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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 14-ALJ-30-0539-CC
Appellate Case No. 2015-00002228
Supreme Court Case No. 2018-001167

Edward W. Miller, ... Petitioner,

v.

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Appellate Case No.: 2015-002228

Deborah Brooks Durden, Administrative Law Judge
Case No. 14-ALJ-30-0539-CC

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SC Court of Appeals

Edward W. Miller

Appellant,

V.

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

Respondent.

THE RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward W. Miller,

Petitioner,

vs.

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

Respondent.

Docket No. 14-ALJ-30-0539-CC

**ORDER DENYING PETITIONER'S
MOTION TO ALTER OR AMEND**

This matter is before the Administrative Law Court (ALC or Court) pursuant to Petitioner's request for a contested case hearing challenging a decision of the South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (PEBA). In that decision, PEBA determined that Petitioner's August 7, 2014 challenge of a 2002 determination of the amount of service credit Petitioner was eligible to purchase was untimely.

On May 5, 2015 counsel for PEBA wrote this Court stating that, "the parties do not believe that an evidentiary hearing is necessary in this matter and instead believe that this matter could be decided by the [Court] as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties." As noted in this Court's scheduling order dated May 7, 2015, the parties agreed that there were no issues of material fact and that there was no need for a hearing in this case. The parties agreed to submit joint stipulations of fact and exhibits as well as memoranda of law for this Court to consider.

After careful consideration of the parties' briefs and stipulations of fact, an Order Granting Respondent's Motion for Summary Judgment was issued on August 24, 2015. On September 2, 2015 Petitioner filed a Motion to Alter or Amend that order.

Petitioner alleges that this Court mischaracterized this case in handling it as cross motions for summary judgment. Petitioner and Respondent joined in a letter requesting that the Court decide the on case factual stipulations and the legal issues based upon the parties' agreement that there were no significant issues of material fact. Therefore, in this Court's May 7, 2015 scheduling order the posture of the case was characterized as cross motions for summary judgment. However,

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September 28, 2015

SC ADMIN. LAW COURT

Petitioner's brief filed on July 6, 2015 was organized as an appellate brief¹. Because the brief addressed the issues of law the parties sought to have this Court decide, the Court notified Petitioner by letter dated July 9, 2015 that the brief would "be accepted as a memorandum of law in support of a motion for summary judgment pursuant to this Court's Order dated May 7, 2015." Petitioner did not raise any objection at that time to the case being handled in that way. Now, Petitioner asserts that the Court has "mischaracterized the procedural posture of this action as if it were presented to the Court for disposition by Respondent's Motion for Summary Judgment, when no such motion was filed." The Court conducted a telephonic hearing to determine Petitioner's position as to the proper procedural posture of the case. Petitioner acknowledged that while he had not made a formal motion for summary judgment that the standard by which the case should be decided is the same as the standard for summary judgment. He stated that there were no issues of fact to be decided. The parties made a joint request that this Court decide the case as a matter of law. Petitioner then filed a memorandum of law supporting his argument that the case should be decided in his favor without resorting to an evidentiary hearing. Finally, he made no objection to this Court's letter advising him that his brief would be accepted as a brief in support of his summary judgment motion. At no time did Petitioner assert that there was a significant issue of material fact requiring an evidentiary hearing in this case. Therefore, the case was properly decided based upon the legal standards applicable to summary judgment motions.

Petitioner next points out that this Court failed to rule on whether or not PEBA should be estopped from asserting the statutory time bar to contest the 2002 decision because PEBA had breached a fiduciary duty to disclose the disposition of another member's similar request to purchase time. The August 24, 2015 order did not discuss the doctrine of estoppel or the issue of fiduciary duty, relying instead on the ruling that the doctrine of laches was not implicated in this matter. Therefore, I take this opportunity to discuss those arguments in greater detail.

The issue of whether Respondent owed a fiduciary duty to Petitioner is a question of law. "[T]he question of whether [a fiduciary duty] should be imposed between two classes of people is a question for the court." Spence v. Wingate, 395 S.C. 148, 160, 716 S.E.2d 920, 927 (2011). Petitioner has not cited any authority to support the imposition of fiduciary duty requiring the administrator of benefits to disclose decisions made concerning benefits of other members of the

¹ Because the case at hand is a contested case and not an appeal, it would be resolved either on a motion for summary judgment or by conducting an evidentiary hearing.

retirement system. To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). The evidence must show the entrusted party actually accepted or induced the confidence placed in him." Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004). I find no precedent for imposing a fiduciary duty under the circumstances presented in this case. The Respondent did nothing to induce confidence on the part of its members that it was acting on their behalf or to create an expectation that it would disclose the details of its dealings with other members to serve as a comparator for decisions made in a particular member's case. Therefore, I conclude that PEBA did not owe a fiduciary duty to the Petitioner to advise him of the circumstances of other claimants' dealings with the agency.

