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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM
THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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ALC Docket Number: 21-ALJ-30-0084-CC
Appellate Case Number: 2023-000521

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Glenn C. Odom .....Appellant,

v.

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

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# INITIAL BRIEF OF APPELLANT

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## INTRODUCTION AND STATEMENT OF THE CASE

On February 12, 2021, Respondent South Carolina Public Employee Benefit Authority ("PEBA" or "Respondent") issued Agency Determination Number 21-004, wherein Respondent determined that certain payments made to Appellant Glenn C. Odom ("Appellant" or "Odom") by the Alligator Rural Water and Sewer Company ("Alligator" or "Company") were not earnable compensation that could be credited to Odom for the purposes of the South Carolina Retirement System.

On March 17, 2021, Odom timely filed a Request for Contested Case Hearing with the South Carolina Administrative Law Court ("ALC" or "Administrative Law Court"). On November 9 and 15, 2022, the ALC conducted a full bench trial on the merits regarding Odom's claim for retirement benefits.

By Order dated March 2, 2023, the ALC denied Odom's requested relief, concluding that: (1) Odom's earnings with Alligator from 2006 through 2020 were not earnable compensation for purposes of the South Carolina Retirement System because Alligator retained Odom as an independent contractor instead of an employee; and (2) Odom's pay increases, starting in 2016, were not earnable compensation but instead were bonuses, incentives, or special payments.

On March 30, 2023, Odom timely filed a Notice of Appeal with the South Carolina Court of Appeals. Odom thereafter timely requested a copy of the trial Transcript on April 5, 2023, and received the Transcript and exhibits thereto on June 13, 2023.

No evidence supported the ALC's Order, which erroneously deprived Odom of earned retirement benefits exceeding $100,000 per year. The undisputed evidence showed that Alligator employed Odom exclusively as an employee, which PEBA continuously acknowledged since

2006. Moreover, Alligator paid Odom a salary at all relevant times and never paid him a bonus, an incentive, or special compensation of any kind.

Accordingly, Odom's retirement contributions were "earnable compensation," per the applicable retirement statutes, thereby entitling Odom to the full relief he requested as a matter of law.

Therefore, the Court should reverse the ALC's decision and order PEBA to base Odom's retirement benefits on his highest twelve (12) consecutive quarters of earnable compensation, which began in July 2017, and retroactively credit Odom's retirement contributions and benefits to the fullest extent allowable under South Carolina Code Section 9-21-50.

## STATEMENT OF THE FACTS

### I. Overview of Alligator's Business Operations

Alligator was incorporated as a non-profit in Chesterfield County, South Carolina, in or about 1987. (Tr. 105, l. 14-15).[1] Alligator "started out originally as a small, rural water company that provided water to 100 rural customers" and has enjoyed explosive growth, particularly since 2014. (Tr. 46, l. 9-24).

Since its inception, Alligator has "added another 1,900 customers [and] several large industries . . . has signed contracts with every town in Chesterfield County except Cheraw . . . [and now is] a large water wholesaler." (Tr. 46, l. 9-24). In Alligator's first year of operations, it pumped 700,000 gallons of water, while last year it pumped more than a billion gallons of water along with 50 million gallons of sewer. (Tr. 46, l. 9-25, Tr. 47, l. 1-5). Over the years, Alligator "has grown a whole lot more than 2,000 percent." (Tr. 47, l. 4-5).

[1] References to pages in the trial transcript are herein designated as "Tr." while a specific line or lines in the trial transcript are herein designated as "l."

Alligator does not operate like a typical state government agency. (Tr. 283, l. 12-15). Unlike a state agency, the Company does not rely upon taxes as a revenue source but instead must generate revenues "like any business" to survive and continue to operate. (Tr. 48, l. 8-14, 25; Tr. 49, l. 1-2).

## II. Odom Was A Member Of PEBA's Retirement System

Alligator hired Odom in 2006 and promoted him to the position of General Manager in or about 2014—a role in which he essentially served as the Company's Executive Director or Chief Executive Officer, reporting directly to the Company's Board of Directors ("Board"). (Tr. 45, l. 15-18; Tr. 49, l. 11-14; Tr. 50, l. 12-15, Tr. 53, l. 14-24).

Alligator is a statutorily defined "employer" for purposes of PEBA's retirement system, pursuant to South Carolina Code Section 9-1-10(14), which PEBA admitted. (Tr. 49, l. 3-6; Tr. 240, l. 1-5).

Since on or about September 1, 2006, Odom was a statutorily defined Class Two "active member" and "employee" of Alligator for purposes of PEBA's retirement system, pursuant to South Carolina Code Sections 9-1-10(2) and (11), which PEBA admitted both at trial and in its treatment of Odom since 2006. (Tr. 49, l. 3-1, Tr. 240, l. 4-8).

## III. Alligator Employed Odom Solely As An "Employee"

Undisputed evidence showed that Alligator employed Odom and never retained him as an independent contractor. At all times, Alligator:

- paid Odom a salary via Internal Revenue Service ("IRS") Form W-2 and never paid him via a Form 1099;
- maintained workers' compensation insurance covering Odom's employment;
- paid payroll taxes, including FICA and FUTA, on Odom's behalf to the state and federal governments;

- provided employment-related benefits to Odom, including paid time off (vacation and sick pay) and health, life, disability, and dental insurance;

- employed Odom on an at-will basis, meaning that Alligator could fire him at any time and for any or no reason;

- maintained a personnel file related to Odom's employment;

- provided office space and equipment, supplies, vehicles, tools, expense reimbursement, and materials necessary for Odom to perform his essential job duties;

- required Odom to report directly to the Board;

- required Odom to meet the Company's performance expectations;

- evaluated his job performance annually;

- required Odom to work, at a minimum, for a set number of hours during each workday;

- reimbursed Odom for work-related expenses;

- provided equipment, tools, supplies, and vehicles, per the Employee Handbook;

- paid Odom a set salary that did not vary based on the completion of certain tasks, jobs, or assignments;

- required Odom to follow the Company's policies, practices, and procedures and provided him with an employee handbook setting forth those policies, which he was required to follow; and

- maintained the right to discipline and/or discharge Odom if, for example, he failed to meet the Company's performance expectations, failed to follow the Company's policies and/or procedures, or for other reasons within the Company's sole discretion.

(Tr. 53, 57, 59-61, 71-72, l. 1-25) (PEBA Ex. 1 (Odom's First and Second Affidavits), 20, 21).

Moreover, in his role as Alligator's Manager, Odom was subject to and responsible for enforcing the Company's policies set forth in its Employee Handbook. (Tr. 56, l. 20-25; Tr. 57, l. 1-21) (PEBA Ex. 1). The Employee Handbook contained policies covering, among other topics, hiring, job performance, promotions, job responsibilities, conflicts of interest, work hours and attendance, equipment, compensation (which was based solely on performance), pay increases, holidays, vacation leave, sick leave, extended leave, military leave, emergency leave, job abandonment, benefits, expense reimbursement, health and safety, sexual harassment, work-related injuries, discipline, and discharge from employment. (Tr. 56, l. 20-25; Tr. 57, l. 1-21) (PEBA Ex. 1).

At trial, PEBA admitted that Alligator's Board maintained control over Odom and that tax records showed that Alligator paid him as an employee.[2] (Tr. 264, l. 3-8, Tr. 341, l. 1-25, Tr. 342, l. 1-7, l.) (PEBA Ex. 20). PEBA specifically testified that it "would not say we had anything that refuted" Odom's above-cited affidavits (which were admitted into evidence at trial and which were entirely consistent with his trial testimony). (Tr. 264, l. 13-25, Tr. 265 l. 1-2).

In addition, from 2006 to 2020, PEBA continuously treated Odom as Alligator's "employee," by allowing him to participate in the PEBA retirement system, accepting contributions from him, and periodically updating him on his contributions and expected retirement benefits. (PEBA Ex. 1, 2, 4, 83).

PEBA produced no testimony or other evidence refuting, countering, or rebutting these undisputed facts. Instead, PEBA merely questioned the supposedly small number of documents in Odom's personnel file, even though no law requires employers to maintain any particular documents in personnel files or to maintain personnel files at all. (Tr. 247, l. 2-15, Tr. 248, l. 2-

[2] PEBA's Director of Retirement Operations, Terry Nichols, testified as PEBA's only witness at trial.

