health & Env’tl. Control, 426 S.C. 236, 257, 826 S.E.2d 595, 67 (2019). “A preponderance of the evidence is evidence which convinces the fact finder as to its truth.” Pascoe v. Wilson, 416 S.C. 628, 640, 788 S.E.2d 686, 693 (2016).

The weight and credibility assigned to evidence presented at the hearing of a matter is “peculiarly within the province” of the trier of fact. See S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness’s demeanor and veracity and to evaluate the credibility of the witness’s testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

The statutes governing SCRS must be interpreted in light of the “elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds.” Wehle v. S.C. Ret. Sys., 363 S.C. 394, 399, 611 S.E.2d 240, 242 (2005).

The basic question presented in this matter is whether payments that Alligator reported as being paid to Petitioner as wages for employment should be considered earnable compensation for the purposes of the calculation of Petitioner’s benefits from SCRS.

As the moving party in this matter, Petitioner bears the burden of establishing, by a preponderance of the evidence, that those reported payments are earnable compensation for the purposes of SCRS. See Sierra Club, 426 S.C. at 257, 826 S.E.2d at 67 (“In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof.”); see also Leventis v. S.C. Dep’t of Health & Env’tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). Petitioner has not met that burden in this matter.

Alligator's Participation in SCRS

The South Carolina General Assembly has found that non-profit corporations, like Alligator, established pursuant to Chapter 36 of Title 33 to provide the local governmental functions of water service or sewage treatment “exist for a public purpose . . . [and] must be treated like special purpose districts” for the purposes of certain state laws. Act 404 of 2000, H.B. 3358, § 1(B). Accordingly, these non-profit corporations “may participate, under the same conditions as afforded special purpose districts, in the State Retirement System.” Id.

Consequently, corresponding provisions of the SCRS statutes authorize “any nonprofit corporation created under the provisions of Chapter 35 of Title 33 [the predecessor of Chapter 36 of Title 33] for the purpose of supplying water and sewer” to become a participating employer in SCRS. S.C. Code Ann. § 9-1-470 (2019). Once such an entity has joined SCRS as a participating employer, “[a]ll persons . . . who are employed” by the entity become members of SCRS, unless the person is eligible, and timely elects, to opt out of membership. S.C. Code Ann. § 9-1-480 (2019).

Membership in SCRS

For the purposes of SCRS, a “member” is defined as “a teacher or employee included in the membership of the system as provided in Article 5 of [Chapter 1 of Title 9].” S.C. Code Ann. § 9-1-10(18) (2019).

For the purposes of determining membership and participation in SCRS, the final determination of employment status does not lie with the participating employer, but instead, “[i]n all cases of doubt, the Board shall determine whether any person is a teacher or employee for the purposes of the System.” S.C. Code Ann. § 9-1-610 (2019); see also § 9-1-10(6) (2019) (providing that, for purposes of Chapter 1 of Title 9, “‘Board’ means the Board of Directors of the South Carolina Public Employee Benefit Authority which shall act under the provisions of this chapter through its Division of Retirement Systems”).

In making a determination of employment status for the purposes of SCRS, PEBA has historically relied upon the common-law test for an employment relationship under South Carolina law. Under this test, “the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.” Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 476, 753 S.E.2d 416, 419 (2013).

Earnable Compensation for the Purposes of SCRS

The concept of “earnable compensation” forms a key component of how benefits are accrued, funded, and paid under SCRS. In particular, both member and employer contributions to SCRS are set and calculated as a percentage of the “earnable compensation” paid to members. See, e.g., S.C. Code Ann. §§ 9-1-1020, 9-1-1085(A) (2019) (providing that member contributions be deducted from, and made as a percentage of, a member’s earnable compensation); S.C. Code Ann. §§ 9-1-1050, 9-1-1085(A) (2019) (setting employer contributions based upon a percentage of the earnable compensation paid to the members employed by the employer). The SCRS statutes also instruct the system’s actuaries to calculate the normal costs and accrued liability contributions of the system as percentages of the earnable compensation payable to the members of the system. S.C. Code Ann. §§ 9-1-1060, 9-1-1070 (2019).

A member’s earnable compensation also forms the basis of the “average final compensation” used to calculate the member’s monthly benefit upon retirement. The maximum annual service retirement benefit payable to a Class Two member of SCRS who retires after age 65 is equal to 1.82 percent of the member’s average final compensation, multiplied by their years of creditable service. See S.C. Code Ann. § 9-1-1550(B)(1) (2019). The “average final compensation” used in that calculation is defined as “the average annual earnable compensation of a member during the twelve consecutive quarters of his creditable service on which regular contributions as a member were made to the system producing the highest such average.” § 9-1-10(4)(a).

