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SC Court of Appeals

THE STATE OF SOUTH CAROLNA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2023-000521

Glenn C. Odom,..Appellant,

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

SHOULD THE COURT AFFIRM THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT CERTAIN COMPENSATION REPORTED FOR APPELLANT IS NOT EARNABLE COMPENSATION FOR THE PURPOSES OF THE SOUTH CAROLINA RETIREMENT SYSTEM WHERE THAT DECISION IS FIRMLY SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD AND IS NOT AFFECTED BY ANY ERRORS OF LAW?

STATEMENT OF THE CASE

By a request for a contested case hearing filed with the South Carolina Administrative Law Court on March 17, 2021, Appellant Glenn C. Odom ("Odom") initiated this matter, in which he seeks review of Final Agency Determination No. 21-004 issued by Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("PEBA") on February 12, 2021. (Request for Contested Case Hearing.) In that Final Agency Determination, PEBA determined that certain payments reported as being made to Odom from the Alligator Rural Water and Sewer Company were not earnable compensation that may be credited to him for the purposes of the South Carolina Retirement System ("SCRS"). (Resp't Ex. #1, at 68-76.)

The contested case proceeding was assigned to the Honorable Deborah Brooks Durden ("ALJ"), and, after the completion of discovery and timely notice to the parties, a full contested case hearing on the merits was held by the ALJ over two days, on November 9 and 15, 2022, at the South Carolina Administrative Law Court. The parties submitted proposed orders to the ALJ on February 1, 2023, and, by a Final Order filed on March 2, 2023, the ALJ denied Odom's requested relief. (Final Order.) In particular, the ALJ found: (1) that the compensation reported by the Alligator Rural Water and Sewer Company for Odom to PEBA between September 2006 and June 2020 was not earnable compensation for the purposes of SCRS because it was not paid as wages or salary in an employment relationship, but instead as payment to an independent contractor pursuant to a management agreement with Odom's company, and (2) that, even if

Odom had been an employee of Alligator Rural Water and Sewer Company, certain large increases in the payments received by Odom beginning in 2016 would not constitute earnable compensation for the purposes of SCRS because they were not part of his regular salary base. (Final Order at 20, 22.)

By a Notice of Appeal filed and served on March 30, 2023, Odom appealed the ALJ's decision to this Court, resulting in the instant proceeding.

STATEMENT OF FACTS

I. Background

Appellant Glenn Odom is a 73-year-old retired member of the South Carolina Retirement System ("SCRS") and South Carolina Police Officers' Retirement System ("PORS"), who retired from those systems effective January 6, 2022. (Resp't Ex. #83; Resp't Ex. #84.) Prior to 2006, Odom had 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 late 1990s and early 2000s, and had accrued approximately three and a half years of service credit in PORS as the result of his service as a magistrate in Chesterfield County beginning in 2002. (Resp't Ex. #1, at 38-39; Tr. p. 45, ln. 8-14; Tr. pp. 121-22)

During March 2006, Odom 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. (Resp't Ex #1, at 23-64; Resp't Ex. #3, at 1-14.) 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 roughly $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. (Resp't Ex. #1, at 25, 27.)

As part of those communications, on March 28, 2006, a PEBA customer service representative explained to Odom 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. (Resp't Ex. #3, at 2-3.) During a follow-up call on March 30, 2006, Odom indicated that 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. (Resp't Ex. #3, at 9-10.) Pursuant to that request, PEBA provided the requested benefit estimates to Odom by facsimile on March 31, 2006. (Resp't Ex. #1, at 42-64.) As reflected on those estimates, if Odom 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, which is approximately ten times greater than the benefit he would have been eligible for without that additional employment at $150,000 per year. (Resp't Ex. #1, at 44; Tr. p. 124 ln. 23-p. 125 ln. 1.) In his testimony at the hearing, Odom 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. (Tr. p. 125 ln. 20-p. 126 ln. 4.)

By a Retirement Plan Enrollment form received by PEBA on September 20, 2006, Odom was reported to PEBA as an employee of Alligator Rural Water and Sewer Company

("Alligator") for the purposes of participation in SCRS, effective on September 1, 2006, the date that Alligator joined SCRS as a participating employer. (Resp't Ex. #1, at 1.) On the Enrollment form, which Odom executed both as the employee and as the employer, Odom listed his position title with Alligator as "General Manager" and his annual salary as $120,000. (Resp't Ex. #1, at 1.)

For 2007, the first full calendar year of Alligator's participation as an employer in SCRS, Alligator reported that Odom's earnable compensation from employment with the company was $112,000.00. (Resp't Ex. #4, at 10, 12.) However, the compensation reported to PEBA by Alligator for Odom's work for the company quickly declined. For calendar year 2008, Alligator only reported compensation for Odom for the first two quarters of the year, for a total compensation for the year of $36,000. (Resp't Ex. #4, at 12, 14.) In subsequent years, the earnable compensation reported to PEBA by Alligator for Odom's work decreased further to an *annual* amount of $12,000. (Resp't Ex. #4, at 14-26.) In particular, Alligator first reported Odom's compensation as $1,000 per month for the quarter of January through March 2009.[1] (Resp't Ex. #4, at 14.) And, with the exception of a slight uptick in the first half of 2011, Alligator reported that Odom had earnable compensation of $3,000.00 per quarter for every quarter between July 2010 and March 2016. (Resp't Ex. #4, at 16-26.)

During this period, Odom visited PEBA on June 16, 2015, to discuss his retirement benefits. (Resp't Ex. #3, at 29; Resp't Ex. #1, at 5-8.) In the visit, PEBA's customer service

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[1] During 2009 and 2010, Alligator also failed to report any compensation for Odom at all for several quarters. (Resp't Ex. #4, at 14-16.) In June 2011, Alligator subsequently submitted supplemental reporting to retroactively report compensation for Odom for those quarters. (Resp't Ex. #4, at 16-17; Resp't Ex. #2, at 1-24.) On the forms, Alligator noted that the "funds were not sent by mistake of a former employee," see, e.g., Resp't Ex. #2, at 4, and, in a letter enclosed with the reports, Alligator's office manager stated that "[i]t has been brought to my attention by the company[y's] CPA: Glenn Odom did not receive a monthly check for nine months in 2009 & 2010," Resp't Ex. #2, at 23; see also Tr. p. 130 ln. 16-ln. 24.

representative generated benefit estimates for Odom for a proposed retirement date of July 1, 2019. (Resp't Ex. #1, at 5-8.) 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 Odom's first three years of participation in SCRS with Alligator. (Resp't Ex. #1, at 6, 8.)