20, Tr. 260, l. 7-19). The mere existence of a personnel file indicates that the individual is an "employee," as employers certainly do not maintain personnel files for independent contractors, and PEBA proffered no evidence or legal citations to the contrary.

Odom's personnel file at Alligator contained documents reflecting his participation in the PEBA retirement plan and various other documents showing that Alligator provided him with health, dental, vision, disability, and life insurance—indicating that he was Alligator's "employee." (PEBA Ex. 82).

At trial, PEBA failed to explain or reconcile its inconsistency in treating Odom as Alligator's "employee" for nearly 15 years and then contending otherwise at trial, as PEBA testified:

> Q. . . . [If Odom] were an employee from 2006 to 2009 for purposes of this [Average Final Compensation] calculation, when did he become an independent contractor and not an employee?
>
> A. I don't have an answer to that question. . . .
>
> . . .
>
> Q. . . . [A]t what time or date did Mr. Odom become an independent contractor?
>
> A. I don't have an answer to that.
>
> Q. And did he become an independent contractor at some point with Odom & Associates or with Alligator or with both?
>
> A. You're asking me a question I don't have an answer for.

(Tr. 256, l. 3-7; Tr. 263, l. 5-13).

## IV. Alligator's Relationship With Odom & Associates

Alligator's business relationship with Odom & Associates ("O&A") was unrelated to Odom's participation in PEBA's retirement system and irrelevant to this case, despite PEBA's failed attempts to use this business relationship as a basis to deny or significantly reduce Odom's retirement benefits.

Odom owns O&A, which is private-sector, for-profit business, founded in 1998, that is separate and distinct from Alligator. (PEBA Ex. 1, Second Odom Aff., ¶ 8) (Tr. 62-64, l. 1-25; Tr. 106, l. 8-21). O&A has substantial income-generating real estate holdings that also are unrelated and unaffiliated with Alligator. (PEBA Ex. 1, Second Odom Aff., ¶ 9). For example, O&A owns roughly 40 rental units and approximately 1,200 acres of land. (PEBA Ex. 1, Second Odom Aff., ¶ 9). O&A also leases warehouse space for large paper mills, which is another business practice that is unrelated and unaffiliated with Alligator. (PEBA Ex. 1, Second Odom Aff., ¶ 10).

Alligator directly paid O&A for any services that it performed and did not include those payments as part of Odom's salary with Alligator. (PEBA Ex. 1, Second Odom Aff., ¶ 11, Currin Aff.) (Tr. 65, l. 2-5).

Odom's role with O&A did not affect his salary with Alligator, as his roles and earnings with the two organizations were separate and distinct. (PEBA Ex. 1, Second Odom Aff., ¶ 16, Currin Aff.) (Tr. 64, l. 2-16). Odom's compensation with Alligator was not based on and was wholly unrelated to any work or services that O&A provided. (PEBA Ex. 1, Second Odom Aff., ¶ 35) (Tr. 64, l. 2-16). Alligator never paid Odom for work that he performed for O&A. (Tr. 65, l. 2-5).

At trial, PEBA admitted that Odom's relationship with Alligator and O&A never changed over the years and likewise that O&A's business relationship with Alligator never changed over

the years. (Tr. 248-249, 258-259, l. 1-25).

PEBA did not proffer any information, documents, or other evidence refuting or rebutting the aforementioned undisputed evidence showing that Alligator and O&A were separate and distinct business entities and that their relationship was wholly unrelated to Odom's participation in PEBA's retirement system.

## V. Odom's Salary At Alligator

Odom's regular annual salary with Alligator was:

| YEAR | AMOUNT |
|---|---|
| 2006 | $40,000.00 |
| 2007 | $112,000.00 |
| 2008 | $36,000.00 |
| 2009 | $32,500.00 |
| 2010 | $31,000.00 |
| 2011 | $16,000.00 |
| 2012 | $12,000.00 |
| 2013 | $12,000.00 |
| 2014 | $12,000.00 |
| 2015 | $12,000.00 |
| 2016 | $112,000.00 |
| 2017 | $428,727.25 |
| 2018 | $282,272.70 |
| 2019 | $247,500.00 |

| | | |
|---|---|---|
| | 2020 | $157,500.00[3] |

(Tr. 71, l. 16-25, Tr. 72, l. 1-10, Tr. 159-160, l. 1-25) (Odom Ex. 4) (PEBA Ex. 20).

Odom's twelve highest consecutive quarters of salary or earnable compensation at Alligator were from July 2017 through his retirement in June 2020:

| | **QUARTER** | **AMOUNT** |
|---|---|---|
| 1) | Q3 2017 | $49,090 |
| 2) | Q4 2017 | $73,636 |
| 3) | Q1 2018 | $73,636 |
| 4) | Q2 2018 | $73,636 |
| 5) | Q3 2018 | $67,500 |
| 6) | Q4 2018 | $67,500 |
| 7) | Q1 2019 | $67,500 |
| 8) | Q2 2019 | $67,500 |
| 9) | Q3 2019 | $67,500 |
| 10) | Q4 2019 | $45,000 |
| 11) | Q1 2020 | $90,000[4] |
| 12) | Q2 2020 | $67,500 |

(Odom Tr. 85-92, l. 1-25) (PEBA Ex. 1, 3, and 6).

Alligator timely reported all of the foregoing quarterly earnings to PEBA. (Tr. 92, l. 12-15; Tr. 240, l. 4-25, Tr. 241, l. 1-10). During those twelve quarters, Alligator paid Odom

[3] Odom retired in June 2021. (Tr. 45, l. 19-22) (Odom Ex. 6).
[4] Odom believes that Alligator mistakenly reported one of his pay periods ($22,500) from the fourth quarter of 2019 as earnings for the first quarter of 2020. (Tr. 88, l. 3-16; Tr. 91, l. 1-16). Thus, Odom's correct earnings were $67,500 during both the last quarter of 2019 and the first quarter of 2020.

$22,500 for 24 consecutive pay periods, covering two full calendar years. (Tr. 91-92, l. 1-25). PEBA never challenged, rebutted, or refuted the foregoing reported amounts of Odom's earnings at Alligator.

## VI. Alligator Always Paid Odom A Salary And Never Paid Him A Bonus, Incentive, Or Special Payment

Odom earned all of the foregoing amounts exclusively from his salary at Alligator, which the Board set. (Tr. 59, l. 1-17). The Company never paid Odom any bonuses, incentives, or special payments of any kind, and he never had any contract, written or verbal, with Alligator giving him the right to earn bonuses, incentives, or special payments. (Tr. 59-60, l. 1-25, Tr. 61-62, l. 1-25). At trial, PEBA admitted that Alligator and Odom never had any written or verbal contract for bonuses, incentives, or special payments of any kind. (Tr. 282, l. 4-22).

Odom testified that:

> I've done 18 separate water phases through federal or state government. And none of that impacted my pay. It just made us larger and made us bring in more money. But no bonus or if you bring in X number of dollars you're gon' get this; no, sir. . . .
> The Board looked at the end of the year, reviewed where we were financially with the auditor's report and saw that, you know, everything was going fine, making money or whatever. And they gave me a raise or left things as it was.

(Tr. 59, l. 10-15, 23-25; Tr. 60, l. 1-3 ).

The accounting firm of Phillips, Currin & Company, CPA's ("PCC") of Hartsville, South Carolina provided accounting services for Alligator for more than 25 years.[5] (Tr. 170 l. 25; Tr. 171, l. 11-23).

[5] This accounting firm previously audited Alligator and still provides bookkeeping for the Company, including compiling state and federal tax returns, compiling and/or analyzing financial statements, and providing payroll services. (Tr. 172, l. 13-25; Tr. 173, l. 22-24).

One of PCC's partners, Certified Public Accountant Karen Currin ("CPA Currin"), testified and confirmed that Alligator always paid Odom exclusively a salary and never paid him a bonus, incentive, or special payment of any kind:

> Q. When Alligator provides you with payroll information, does it break it down in terms of whether the payments are for a salary or a bonus or some type of incentive payment? Does it break it down in any way?
>
> A. Yeah. I believe when the office manager would communicate that to my payroll staff. So it should be on those reports if there's bonuses or anything. There should be a separate line item for bonuses.
>
> Q. Has Alligator ever reported to your accounting firm a bonus for Mr. Odom?
>
> A. No. Not [that] I'm aware of; no.
>
> Q. Has it ever reported any incentive payments to Mr. Odom?
>
> A. No.
>
> Q: . . . [H]as Alligator always reported only Mr. Odom's salary to your accounting firm?
>
> A. Yes. Just however those weekly -- well, I'm not even sure it's weekly. I think it's biweekly for payroll. They communicate that with my payroll staff.