This concept of “earnable compensation” is defined by the SCRS statutes as “the full rate of the compensation that would be payable to a member if the member worked the member’s full normal working time.” § 9-1-10(8)(a). In addition, section 9-1-1020 further clarifies the compensation that is includable in a member’s earnable compensation and upon which contributions are due. That section provides, in relevant part, that “[p]ayments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base are not compensation for which contributions are deductible.” Id. The SCRS statutes also provide that, “[f]or work performed by a member after December 31, 2012, earnable compensation does not include any overtime pay not mandated by the employer.” § 9-1-10(8)(b).

As a threshold matter, compensation must be paid to an individual in their capacity as an employee of a participating employer in SCRS and as a member of the system in order to be considered earnable compensation. Further, even if the compensation is paid to the individual in their capacity as an employee, it must reflect the member's normal, regular rate of pay to qualify as earnable compensation. A member's average final compensation, and the earnable compensation used in calculating that figure, is not intended to reflect an abnormal, short-term spike in a member's compensation, but is instead designed to approximate the member's highest normal rate of regular compensation earned over a sustained period of their covered employment. Cf. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008); Wehle, 363 S.C., 611 S.E.2d; Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001) (all rejecting attempts to inflate members' average final compensation with additional leave payouts that would lead to absurd results by causing the payment of actuarially unsound benefits).

It is important to note that the determination that a payment from an employer does not constitute earnable compensation for the purposes of SCRS is not necessarily a finding that the payment is illegitimate or improper or that the payment may not be compensation for other purposes, such as federal or state income taxation. For example, bonuses, severance payments, and certain types of payments for unused leave are all legitimate types of compensation that could be paid to a member by a participating employer and reported as compensation for tax purposes, but that would not be considered earnable compensation for the purposes of SCRS. See § 9-1-1020.

These payments outside of a member's regular salary base are excluded from the definition of earnable compensation not because the payments fail to qualify as compensation, but because the inclusion of those types of irregular or abnormal payments in the calculation of members' retirement benefits would undermine the actuarial basis upon which the system is funded. Member and employer contributions to SCRS are set on an actuarial basis upon which the system is funded. Member and employer contributions to SCRS are set on an actuarial basis as a percentage of employees' earnable compensation, and it is those contributions and the investment earnings on them that, when accrued over time, provide the funds for the lifetime monthly benefits payable to retirees from the System. If member and employer contributions were collected on a lower, regular compensation for most of a member's career, but the

member's lifetime monthly benefit were to be based upon a short-term, irregular spike in compensation at retirement, such as a bonus or severance payment, the resulting gap between the contributions collected over the member's career and the benefits to be paid over their retirement would be a fiscal harm to the System that would weaken its actuarial soundness.

Courts in other jurisdictions have recognized the importance of the concept of regularity in the definitions of the compensation that may be included in the calculation of pension benefits. For example, in construing a similar concept of "regular compensation" for a Boston retirement system, the Massachusetts Supreme Judicial Court recognized that such definitions of the compensation that may be included for the purposes of calculating retirement benefits provide "a safeguard against the introduction into the computations of adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems," noting that these safeguards are "needed especially where the public entity that negotiates [the compensation] is not the one that will have to find the funds to pay the continuing retirement benefits." Boston Ass'n of School Administrators & Supervisors v. Boston Ret. Bd., 419 N.E.2d 277, 280-81 (Mass. 1981). In reaching that conclusion, the court explained that the word "regular," as it modifies "compensation," imports the idea of ordinariness or normality as well as the idea of recurrence" in determining what constitutes compensation for the purposes of calculating retirement benefits. Id. at 280. Similarly, a New York court emphasized the statutory definition of "regular compensation" in sustaining the retirement system's determination that certain longevity payments and certain payments for extra work should not be included in the calculation of the member's benefits because those payments were in the nature of a bonus or other "extraordinary" payments outside the member's employment contract. Martone v. N.Y. State Teachers' Ret. Sys., 481 N.Y.S.2d 781, 782 (App. Div. 1984).

Petitioner's Compensation from Alligator

In this matter, Petitioner contends that the compensation Alligator reported to SCRS as his wages from covered employment should be included in the earnable compensation used to calculate his benefits under SCRS and PORS. In particular, Petitioner asserts that certain large increases in his compensation reported by Alligator beginning in 2016 – namely, a 2,354% increase in reported compensation from \$12,000 annually to \$294,545 per year – should be considered his regular salary and included in his earnable compensation. However, as set forth below, the Court finds Petitioner's claim must fail because he has not shown that his reported

compensation from Alligator between September, 2006 and June, 2020 constitutes earnable compensation. Specifically, the facts of this case show his compensation from Alligator was not paid to him as an employee, but as an independent contractor pursuant to the management agreement between Alligator and O&A.