After reporting Odom's earnable compensation at $3,000 per quarter for over six years, Alligator reported that Odom's compensation for the single quarter ending June 30, 2016, was $103,000. (Resp't Ex. #4, at 26.) For the subsequent quarters of 2016 and early 2017, Alligator resumed reporting Odom's earnable compensation at $3,000 per quarter, but again reported a disproportionately large earnable compensation for the quarter ending in June 2017, this time in the amount of $303,000 for the single quarter. (Resp't Ex. #4, at 28; Resp't Ex. #2, at 129.) Because 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 that the amount of compensation reported for Odom would have to be reduced to comply with that limit and that the excess contributions attributable to amounts above the limit would be returned to Alligator. (Resp't Ex. #9; Resp't Ex. #4, at 28.) In a response email on July 25, 2017, Odom wrote to PEBA to request more information about the compensation limit. (Resp't Ex. #8, at 2-3.) In his email, Odom explained that, "[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." Id. By additional emails on July 25 and 26, 2017,

[2] See 26 U.S.C. § 401(a)(17); S.C. Code Ann. § 9-1-1970 (2019). Importantly, this compensation limit does not restrict the amount of compensation that an employee may actually receive from an employer; rather, it simply limits the amount of such compensation that can be "taken into account" for calculating benefits under a qualified retirement plan. Id.

PEBA provided Odom 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. (Resp't Ex. #8, at 1, 4.) In reply to those explanatory emails, Odom indicated that 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 that instead of reporting additional compensation in 2017, "I will wait till Jan 2018." (Resp't Ex. #8, at 1, 4.)

Given the size of these reporting variances in Odom's compensation, PEBA's retirement finance staff reviewed the earnable compensation reported for Odom for the June quarters of 2016 and 2017. By a letter dated August 8, 2017, PEBA wrote to Alligator to explain that the compensation reported for those quarters appeared to include special payments that were not part of Odom's regular annual salary and that would not be included in his earnable compensation for the purposes of SCRS. (Resp't Ex. #2, at 129.) Accordingly, PEBA notified Alligator in the letter that it would be returning the contributions Alligator had remitted based upon earnable compensation for Odom in excess of $3,000 for those quarters. Id. The letter also explained that Odom could appeal the determination regarding his earnable compensation to PEBA's Executive Director within one year of the date of the letter. Id.

Although neither Alligator nor Odom sought review of PEBA's initial determination regarding Odom's earnable compensation, Alligator continued to report excessive compensation for Odom. In particular, starting with the 2017-2018 fiscal year, and continuing into the 2018-2019 and 2019-2020 fiscal years, Alligator reported Odom's quarterly compensation in amounts that equaled exactly $270,000 for each year. (Resp't Ex. #4, at 30, 33, 36.) Consequently, by letters dated August 8, 2018, August 8, 2019, and August 11, 2020, respectively, PEBA again returned to Alligator all contributions remitted each fiscal year based upon earnable

compensation for Odom that exceeded the $12,000 annual salary that had previously been reported to PEBA as Odom's regular compensation base. (Resp't Ex. #2, at 95-96, 105-06, 120-21; Resp't Ex. #4, at 30-38.)

In March 2017, PEBA had 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. (Resp't Ex. #2, at 67-89.) 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. (Resp't Ex. #2, at 77.) In order to investigate the assertions made in that report, and other irregularities in the total number of employees reported by Alligator both to PEBA in its quarterly SCRS reports and to the IRS in its Form 990s, 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. (Tr. p. 302 ln. 11-ln. 14; Resp't Ex. #2, at 179-80.) After a period of correspondence between PEBA and Alligator's accountant in late 2018 and early 2019 (Resp't Ex. #2, at 148-150), 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 (Resp't Ex. #2, at 145-46). However, in the letter, PEBA further explained 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 Odom for the purposes of SCRS and that, accordingly, 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." (Resp't Ex. #2, at 145.)

By correspondence received March 25, 2020, Odom sought further review of PEBA's initial determination regarding his earnable compensation for the purposes of SCRS before PEBA's Executive Director. (Resp't Ex. #1, at 141-99.) Odom submitted additional documentation in support of his request for review on June 5, 2020, and October 7, 2020. (Resp't. Ex. #1, at 79-140.) On February 12, 2021, PEBA issued Final Agency Determination No. 21-004 in response to Odom's request for review. (Resp't Ex. #1, at 68-76.) Odom sought review of that Final Agency Determination before the South Carolina Administrative Law Court, resulting in the instant case.

II. 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. (Resp't Ex. #16.) Odom was one of the original incorporators of Alligator and served on its first board of directors as the company's president. (Resp't Ex. #16; Tr. p. 105 ln. 11-ln. 21.) Odom has also purchased land from, and has sold land to, Alligator over the years. (Tr. p. 119 ln. 21-p.120 ln. 14.)

As a tax-exempt entity, Alligator is required to annually file a Form 990, Return of Organization Exempt from Income Tax, with the IRS. (Tr. p. 181 ln. 20-p. 182 ln. 6.) Among other things, 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. See generally Resp't Ex. ##22 through 37.

III. Odom & Associates, Inc.

Odom & Associates, Inc. ("O&A") is a South Carolina corporation incorporated in 1998. (Resp't Ex. #12.) Odom serves as the president, and sole officer, of O&A and is the sole owner of the corporation. (Resp't Ex. #11; Resp't Ex. #12; Tr. p. 106 ln. 12-ln. 21.)

Odom uses O&A's funds for his personal expenses. (Tr. p. 107 ln. 5-ln. 19.) As reflected in O&A's general ledger, between December 31, 2007, and December 18, 2020, Odom 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. (Resp't Ex. #13, at 1-52; Tr. p. 107 ln. 20-p. 108 ln. 13.) These personal expenses included itemized expenses for matters such as personal travel and meals, alimony payments, and personal vehicle taxes, as well as large, uncategorized transfers to Odom in amounts as large as $50,000 and $80,000. (Resp't Ex. #13, at 1-52; Resp't Ex. #13, at 36, 37.)

At the hearing of this matter, Odom stated that the president of the Alligator Board of Directors considered owing funds to O&A and owing funds to Odom personally as a "similar thing." (Tr. p. 149 ln. 6-ln. 19.)

IV. 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. (Resp't Ex. #10.) In the preamble of that Agreement, the parties indicated that "the Water Company [i.e., Alligator] desires to avail itself of the services of Odom & Associates to manage and operate its water production and sewer facilities and Odom &

Associates desires to provide such services to the Water Company." (Resp't Ex. #10, at 2 (emphasis added).) Among other things, 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." (Resp't Ex. #10, at 3 (emphasis added); Tr. p. 114 ln. 18-p. 115 ln. 6.) The Agreement also requires O&A to cover all office overhead expenses except for telephone costs. (Resp't Ex. #10, at 5; Tr. p. 115 ln. 7-ln. 21.)

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. (Resp't Ex. #10, at 4-5.) The Agreement provided for an initial term of twenty years from its effective date (Resp't Ex. #10, at 5-6); however, at the hearing of this matter, Odom testified that the Agreement had been revised approximately halfway through the initial term to extend the Agreement for an additional twenty years (Tr. p. 115 ln. 22-p. 116 ln. 7).

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, Odom & Associates, Inc. (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.

(Resp't Ex. #68, at 42 (emphasis added).) The bond disclosure further noted that, "[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." (Resp't Ex. #68, at 43.)

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." (See, e.g., Resp't Ex. #33, at 6 (Part VI, line 3), 20.) 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 as of the contested case hearing, for an average of about $935,802 per year for such services. (Resp't Ex. ##24-37.)[3]

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 (Resp't Ex. #13, at 147-208), and, at the hearing, Odom testified that the operation of the Alligator water and sewer system is the primary business activity of O&A (Tr. p. 112 ln. 4-ln. 18).[4] In addition, over the years, O&A has loaned substantial sums of money to Alligator for purposes ranging from providing operating expenses, paying off existing loans, and making improvements to the water

[3] These management fees to non-employees can generally be found in Part IX, line 11a, of the Form 990s. See, e.g., Resp't Ex. #33, at 10.