(Tr. 174, l. 8-25; Tr. 175, l. 1-5).

Similarly, Alligator's Board Chair, via a letter to PEBA, further corroborated that the Company paid Odom exclusively via a salary. (Odom Ex. 7) (Tr. 75-76, l. 1-25).

PEBA produced no testimony, documents, or other evidence refuting or rebutting the foregoing undisputed evidence showing that Alligator paid Odom exclusively with a salary and that the Company never paid him a bonus, a special payment, or an incentive.

## VII. PEBA's Erroneous Final Agency Decision

PEBA began investigating Odom's retirement contributions at least as early as 2017, as it questioned: (1) whether Odom's pay at Alligator was salary-based, (2) why the Company increased Odom's salary beginning in 2016, and (3) Alligator's business relationship with O&A—an entity which Odom owned and which contractually provided services to Alligator. (Tr. 243, l. 4-25).

For approximately four years, Odom, Alligator, and O&A each timely and fully responded to PEBA's numerous requests for information and documents regarding these issues, including two sworn affidavits that Odom provided. (Tr. 78-80, l. 1-25) (PEBA Ex. 1). At trial, PEBA admitted that it had no evidence contradicting Odom's undisputed affidavits, as PEBA testified that, "I would not say we had anything that refuted it . . ." (Tr. 264, l. 23-25; Tr. 265, l. 1; Tr. 346, l. 1-25; Tr. 347, l. 1-2) (PEBA Ex. 1).

In addition, CPA Currin sent multiple correspondence and documents to PEBA, along with a sworn affidavit affirming that Alligator paid Odom exclusively with a salary and further explaining the legitimate business reasons that motivated the Company to increase Odom's salary beginning in 2016.[6] (Odom Tr. 78, l. 21-25, Tr. 79, l. 1-25; Tr. 80, l. 1-6; Tr. 245, l. 2-23) (Odom Ex. 1, Currin Aff.). Alligator's Board Chair sent a letter to PEBA, explaining these same issues. (Odom Ex. 7).

Despite the mountain of information and documents that Odom and others provided, PEBA rejected Odom's claim for full retirement benefits and instead calculated his projected

[6] Odom and/or Alligator provided to PEBA tax returns, contracts, bank ledgers, bank statements, policies, a personnel file, Board minutes, and financial information, among other documents—all of which the ALC admitted into evidence. (Tr. 245-247, l. 1-25).

retirement benefits based on contributed earnings for quarters in which he earned only $12,000.00 per year.[7] (PEBA Ex. 4).

PEBA gave no weight to the Odom and Currin sworn Affidavits, as PEBA viewed them merely as "his perception," "her statement," and "his word." (Tr. 264, l. 16-20; Tr. 273, l. 8-23; Tr. 274, l. 1-3; Tr. 346, l. 3-18).

PEBA concluded that it "properly excluded . . . additional payments . . . for the purposes of Claimant's participation" in the retirement system "because those payments do not meet the requirements for earnable compensation in the system." (PEBA Ex. 4).

At trial, PEBA testified that Odom's reported salary "was some other special incentive payment or bonus, but it was not part of the regular salary base." (Tr. 252, l. 12-14). PEBA characterized Odom's salary increases as an actuarial "spike" and characterized this as the "sole basis" for the Final Determination. (Tr. 253, l. 1-13).

At trial, PEBA could not and did not explain specifically why it classified Odom's earnings, which included payments of $22,500 for 24 consecutive pay periods, as a "special payment," as PEBA merely testified that, "It's not part of the—it did not appear to be a regular salary. . . . You're badgering me." (Tr. 279-280, l. 1-25).

PEBA attempted to justify this conjecture by citing a case, in the Final Determination, from Massachusetts, contending that the retirement system needed "safeguards" to protect from "untoward, massive, continuing burdens." (PEBA Ex. 4). However, PEBA cited no South Carolina authority, whether statute, regulation, or judicial precedent, allowing it to arbitrarily reduce Odom's statutorily-protected retirement benefits under these circumstances.

[7] PEBA's Final Determination explicitly found no evidence showing or suggesting that Alligator's payments to Odom were "illegitimate or improper." (Tr. 265, l. 3-21) (PEBA Ex. 4).

In fact, at trial, PEBA admitted that: (1) the South Carolina Code of Laws does not address or reference "spikes;" (2) the applicable retirement statutes do not define the terms "salary," "incentive," or "special payment;" and (3) PEBA does not have any internal written guidelines defining those terms or any formula for determining what constitutes a "spike." (Tr. 267-269, l. 1-25; Tr. 281, l. 2-25).

Instead, PEBA testified that it merely looks for "unusual fluctuations" in pay when determining whether reported compensation constitutes "salary" or is a bonus, incentive, or special payment, even though PEBA admitted that the applicable statutes do not prohibit fluctuations in salary. (Tr. 269, l. 6-25; Tr. 271-272, l. 1-25). In fact, PEBA agreed that the South Carolina retirement statutes do not prohibit or preclude an employee "from getting a large jump in pay and having it count toward their State retirement," as long as the pay is considered earnable compensation. (Tr. 272, l. 7-23).

PEBA further testified that, if it identifies an "unusual fluctuation" in reported compensation, PEBA "go[es] to the employer" and "ask[s] for an explanation as to whether it increases or decreases. Help us understand what's going on." (Tr. 281, l. 8-11).

In this case, PEBA admitted that Odom and Alligator timely responded to PEBA's requests for documents and information regarding his salary increases, by providing two affidavits from Odom, an affidavit from CPA Currin, a letter from Alligator's Board Chair, and all of the requested personal and business records from Odom, Alligator, and O&A. (Tr. 275-276, l. 1-25).

Nevertheless, PEBA rejected and/or refused to give any weight to the undisputed affidavits and numerous documents that Odom, Alligator, and O&A provided. PEBA's trial

testimony showed that it would have rejected Odom's claim, regardless of what information or documents he provided:

> Q. So, again, let's go back to this, what PEBA had to consider. You first said that PEBA only had Mr. Odom's affidavit to consider. He submitted two affidavits; correct?
>
> A. I never said we only had his affidavit. We had the letter from the board.
>
> Q. The letter from the board.
>
> A. We had the affidavits.
>
> Q. You had two affidavits from Mr. Odom; correct?
>
> A. We did.
>
> Q. You had an affidavit from Ms. Currin; correct?
>
> A. We did.
>
> . . .
>
> Q. And then you also had all of the documents that Mr. Odom, Alligator, and Odom & Associates produced on your request; correct?
>
> A. Yes.
>
> Q. All of these before the Court; correct?
>
> A. Yes.
>
> Q. So I guess my question is: You say that's still not enough? What else could there have been? What could Alligator or Mr. Odom have provided that would have been enough?
>
> A. **I don't have an answer for you**.

(Tr. 275, l. 10-23; Tr. 276, l. 4-14) (emphasis added).

PEBA never proffered any information, documents, or other evidence refuting or rebutting the undisputed affidavits and other documents that Odom and Alligator produced that thoroughly and specifically explained that Odom's compensation was "salary" and Alligator's

legitimate business reasons for increasing his salary beginning in 2016.

## VIII. PEBA Miscalculated Odom's Earnable Compensation And Thus Significantly Reduced His Estimated Monthly Retirement Benefits

On June 7, 2022, PEBA notified Odom that his estimated monthly retirement benefit was $2,419.27. (Tr. 241-243, l. 1-25) (PEBA Ex. 83). PEBA inexplicably deviated from the Final Determination by calculating Odom's Average Final Compensation ("AFC") based on twelve (12) consecutive quarters from 2006 to 2009, instead of the years in which he earned only $12,000 (as the Final Determination previously indicated). (Tr. 83, l. 5-25 Tr. 243, l. 1-3) (PEBA Ex. 83).