Petitioner's Relationship with Alligator

Using the four-factor common-law test for employment under South Carolina law, the evidence in this matter shows the substance and true character of the compensation paid by Alligator to Petitioner was as payments made to an independent contractor pursuant to the management contract between Alligator and O&A, and not as wages for employment for the purposes of SCRS.

Direct Evidence of the Right or Exercise of Control

Since 2002, Alligator has entirely outsourced the operation of its water and sewer services, including the position of its general manager, to O&A pursuant to the Management Agreement between Alligator and O&A. The contractor relationship established by the Management Agreement is the sole basis of any control the Alligator Board of Directors has over the operations of the water and sewer services. For example, as explained by Alligator's CPA, O&A was entirely in control of providing and approving any personnel for the operations of the water and sewer system. Further, although Alligator has reported Petitioner as an employee for certain purposes, Alligator did not have any records reflecting the normal level of control that would be expected of a true employment relationship, particularly for a highly-compensated employee. Petitioner did not have any written or oral employment contract with Alligator; did not have a written position description with Alligator; did not have any written performance reviews or evaluations from Alligator; did not have any salary schedule, compensation plan, or other written confirmation of his salary (or any changes to his salary); did not have any records of sick or annual leave accrued or used; and did not have any other comparable documentation that would substantiate an employment relationship with Alligator. In short, as provided in the Management Agreement, it was O&A, not Alligator, that was required to "[p]rovide a general manager" for the water and sewer system.

Furnishing of Equipment

Pursuant to the Management Agreement, O&A is responsible for furnishing the equipment necessary for the operation of the water and sewer system. In particular, the

Management Agreement requires O&A to “[p]rovide a general manager, office manager, administrative assistant along with a properly equipped office necessary to carry out its functions under this agreement.” While Alligator is responsible for telephone expenses, “[a]ll other office overhead expenses, including, but not limited to postage, stationary or account statements shall be paid for by [O&A].”

Method of Payment

Although Alligator reported it paid certain compensation to Petitioner as wages for employment, the method of those reported payments is not indicative of the regular wages or salary of an employment relationship. Petitioner’s reported compensation from Alligator was subject to dramatic fluctuations, such as dropping 90% from \$120,000 to \$12,000 between 2006 and 2010, and then increasing 2,354% from \$12,000 to \$294,545 from 2015 to 2017. Petitioner also experienced unusual gaps in his compensation, such as the period of nine months during 2009 and 2010 when he did not receive a paycheck and the three months between November, 2019 and February, 2020 when he missed two paychecks. Even when Petitioner received regular paychecks, they were paid on a monthly basis, which is an uncommon payroll schedule for an employee.

The record reflects that the large bonus payments that were reported for Petitioner in June, 2016 and June, 2017 were not new payments made by Alligator to Petitioner, but were simply reclassifications of amounts already paid by Alligator to O&A, revised to instead show the payments as having been made directly to Petitioner, for which Petitioner reimbursed Alligator for the tax withholding and retirement conditions. Further, the inverse relationship between the amounts reported by Alligator as contract management fees to non-employees and the salary reported to Petitioner indicates the increased compensation reported for Petitioner was a reclassification of amounts already owed pursuant to the management contract.⁴ This connection was also reflected in the 2017 letter from the President of Alligator’s Board, in which he explained the increased compensation reported for Petitioner occurred because Alligator was no longer making debt payments to O&A in lieu of compensation to Petitioner.

Finally, the amounts reported as salary for Petitioner are not credible as compensation for employment for his position. For example, the \$12,000 annual salary reported as his

⁴ This same inverse relationship holds true for the corporate and employment income reported by Petitioner on his personal tax returns.

compensation from Alligator between 2009 and 2016 would be barely above minimum wage for a year of work as a full-time employee. Similarly, a salary survey conducted by the South Carolina Rural Water and Sewer Association in 2016 shows that the increased compensation reported for Petitioner beginning in 2016 is not consistent with the amounts paid to general managers employed by similarly situated rural water and sewer systems, but would instead be over three times greater than the average salary for such general managers taken as a whole and over twice as great as the average general manager salary for even the largest systems in the survey. Taken as a whole, the method of payment for Petitioner's reported compensation from Alligator is indicative of an independent contractor, sharing in the profits and losses of a business enterprise, which is consistent with the Management Agreement between Alligator and O&A.