[4] Notably, this stands in contrast to the characterization of O&A's business activities in the affidavit Odom submitted to PEBA in support of his claim, which, among other things, stated that O&A "primarily leases warehouse space for large paper mills." (Resp't Ex. #1, at 86.)

and sewer systems. (See, e.g., Resp't Ex. #48, at 12-14.) For example, Alligator's financial statements reflect that the company owed a total of $1,347,940 to O&A as of December 31, 2014. (Resp't Ex. #45, at 16.)

By a letter dated June 8, 2017, Karen Currin, a CPA who performs accounting work and tax filings for Alligator and O&A as corporate entities and for Odom in his individual capacity, wrote to Odom to explain how certain bookkeeping is handled in connection with the Management Agreement between Alligator and O&A. (Resp't Ex. #6.) In the letter, Ms. Currin confirmed that, under the Management Agreement, O&A was responsible for providing the personnel to manage and operate the systems and that O&A approved the hiring of all staff, including those that were reported as Alligator employees. Id. 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. Id.; see also Tr. p. 201 ln. 16-p. 202 ln. 9. Similarly, the minutes of the meeting of the Alligator Board of Directors from August 15, 2006, state that, upon Alligator joining SCRS, "Odom & Associates, Inc. will pay the premiums" for the workers that are reported as Alligator employees for the purposes of the system. (Resp't Ex. #52, at 12; see also Tr. p. 203 ln. 23-p. 204 ln. 5.)

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. (Resp't Ex. #38, at 22-23.) In particular, 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." Id. at 23. 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." Id.

V. Odom's Relationship with Alligator

A. Personnel Records

Odom did not have a written or oral employment contract with Alligator. (Resp't Ex. #1, at 86; Tr. p. 131 ln. 14-ln. 20.) 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 his 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 Odom's work with Alligator. (Resp't Ex. #82; Tr. p. 131 ln. 4-p. 133 ln. 25.) In fact, the personnel file produced by Odom in this matter for his relationship with Alligator consists solely of documents related to his retirement and insurance benefits through PEBA and includes no records prior to 2006, when Alligator joined PEBA's benefit programs. (Resp't Ex. #82.)

Alligator has also been inconsistent in reporting Odom's status with Alligator on its Form 990s. Between 2006 and 2019, there are five years during which Alligator did not identify Odom as a "key employee" of Alligator and did not report compensation for him as such as a key employee. (Resp't Ex. ##24, 25, 29, 33, 34.)

B. Compensation

The history of the compensation reported as Odom's salary from Alligator is inconsistent with an employment relationship. For example, although Odom 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. (Resp't Ex.#1, at 1; Resp't Ex. #7;

Tr. p. 129 ln. 21-p. 130 ln. 3.) In his testimony at the hearing, Odom confirmed that there are no records of how the Alligator Board of Directors arrived at that reported 90% reduction in his salary. (Tr. p. 130 ln. 4-ln. 15.) Odom 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. (Tr. p. 148 ln. 15-ln. 22.) Further, as noted above, there was a period of nine months during 2009 and 2010 when Odom did not receive any monthly paycheck from Alligator. (Resp't Ex. #2, at 23; Tr. p. 130 ln. 16-ln. 24.)

In response to PEBA's August 7, 2018 letter returning excess contributions to Alligator (Resp't Ex. #2, at 120-21), Wade Huggins, the President of Alligator's Board of Directors, wrote to PEBA on August 30, 2018, to provide further information regarding Odom's reported compensation from Alligator (Resp't Ex. #7). In the letter, Mr. Huggins acknowledged that Odom "received $1000 a month as his wage base for the past nine years," but explained that "Alligator Rural Water Company, Inc. has owed Mr. Odom a large sum for years since the inception of the company" and that "[t]his debt was being paid down in lieu of compensation." Id. Mr. Huggins further stated in the letter that, because "[t]he amount owed to Mr. Odom has been drastically reduced," Alligator was then able to pay him an increased salary of $24,545 per month, or $294,545 annually. Id. At the hearing of this matter, both Odom and his CPA confirmed that there was no documentation reflecting how the Alligator Board of Directors arrived at that amount, and neither Odom nor his CPA could provide an explanation of how the amount was determined.[5] (Tr. p. 60 ln. 7-ln. 12; Tr. p. 134 ln. 1-ln. 20; Tr. p. 215 ln. 20-p. 216 ln. 14; Tr. p. 217 ln. 9-ln. 22.)

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[5] These statements are more limited than those provided by Odom and his CPA in the affidavits they submitted to PEBA in connection with Odom's claim, which purported to explain the basis

Despite this August 2018 letter stating that Odom's salary from Alligator was $294,545, Odom's reported compensation from Alligator was reduced to $282,272 for calendar year 2018 and further reduced to $247,500 for calendar year 2019. (Pet'r Ex. #6, at 2-3; Resp't Ex. #20, at 9-10.) Notably, these reductions resulted in Odom's reported compensation from Alligator equaling *exactly* $270,000 per year for *exactly* three fiscal years, from July 2017 through June 2020 (Resp't Ex. #4, at 30, 33, 36), which directly followed Odom being notified 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 would be excluded from his retirement benefit calculations (Resp't Ex. #8). At the hearing, Odom stated that 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. (Tr. p. 138 ln. 23-p.139 ln. 16.)

During this three-year period when Odom'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. (Pet'r Ex. #6.) In addition, there was also a period between November 21, 2019, and February 27, 2020, when no payments were issued to Odom at all, resulting in catch-up payments being reported on February 27, 2020, and March 12, 2020. (Pet'r Ex. #6, at 1-2.)

As noted above, Alligator also reported that Odom received large bonus payments of $100,000 in June 2016 and $300,000 in June 2017. Tellingly, however, the bank and accounting records produced for Alligator do not reflect that these amounts were actually paid to Odom from Alligator, but instead reflect that amounts already paid to O&A were reclassified as these reported payments to Odom. For example, the check number referenced in Alligator's general

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for the reported increases in Odom's compensation from Alligator. (Resp't Ex. #1, at 86 (Odom Aff. ¶17), 89 (Odom Aff. ¶¶35-37), 94 (Currin Aff. ¶¶33-35).)

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. (Resp't Ex. #17, at 135-36 (Check Number 7861); Resp't Ex. #18, at 181 (Check Number 7861); Tr. p. 206 ln. 20-p. 209 ln. 13.) Similarly, Alligator's general ledger shows that, in July 2017, *Odom actually paid Alligator* $125,000 to cover federal taxes on the large bonus payment that was reported for him and $60,000 to cover state taxes and retirement contributions for that payment. (Resp't Ex. #17, at 167, 168.) Notably, the federal tax payment is listed in the ledger as being "From Glenn Odom (from O&A)," (Resp't Ex. #17, at 167), and when those excess contributions were returned to Alligator by PEBA, Alligator, in turn, refunded those contributions, both member and employer contributions, directly to Odom two days later (Resp't Ex. #17, at 171). And, 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 actually issued to Odom during 2017. (Resp't Ex. #18.)