Nevertheless, PEBA erroneously did not calculate Odom's AFC on his twelve (12) highest quarters of salary, which were the third quarter of 2017 through the second quarter of 2020 (as set forth above). (Tr. 84, l. 1-21). PEBA's miscalculation deprived Odom of approximately $100,000 (or more) per year in earned retirement benefits, as Odom calculated that his monthly retirement benefit would exceed $10,000 when calculating his AFC based on his twelve (12) highest quarters of salary. (Tr. 84, l. 3-21).

Importantly, although PEBA erroneously calculated Odom's AFC on the incorrect quarters of highest earnings, PEBA's decision to provide Odom with some amount of benefits (albeit the wrong amount) implicitly conceded that PEBA recognized him as Alligator's employee, thereby directly refuting PEBA's flawed trial argument that Odom was an independent contractor and the ALC's erroneous ruling on that issue.

## IX. Alligator Increased Odom's Salary Based On Legitimate Business Reasons

Prior to PEBA's Final Determination, Odom provided PEBA with two comprehensive affidavits, a Memorandum in Support of his position from his attorney, an affidavit from CPA Currin, and a letter from Alligator's Board Chair—all explaining why the Company increased

Odom's salary and that those pay increases were not bonuses, incentives, or special payments of any kind. (Tr. 78-80, l. 1-25) (PEBA Ex. 1, 2).

For example, in Odom's second affidavit, dated September 22, 2020, he testified, in pertinent part, as follows:

> 12. For approximately nine consecutive years, Alligator paid me a reduced or lower salary of just $12,000 per year so that the Company could pay down debt and become more financially secure.
>
> 13. Alligator increased my salary in or about 2016 and since has paid me a salary that was more consistent with the industry averages for my role at the Company, wherein I essentially served as the Executive Director or Chief Executive Officer, though my official title is Manager.
>
> . . .
>
> 17. Alligator set my annual salary based on my job performance and the Company's financial success and ability to pay.
>
> . . .
>
> 19. Alligator never suppressed or deferred any of my compensation in any year in order to pay me more in any subsequent year. Instead, Alligator's Board of Directors expressed its willingness or desire to increase my salary, at some future point, if I remained employed, my performance remained satisfactory, and the Company's financial performance improved enough to justify and/or allow a salary increase.
>
> 20. In fact, I never wanted to defer any compensation, as I wanted to earn as much as possible each year because I was never guaranteed continued or future employment. . . .
>
> 21. Beginning in 2016, Alligator increased my salary because it finally had the financial ability to do so and to reward me for successfully increasing the Company's customer base and revenues.
>
> 22. In or about 2014, I renegotiated a wastewater treatment contract with the City of Hartsville to provide the necessary infrastructure to allow Nestle Waters to open a bottling facility in Chesterfield County. Almost immediately, Nestle became Alligator's biggest

customer . . .

23. Nestle's large purchases substantially increased Alligator's revenues, stabilized the Company's financial position, and eventually allowed it to increase my annual compensation so that my pay finally was more consistent with industry averages for executive managers.

24. The accounting firm of Phillips, Currin & Company, CPA's ("PCC") serves as Alligator's outside accountants and/or auditors.

25. I asked PCC to provide a financial analysis of Alligator for the period of 2010 to 2018, in order to summarize and explain the Company's financial performance.

26. According to PCC's analysis, Alligator's sewer revenues increased from $311,542 in 2010 to $658,096 in 2018—a total increase of $346,554 (111% increase).

27. According to PCC's analysis, Alligator's water revenues increased from $1,897,313 in 2010 to $3,082,538 in 2018—a total increase of $1,185,225 (62% increase).

28. According to PCC's analysis, Alligator's total water and sewer revenues increased from $2,208,855 in 2010 to $3,740,634 in 2018—a total increase of $1,531,779 (69% increase).

29. However, notwithstanding these impressive increases in revenues during the referenced nine-year period, Alligator's financial condition remained volatile before the addition of Nestle to the customer base in 2014.

30. For example, during 2012, Alligator suffered a **negative** cash flow of $374,058.

31. Adding Nestle to the customer base in 2014 greatly stabilized Alligator's financial position.

32. From 2013 (the year prior to adding Nestle) to 2018, Alligator's annual water revenues increased from $2,383,529 to $3,082,538—a total increase of $699,009 (29% increase). Nestle's water purchases accounted for nearly all of this increase during the referenced period.

33. Alligator's water and sewer revenues each increased every year from 2015 through 2018.

34. In fact, Alligator enjoyed the highest water and sewer revenues in the Company's history (to that point) during 2016, 2017, and 2018. Not coincidentally, Alligator paid me the highest annual salaries of my career (to that point) during those same years.

35. My compensation with Alligator was not based on and was wholly unrelated to any work or services that Odom and Associates provided.

36. My compensation with Alligator was not based on my participation in, contributions to, or projected future benefits from the PEBA retirement plan.

37. Alligator based my annual compensation on my job performance and the Company's financial success and ability to pay.

38. Accordingly, the three highest revenue producing years in Alligator's history were 2016, 2017, and 2018, which resulted in the Company substantially increasing my salary during those same three years.

39. Alligator enjoyed record high revenues in 2016, 2017, and 2018 as a direct result of my successful management of the Company, including but not limited to my recruitment of Nestle in 2014. The addition of Nestle to the Company's customer base dramatically increased Alligator's revenues and significantly improved the Company's financial position and ability to pay me a salary commensurate with industry averages.

40. I have not engaged in any fraud, misrepresentation, or unlawful conduct of any kind in my participation in, contributions to, or receipt of future benefits from PEBA's retirement plan.

41. The undersigned affirms and attests that the foregoing allegations are accurate and truthful based on the facts, information, and documents available upon execution of this Second Affidavit.

(Odom Ex. 1, Second Odom Aff.).

CPA Currin's affidavit corroborated Odom's second affidavit, and Odom and Currin testified at trial consistently with the foregoing legitimate business reasons that justified Alligator

increasing Odom's salary. (Tr. 49-53, l. 1-25, Tr. 58, l. 12-25; Tr. 65-70, l. 1-25, Tr. 176-181, l. 1-25) (PEBA Ex. 1, Currin Aff.).

At trial, Odom testified that Alligator increased his salary because the Company finally had the financial ability to do so and because, among other reasons, he successfully recruited new commercial customers, retained existing commercial customers, and managed the Company during the three highest-revenue producing years in its history. (Tr. 50-53, l. 1-25, Tr. 69, l. 9-20).

Odom specifically testified as follows:

> Q. . . . Were there several years where your salary at Alligator was $12,000 a year?
>
> A. Yes, sir.
>
> Q. Would you consider that to be a low salary for someone with your job responsibilities?
>
> A. Yes, sir.
>
> Q. Why did you accept such a low salary?
>
> A. . . . I essentially started the water company, and it took a while to build it up. And, you know, because of -- especially 2008, 2009. Those years were downturns. The money just did not come in. And then things turned around. Nestle came in. We signed the contract selling a lot of wholesale water that brought in $200,000 a month from that. And things went up and the board increased the pay.
>
> Q. During the years that you earned $12,000 a year, did the company have the financial wherewithal to pay you more?
>
> A. No, sir.
>
> . . .
>
> Q. . . . [W]hat did Alligator base your annual compensation on?

> A. Alligator based my annual compensation on my job performance and the company's financial success and ability to pay.

(Tr. 58, l. 5-25; Tr. 69, l.23-25; Tr. 70, l. 1-2).

PEBA did not proffer any information, documents, or other evidence refuting or rebutting the aforementioned undisputed evidence explaining Alligator's legitimate business-related reasons for increasing Odom's salary.

## X. Odom Acted Lawfully, Properly, And Within His Statutory Rights

In PEBA's zealous attempt to deny or significantly reduce Odom's monthly retirement benefits, PEBA explored (and failed to establish) various other theories at trial. For example, PEBA extensively questioned Odom and CPA Currin on, among other documents, tax returns, bank statements, and business ledgers for Odom, Alligator, and O&A. In doing so, PEBA sought (and failed) to show that Odom, Alligator, and/or O&A had engaged in some type of impropriety or illegality—despite explicitly finding otherwise in the Final Determination.

However, Odom's and CPA Currin's testimony showed that the business relationship between Alligator and O&A was not improper or illegal and that they had engaged in no activities that possibly would have adversely affected Odom's participation in and right to receive benefits from the PEBA retirement system.