Right to Fire

The record does not reflect that Alligator had the right to fire Petitioner from his position as general manager. As noted above, O&A is responsible for providing the general manager position for the water and sewer system under the Management Agreement and has control over all personnel for the system's operations. Furthermore, although Petitioner contends he was terminated from employment with Alligator in June, 2020, the evidence in this case does not demonstrate the termination of an employment relationship. In the two years since Petitioner's reported termination, Alligator has not hired another general manager, Petitioner has continued to organize and attend every Alligator board meeting, and Alligator has not produced any records that document a termination of employment for Petitioner. In addition, at the hearing, Petitioner testified that the Management Agreement between Alligator and his company had been extended and would not be expiring any time soon.

Conclusion

Because Petitioner has not demonstrated that his reported compensation from Alligator between September, 2006 and June, 2020 was paid as wages or salary in an employment relationship with a participating employer, that compensation cannot be considered earnable compensation for the purposes of Petitioner's participation in SCRS. Rather, the preponderance of the evidence in this matter shows the true character of the compensation is payment to an independent contractor made pursuant to the Management Agreement between Alligator and O&A.

Petitioner's Regular Salary Base from Alligator

Although it is clear that the relationship between Alligator and Petitioner is an independent contractor relationship based upon the Management Agreement, even if some of the reported compensation had been paid to Petitioner as an employee of Alligator, the additional payments received by Petitioner from Alligator beginning in 2016 do not constitute earnable compensation for the purposes of SCRS.

As an initial matter, the \$103,000 reported by Alligator as Petitioner's compensation for the April to June quarter of 2016 clearly includes a bonus or other special payment that was not part of Petitioner's regular salary base. For the prior nineteen quarters leading up to that payment, Alligator reported Petitioner's earnable compensation as \$3,000 per quarter. The payment of an additional \$100,000 in that quarter would not be reflective of Petitioner's regular, recurring salary base and, thus, would not be considered earnable compensation for the purposes of SCRS. Similarly, the \$303,000 reported by Alligator as Petitioner's compensation for the April to June quarter of 2017 reflects a special payment that would not be earnable compensation for the purposes of the system. At the time of that reported payment, Alligator had reported Petitioner's earnable compensation as \$3,000 per quarter for twenty-two of the prior twenty-three quarters, with the one exception being the April to June quarter of 2016 when the additional \$100,000 discussed above was reported. Whether characterized as bonuses, incentive pay, or some other form of special payment, these payments of \$100,000 and \$300,000 made in the quarters ending in June, 2016 and June, 2017, respectively, are not consistent with the regular base salary of \$3,000 per quarter that Alligator had been reporting for Petitioner on a recurring and consistent basis since 2010. Therefore, these payments would not be considered earnable compensation for the purposes of SCRS.

Further, the increased compensation Alligator began reporting for Petitioner in July, 2017, in the amount of \$270,000 per year, also fall outside the regular salary base Alligator previously established for Petitioner. To the extent that this increased reported compensation does not reflect bonuses or special payments, this compensation would still include payments that, prior to these final years of his employment before retirement, had not previously been considered part of his regular salary base and had not previously been treated as wages for employment by Alligator. Whether these payments had previously been classified as payments to pay off debt Alligator owed to Petitioner, as payments to O&A pursuant to the Management

Agreement with Alligator, or as some other form of compensation, the payments had not been considered part of Petitioner's normal, regular salary from Alligator and had been paid to Petitioner outside of Alligator's employment payroll prior to 2017. To permit any such non-payroll payments to be reclassified as wages for employment and included in Petitioner's earnable compensation would allow Petitioner's average final compensation – and resulting retirement benefit – to be distorted by a short-term spike in his reported compensation that does not accurately reflect the regular salary base upon which Petitioner and Alligator had remitted contributions for the majority of his employment.⁵

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that the compensation reported by Alligator for Petitioner to Respondent PEBA between September, 2006 and June, 2020 is not earnable compensation for the purposes of SCRS.

IT IS FURTHER ORDERED that, consistent with this determination, Respondent PEBA shall adjust the monthly benefit payable to Petitioner after the date of this Order as required to account for any changes to his service credit and average final compensation resulting from the exclusion of the compensation reported by Alligator as earnable compensation for Petitioner under SCRS.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

March 2, 2023
Columbia, South Carolina

⁵ For example, if Petitioner's monthly SCRS and PORS benefits were based upon an average final compensation of \$270,000, his total monthly benefit amount across both plans would be nearly \$13,000 a month, such that he would receive a monthly benefit greater than the \$12,000 annual salary that was reported (and contributed upon) for nine years of his participation with Alligator.

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

March 2, 2023
Columbia, South Carolina