In this matter, Odom contends that the increased compensation Alligator reported for him beginning in 2016 was intended to be commensurate with industry averages for other rural water system general managers. (Resp't Ex. #1, at 86 (Odom Aff. ¶13), 87 (Odom Aff. ¶23), 89 (Odom Aff. ¶39), 94 (Currin Aff. ¶37); Respt. Ex. #7.) However, in a salary survey conducted in that same year, the South Carolina Rural Water Association, a group in which Alligator is a member (see, e.g., Resp't Ex. #63, at 11; Tr. p. 135 ln. 4-ln. 13), found that the average salary for the general manager of a participating rural water and sewer company in 2016 was $79,530 (Resp't Ex. #70, at 28). Further, even looking at the salaries for general managers of the largest systems in the survey, at more than 10,000 taps, the average salary was still only approximately $133,000, less than half of the compensation claimed by Odom. (Resp't. Ex. #70, at 25.)

Quite revealingly, the records in this matter reflect that there is an inverse relationship between the contract management fees Alligator reported to the IRS and the compensation Alligator reported to SCRS for Odom's salary. (Resp't Ex. #80.) For example, 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, Odom's reported compensation from Alligator decreased to the $12,000 annual salary that was reported between 2009 and 2016. (Resp't Ex. #4, at 14-19; Resp't Ex. ##26-29; Resp't Ex. #80.) Similarly, between 2015 and 2017, when Alligator reported that Odom'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 Odom.[6] (Resp't Ex. #4, at 24-32; Resp't Ex. ##33-35; Resp't Ex. #80.) And, finally, when Alligator reported that Odom's compensation dropped back down to the IRS compensation limit for 2018 and 2019, the contract management fees reported on its 990s increased correspondingly. (Resp't Ex. #4, at 30-38; Resp't Ex. ##36-37; Resp't Ex. #80.)

Odom's personal income tax returns 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. (Resp't Ex. #81.) For example, in 2014, when Odom reported his wages from employment as $11,222, he reported corporate income from O&A of $366,286, but, by 2017, when he reported wages in the amount of $471,684, Odom actually reported an income loss of $65,252 from O&A—again for a period during which he contends water and sewer revenues were increasing. (Resp't Ex. ##73-76.)

[6] This reduction in management fees is particularly surprising, given that the increases in water and sewer services and revenues that Odom 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. (Resp't Ex. #1, at 88, 93; Resp't Ex. #10, at 4-5.)

C. Termination

Odom has stated that he terminated from employment with Alligator on June 30, 2020. (Tr. p. 142 ln. 23-p. 143 ln. 5.) And, Alligator has not reported any compensation or remitted any retirement contributions for Odom to PEBA since June 30, 2020. (Resp't Ex. #4, at 39-40.) However, despite the reported termination of Odom's employment with Alligator, Odom testified at the hearing that, over two years later, Alligator had still not hired another general manager. (Tr. p. 143 ln. 6-ln. 15.) Further, the record reflects that, in lieu of a general manager, Odom was listed as a "consultant" on Alligator's website at the time of the hearing. (Resp't Ex. #21.) In addition, the minutes of the Alligator Board of Directors' meetings between Odom's reported termination in June 2020 and the end of 2021 show that Odom attended every in-person meeting of the Board during that time and had a role in canceling the meetings that were not held. (Resp't Ex. ##66-67; Tr. p. 146 ln. 8-ln. 17.) Moreover, there is no reference in any of those meeting minutes to a termination of Odom's employment for Alligator or any other acknowledgement of a change in his employment status. (Resp't Ex. ##66-67; Tr. p. 146 ln. 18-ln. 21.)

Odom also continues to use his Alligator email address, awsc@shtc.net, for his personal email address on file with SCRS for his retirement benefits. (Tr. p. 142 ln. 6-ln. 19.) And, as noted above, Odom's Alligator personnel file does not contain any documentation reflecting his termination from employment with Alligator. (Resp't Ex. #82.)

VI. Summary

Based upon the testimony and exhibits presented at the contested case hearing of this matter, there is substantial evidence in the whole record to fully and firmly support a finding that the compensation reported by Alligator to SCRS for the work performed by Odom for the

company for the entire period between September 2006 and June 2020 was not earnable compensation for the purposes of SCRS. Although, in form, some of the compensation was reported as compensation from employment for certain purposes, the evidence in this matter shows that, in substance, the true character of the compensation was as payments made to an independent contractor pursuant to the Management Agreement between Alligator and O&A, and not as wages for employment for the purposes of SCRS. Furthermore, although it is clear that the relationship between Alligator and Odom is an independent contractor relationship based upon the Management Agreement, even if some of the reported compensation had been paid to Odom as an employee of Alligator, there is more than enough substantial evidence in the record to support a finding that the additional payments received by Odom from Alligator beginning in 2016 were not part of any regular salary base and do not constitute earnable compensation for the purposes of SCRS.

STANDARD OF REVIEW

The standard of review for an appeal to this Court of a final decision of an ALJ is set out in the Administrative Procedures Act at Section 1-23-610(B) of the Code of Laws. S.C. Code Ann. § 1-23-610(B) (Supp. 2022). Pursuant to that section, "[t]he review of the administrative law judge's order must be confined to the record." Id. And, in conducting that review, this 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." Id. Rather, under Section 1-23-610(B), this Court

> 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. Accordingly, under this standard, "[t]he decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (quoting Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)).

Substantial evidence is evidence, "when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court." Original Blue Ribbon Taxi Corp., 380 S.C. at 605, 670 S.E.2d at 676; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) ("'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.") Importantly, "[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Original Blue Ribbon Taxi Corp., 380 S.C. at 605, 670 S.E.2d at 677; see also Lark, 276 S.C. at 136, 276 S.E.2d at 307 (recognizing that substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Thus, "[w]hen the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder." A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 200, 833 S.E.2d 451, 457 (Ct. App. 2019). Consequently, "[i]n determining whether the ALC's

decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." Id.

Further, "[u]nder this 'substantial evidence' standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 144, 600 S.E.2d 80, 85 (Ct. App. 2004). Therefore, on appeal, "[t]he burden is on Appellants to prove convincingly that the agency's decision is unsupported by the evidence." Id.; see also In re Blue Granite Water Co., 434 S.C. 180, 188, 862 S.E.2d 887, 891 (2021) (noting that, under the substantial evidence standard of review, "[b]ecause the [agency's] findings are presumptively correct, the party challenging the [agency's] order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole").

ARGUMENT

THE COURT SHOULD AFFIRM THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT CERTAIN COMPENSATION REPORTED FOR APPELLANT IS NOT EARNABLE COMPENSATION FOR THE PURPOSES OF THE SOUTH CAROLINA RETIREMENT SYSTEM BECAUSE THAT DECISION IS FIRMLY SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD AND IS NOT AFFECTED BY ANY ERRORS OF LAW.