For example, Odom testified that:

- Alligator's Board and the federal government approved the contract between Alligator and O&A. (Tr. 64, l. 19-22);
- He had never engaged in any fraud, manipulation, or misrepresentation or acted unlawfully in his application for or pursuit of state retirement benefits. (Tr. 70, l. 6-14; Tr. 158, l. 2-6; Tr. 160; l. 3-15; Tr. 161, l. 3-11, 22-25; Tr. 162, l-4);

- No federal or state governmental taxing authority ever cited Alligator or O&A for any improprieties or illegalities. (Tr. 161-163, l. 1-25);

- Alligator and O&A never engaged in any improper or illicit transaction with each other. (Tr. 163, l. 10-25; Tr. 164, l.1-7, 12-14);

- Outside accountants annually audit Alligator and O&A, and no audit ever revealed any improprieties or illegalities. (Tr. 161, l. 10-23, Tr. 162, l. 1-11; Tr. 163, l. 1-4);

- Alligator and O&A always fully disclosed their business dealings, including but not limited to loans, to Alligator's Board. (Tr. 164, 4-14; Tr. 165, 2-5);

- Odom's business activities at O&A were unrelated to his participation in and receipt of PEBA retirement benefits. (Tr. 165, 11-15); and

- Alligator's attorney was involved in creating the contractual relationship between Alligator and O&A. (Tr. 166, l. 5-8, 15-18).

CPA Currin corroborated Odom's undisputed testimony, as she testified that:

- PCC has performed accounting, payroll, and/or bookkeeping services for Alligator and O&A for more than 25 years and never found any irregularities or improprieties with either entity. (Tr. 161, l. 10-17; Tr. 170, l. 20-25; Tr. 171, l. 18-23; Tr. 173, l. 22-24; Tr. 229, l. 15-21);

- Alligator and O&A are separate and distinct business entities. (Tr. 175, l. 6-11);

- Alligator directly paid O&A for services that O&A performed and, those payments were unrelated to and did not include Odom's salary with Alligator. (Tr. 175, l. 12-21);

- Odom's salary with Alligator was unrelated to his participation in or projected benefits from the PEBA retirement plan. (Tr. 175, l. 17-21);

- Odom had not engaged in any fraud, misrepresentation, or unlawful conduct of any kind with regard to his application

for and receipt of PEBA retirement benefits. (Tr. 181, l. 4-9); and

- Alligator (not O&A) always paid the premiums for its employees, including Odom, to the PEBA retirement system. (Tr. 232, l. 10-14).

Moreover, CPA Currin directly refuted PEBA's flawed trial summaries or theories that attempted to show that Odom somehow engaged in impropriety, as she testified:

> Q. Ms. Currin, in that cross-examination, you reviewed a number of records. You reviewed tax records, bank records, bank ledgers, among other documents; correct?
>
> A. Yes.
>
> Q. And you answered a lot of questions with regards specifically to bank records and bank ledgers?
>
> A. Yes.
>
> Q. As a CPA, in your review of those records in court today, do you believe there were any improprieties or illegality based on your review of those bank ledgers and bank records that Mr. Werner presented to you in [Respondent's] Exhibit 17 and 18?
>
> A. No.
>
> Q. You reviewed Mr. Odom's personal tax records, and Mr. Werner provided this chart . . . that . . . purports to show . . . Odom's & Associates' income and Mr. Odom's wages ---
>
> A. Yes.
>
> . . .
>
> Q. It's your testimony that this is an incomplete chart because it doesn't include all of the Odom & Associates sources of income; is that correct?
>
> A. Yes.
>
> Q. You also reviewed earlier Respondent's Exhibit 80, which was a summary that Mr. Werner provided that purportedly shows the relationship between Mr. Odom's contributions

to the South Carolina Retirement System and the fees for management services for Odom & Associates. . . .

A. Yes.

. . .

Q. And you testified that the 990 information on here was incorrect; right?

A. On some of those 990s I did not have things broken down on the l., I believe; yes.

Q. Does that call into question the accuracy of this summary?

A. Yes.

(Tr. 229, l. 6-25; Tr. 230, l. 1-25; Tr. 231, l. 1).

Likewise, CPA Currin specifically affirmed that Odom never engaged in any illicit or unlawful conduct relevant to this case, as she testified:

Q. Do you believe that Alligator or Mr. Odom engaged in any fraud, misrepresentation, or unlawful conduct of any kind with regard to his application for [or] receipt of PEBA benefits?

A. No, no.

. . .

Q. [I]n your review of . . . Mr. Odom's contribution to the retirement system and Alligator's fees to Odom & Associates for management services, in your reviewing that information, as a CPA, do you believe there were any improprieties or illegalities based on the information that was set forth in this summary in Respondent's [Exhibit] 80?

A. No. And that general ledger that I looked [] had all our bookkeeping on it.

. . .

Q. In your review of tax records, banks statements, bank ledgers, have you seen anything showing any manipulation by Mr. Odom of the PEBA Retirement System?

A. No.

Q. Have you seen any manipulation or improprieties from Mr. Odom with regard to the Internal Revenue Service?

A. No.

Q. How about the South Carolina Department of Revenue?

A. No, no.

(Tr. 181, l. 4-9; Tr. 231, l. 2-11; Tr. 234, l. 10-21).

At trial, PEBA could not explain whether or how any of the tax returns, bank statements, or ledgers changed its analysis or Final Determination in any meaningful or substantive way. (Tr. 344, l. 4-25; Tr. 345, l. 1-25). In fact, PEBA never made any agency determinations or findings on these issues for the Court to review, as PEBA merely deferred to the Court, testifying "that's why we're here in court today." (Tr. 345, l. 21-25; Tr. 346, l. 1-25; Tr. 347, l. 1-2).

PEBA proffered no information, documents, or other evidence establishing that Odom engaged in any improprieties, manipulation, or illegalities that possibly could justify denying or significantly reducing his monthly retirement benefits. To the contrary, the undisputed evidence showed that Odom never engaged in any actions that would disqualify him from receiving his state retirement benefits.

## XI. PEBA Erroneously Sought And Considered Highly Prejudicial Materials

PEBA specifically requested, received, internally distributed, and considered irrelevant materials that greatly prejudiced Odom, as part of PEBA's four-plus year investigation.

For many years, Odom has been a high-profile public figure in Chesterfield County, as he served as Alligator's General Manager, as well as Mayor of McBee, Magistrate, and as a Municipal Court Judge. (Tr. 92, l. 16-25; Tr. 93, l. 1-4). Unfortunately, various individuals, including some associated with a group known as the McBee South Carolina Concerned Citizens

("Concerned Citizens") targeted Odom, accused him of various improprieties, and sued him during what he described as "ten years of this constant harassment." (Tr. 93, l. 5-24; Tr. 96, l. 23-25; Tr. 97, l. 1-10).

Odom denied and continues to deny the Concerned Citizens' accusations and allegations against him, which he characterized as a "political hit piece." (Tr. 102, l. 2-15; Tr. 103, l. 12-23). Those accusations and allegations were wholly unrelated and irrelevant to Odom's participation in and receipt of benefits from the PEBA retirement system. (Tr. 101, l. 10-15; Tr. 103, l. 12-23).

Odom testified that:

> I have fought with these people for years. They've reported me and Alligator to [the] Office of Inspector General, Department of Agriculture, I've been investigated and audited by them twice. Nothing found wrong. I've been investigated by SLED on three occasions. 82 complaints. . . . These same people filed a fictious lawsuit, and they've tried to withdraw it . . . [W]hat is this doing in my PEBA file?

(Tr. 96, l. 23-25; Tr. 97, l. 1-10).

During pre-trial discovery, PEBA produced dozens of pages of documents that it obtained from the Concerned Citizens. (Odom Ex. 8, 9, 10, and 11).

In fact, on March 10, 2017, PEBA's Director of Retirement Operations, Terry Nichols, specifically requested those documents via an email, in which she requested:

> Can someone with access to Facebook look at a page called 'McBee, SC Concerned Citizens' and print a copy of any information related to facts concerning one of our covered employers – Alligator Rural Water and Sewer Company (713.15). Also, please print anything on that page that you see that is related to one of their members, Glenn Odom or to Odom and Associates. Let me know when you have something and I'll be glad to come get it or if you want to copy and send us electronic version, that would be great too. Thank you.

(Tr. 284, l. 20-25; Tr. 285, l. 1-9) (Odom Ex. 7).