Furthermore, even if a fiduciary duty were found to exist, the stipulated facts do not contain sufficient evidence to establish a breach of that duty. The determination of whether a fiduciary duty has been breached is a question of fact. Spence, 395 S.C. at 160. A determination that PEBA should be estopped from asserting the time limitation by its actions would require a finding of facts not stipulated by the parties. Regions Bank v. Schumach, 354 S.C. 648, 582 S.E.2d 432 (2003). ("Whether the actions lulled the plaintiff into a false sense of security is usually a question of fact. However, summary judgement is proper where there is no evidence of conduct warranting estoppel.") The parties have not stipulated that a breach of fiduciary duty occurred. Because Petitioner took the position that there was no genuine issue of material fact for this Court to decide, such a finding was beyond the scope of the order issued by this Court on August 24, 2015.

"The party asserting estoppel bears the burden of establishing all its elements." Estes v. Roper Temp. Servs., 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991). A government entity may be equitably estopped in matters that do not affect the due exercise of its police power or the application of public policy. Grant v. City of Folly Beach, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). A party asserting estoppel against the government must prove "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." Id. Absent even one element, estoppel will not lie against a government entity. Id. However, citizens are presumed to know the law and are charged with exercising "reasonable care to protect [their] interest[s]." Smothers v.

U.S. Fidelity and Guar. Co., 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996). Here, as discussed above, Petitioner has not shown that it would have been justifiable to rely on PEBA's silence to conclude that no individuals who were employed performing indigent criminal defense work in Greenville County had been found to be full-time employees. Where the relevant statutes and plan language do not leave PEBA authority or discretion to provide a claimant with the benefit sought it is improper to apply the doctrine of estoppel. Morgan v. S. Carolina Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008). Therefore, I must conclude that the doctrine of estoppel does not operate to excuse Petitioner's delay in bringing his challenge to the 2002 decision regarding service purchase. Therefore,

IT IS HEREBY ORDERED that Petitioner's Motion to Alter or Amend is **DENIED**.

AND IT IS SO ORDERED.

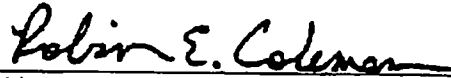


Deborah Brooks Durden
Administrative Law Judge

September 28, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

September 28, 2015
Columbia, South Carolina

FILED

September 28, 2015

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

vs.

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

Respondent.

Docket No. 14-ALJ-30-0539-CC

**ORDER GRANTING
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT**

Appearances: For Petitioner: Judge Edward W. Miller, *pro se*
For Respondent: Justin R. Werner, Esquire

STATEMENT OF THE CASE

This contested case arises from the October 17, 2014 decision of the South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (Department) finding Edward W. Miller's request for review of the December 2002 determination of the public service credit he was eligible to purchase as a member of the Retirement System for Judges and Solicitors of the State of South Carolina (JSRS or System) was not timely made. Upon motion of the parties in this matter, the South Carolina Administrative Law Court (ALC or Court) issued an Order for Continuance and Scheduling Order, agreeing to hear the above-referenced case as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties.

After reviewing the motions, memoranda, exhibits, and statutory and case law, I conclude, as a matter of law, that Respondent's Motion for Summary Judgment should be granted.

FACTS

Petitioner Edward W. Miller is an active member of the JSRC, who has approximately 12 years of earned service credit and 16-years of purchased service credit in the System. Petitioner's membership in JSRS commenced on September 3, 2002, when he was seated as a Circuit Court Judge. Prior to his election to Circuit Court, Petitioner maintained a private law practice simultaneously with his employment as an assistant public defender with the Greenville County Public Defender's Office between May 1986 and June 2002. Petitioner now seeks review of a

FILED

August 24, 2015

SC ADMIN. LAW COURT

1

determination made by JSRS in December 2002 regarding the amount of service credit he was eligible to purchase in the System in connection with his employment with the public defender's office.

