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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case Number: 2023-000521

Glenn C. Odom .....Appellant,

v.

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

APPELLANT'S FINAL REPLY BRIEF

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INTRODUCTION AND STATEMENT OF THE CASE

Appellant Glenn C. Odom ("Appellant" or "Odom") timely submits this Final Reply Brief, pursuant to South Carolina Appellate Court Rule 211. This appeal involves Respondent South Carolina Public Employee Benefit Authority's ("PEBA" or "Respondent") Agency Determination Number 21-004, wherein Respondent determined that certain payments made to Appellant Glenn C. Odom ("Appellant" or "Odom") by the Alligator Rural Water and Sewer Company ("Alligator" or "Company") were not earnable compensation that could be credited to Odom for the purposes of the South Carolina Retirement System.

Appellant herein incorporates the Statement of Facts from its Final Brief, by reference thereto.

ARGUMENT

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

A. Standard Of Review

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

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

(a) in violation of constitutional or statutory provisions;

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

(c) made upon unlawful procedure;

> **(d)** affected by other error of law;
>
> **(e)** clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> **(f)** arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

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

The Court "may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record." *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843, 845 (1999) (citation omitted).

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

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

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

> A verdict or finding must be based on the evidence and must be based on the facts proved. Under this well-established rule,

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

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

B. Alligator And Odom Had An Employment Relationship

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

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

> Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the ***right*** to control the claimant in the performance of his work. . . . Under the controlling common law rubric of the right of control, 'the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [or] (4) right to fire.'

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

Establishing only a **single** factor is "virtually proof of" an employment relationship, while "contrary evidence is as to any one factor at best only mildly persuasive evidence of

contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

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

i. Alligator Maintained The Right of Control Over Odom

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

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

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

Undisputed evidence showed that Alligator controlled or had the right to control nearly every aspect of Odom's work, including the right to establish and change Odom's job duties and the right to determine the time, place, degree, and amount or number of his job duties.[1] In

[1] On page 36 of Respondent's Brief, PEBA erroneously contended that Appellant's references to "undisputed" evidence were somehow misplaced and accused Odom of "view[ing] the evidence .

addition, Alligator's Board maintained the right to instruct Odom on how and when to perform his job duties, how to conduct himself in the workplace, and how and when to engage in other actions related to the Company's business and customers. Alligator required Odom to follow the Board's instructions and direction at all times, as well as all of the Company's policies and procedures. Moreover, as Alligator's General Manager, Odom administered and enforced all of the Company's policies and procedures—subject to oversight, guidance, and direction from the Company's Board of Directors.

In Respondent's Brief, PEBA mistakenly contended that, "Alligator did not have any records reflecting a normal level of control" over Odom, which the ALC also erroneously concluded on this issue. (Resp. Brief, p. 28) (R. p. 0018).

PEBA and the ALC grossly misstated the Record on Appeal, as numerous documents existed showing conclusively that Alligator employed Odom, including the following:

- Alligator's Employee Handbook, which contained numerous policies that the Company required Odom to follow and which specifically gave Alligator (among other rights as an employer) the right to discipline and/or discharge Odom if, for example, he failed to meet the Company's performance expectations, failed to follow the Company's policies and/or procedures, or for other reasons within the Company's sole discretion—hallmarks of an employment relationship. The Handbook's plain language showed that it explicitly only applied to Alligator's employees and did not apply to independent contractors, as the Employee Handbook specifically addressed employment-related issues such as hiring, job performance, promotions, job responsibilities, conflicts of interest, work hours and attendance, equipment, compensation (which was based solely on performance), pay increases, holidays, vacation leave, sick leave, extended leave, military leave,

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. . with blinders on." However, PEBA failed to produce any witness testimony or other evidence refuting the uncontested trial testimony of Odom or Certified Public Accountant ("CPA") Karen Currin, and the ALC's Order did not expressly, or even implicitly, make any adverse credibility determinations regarding Odom or Currin. Based on the uncontested trial testimony of Odom and Currin, along with no adverse credibility determinations from the trial court, Appellant accurately described their testimony as "undisputed" in his Brief.

emergency leave, job abandonment, employee benefits, expense reimbursement, health and safety, sexual harassment, and work-related injuries—again hallmarks of an employment relationship;