Ms. Nichols sent the foregoing email to her boss (PEBA's Deputy Director/Chief Financial Officer), PEBA's in-house attorney, and two members of PEBA's communications department. (Tr. 285, l. 10-25; Tr. 286, l. 1-3). Ms. Nichols supposedly requested those documents based on an "anonymous package that was mailed to our office," though she could not remember why she specifically referenced the Concerned Citizens in her email. (Tr. 286, l. 4-10, 14-19; Tr. 287, l. 1-6).

Incredibly, Ms. Nichols admitted that PEBA reviewed and considered the Concerned Citizens' documents in determining Odom's eligibility for and receipt of monthly retirement benefits:

> Q. . . . [Y]ou would agree that from . . . 2017 to current, PEBA [had] these documents stored somewhere in some file?
>
> A. We do have these documents; yes.
>
> Q. What did PEBA use these documents for?
>
> A. In reviewing the employer—just in reviewing the entire case.
>
> . . .
>
> Q. Did PEBA review and consider these documents as part of its decision in this case?
>
> A. They were part of the review.

(Tr. 289, l. 4-22).

PEBA's request for, receipt, and consideration of these highly inflammatory, prejudicial, and irrelevant documents showed that PEBA harbored animus toward Odom and had ulterior (possibly political) motives to deny or significantly reduce his monthly retirement benefits, in violation of PEBA's statutory duties.

## ARGUMENT

## I. DID THE ADMINISTRATIVE LAW COURT ERR IN DETERMINING THAT APPELLANT WAS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE, THEREBY STRIPPING HIM OF HIS STATE RETIREMENT BENEFITS FOR THE LAST 15 YEARS OF HIS EMPLOYMENT?

### A. Standard Of Review

"The review of the administrative law judge's order must be confined to the record. The Court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code § 1-23-610(B).

The Court of Appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

**(a)** in violation of constitutional or statutory provisions;

**(b)** in excess of the statutory authority of the agency;

**(c)** made upon unlawful procedure;

**(d)** affected by other error of law;

**(e)** clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

**(f)** arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Id.*

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *See Friends of the Earth v. Pub. Serv. Comm'n of S.C.,* 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

The Court "may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the

reliable, probative, and substantial evidence on the record." *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843, 845 (1999) (citation omitted).

However, the Court is not so constrained when deciding questions of law. *See Gibson v. Ameris Bank*, 420 S.C. 536, 804 S.E.2d 276, 279 (Ct. App. 2017) ("Questions of law may be decided with no particular deference to the trial court . . .").

Courts cannot base a ruling on "surmise, conjecture, or speculation." *Tiller*, 513 S.E.2d, at 845; *see also Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 732 S.E.2d 500, 503 (2012) (A finding or ruling "must be founded on evidence of sufficient substance to afford a reasonable basis for it.") (citation omitted); *Tims v. J.D. Kitts Const.*, 393 S.C. 496, 713 S.E.2d 340, 343-344 (Ct. App. 2011) ("A finding may not be based upon surmise, conjecture, or speculation but must be founded on evidence of sufficient substance to afford a reasonable basis for it.").

The test for the sufficiency of a proffer of evidence to warrant a finding follows:

> A verdict or finding must be based on the evidence and must be based on the facts proved. Under this well-established rule, although difficulty of proof does not prevent the assertion of a legal right, the verdict or finding cannot rest on surmise, speculation, or conjecture. Furthermore, . . . a finding of the court cannot be supported only by guesswork. Also, it has been said that the . . . finding cannot rest on supposition, assumption, imagination, suspicion, arbitrary action, whim, percentage, or conclusions that are in conflict with undisputed fact.
>
> The evidence on which the verdict or finding is based must be competent, legal evidence received in the course of the trial, credible, and of probative force, and must support every material fact. The decision should be against the party having the burden of proof where there is no evidence, or the evidence as to a material issue is insufficient.

32A C.J.S. Evidence § 1339, at 757-58 (1996); *see also* S.C. Code § 1-23-320(i) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed.").

### B. Alligator And Odom Had An Employment Relationship

Alligator and Odom had an employment relationship at all times, contrary to the ALC's erroneous ruling. Under the common law and all employment-related statutes, workers must be classified as either employees or independent contractors.

The South Carolina Supreme Court established the following standards in determining whether a worker is an employee or independent contractor:

> Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the ***right*** to control the claimant in the performance of his work. . . . Under the controlling common law rubric of the right of control, '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; [or] (4) right to fire.'

*Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416, 419 (2013) (citations omitted).

Establishing only a **single** factor is "virtually proof of" an employment relationship, while "contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

Based on the record evidence, all four of these factors conclusively showed that Alligator and Odom had an employment relationship, even though establishing only a **single** factor "is virtually proof" that an employment relationship existed.

### i. Alligator Maintained The Right of Control Over Odom

Alligator maintained substantial, if not total, actual and inherent control over Odom, indicating that they had an employer-employee relationship. "The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work or undertaking." *Paschal v. Price*, 392 S.C. 128, 708 S.E.2d 771, 773 (2011).

"While evidence of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is 'whether there exists the ***right and authority*** to control and direct the particular work or undertaking.'" *Shatto*, 753 S.E.2d at 420 (citation omitted).

"The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the ***right*** to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services." *Id.* The right to control the time, place, and amount of work "weighs heavily" in favor of finding an employment relationship. *Id.*

Undisputed evidence showed that Alligator controlled or had the right to control nearly every aspect of Odom's work, including the right to establish and change Odom's job duties and the right to determine the time, place, degree, and amount or number of his job duties. In addition, Alligator's Board maintained the right to instruct Odom on how and when to perform his job duties, how to conduct himself in the workplace, and how and when to engage in other actions related to the Company's business and customers. Alligator required Odom to follow the Board's instructions and direction at all times, as well as all of the Company's policies and procedures. Moreover, as Alligator's General Manager, Odom administered and enforced all of the Company's policies and procedures—subject to oversight, guidance, and direction from the Company's Board of Directors.

The ALC erroneously concluded that Alligator "did not have any records reflecting a normal level of control" over Odom, listing several documents that did not exist, including a job description, performance evaluation, or a written contract. (ALC Order, p. 18). However, none

of the documents that the ALC referenced in its Order are legally required or necessary to establish an employment relationship.

Further, the ALC disregarded the undisputed evidence from Odom's two affidavits and his trial testimony, wherein he testified that Alligator employed him as an at-will employee and could fire him at any time and for any or no reason and that he had to follow the Board's instructions, meet the Board's performance expectations, and work a set number of hours each week. Likewise, the ALC ignored the undisputed fact that Alligator published its policies in the Employee Handbook and maintained the right to discipline or fire Odom if he violated those policies, which included issues such as job performance, sexual harassment, work hours and attendance, and conflicts of interest, among many others.

Alligator maintained substantial, if not total, actual, and inherent control over Odom, conclusively showing that they had an employer-employee relationship at all relevant times.

**ii. Alligator Provided Odom's Materials And Equipment**

Alligator provided the materials and equipment that were necessary for Odom to perform his job duties with the Company and did not require him to provide and/or pay for any such materials and equipment, thereby establishing that they enjoyed an employment relationship. Alligator specifically provided Odom with an office, supplies, tools, vehicles, and expense reimbursements, per policies in the Employee Handbook.

These undisputed facts were more than sufficient to establish an employer-employee relationship, which Alligator and Odom maintained at all relevant times. *See Shatto*, 753 S.E.2d at 421 (noting that, "When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business.") (citation omitted)).

**iii. Alligator Paid Odom As An Employee**

Alligator compensated Odom as an employee by paying him a regular salary, as opposed to payment based on completion of a specific project or assignment—thereby indicating that they enjoyed an employer-employee relationship. *See Shatto*, 753 S.E.2d at 421 (noting that, "Payment on a time basis [such as a salary] is strong indication of the status of employment, while payment on a completed project basis is indicative of independent contractor status.") (citation omitted));

Similarly, Alligator paid state and federal payroll taxes on Odom's behalf and reported his wages to the IRS via Form W-2, which further established that Alligator and Odom enjoyed an employment relationship at all relevant times.[8] *See Farlow v. Wachovia Bank of N.C., N.A.*, 259 F.2d 309, 315 (4th Cir. 2001) ("The **failure** of an employer to extend employment benefits or to pay any payroll taxes is 'highly indicative' that the employee is an independent contractor. . . A party's tax and benefit treatment can be 'virtual admissions' of the party's status.") (emphasis added); *see also* IRS Publication 15-A, Employer's Supplemental Tax Guide (2023) (An employer must "withhold federal income taxes, withhold and pay over social security and Medicare taxes, and pay unemployment tax on wages paid to an employee. **An employer doesn't generally have to withhold or pay over any federal taxes on payments to independent contractors**.") (emphasis added); IRS Publication 1779, Independent Contractor or Employee (2023) (explaining that an "employer is responsible for paying . . . taxes on your wages. Your employer must give you a Form W-2 . . . showing the amount of taxes withheld from your pay.").