After his election to the bench, but prior to being seated, Petitioner contacted the Department in late July 2002 to inquire about purchasing public services credit in the JSRS for his prior employment with the Greenville County Public Defender's Office. By a letter dated July 25, 2002, the Department forwarded a Request for Service Verification form to Petitioner to obtain the verification of his employment with the public defender's office necessary to process his service purchase request. On December 16, 2002, the Department received the completed service verification form signed by Petitioner and the public defender's office. In the member information section of the form, Petitioner indicated that he had been employed by the public defender's office between May 12, 1986, and June 30, 2002, but that the employment had not been "full time" service. Similarly, in the employer verification section of the form, the public defender's office confirmed that Petitioner had been employed by the office as an assistant public defender between May 1986 and June 2002 and that the service had not been "full time" service, but had been part-time service equal to 60% of full-time employment. The defender's office also verified on the form that Petitioner's total earnings for the sixteen years of his employment with the office had been \$302,086.84.¹

Based upon the verification form, the Department determined that Petitioner was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS in connection with his part-time employment with the Greenville County Public Defender's Office between May 1986 and June 2002, for a cost of \$43,963.02.² By a letter dated December 23, 2002, the Department mailed Petitioner a Member Service Payment Invoice for the purchase of 9 years, 8 months, and 5 days of public service credit. Subsequently, on August 1, 2003, Petitioner completed the purchase of the public service credit as invoiced.

By a letter dated August 7, 2014, Petitioner requested formal review of the December 2002 determination of the amount of public service credit he was eligible to purchase in JSRS for his

¹ This form also reflects that Petitioner was employed by the public defender's office in a full-time position between April 1980 and June 1981. Petitioner participated in the South Carolina Retirement System in connection with that employment, withdrawing his contributions upon leaving the position in 1981. Petitioner established full credit for that year and three months of withdrawn service in JSRS at the same time as the public service purchase in question in this matter. The calculation of the purchase of this withdrawn service is not in dispute.

² This 9 years, 8 months, and 5 days of credit was determined by applying the 60% part-time percentage reported on the verification form to the 16 years, 1 month, and 18 days of the total duration of Petitioner's employment for the public defender's office.

employment with the Greenville County Public Defender's Office. In his request for review before the Department, Petitioner sought to "appeal [the] agency's decision in December of 2002 to allow [him] to purchase only 60% of [his] allowable service credit for the time period of May 12, 1986 through June 30, 2002." In particular, Petitioner asserted that the part-time service reported on the Request for Service Verification form completed by Petitioner and the defender's office in December 2002 reflected only his nominal classification as a part-time assistant public defender for staffing and benefit purposes, but did not reflect his true workload in that position, which was consistent with the caseload and time demands of a full-time public defender. In addition, Petitioner contends that other members of JSRS have been allowed to purchase full-time service credit in the System for similar work.

By Final Agency Determination No. 14-015, the Department found that Petitioner's request for review of that December 2002 determination was not timely filed and should be dismissed. Petitioner now seeks review of that Final Agency Determination in this contested case proceeding.

STANDARD OF REVIEW

Under Administrative Law Court (ALC or Court) Rule 68, this Court may apply the South Carolina Rules of Civil Procedure in contested case proceedings where no ALC rule applies and when practicable. Therefore, Rule 56(c), SCRPC, applies in determining whether summary judgment is proper in this case. Summary judgment is proper when there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000); Rule 56(c), SCRPC. Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusions or inferences to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Fleming v. Rose, 338 S.C. 524, 236 S.E.2d 732 (2000). To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable ambiguities and inferences in the light most favorable to the non-moving party. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

The parties have stipulated that there is no genuine dispute regarding the material facts relevant to a decision in this case.

DISCUSSION

Petitioner argues that the Department should not have applied the doctrine of laches to deny his claim. However, the Department did not dismiss Petitioner's claim based upon the equitable doctrine of laches, but under the statutory terms required for a timely claim under the South Carolina Retirement Systems Claims Procedures Act (Act) with consideration given to the Department's procedures in effect at the time of the 2002 decision.

The time of the decision for which Petitioner seeks review in this matter and the time of the filing of his request for review bridges two sets of administrative procedures. When JSRS reached its decision on the amount of public service credit Petitioner was eligible to purchase in December 2002, the proper recourse for the member of JSRS who disagreed with a determination made by the Department, including a determination involving the purchase of service credit, was to seek administrative review of that determination under the Department's internal administrative review procedures. See Internal Administrative Review Procedures for the South Carolina Retirement Systems § 1(a)(6) (1997) (Procedures). Under those procedures, the member would initiate the administrative review by requesting that the appropriate department manager review the disputed decision and issue a formal administrative ruling in the matter which could, in turn, be appealed to the appropriate Deputy Director of the South Carolina Retirement Systems and then the Director of the Department. Procedures §§ 2(a)-(b), 3(a). In order to properly initiate review of a decision of the Department, the member was required to make the initial request for formal review by the department manager within thirty days of his notification of the determination at issue. Procedures § 2(a) ("The request for formal review must be made within thirty (30) days after notification of the determination.") (emphasis added). And, if the member failed to timely make that request, or otherwise failed to comply with the administrative review procedures, the review of the determination would terminate and the Department's initial decision would "be deemed the final decision of the agency and the Budget and Control Board." Procedures § 1(c).