- Internal Revenue Service ("IRS") W-2 forms, showing that Alligator paid Odom as an employee since it hired him in 2006 and further showing that both Alligator and Odom paid federal FICA and FUTA taxes on Odom's behalf throughout his entire tenure with Alligator. In fact, independent contractors report their pay to the IRS via a form 1099 and not a form W-2;

- Odom's tax returns showing that Alligator paid him as an employee throughout his entire tenure with the Company;

- Documents showing Odom's enrollment (or right to participate) in various employee benefits, including health, life, disability, and dental insurance. Employers offer such benefits only to employees, and an employer's group insurance benefits do not cover independent contractors; and

- PEBA's own documents showing that PEBA allowed Odom to participate in the retirement system, accepted retirement contributions on Odom's behalf, and updated him periodically throughout his employment with Alligator (starting in 2006). PEBA's retirement plan covers only employees and excludes coverage for independent contractors.

Accordingly, contrary to PEBA's and the ALC's erroneous contention, numerous documents showed conclusively that Alligator maintained control over Odom and employed him throughout his tenure with the Company, which began in 2006. The ALC's specific finding that "Alligator did not have any records reflecting a normal level of control" over Odom was clearly erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

PEBA and the ALC also specifically contended that Odom's personnel file did not contain documents such as an employment contract, a job description, performance reviews, salary schedule, compensation plan, or records of leave used. However, such documents are not

legally required or necessary to establish an employment relationship, and PEBA produced no expert testimony, or evidence of any kind, showing, or even inferring, that employers routinely, generally, or typically maintain such documents, particularly for an executive-level employee such as Odom. To the contrary, the undisputed fact that Alligator maintained a personnel file at all for Odom conclusively showed that it treated him as an "employee," as employers do not maintain personnel files for independent contractors.

Further, the ALC disregarded the undisputed evidence from Odom's two affidavits and his trial testimony, wherein he testified that Alligator employed him as an at-will employee and could fire him at any time and for any or no reason and that he had to follow the Board's instructions, meet the Board's performance expectations, and work a set number of hours each week. At trial, PEBA admitted that Alligator's Board maintained control over Odom and that tax records showed that Alligator paid him as an employee.

Alligator maintained substantial, if not total, actual, and inherent control over Odom, conclusively showing that they had an employer-employee relationship at all relevant times. Establishing this **single** factor is "virtually proof of" an employment relationship, while "contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

The ALC's disregard of these dispositive issues was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

ii. Alligator's Agreement With Odom & Associates Is Irrelevant

In Respondent's Brief, PEBA erroneously contended that Alligator did not employ Odom because "as provided in the Management Agreement, it was [Odom & Associates] O&A, not Alligator, that was required to 'provide a general manager' for the water and sewer system.'" (Resp. Brief, pp. 29, 34-35).

However, PEBA's contention and the ALC's finding on this issue are erroneous, misplaced, and contrary to applicable law. The Management Agreement required O&A to provide various services to Alligator, including some labor, which is not a factor in analyzing whether an employment relationship existed between Alligator and Odom.

Contrary to PEBA's speculative and unsupported theory, the contractual relationship between Alligator and O&A is typical of many staffing agreements, wherein one entity, such as a staffing agency, provides labor to another unrelated entity ("second entity").

As a matter of law, the provided worker is an "employee" of the second entity, if it maintains control over the worker (or meets any one of the other factors in the test for determining whether an employment relationship exists). Similarly, the staffing agency and the second entity could be "joint employers," if they both exert the requisite control over the worker or meet any one of the other factors. *See Butler v. Drive Automotive Indus. of Am., Inc.*, 793 F.3d 404, 408 (4th Cir. 2015) (an employment relationship exists where "one employer while contracting in good faith with an otherwise independent company has retained for itself sufficient control of the terms and conditions of employment" of the worker from the other company) (citation omitted).

Alligator's contractual agreement with O&A is irrelevant to the employer-employee/independent contractor analysis under the four-factor test set forth above and, contrary

to the ALC's erroneous conclusion, did not foreclose or preclude an employment relationship between Alligator and Odom. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416, 419 (2013) (citations omitted).