Finally, Alligator provided workers' compensation insurance covering Odom and gave

[8] Employers do not withhold state and federal taxes on independent contractors or pay them via a W-2, and neither the ALC's Final Order nor PEBA cited any cases or legal authority showing otherwise.

him numerous employee benefits, including the right to participate in the PEBA retirement plan, along with health, disability, life, and dental insurance, all of which show that the Company and Odom enjoyed an employment relationship at all relevant times. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752, 109 S.Ct. 2166 (1989) (courts must consider "the provision of employee benefits and the tax treatment of the hired party," among other factors, when determining whether an employment relationship exists); *Midwest Ink Co. v. Graphic Ink Sys.*, 2003 U.S. Dist. LEXIS 2327, *16 (N.D. Ill., Feb. 18, 2003) ("The fact that plaintiff paid worker's compensation for the defendant, [and] deducted from his salary the costs of FICA and health insurance also indicates employee status."); *Palmer v. Ake*, 181 N.E. 3d 421, 430 (Ind. Ct. App. 2021) ("The IRS requires employers to report wage and salary information for employees on a Form W-2."); *see also Packard v. Comm'n*, 63 T.C. 621, 632 (U.S. Tax Ct. 1975) ("[T]he payment of salaries, insurance benefits, and withholding of taxes by the corporation on behalf of the employees . . . gives a clear indication that they were employees of the corporation . . .").

The ALC erroneously disregarded all of the foregoing undisputed evidence and instead asserted that Alligator paid Odom "on a monthly basis, which is an uncommon payroll schedule for an employee." (ALC Order, p. 19-20). No evidence showed, or even inferred, that monthly payments are "uncommon" for employees, and the ALC likewise failed to cite any cases or other legal authority indicating that this is a valid factor to consider in determining whether an employment relationship existed. No South Carolina cases support the ALC's conclusion.

Moreover, the ALC also incorrectly concluded, based on a speculative and irrelevant theory PEBA proffered at trial, that Alligator increased Odom's pay by reducing or reclassifying payments to O&A.[9] (ALC Order, p. 19-20). However, the undisputed evidence showed that

[9] CPA Currin testified that PEBA's theory was flawed because PEBA relied on incomplete and incorrect information, and PEBA never refuted Currin's testimony.

Odom, Alligator, and O&A never engaged in any unlawful, illicit, or improper conduct of any kind and that Alligator increased Odom's pay, beginning in 2016, because the Company's revenues markedly increased—a legitimate business reason and not because of any reclassification of funding to O&A.

Overall, the funding of Alligator's salary payments to Odom was irrelevant so long as the funding was legal, which no one ever disputed. The proper analysis, which the ALC erroneously disregarded, focuses, not on the funding of Odom's pay, but on the following dispositive facts:

- Alligator paid Odom a salary as opposed to paying him upon completion of a project;
- Alligator paid Odom via IRS W-2 and withheld state and federal taxes, including FICA and FUTA; and
- Alligator provided workers' compensation insurance and numerous employee benefits to Odom, including health, dental, life, and disability insurance, along with the right to participate in the retirement plan.

Each of the foregoing factors established that Alligator and Odom had an employment relationship at all relevant times.

Finally, the ALC erroneously concluded that Alligator overpaid Odom, based on the results of an irrelevant survey that PEBA introduced over an objection at trial. (ALC Order, p. 20). The ALC's flawed conclusion was irrelevant, as South Carolina's appellate courts do not consider the amount of compensation paid or earned in determining whether an employment relationship exists, and neither the ALC's Order nor PEBA cited any legal authority to the contrary.[10]

[10] Courts have no authority to second-guess an employer's business judgment. *See DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (ruling that a court or an administrative agency "does not sit as a kind of super-personnel department weighing the prudence of employment decisions . . . it is not [the court's] province to decide whether the reason was wise, fair, or even correct"); *EEOC v. Clay Printing Co.*, 955 F2d. 936, 946 (4th Cir. 1992) (ruling that, "It is not the

Alligator's method of pay, tax treatment, and provision of workers' compensation insurance and employment benefits establish that Alligator and Odom had an employment relationship at all relevant times.

**iv. Alligator Maintained The Right To Fire Odom**

According to Odom's undisputed testimony and Alligator's Employee Handbook, the Company maintained the right to discipline or discharge Odom if he failed to follow the Board's instructions, policies, or directives, if he performed unsatisfactorily, or for other reasons within the Board's discretion. Likewise, Alligator employed him on an at-will basis, meaning that the Company could fire Odom at any time and for any or no reason.

These factors conclusively established that Alligator and Odom enjoyed an employment relationship. *See Shatto*, 753 S.E.2d at 422 (noting that, "The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project.") (citation omitted)).

The ALC erroneously concluded that the "record does not reflect that Alligator had the right to fire" Odom, as the ALC ignored the foregoing undisputed evidence. Instead, the ALC stated that Odom "contends he was terminated from employment with Alligator in June 2020, [but] the evidence does not demonstrate the termination of an employment relationship." (ALC Order, p. 20). The ALC's Order is incorrect because Odom retired and never claimed that he was fired. Moreover, Odom was not required to show an actual termination but only that Alligator had the **right** to fire him, which he indisputably established through his testimony and the provisions in the Employee Handbook.

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function of this court to second guess the wisdom of business decisions.").

Alligator always employed Odom on an at-will basis, meaning that the Company had the right to fire him at any time and for any or no reason. A mountain of evidence showed that Alligator and Odom enjoyed an employment relationship at all times and that the Company never retained him as an independent contractor.

#### v. PEBA Waived The Independent Contractor Issue

PEBA waived its contention that Alligator retained Odom as an independent contractor. PEBA repeatedly and consistently conceded that Alligator and Odom had an employment relationship at all times, as PEBA: (1) allowed Odom to make quarterly retirement contributions each year, from 2006 through 2020, and periodically estimated Odom's retirement benefits throughout those years, and (2) admitted at trial that Odom's relationship with Alligator never changed over the years—meaning that Alligator continuously employed him as an "employee" until he retired.

## II. DID THE ADMINISTRATIVE LAW COURT ERR IN DETERMINING THAT APPELLANT'S SALARY WAS NOT "EARNABLE COMPENSATION" UNDER THE APPLICABLE RETIREMENT STATUTE?

The ALC arbitrarily and erroneously eliminated Odom's statutorily-protected retirement benefits by improperly characterizing his undisputed and consistent salary as a special payment, bonus, or incentive of some type—though the ALC (like PEBA) conceded that it could not specify precisely what type of compensation Odom received.

### A. Applicable Statutory Sections Governing The Retirement System

Any nonprofit corporation, including Alligator, created "for the purpose of supplying water and sewer" may become a participating employer in the state retirement system. S.C. Code § 9-1-470 (2019).

"[T]he State shall be a Class Two employer." S.C. Code § 9-1-640 (2019). "[M]embers in the employ of a Class Two employer shall be Class Two members." *Id.*

Upon retirement from service after December 31, 2000, a Class Two member shall receive a service retirement allowance computed as follows: (1) If the member's service retirement date occurs on or after his sixty-fifth birthday or after he has completed 28 or more years of creditable service, the allowance must be equal to one and eighty-two hundredths percent of his average final compensation, multiplied by the number of years of his creditable service. S.C. Code § 9-1-1550(B)(1) (2019).

"'Creditable service' means a member's earned service, prior service, and purchased service." S.C. Code § 9-1-10(7) (2019). "'Earned service' means . . . paid employment as [an] . . . employee of an employer participating in the system where the . . . employee makes regular retirement contributions to the system[.]" S.C. Code § 9-1-10(9)(a) (2019).

"Average final compensation" for calculating PEBA retirement benefits "means 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." S.C. Code § 9-1-10(4)(a) (emphasis added).

"Payments 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." S.C. Code § 9-1-1020.