Those internal administrative review procedures were supplanted by the enactment of the Act in 2003. See S.C. Code Ann. § 9-21-10 et seq. (Supp. 2014). For claims filed after July 1, 2003, the Act, and the procedures set forth therein, "constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member or a member's designated beneficiary arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina," and any claim presenting such a dispute "must be resolved in accordance with the procedures and provisions

provided in [the Act].” Id. § 9-21-30. In order to timely file a claim with the retirement systems under the Act,

[a] member or the member’s designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member’s designated beneficiary by the filing of a written claim with the director within one year of the decision by retirement systems.

Id. § 9-21-50(A) (emphasis added). If a member does not timely file a claim pursuant to section 9-21-50 with regard to a decision of the Department, the member has failed to exhaust his or her agency remedies under the Act and is precluded from seeking a contested case hearing before this Court to challenge the decision in question. See id. § 9-21-20(5) (Supp. 2014) (stating that the first prerequisite to the “exhaustion of agency remedy” under the Act is for the member to have “filed a timely claim pursuant to Section 9-21-50 containing the information required pursuant to that section”) (emphasis added); id. § 9-21-60 (Supp. 2014) (providing that a claimant under the Act may only seek review of a Department decision with the ALC, “[u]pon exhaustion of the agency remedy set out in this chapter”); see, generally, Richard H. Seamon, Paige J. Gossett and John D. Geathers, Administrative Agencies-General Concepts and Principles, in South Carolina Administrative Practice and Procedure 1, 92-93, 102-104 (Randolph R. Lowell ed., 3d ed. 2013) (noting that, when a person entirely foregoes his or her administrative remedies by failing to timely pursue those remedies before seeking judicial review (rather than simply seeking judicial review prematurely or in addition to administrative remedies), that failure to timely exhaust his or her administrative remedies generally precludes judicial review altogether (rather than merely delaying such review); and noting further that, where the exhaustion requirement is a statutory one, this bar to review by the courts may be jurisdictional).

In the instant matter, by a Member Service Payment Invoice prepared December 20, 2002, and mailed to Petitioner on December 23, 2002, the Department notified Petitioner of its determination of the amount of public service credit he was eligible to purchase in JSRS based upon his employment with the Greenville County Public Defender’s Office between 1986 and 2002. The invoice clearly specified that the total public service credit Petitioner was eligible to purchase for his employment between May 12, 1986 and June 30, 2002, was 9 years, 8 months, and 5 days, based upon 60% of full-time equivalent service credit for that period. Upon receipt of the invoice, Petitioner did not seek review of the calculation reflected on that invoice or otherwise contact the Department to inquire about the accuracy of the service purchase invoice. To the contrary, Petitioner

purchased the service as invoiced without protest, in August 2003. Then, in August 2014, eleven years after the issuance and payment of that invoice, Petitioner sought formal review of the calculation of the public service credit he was eligible to purchase as reflected on that invoice.

Petitioner's August 2014 request for review of the December 2002 invoice is untimely, both under the provisions of the Department's internal administrative review procedures that were in effect at the time the invoice was issued, and under the provisions of the Act that were in effect at the time Petitioner's request for review was submitted. Specifically, the request for review was not filed within thirty days of Petitioner's notification of the public service he was eligible to purchase upon his receipt of the December 2002 invoice, see Procedures § 2(a), nor was it filed within one year of the date of that invoice, see S.C. Code Ann. § 9-21-50(A). Rather, the request for formal review was not submitted with the Department until some eleven years had elapsed since the invoice was issued and paid. Therefore, because Petitioner did not timely submit a written appeal of the December 2002 invoice, his untimely request for further review of that determination was properly dismissed by the Department. See Procedures § 1(c); S.C. Code Ann. § 9-21-50(A). Furthermore, by failing to timely file his claim, Petitioner also failed to exhaust his agency remedy under the Act and is now precluded from pursuing his claim on its merits before the ALC as a matter of law because of his failure to exhaust those remedies. S.C. Code Ann. §§ 9-21-20(5)(a), 9-21-60.