The ALC's misapplication of this analysis was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

iii. Alligator Provided Odom's Materials And Equipment

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

PEBA and the ALC erroneously disregarded the foregoing undisputed evidence and instead merely cited a provision in Alligator's agreement with O&A, which required O&A to provide "postage, stationery or account statements" and a "properly equipped office." (Resp. Brief, p. 29).

Importantly, no evidence showed, or even inferred, that **Odom** personally provided any of the materials and equipment necessary to perform his job duties with Alligator.

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

any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

The ALC's misapplication of this factor was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

iv. Alligator Paid Odom As An Employee

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

Similarly, Alligator paid state and federal payroll taxes on Odom's behalf and reported his wages to the IRS via Form W-2, which further established that Alligator and Odom enjoyed an employment relationship at all relevant times.[2] *See Farlow v. Wachovia Bank of N.C., N.A.*, 259 F.2d 309, 315 (4th Cir. 2001) ("The **failure** of an employer to extend employment benefits or to pay any payroll taxes is 'highly indicative' that the employee is an independent contractor. . . **A party's tax and benefit treatment can be 'virtual admissions' of the party's status.**") (emphasis added); *see also* IRS Publication 15-A, Employer's Supplemental Tax Guide (2023) (An employer must "withhold federal income taxes, withhold and pay over social security

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

and Medicare taxes, and pay unemployment tax on wages paid to an employee. **An employer doesn't generally have to withhold or pay over any federal taxes on payments to independent contractors**.") (emphasis added); IRS Publication 1779, Independent Contractor or Employee (2023) (explaining that an "employer is responsible for paying . . . taxes on your wages. Your employer must give you a Form W-2 . . . showing the amount of taxes withheld from your pay.").

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

The ALC erroneously disregarded all of the foregoing undisputed evidence and instead asserted that Alligator paid Odom "on a monthly basis, which is an uncommon payroll schedule for an employee." (R. p. 0019-0020). No evidence showed, or even inferred, that monthly

payments are "uncommon" for employees, and the ALC likewise failed to cite any cases or other legal authority indicating that this is a valid factor to consider in determining whether an employment relationship existed. No South Carolina cases support the ALC's conclusion.

Moreover, the ALC also incorrectly concluded, based on a speculative and irrelevant theory PEBA proffered at trial, that Alligator increased Odom's pay by reducing or reclassifying payments to O&A.[3] (R. p. 0019-0020). However, the undisputed evidence showed that Odom, Alligator, and O&A never engaged in any unlawful, illicit, or improper conduct of any kind and that Alligator increased Odom's pay, beginning in 2016, because the Company's revenues markedly increased—a legitimate business reason and not because of any reclassification of funding to O&A.

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

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

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

Finally, the ALC erroneously concluded that Alligator overpaid Odom, based on the

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

results of an irrelevant survey that PEBA introduced over an objection at trial. (R. p. 0020). The ALC's flawed conclusion was irrelevant, as South Carolina's appellate courts do not consider the amount of compensation paid or earned in determining whether an employment relationship exists, and neither the ALC's Order nor PEBA cited any legal authority to the contrary.[4]

Alligator's method of pay, tax treatment, and provision of workers' compensation insurance and employment benefits conclusively established that Alligator and Odom had an employment relationship at all times. Establishing this **single** factor is "virtually proof of" an employment relationship, while "contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

The ALC's erroneous analysis on this issue was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

v. Alligator Maintained The Right To Fire Odom

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

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

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

The ALC erroneously concluded that the "record does not reflect that Alligator had the right to fire" Odom, as the ALC ignored the foregoing undisputed evidence. Instead, the ALC stated that Odom "contends he was terminated from employment with Alligator in June 2020, [but] the evidence does not demonstrate the termination of an employment relationship." (R. p. 0020). The ALC's Order is incorrect because Odom retired and never claimed that he was fired. Moreover, Odom was not required to show an actual termination but only that Alligator had the **right** to fire him, which he indisputably established through his testimony and the provisions in the Employee Handbook.

In Respondent's Brief, PEBA also applied the wrong analysis, as PEBA focused exclusively on the fact that Alligator never actually fired Odom, when the test requires analysis of the **right** to fire him. (Resp. Brief, p. 31).