In this matter, Odom 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, he 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 ALJ

correctly rejected Odom's claim because he did not show that his reported compensation from Alligator between September 2006 and June 2020 constitutes earnable compensation. Specifically, the facts in this case demonstrated that 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 his company. Further, even if some compensation had been paid to him as part of an employment relationship, the reported compensation increases beginning 2016 were in the nature of bonuses or other special payments that would not be considered part of his regular salary base. Because these findings by the ALJ are firmly supported by substantial evidence in the record and are not controlled by any errors of law, the ALJ's decision in this matter should be affirmed by this Court.

A. The ALJ correctly applied the relevant background retirement systems law.

In reaching her decision in this matter, the ALJ correctly applied the general law governing the administration of the South Carolina Retirement Systems.

1. 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, § 1(B). Accordingly, these non-profit corporations "may participate, under the same conditions as afforded special purpose districts, in the State Retirement System." Id. (emphasis added).

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). And, once such an entity has joined SCRS as a participating employer, "all persons . . . who are employed" by the entity become members of SCRS, unless the person is eligible, and timely elects, to opt out of membership. Id. § 9-1-480.

2. 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). Importantly, 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).[7]

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).

3. 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.

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[7] For the purposes of administering Chapter 1 of Title 9, which governs SCRS, "'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." Id. § 9-1-10(6).

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); id. §§ 9-1-1050, 9-1-1085(A) (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. Id. §§ 9-1-1060, 9-1-1070.

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 his or her 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." Id. § 9-1-10(4)(a) (emphasis added).

This fundamental 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." S.C. Code Ann. § 9-1-10(8)(a) (2019) (emphasis added). In addition, Section 9-1-1020 of the Code of Laws 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. § 9-1-1020 (emphasis added). 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." Id. § 9-1-10(8)(b).

As reflected in these Code provisions, as a threshold matter, compensation must be paid to an individual in his 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 his or her capacity as an employee, it must reflect the member's normal, regular rate of pay to qualify as earnable compensation. As implied by its name and as defined in the SCRS statutes, a member's average final compensation, and the earnable compensation used in calculating that figure, is not intended to reflect an abnormal, short-term distortion in a member's reported compensation, but is instead designed to approximate the member's highest normal rate of regular compensation actually earned over a sustained period of his or her covered employment. Cf. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008); Wehle v. S.C. Ret. Sys., 363 S.C. 394, 611 S.E.2d 240 (2005); 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 S.C. Code Ann. § 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 are not 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 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 inflated reported 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 his or her retirement would be a fiscal harm to the System that would weaken its actuarial soundness. See Tr. p. 300 ln. 23-p.301 ln. 12; see also, e.g., Duvall v. S.C. Budget & Control Bd., Docket No. 03-ALJ-30-0448-CC, 2004 WL 3154719, at *6 (S.C. Admin. Law Ct. Mar. 5, 2004) (discussing the effects of such salary distortions upon the actuarial soundness of SCRS and rejecting an employer's attempt to recharacterize certain leave payments to a member as additional salary for the purposes of inclusion in a member's earnable compensation).

Courts in other jurisdictions have also 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 and Sup'rs 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).

B. The ALJ's determination that the compensation paid by Alligator to Odom was made as payments to an independent contractor is supported by substantial evidence on the whole record and unaffected by errors of law.

In making a determination of Odom's employment status for the purposes of his participation in SCRS through Alligator, the ALJ used 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). Applying that four-factor test in this matter, the ALJ determined that the evidence in the record shows that the character of the compensation paid by Alligator to Odom 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. Because this determination is supported by substantial evidence on the whole record and applies the correct legal standard, it should be affirmed by this Court.

1. The four-factor test for an employment relationship reveals that the payments made by Alligator to Odom were made as payments to an independent contractor.

a. Direct evidence of the right or exercise of control

Since 2002, Alligator has entirely outsourced the operations 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. (Resp't Ex. #10.) The contractor relationship established by that 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. (Resp't Ex. #6.) Further, although Alligator has reported Odom 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. Odom 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. (Resp't Ex. #82.) 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. (Resp't Ex. #10, at 3 (¶ II.1).)

b. 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." (Resp't Ex. #10, at 3 (¶ II.1) (emphasis added).) Further, while Alligator is responsible for telephone expenses, "[a]ll other office overhead expenses, including, but not limited to postage, stationery or account statements shall be paid for by Odom & Associates." (Resp't Ex. #10, at 5 (¶ V).)

c. Method of payment

Although Alligator reported that it paid certain compensation to Odom as wages for employment, the method of those reported payments is not indicative of the regular wages or salary of an employment relationship. Odom'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. He 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. The record also reflects that the large bonus

payments that were reported for Odom in June 2016 and June 2017 were not new payments made by Alligator to Odom, 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 Odom, for which Odom reimbursed Alligator for the tax withholding and retirement contributions. Further, the clear inverse relationship between the amounts reported by Alligator as contract management fees to non-employees and the salary reported to Odom indicates that the increased compensation reported for Odom was a reclassification of amounts already owed pursuant to the management contract.[8] (Resp't Ex. #80.) This connection was also reflected in the 2017 letter from the President of Alligator's Board, in which he explained that the increased compensation reported for Odom occurred because Alligator was no longer making debt payments to O&A in lieu of compensation to Odom. (Resp't Ex. #7.)

Finally, the simple amounts reported as salary for Odom are not credible as compensation for employment for his position. For example, the $12,000 annual salary reported as his 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 Odom 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. (Resp't Ex. #70.) Taken as a whole, the evidence in the record demonstrates that the method of payment for Odom's reported compensation from Alligator is indicative of an

[8] This same inverse relationship holds true for the corporate and employment income reported by Odom on his personal tax returns. (Resp't Ex. #81.)

independent contractor, sharing in the profits and losses of a business enterprise, which is consistent with the Management Agreement between Alligator and O&A.

d. Right to fire

The record does not reflect that Alligator had the right to fire Odom 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. (Resp't Ex. #6; Resp't Ex. #10.) Furthermore, although Odom contends he terminated from employment with Alligator in June 2020, the evidence in this case does not demonstrate the termination of an employment relationship. Among other things, in the two years after Odom's reported termination, Alligator had not hired another general manager; Odom continued to organize and attend every Alligator board meeting; and Alligator did not produce any records that document a termination of employment for Odom. (Resp't Ex. #21; Resp't Ex. ##66-67; Resp't Ex. #82.) In addition, at the hearing, Odom testified that the Management Agreement between Alligator and his company had been extended and would not be expiring any time soon. (Tr. p. 115 ln. 22-p. 116 ln. 7.)

In sum, because Odom did not demonstrate 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 his participation in SCRS. Rather, the preponderance of the evidence in this matter shows that the true character of the compensation was as payment to an independent contractor made pursuant to the Management Agreement between Alligator and Odom's management company. Consequently, the ALJ's findings to that effect are clearly

supported by substantial evidence on the whole record, are not affected by any errors of law, and should be affirmed.