### B. The ALC Misclassified Odom's Salary

The ALC erroneously misclassified Odom's salary, characterizing it as a bonus, special payment, or incentive—without specifying precisely which. (ALC Order, pp. 21-22). The

ALC's error unjustifiably deprived Odom of more than $100,000 (or more) per year in retirement benefits.

Per South Carolina Code Section 9-1-1020, PEBA must consider a member's reported compensation as "salary," unless the pay is "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."

In this case, the ALC and PEBA erroneously determined that Odom's reported compensation from July 2017 through June 2020 did not constitute "salary," as they considered it to constitute a bonus, special payment, or incentive.

No evidence, much less substantial evidence, supported the ALC's erroneous conclusion. In fact, the following undisputed evidence conclusively established that Alligator always consistently and exclusively paid Odom a salary:

- Alligator only paid Odom a salary and never paid him a bonus, incentive, or special payment of any kind, as he testified in two affidavits and his trial testimony. CPA Currin corroborated this fact through an affidavit and her trial testimony;

- Alligator's Board Chair affirmed, via a letter to PEBA, that the Company paid Odom only a salary;

- Alligator reported only "salary" entries for Odom on the Company's payroll reports and never reported or designated any of his compensation as bonuses, incentives, or special payments of any kind;

- PEBA admitted at trial that it had no evidence to refute Odom's affidavits, which were admitted in evidence;

- PEBA admitted at trial that Alligator and Odom had no written or verbal agreement to pay him a bonus, incentive, or special payment of any kind;

- Alligator increased Odom's salary for legitimate business reasons, beginning in 2016, because of his good job performance and because the Company's financial conditions improved significantly as the Company achieved the highest revenues in its history with the addition and retention of large commercial customers;

- Odom's salary was consistent and varied only slightly from July 2017 through the date of his retirement, as Alligator once paid him $22,500 for 24 consecutive pay periods during that time period; and

- PEBA proffered no testimony, documents, or other evidence refuting or rebutting the foregoing undisputed facts.

Based on these undisputed facts, the ALC erroneously misconstrued and/or misapplied the retirement statutes by concluding that Odom's reported compensation did not constitute "salary."

### C. The ALC Disregarded The Rules Of Statutory Construction

The ALC erroneously disregarded the rules of statutory construction in concluding that Alligator did not pay Odom a salary.

In construing a statute, courts must give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand [a] statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598, 607 (2006).

"Our role is to apply and interpret, not rewrite, regulations [or statutes]" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 720 (2014) (citation omitted).

"If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Where the terms of the statute are clear, the court

must apply those terms according to their literal meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890, 892 (1995).

Contrary to the ALC's erroneous ruling, Alligator always exclusively paid Odom a salary, and his compensation from July 2017 through June 2020 was consistently and evenly distributed. He did not receive a single, balloon-type payment upon his retirement, and the undisputed evidence showed that he never received and, in fact, was ineligible to receive a bonus, incentive, or other such special payment.

The applicable retirement statutes do not define the terms "salary," "bonus," "incentive," or "special," and PEBA has not issued any Regulations or internal guidance regarding those terms. However, the plain and ordinary meanings of those terms conclusively show that Alligator always paid Odom a salary and never paid him a bonus, incentive, or special payment of any kind.

The Oxford Essential Business and Office Dictionary defines these terms as follows:

- **Bonus**—extra benefit; seasonal gratuity to employees beyond their normal pay;
- **Incentive**—payment or concession to stimulate greater output by workers; serving to motivate or incite;
- **Salary**—fixed regular wages; and
- **Special**—uncommon, rare, unusual, out of the ordinary.

American Ed. (2002).

Odom's compensation during his last twelve (12) quarters of employment with Alligator was steady, consistently paid during each pay period, and did not vary by the amount or type of work he performed. Nothing about Odom's pay during those time periods was extra, seasonal, motivating, uncommon, rare, or extraordinary—again conclusively showing that his

compensation, as a matter of law, constituted "salary," as opposed to a bonus, incentive, or special payment of any kind based on the plain, ordinary meaning of those terms.

Nevertheless, the ALC erroneously accepted PEBA's misplaced theory that Odom's compensation was an actuarial "spike," even though the applicable statutes did not expressly or implicitly mention, reference, or use that term or concept in any way and further did not give PEBA the discretion to incorporate that concept when administering the retirement statutes. (ALC Order, pp. 15-16).

To the contrary, the applicable retirement statutes **required** PEBA to calculate Odom's AFC based on his 12 highest quarters of reported compensation, which began in July 2017—regardless of whether his salary during those 12 quarters was greater, even significantly greater, than his reported salary during prior quarters throughout his career.

Instead of relying on the undisputed evidence and applying the plain and ordinary meaning of the applicable retirement statutes, the ALC and PEBA impermissibly "rewrote" those statutes by incorporating and applying the notion or theory of "actuarial spiking," a concept which no applicable South Carolina retirement statutes or regulations mention, reference, or employ in any way.

The ALC's Final Order and PEBA's actions contravened the applicable retirement statutes, exceeded PEBA's statutory authority, and flouted the rules of statutory construction in derogation of the South Carolina Supreme Court's above-cited rulings in *Kiawah* and *Paschal*.

The ALC's ruling affirming PEBA's impermissible methods and flawed conclusions was erroneous based on the reliable, probative evidence on the whole record and further was arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, thereby warranting dismissal under South Carolina Code Section 1-23-610(B).

## III. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO CONSIDER WHETHER RESPONDENT BREACHED STATUTORY FIDUCIARY DUTIES THAT IT OWED TO APPELLANT?

The ALC erred in failing to consider PEBA's illicit compilation and consideration of inflammatory, irrelevant, and highly prejudicial documents as part of its review of Odom's application for and receipt of retirement benefits.

PEBA owed a fiduciary duty to Odom, as PEBA statutorily must act "in the interest of the . . . [plan] participants" for "the exclusive purpose of providing benefits to participants." S.C. Code § 9-16-40 (1) and (2). This fiduciary duty required PEBA to act "impartially," in "good faith," and "with the care, skill, and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose." S.C. Code § 9-16-40 (3), (4), and (6).

PEBA admitted at trial that it requested, analyzed, and relied upon documents and information from the Concerned Citizens political group—which publicly has expressed animus and rancor toward Odom for a decade or more, forcing him to defend numerous complaints and lawsuits. At trial, PEBA incredibly could not remember why it requested documents specifically from the Concerned Citizens group.

PEBA's request, analysis, and consideration of the Concerned Citizens' documents as part of its review of Odom's case exceeded PEBA's statutory authority, diminished PEBA's credibility, and breached the fiduciary duty that it owed to Odom as a retirement plan participant.

No reasonable fiduciary would have sought and considered documents or information from the Concerned Citizens political group. No reasonable person, much less a professional trustee in charge of administering a statewide retirement system, would believe that this political

group would have any legitimate information that possibly could be relevant to Odom's participation in the state retirement plan.

PEBA's actions created a strong inference, which PEBA failed to refute at trial, that it was not impartial toward Odom but that it instead was motivated to significantly reduce or altogether eliminate Odom's monthly retirement benefits for political reasons or other illicit considerations unrelated to the applicable retirement statutes.

## CONCLUSION

The ALC erroneously: (1) concluded that Appellant was an independent contractor and not an employee, thereby stripping him of his state retirement benefits for the last 15 years of his employment; (2) concluded that Appellant's salary was not "earnable compensation" under the applicable retirement statutes; and (3) failed to consider Respondent's breach of statutory fiduciary duties that it owed to Appellant.

Therefore, the Court should reverse the ALC's decision and order PEBA to base Odom's retirement benefits on his highest twelve (12) consecutive quarters of earnable compensation, which began in July 2017, and retroactively credit Odom's retirement contributions and benefits to the fullest extent allowable under South Carolina Code Section 9-21-50.

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July 12, 2023 By: s/RW Belcher

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In the Court of Appeals

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APPEAL FROM
THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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ALC Docket Number: 21-ALJ-30-0084-CC
Appellate Case Number: 2023-000521

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Glenn C. Odom .....Appellant,

v.

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

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**PROOF OF SERVICE**

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The undersigned, certifies that on the 12th day of July, 2023, she served a copy of **Appellant Glenn C. Odom's Initial Brief** upon all other counsel of record by emailing a copy to:

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