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

Establishing this **single** factor is "virtually proof of" an employment relationship, while "contrary evidence is as to any one factor at best only mildly persuasive evidence of

contractorship, and sometimes is of almost no such force at all." *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110, 112-113 (2002).

The ALC's flawed analysis was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

vi. PEBA Waived The Independent Contractor Issue

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

Since 2006, Odom has relied on his contributions to PEBA to fund his retirement, and, for roughly 16 years (until 2022), PEBA consistently led Odom to believe that he was a member of the retirement plan and that it accepted his contributions. Under these circumstances, PEBA waived the independent contractor issue that it raised for the first time at trial in 2022.

In Respondent's Brief, PEBA erroneously contended that Odom failed to preserve this argument because he "only made [it] in a conclusory manner" and did not file a motion to alter or amend on the issue. (Resp. Brief, pp. 37-38, fn. 9).

To the contrary, Odom raised the waiver argument, in a separate stand-alone section, in plain view in both his Post-Trial Brief and his Brief on appeal, as well as arguing the same position at trial. (R. p. 0284, lines 10-25) (R. p. 0285, lines 6-25) (R. p. 0286, lines 4-13).

Moreover, no applicable law required Odom to cite caselaw or other legal authority, as the argument unambiguously explained that PEBA changed its position after 16 years to Odom's prejudice. *See Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640, 642 (2011) ("[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue . . . [as long as] the issue . . . [is] sufficiently clear to bring into focus the precise nature of the alleged error . . .").

Through its longstanding conduct, PEBA waived the independent contractor issue, which Odom adequately raised and preserved for appeal. The ALC's flawed analysis was erroneous, arbitrary, or capricious based on the reliable, probative, and substantial evidence on the whole record, thereby warranting reversal under South Carolina Code Section 1-23-610(B)(e) and (f).

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

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

A. The ALC Misclassified Odom's Salary

The ALC erroneously misclassified Odom's salary, characterizing it as a bonus, special payment, or incentive—without specifying precisely which. (R. p. 0021-0022). The ALC's error unjustifiably deprived Odom of more than $100,000 (or more) per year in retirement benefits.

Per South Carolina Code Section 9-1-1020, PEBA must consider a member's reported compensation as "salary," unless the pay is "unused sick leave, single special payments at

retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base."

In this case, the ALC and PEBA erroneously determined that Odom's reported compensation from July 2017 through June 2020 did not constitute "salary," as they considered it to constitute a bonus, special payment, or incentive.[5]

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

- Alligator only paid Odom a salary and never paid him a bonus, incentive, or special payment of any kind, as he testified in two affidavits and his trial testimony. CPA Currin corroborated this fact through an affidavit and her trial testimony;
- Alligator's Board Chair affirmed, via a letter to PEBA, that the Company paid Odom only a salary;
- Alligator reported only "salary" entries for Odom on the Company's payroll reports and never reported or designated any of his compensation as bonuses, incentives, or special payments of any kind;
- PEBA admitted at trial that it had no evidence to refute Odom's affidavits, which were admitted in evidence;
- PEBA admitted at trial that Alligator and Odom had no written or verbal agreement to pay him a bonus, incentive, or special payment of any kind;

[5] The ALC and PEBA erroneously focused on the source of Odom's salary, characterizing it as a "reclassification of payments previously made to O&A." (Resp. Brief, p. 37). The applicable retirement statutes do not define or interpret "salary" or any other term at issue in this case based on the source of the funding. Stated differently, contrary to the ALC's ruling and PEBA's contention, whether Alligator paid Odom directly from the Company's water revenues, from payments that previously came from O&A, or any combination of these or other sources is irrelevant to the issues in this case. The relevant analysis simply is whether Alligator paid Odom a "salary," based on the applicable retirement statutes, and the undisputed evidence affirmatively answered this inquiry.

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

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

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

Based on these undisputed facts, the ALC erroneously misconstrued and/or misapplied the retirement statutes by concluding that Odom's reported compensation did not constitute "salary." The ALC's ruling was erroneous, arbitrary, and capricious, thereby warranting dismissal under South Carolina Code Section 1-23-610(B)(a), (b), (c), (d), (e) and (f).

B. The ALC Disregarded The Rules Of Statutory Construction

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

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

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

"If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no

right to look for or impose another meaning. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890, 892 (1995) *see also Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body [such as PEBA] is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.").