In sum, because Petitioner's request for review of the December 2002 invoice was not timely made, it was properly dismissed by the Department under the plain terms of the applicable claims procedures and constitutes a failure of Petitioner to exhaust his administrative remedies such that the matter cannot be heard by this Court on the merits.

Accordingly, I find that Petitioner's Motion for Summary Judgement should be granted.

ORDER

IT IS THEREFORE ORDERED that Respondent's Motion for Summary Judgment is **GRANTED** and this matter is **DISMISSED** with prejudice.

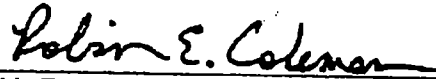
AND IT IS SO ORDERED.


Deborah Brooks Durden
Administrative Law Judge

August 24, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

August 24, 2015
Columbia, South Carolina

FILED

August 24, 2015

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

vs.

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

Respondent.

Docket No. 14-ALJ-30-0539-CC

**ORDER FOR CONTINUANCE
AND
SCHEDULING ORDER**

On May 5, 2015, Counsel for Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (Respondent) sent a letter to this Court stating that the parties have conferred and agreed upon facts, and documents that may be admitted into evidence at the hearing in the above-referenced matter, and believe that this matter could be decided by the Administrative Law Court (ALC) as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. Additionally, the parties in this matter jointly request a continuance of the hearing scheduled for May 26, 2015, to allow the parties sufficient time to finalize and submit the stipulations of fact, joint exhibits, and memoranda of law necessary for the adjudication of this case. Pursuant to ALC Rule 10:

The administrative law judge, upon being assigned a contested case, shall review the request for a contested case hearing and determine the procedure appropriate to the complexity of the issues presented and the types of proof likely to be introduced so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved in the hearing. The administrative law judge may limit the pre-hearing procedures and simplify the prehearing exchange of materials and otherwise take such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts.

ALC Rule 10. Therefore, in lieu of a hearing in this matter, this Court will accept stipulations of fact, joint exhibits, and memoranda of law from the parties in this matter for adjudication of this case upon cross motions for summary judgment.

FILED

May 7, 2015

SC ADMIN. LAW COURT

IT IS THEREFORE ORDERED that the parties shall file stipulations of fact, joint exhibits, and memoranda of law within 60 days from the date of this Order.

IT IS ALSO ORDERED that each party may file a reply brief in response to issues or arguments raised in the opposing party's memorandum of law within 10 days after the filing of the memorandum of law.

IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

May 7, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

May 7, 2015
Columbia, South Carolina

FILED

May 7, 2015

SC ADMIN. LAW COURT

**South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM**

Last Name: MILLER First: EDWARD Middle: W ☒ Mr. ☐ Miss ☐ Mrs. ☐ Ms. Docket No. (To Be Completed by ALC)

Mailing Address: GREENVILLE COUNTY GOVT HOUS City: GREENVILLE State and Zip: SC 29601
305 E. NORTH ST. STE 219

Home Number: 864-232-6774 Work Number: 864-467-8559 Cell Number: 864-430-4848 *E-Mail Address: emillerj@scalcourt.org

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☒ Yes ☐ No

If No, please complete the following:

Are you represented by an Attorney? ☐ Yes ☒ No
NOT AT THIS TIME

Are you represented by a CPA? ☐ Yes ☒ No

Name of Attorney:

Name of CPA:

Mailing Address:

Mailing Address:

City, State and Zip:

City, State and Zip:

Work Number, Cell Number and E-mail Address:

Work Number, Cell Number and E-mail Address:

CASE INFORMATION

Name of the Agency that issued the decision: S.C. PEBA
(Example - Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, you must attach the agency decision. Is it attached? ☒ Yes ☐ No

If no, please explain:

Date the decision was issued: 10/17/14

Date the decision was received: 11/20/14

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

S.C. PEBA'S DECISION IS IN ERROR. PLEASE SEE MY AUGUST 7, 2014 SUBMISSION. THE AGENCY HAS DENIED ME EQUAL TREATMENT WHICH WAS AFFORDED SIMILARLY SITUATED EMPLOYEES. EQUITY MANDATES GRANTING MY REQUEST. THERE IS NO PREJUDICE TO THE AGENCY DUE TO THE DELAY OF MY REQUEST.