2. Odom's attempt to reargue the facts regarding his employment status is unavailing.

On appeal, Odom does not identify any error of law committed by the ALJ in her decision that the compensation paid by Alligator to him was made pursuant to an independent contractor relationship. All parties agree that the ALJ applied the correct four-factor test for an employment relationship under South Carolina law. (See, e.g., Initial Brief of Appellant at 32.) And, while Odom does argue that establishing only a single factor under that test is "virtually proof" of an employment relationship, citing to Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002) (Initial Brief of Appellant at 32), that "single factor" analysis has been expressly overruled by the South Carolina Supreme Court in favor of the traditional analysis that "evaluates the four factors with equal force in both directions." Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009); see particularly id. 382 S.C. at 300 n.3, 676 S.E.2d at 702 n.3 (expressly overruling Nelson v. Yellow Cab Co.). And, in any event, all four factors of the traditional test point in favor of an independent contractor relationship as described in Section B(1) above.

Rather than identifying an error of law or an abuse of discretion made by the ALJ, Odom's challenge to the ALJ's findings on his employment status largely amounts to a rearguing of the facts of the case. (See Initial Brief of Appellant at 4-26, 32-39.) However, as discussed at length above, under the applicable standard of review in this matter, this 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 Ann. § 1-23-610(B) (Supp. 2022). Rather, the weight and credibility assigned to the evidence presented at the hearing of this matter is "peculiarly

within the province" of the ALJ as 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). And, the ALJ, like any trial judge who observes a witness, is in the best position to judge the witnesses' demeanor and veracity and to evaluate the credibility of their testimony in this matter. See, e.g., Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Accordingly, on appeal, this Court's review of the ALJ's factual findings is limited to a narrow inquiry of whether those findings are supported by substantial evidence on the whole record. In particular, under this deferential standard of review, a simple conflict in the evidence or the mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Original Blue Ribbon Taxi Corp., 380 S.C. at 605, 670 S.E.2d at 677. Therefore, "[w]hen the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder." A.O. Smith Corp., 428 S.C. at 200, 833 S.E.2d at 457. In short, the ALJ's findings of fact regarding Odom's employment status are presumed correct and will only be set aside if Odom can "prove convincingly" that the findings are not supported by the substantial evidence on the record as a whole. See Bursey, 360 S.C. at 144, 600 S.E.2d at 85. Odom has not carried that burden in this matter.

As reflected in the discussion in Section B(1) above, the ALJ's findings with regard to Odom's employment status are fully supported by the substantial evidence in the record in this matter. This evidence includes, but is by no means limited to, the testimony presented by Odom and his accountant at the contested case hearing (Tr. pp. 44-169; Tr. pp. 170-234); the Management Agreement between O&A and Alligator that governs the relationship between the parties (Resp't Ex. #10); correspondence from Alligator, Odom, and their accountant regarding Odom's reported compensation (Resp't Ex. ##6-8); bond disclosures made by Alligator (Resp't

Ex. #68); fourteen years of bank records and accounting records for O&A and Alligator (Resp't Ex. ##13, 14, 17, 18); sixteen years of federal tax reporting made by Alligator on its Form 990s (Resp't Ex. ##22-37); fifteen years of financial statements issued by Alligator (Resp't Ex. ##38-51); sixteen years of minutes for the meetings of Alligator's Board of Directors (Resp't Ex. ##52-67); and nine years of Odom's personal tax records (Resp't Ex. ##71-79). The Findings of Fact and Conclusions of Law in the ALJ's Final Order in this matter reflect that the ALJ fully considered all of the evidence in the whole record regarding Odom's relationship with Alligator and made detailed findings about that relationship supported by substantial evidence in the record, including findings under each element of the four-factor test for an employment relationship. (Final Order at 6-12, 17-20.) In particular, in her analysis, the ALJ made it clear that she was not just relying on the superficial form of the reported compensation for Odom, but was examining the underlying substance of the relationship between Odom and Alligator. (Final Order at 12 ("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."), 20 ("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.")); see also S.C. Code Ann. § 9-1-610 (2019) (providing that employment status for the purposes of SCRS is not determined by the employer, but "[i]n all cases of doubt, the Board shall determine whether any person is a teacher or employee for the purposes of the System"). Because those findings are supported by substantial evidence and unaffected by errors of law, they should be affirmed.

In rearguing the facts of this case and asking this Court to reject the well-supported findings of the ALJ, Odom generally demands that the Court ignore large portions of the evidentiary record in this matter and accept his view of the facts as "undisputed" or "admitted." Most strikingly, Odom contends that Alligator's "business relationship with [O&A] was unrelated to Odom's participation in PEBA's retirement system and irrelevant to this case." (Initial Brief of Appellant at 8.) And, apart from this bare declaration that Alligator's "business relationship" with O&A is irrelevant, Odom does not address or make any mention of the Management Agreement between Alligator and O&A in his brief. Odom makes this claim despite the fact that the Management Agreement specifically provides that O&A is to provide services "to manage and operate" Alligator's water and sewer facilities, including 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" (Resp't Ex. #10, at 3 (emphasis added); Tr. p. 114 ln. 18-p. 115 ln. 6) and to cover all office overhead expenses except for telephone costs (Resp't Ex. #10, at 5; Tr. p. 115 ln. 7-ln. 21). The Management Agreement also forms the basis of the representations in Alligator's bond disclosure that O&A has "managed and operated the System" since November 2002 and that O&A provides "financial services, office operations and management" for Alligator. (Resp't Ex. #68, at 42.) Likewise, the Management Agreement is the basis for the reporting Alligator has made to the IRS 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" and that "[t]he Organization contracts with a management company for the day to day operations." (See, e.g., Resp't Ex. #33, at 6 (Part VI, line 3), 20.)

In addition to attempting to exclude any consideration of the Management Agreement, a key document in this case, Odom also asks the Court to view the evidence in the record with blinders on, characterizing facts that are very much in dispute as being "undisputed" or "admitted." For example, Odom alleges that PEBA admitted at trial that Odom was an employee of Alligator for the purposes of SCRS. (Initial Brief of Appellant at 4.) However, the cited portion of the hearing transcript for that admission only reflects that PEBA's witness confirmed that Odom is a retired member of the retirement systems. (Tr. p. 240 ln. 4-8.) This confirmation of his membership merely reflects Odom's participation in the systems in connection with his prior service with the Town of McBee and as a Chesterfield County magistrate (Resp't Ex. #1, at 38-39; Tr. p. 45 ln. 8-14; Tr. pp. 121-22) and does not constitute any form of admission regarding his employment status with Alligator. Similarly, the cited portion of the transcript for Odom's assertion that, "[a]t trial, PEBA admitted that Alligator's Board maintained control over Odom" (Initial Brief of Appellant at 6) only reflects that PEBA's witness stated that it was her understanding that the Alligator board "supposedly had control" over Odom, but that she never saw anything in the board's minutes to corroborate that assertion (Tr. p. 264 ln. 3-12)—hardly an admission that the board maintained control over Odom's activities. In a similar fashion, Odom contends in his brief that "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." (Initial Brief of Appellant at 9.) However, the record in this matter reflects a wealth of information, documents, and other evidence that refutes and rebuts any assertion that Alligator's contract with O&A is unrelated to Odom's status with regard to Alligator. This evidence includes, most notably, as discussed immediately above,