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

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

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

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

American Ed. (2002).

Odom's compensation during his last twelve (12) quarters of employment with Alligator was steady, consistently paid during each pay period, and did not vary by the amount or type of work he performed. Nothing about Odom's pay during those time periods was extra, seasonal, motivating, uncommon, rare, or extraordinary—again conclusively showing that his compensation, as a matter of law, constituted "salary," as opposed to a bonus, incentive, or special payment of any kind based on the plain, ordinary meaning of those terms.

Nevertheless, the ALC erroneously accepted PEBA's misplaced theory that Odom's compensation was an actuarial "spike," even though the applicable statutes did not expressly or implicitly mention, reference, or use that term or concept in any way and further did not give PEBA the discretion to incorporate that concept when administering the retirement statutes. (R. p. 0015-0016).

In Respondent's Brief, PEBA erroneously argued that the "ALJ's analysis plainly cites to, and follows the letter of, the relevant law." (Resp. Brief, pp. 41-42).

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

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

In Respondent's Brief, PEBA erroneously cited three cases, alleging that they supported PEBA's theory that it unilaterally could rely on the concept of "actuarial spiking" when making benefit determinations. (Resp. Brief, p. 42; citing *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)).

However, those cases are distinguishable and inapplicable to the analysis of Odom's retirement benefits. First, those cases analyzed whether state retirees were entitled to include unused annual leave as part of their retirement computation, and they did not address or involve the specific and narrow issues herein, including the definitions and application of the terms salary, bonus, special payments, and incentives.

Second, the *Kennedy* and *Wehle* cases involved witnesses who testified on actuarial issues because of the ambiguity of the applicable leave statute, and the *Kennedy* Court indicated that the potential impact on the retirement system was nearly $1.2 billion. Conversely, Odom's case involves a single individual pursuing relief under unambiguous statutes, and PEBA failed to introduce any actuarial testimony or evidence showing, or even inferring, that the outcome of Odom's case would have any impact on the retirement system, much less a significant impact.

Finally, contrary to PEBA's inference, neither *Duvall*, *Kennedy*, or *Wehle* permitted, sanctioned, or otherwise allowed PEBA to base any determinations on actuarial soundness or any other related theory. Instead, PEBA must apply the statutes as written, and if it wishes to apply extra-statutory terms or conditions, it must promulgate regulations allowing it to do so or convince the Legislature to amend the statutes.

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

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

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

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

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

PEBA admitted at trial that it requested, analyzed, and relied upon documents and information from the Concerned Citizens political group—which publicly has expressed animus and rancor toward Odom for a decade or more, forcing him to defend numerous complaints and lawsuits.

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

No reasonable fiduciary would have sought and considered documents or information from the Concerned Citizens political group. No reasonable person, much less a professional trustee in charge of administering a statewide retirement system, would believe that this political group would have any legitimate information that possibly could be relevant to Odom's participation in the state retirement plan.

In Respondent's Brief, PEBA alleged that the ALC failed to rule on this issue and that it was not preserved for appellate review. To the contrary, Odom raised the issue at trial and in its Post-Trial Brief with specificity and particularity, and he was not required to do more in order to adequately preserve the issue. (Odom Post-Trial Brief, pp. 36-39) (Tr. 92-103, 284-289) (Pet. Ex. 8, 9, 10, 11).

In its Brief, PEBA defended its prejudicial investigation and alleged that Odom's contentions on the issue were "wild" and "irresponsible." (Resp. Brief, p. 46). However, PEBA's position is flawed and unsupported. At trial, PEBA dubiously could not even remember why it requested the documents, which Odom described as a "political hit piece," specifically from the Concerned Citizens group and further never explained what relevant information a third-party political group possibly could provide regarding Odom's retirement contributions or benefits—a matter entirely between Odom, his employer, and PEBA.

In addition, PEBA never explained, referenced, or cited to any statutory or regulatory authority that allowed it to seek and consider information from such a third-party group, as no applicable law authorizes such a fishing expedition.

Finally, PEBA admitted at trial that it indeed considered the information as part of its shadowy "review," though PEBA never disclosed or explained the specific information it relied upon or the motivations behind doing so.

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

CONCLUSION

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

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

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