the Management Agreement between Alligator and O&A that outsources management of Alligator's operations, including the services of a general manager, to O&A and Alligator's reporting related to that Management Agreement (Resp't Ex. #10; Resp't Ex. #68, at 42; Resp't Ex. #33, at 6 (Part VI, line 3), 20); but also includes a wide variety of other evidence, such as correspondence from Alligator's accountant and its board president regarding the relationship between Alligator and O&A and the associated reporting of compensation for their employees (Resp't Ex. #6; Resp't Ex. #7) and bank and accounting records from Alligator revealing that bonus payments reported as being paid to Odom were not new payments made from Alligator, but were the reclassification of payments previously made to O&A (Resp't Ex. #17, at 135-36 (Check Number 7861); Resp't Ex. #18, at 181 (Check Number 7861); Tr. p. 206 ln. 20-p. 209 ln. 13; Resp't Ex. #17, at 167, 168, 171.) In another example of such a contention, Odom later contends that "undisputed facts" show that Alligator provided the materials and equipment that were necessary for Odom to perform his work. (Initial Brief of Appellant at 34.) However, as discussed earlier, the Management Agreement between Alligator and O&A directly refutes that claim, providing that, while O&A is responsible for telephone expenses, "[a]ll other office overhead expenses, including, but not limited to postage, stationery or account statements shall be paid for by Odom & Associates." (Resp't Ex. #10, at 5.) Without further belaboring the point, put simply, the assertion that the material facts in the case are undisputed or admitted is unavailing. The Court should reject Odom's invitation to ignore the comprehensive record established in this case and instead affirm the decision of the ALJ based upon the substantial evidence on the record as a whole.[9]

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[9] In his brief, Odom also contends that "PEBA waived its contention that Alligator retained Odom as an independent contractor." (Initial Brief of Appellant at 39.) However, this argument is only made in a conclusory manner in two sentences with no citations of authority, such that the

C. The ALJ's determination that, even if Odom were an employee of Alligator, the increased payments made to him beginning in 2016 were not earnable compensation for the purposes of SCRS is supported by substantial evidence on the whole record and unaffected by errors of law.

In her Final Order in this case, the ALJ found that, "although it is clear that the relationship between Alligator and Petitioner [i.e., Odom] 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." (Final Order at 21.) Because this determination is supported by substantial evidence on the whole record and applies the correct legal standard, it should be affirmed by this Court as an additional sustaining ground for the ALJ's decision, even if it finds that the ALJ's determination regarding Odom's employment status was in error.

1. The increased payments Alligator reported as being made to Odom beginning in 2016 do not meet the statutory definition of "earnable compensation" for the purposes of SCRS.

As discussed above, a member's "earnable compensation" for the purposes of calculating contributions to, and benefits from, SCRS is defined by statute 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." S.C. Code Ann. § 9-1-10(8)(a) (2019) (emphasis added). In addition, Section 9-1-1020 of the Code of Laws further clarifies the compensation that is includable in a

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argument should be considered abandoned on appeal. See, e.g., S.C. Dep't of Probation, Parole & Pardon Servs. v. Reynolds, 343 S.C. 465, 468 n.1, 540 S.E.2d 480, 482 n.1 (Ct. App. 2000) (declining to consider an argument "because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal"). Moreover, the issue was not preserved for appellate review; although Odom raised the issue—again, in a conclusory manner—in his post-trial brief, the ALJ did not explicitly rule on Odom's waiver argument in the Final Order, and Odom did not file a motion to alter or amend the ALJ's decision to seek such a ruling. See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001).

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. § 9-1-1020 (emphasis added). 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." Id. § 9-1-10(8)(b). As reflected in these statutes, a member's earnable compensation is not intended to be distorted by abnormal, short-term inflations of a member's reported compensation through bonuses, unauthorized overtime, or "other payments not considered part of the regular salary base," but is instead designed to reflect the normal rate of regular compensation actually earned by the member.

As an initial matter, the $103,000 reported by Alligator as Odom's compensation for the April to June quarter of 2016 clearly includes a bonus or other special payment that was not part of Odom's regular salary base. For the prior 19 quarters leading up to that payment, Alligator had reported Odom's earnable compensation as exactly $3,000 per quarter. The payment of an additional $100,000 in that single quarter would not be reflective of Odom'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 Odom's compensation for the April to June quarter of 2017 reflects a bonus or special payment that would not be earnable compensation for the purposes of the system. At the time of that reported payment, Alligator had reported Odom's earnable compensation as exactly $3,000 per quarter for 22 of the prior 23 quarters, with the one exception being the April to June quarter of 2016 when the additional $100,000 discussed above was reported. In short, 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 Odom on a recurring and consistent basis since 2010, and, thus, would not be considered earnable compensation for the purposes of SCRS. See S.C. Code Ann. §§ 9-1-10(8)(a), 9-1-1020.

Further, the increased compensation Alligator began reporting for Odom in July 2017—in the amount of $270,000 per year—also falls outside of the regular salary base Alligator previously established for Odom and would not be considered earnable compensation under SCRS.[10] 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 Odom, 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 Odom's normal, regular salary from Alligator and had been paid to Odom 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 Odom's earnable compensation for only the minimum three-year period necessary to calculate an inflated average final compensation would allow Odom's average final compensation—and resulting retirement benefit—to be distorted by a short-time,

[10] Notably, in his discussions with PEBA regarding the increased payments beginning in July 2017, Odom characterized the large payment due to him in July as a "bonus." (Resp't Ex. #8 at 1.) Further, the record reflects that Odom's reported compensation of $270,000 only began once he was informed that bonuses and other special payments could not be included in his earnable compensation and that the maximum allowable compensation allowed by the IRS for the calculation of retirement benefits in 2017 was $270,000. (Resp't Ex. #8 at 1-2.)

artificial inflation of his reported compensation that does not accurately reflect the regular salary base upon which Odom and Alligator had remitted contributions for the majority of his employment.[11]

In short, because Odom could not demonstrate that the increased payments made to him beginning in 2016 reflected his normal rate of regular compensation as reported by Alligator for his services, those payments cannot be considered earnable compensation for the purposes of SCRS. Rather, the preponderance of the evidence in this matter shows that those increased payments were made in the form of bonuses or other special payments that were not considered part of his reported regular salary base. Consequently, the ALJ's findings to that effect are clearly supported by substantial evidence on the whole record, are not affected by any errors of law, and should be affirmed.

2. Odom's argument that the ALJ erred in reaching those findings is unsuccessful.

On appeal, Odom contends that the ALJ's findings regarding the reported increases in his compensation misconstrue the applicable statutes and are based on "no evidence." (Initial Brief of Appellant at 41, 42.) However, Odom's contentions fail on both counts.

In his brief, Odom alleges that the ALJ's findings are in error because the ALJ "impermissibly rewrote" the statutes defining earnable compensation for the purposes of SCRS by "applying the notion or theory of 'actuarial spiking.'" (Initial Brief of Appellant at 44.) However, the ALJ's Final Order in this case does not reflect any such rewriting of the applicable statutes. To the contrary, the ALJ's analysis plainly cites to, and follows the letter of, the

[11] For example, if Odom'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 the majority of his participation with Alligator. (Tr. p. 339 ln. 14-p. 340 ln. 14.)

relevant law as the basis for the findings regarding Odom's earnable compensation. (Final Order at 15-17, 21-22.) Specifically, the ALJ expressly, and correctly, reviewed whether the reported increases in Odom's compensation reflected "bonus and incentive-type payments, or any other payments not considered part of the regular salary base" to determine whether the reported increases would be earnable compensation. See S.C. Code Ann. § 9-1-1020; Final Order at 15-17, 21-22. And, while the ALJ does acknowledge the actuarial basis for those statutory provisions and the actuarial implications of Odom's claim in the Final Order (Final Order at 16-17, 22), that recognition did not change the ALJ's application of the plain language of the relevant statutes or otherwise cause the ALJ to apply a different standard or test for the determination of earnable compensation for the purposes of SCRS other than what is found in the SCRS statutes (Final Order at 15-17, 21-22). Further, the acknowledgment of those background actuarial implications is entirely in keeping with the South Carolina Supreme Court's jurisprudence on these questions. See Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008); Wehle v. S.C. Ret. Sys., 363 S.C. 394, 611 S.E.2d 240 (2005); 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); see in particular, e.g., Duvall, 377 S.C. at 41, 659 S.E.2d at 127 (quoting Wehle and emphasizing that, in construing SCRS statutes, it must be recognized that SCRS is "administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds"). Because the parties agree on the applicable statutes implicated on this issue, and because the ALJ correctly applied those statutes in the Final Order, Odom's contention that the

ALJ's findings with regard to his earnable compensation are affected by an error of law must fail.

Similarly, Odom's assertions that the ALJ's findings regarding his earnable compensation are unsupported by the evidence are also unavailing. For example, in his brief, Odom contends that "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." (Initial Brief of Appellant at 12.) However, as cited above, in an email to PEBA on July 26, 2017, Odom himself expressly identified an increased payment that he was due to receive that month from Alligator as a "bonus." (Resp't Ex. #8, at 1 ("Glad we talked as the bonus is due in July[.]").) And, the single payments of $100,000 and $300,000 payments reported as being made to Odom in June 2016 and June 2017, respectively, amidst a decade of reported compensation of $1,000 a month nearly speak for themselves as being bonuses or other forms of special payments that are not part of his regular salary base. (Resp't Ex. #4, at 26, 28; Resp't Ex. #2, at 129.) Similarly, elsewhere in his brief, Odom claims that "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." (Initial Brief of Appellant at 22.) However, in their testimony at the hearing of this case, both Odom and his accountant confirmed that there was no documentation reflecting how the Alligator Board of Directors arrived at the amount of Odom's reported salary increases and, because the board made any such determinations in executive session, neither Odom nor his accountant could provide an explanation of how those reported salary amounts were determined.

(Tr. p. 60 ln. 7-ln. 12; Tr. p. 134 ln. 1-ln. 20; Tr. p. 215 ln. 20-p. 216 ln. 14; Tr. p. 217 ln. 9-ln. 22.)

In short, the ALJ's finding that the compensation increases reported as being paid to Odom from Alligator beginning in 2016 would not be earnable compensation, even if paid to him as an employee, is based upon the correct application of the plain language of the relevant statutes and is well-supported by substantial evidence in the whole record. Accordingly, the Court should affirm the decision of the ALJ on that issue as an additional sustaining ground for the Final Order.

D. Odom's contention that the ALJ's decision is in error because it did not find that PEBA breached its fiduciary duties is not preserved for review and, in any event, is without merit.

In his brief, Odom contends the ALJ erred in failing to find that PEBA breached its fiduciary duties to Odom as a result of what he alleges was "PEBA's illicit compilation and consideration of inflammatory, irrelevant, and highly prejudicial documents" in this matter. (Initial Brief of Appellant at 45.) This argument is not preserved for appellate review and, even if it were, the argument is without merit.

As with his wavier argument, while Odom raised his breach of fiduciary duty claim in his post-trial brief, albeit with little citation of authority, the ALJ did not explicitly rule on Odom's breach of fiduciary duty argument in the Final Order, and Odom did not file a motion to alter or amend the ALJ's decision to seek such a ruling. Accordingly, because the issue was not ruled on by the ALJ, it is not preserved for appellate review by this Court. See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001). But, even if the issue had been properly preserved for review, it is wholly without merit. There is no question that PEBA owes fiduciary duties to the members of the

retirement and insurance plans it administers. S.C. Code Ann. § 9-4-10(K) (Supp. 2022). However, Odom does not cite to any authority whatsoever to support the proposition that an agency's mere investigation of an anonymous complaint is somehow improper or is a reflection of bias. (Initial Brief of Appellant at 45-46.) To the contrary, an even-handed investigation of an anonymous complaint is a routine governmental activity. See, e.g., Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 12, 698 S.E.2d 612, 618 (2010) (describing a DHEC investigation into an improperly constructed bulkhead in response to an anonymous complaint); In re Flowers, 402 S.C. 385, 386, 741 S.E.2d 759, 759-60 (2013) (describing an attorney disciplinary matter initiated by an anonymous complaint that the attorney had failed to file state and federal income tax returns for several years). And, in fact, PEBA would likely breach its fiduciary duties to all of the participants of the retirement systems if it ignored a complaint that benefits were being improperly accrued or paid from the system simply because the source of the complaint was not friendly to the member who is the subject of the complaint.[12] See, e.g., McIntyre v. Santa Barbara County Employee's Ret. Sys., 110 Cal. Rptr. 2d 565, 569 (Ct. App. 2001) (recognizing that, because a retirement plan's board of trustees owes fiduciary duties to all of the participants of the plan, "[i]t cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them," and holding therefore that, in investigating and litigating a member's eligibility for benefits, "the Board fulfills, rather than breaches, its fiduciary duties" to the plan and its participants); Tr. p. 307 ln. 12-18 (testifying that PEBA had a duty to investigate the complaint it received).

[12] Because one would assume that many, if not most, complaints of impropriety lodged against an individual do not come from a friendly relationship, Odom's allegation that the mere investigation of such complaints represents illicit activity or impermissible bias would lead to absurd rule essentially requiring governmental agencies to ignore all such complaints.

And, not only is Odom's argument unsupported by any legal authority, it also lacks any credible support in the record. There is no dispute that PEBA received an anonymous complaint related to Alligator's participation in SCRS, and that it thoroughly investigated that complaint, including inquiry into the source of the complaint. (Resp't Ex. #2, at 67-89; Tr. p. 284 ln. 12-p. 285 ln. 9.) However, there is no evidence the record to support Odom's wild—and, frankly, irresponsible—allegation that the simple fact of that investigation shows that PEBA "was motivated to significantly reduce or altogether eliminate Odom's monthly retirement benefits for political reasons or other illicit considerations." (Initial Brief of Appellant at 46.) Notably, reflecting the recklessness of his claim, Odom makes no effort to even identify the purported political or illicit motives that PEBA would have to interfere with his retirement benefits. Id. Thus, even if it had been preserved for appeal, Odom's allegation on this point should be rejected as entirely without merit.

CONCLUSION

Based upon the foregoing discussion and the record in this matter as a whole, the Court should affirm the decision of the ALJ below, because that decision is firmly supported by substantial evidence in the record and is not affected by any errors of law.

Respectfully submitted,

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