Payment via ☐ Check ☐ Money Order ☐ Cash for \$ submitted today to the Administrative Law Court via

(applicable filing fee pursuant to ALC Rule 71) is being ☐ U.S. Postal Service ☐ Hand-delivery

[Signature]

11/20/14

X Your Signature or Signature of Attorney/CPA

Date

CERTIFICATE OF SERVICE (MUST BE COMPLETED)

Your Name:

Date:

City:

State:

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

SC PEBA
Name and/or Agency

PO BOX 11960
Address

COLUMBIA SC 29211-1960
City, State and Zip

Name and/or Agency

Address

City, State and Zip

[Signature]

11/20/14

X Your Signature or Signature of Attorney/CPA

Date

South Carolina
PUBLIC EMPLOYEE BENEFIT AUTHORITY

PEBA

Peggy G. Boykin, CPA
Executive Director
Retirement Benefits

May 5, 2015

The Honorable Deborah Brooks Durden
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

RE: Edward W. Miller v. S.C. Public Employee Benefit Authority, S.C. Retirement Systems, Docket No. 14-ALJ-30-0539-CC

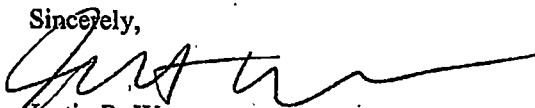
Dear Judge Durden:

Pursuant to paragraph 4 of the Order and Notice of Hearing issued in the above-captioned matter on February 26, 2015, the parties to this matter have conferred regarding the list of facts the parties agree upon and a list of documents that all parties agree may be admitted into evidence at the hearing in this matter. Based upon those discussions, the parties do not believe that an evidentiary hearing is necessary in this matter and instead believe that this matter could be decided by the Court as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. In furtherance of those discussions, the parties have begun circulating draft stipulations of fact and joint exhibits for consideration by the Court.

If the Court is amenable to adjudicating this case as a matter of law based upon the written submissions of the parties, the parties hereby jointly request a continuance of the hearing scheduled in this matter for May 26, 2015, to allow the parties sufficient time to finalize and submit the stipulations of fact, joint exhibits, and memoranda of law necessary for the adjudication of this case. The parties do not expect that they would need more than sixty (60) days to finalize and submit those materials for the Court's consideration.

If you have any questions or concerns regarding this request, please do not hesitate to call me at (803) 737-6894.

Sincerely,



Justin R. Werner
Legal Counsel

cc: The Honorable Edward W. Miller

Street Address:
202 Arbor Lake Drive
Columbia, South Carolina 29223

www.retirement.sc.gov
803-737-6800
800-868-9002 (within S.C. only)

Mailing Address:
Post Office Box 11960
Columbia, South Carolina 29211-1960

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

v.

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

Respondent.

BRIEF OF PETITIONER

DOCKET NO. 14-ALJ-30-0539-CC

Petitioner respectfully seeks relief from the denial of certain retirement benefits by Respondents (herein, collectively, "Agencies"). Petitioner submits the following as the basis for his appeal from the Agencies' rejection:

STATEMENT OF ISSUES ON APPEAL

1. DID AGENCIES IGNORE THAT THEY ARE STATE-CREATED ADMINISTRATORS CHARGED WITH COMMON-LAW AND STATUTORY FIDUCIARY RESPONSIBILITIES?
2. DID AGENCIES BREACH THEIR FIDUCIARY DUTIES OWED TO PETITIONER, BY DENYING PETITIONER'S APPLICATION FOR EARNED SERVICE CREDIT?
3. DID AGENCIES VIOLATE CONSTITUTIONAL EQUAL PROTECTION STANDARDS, IN DENYING PETITIONER'S APPLICATION FOR EARNED SERVICE CREDIT?
4. DID AGENCIES ERR IN RELYING ON LACHES AS A BASIS TO DENY PETITIONER'S APPLICATION FOR EARNED SERVICE CREDIT?

Page 1 of 9

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STATEMENT OF THE CASE

This case was initiated by Petitioner's August 7, 2014 letter to Agencies requesting a review of Respondent's 2002 determination of Petitioner's allowable earned service credit. Petitioner argues that Agencies erred in their 2002 decision which determined Petitioner only eligible to purchase earned service credit as a part-time employee, during the time frame from 1986 through 2002. Petitioner asserts that the work performed during that period qualifies as full-time employment for purposes of determining earned service credit. Agencies denied Petitioner's request and affirmed their prior decision, by way of a Final Agency Determination dated October 17, 2014.

FACTS

Petitioner incorporates herein the agreed Joint Stipulations of fact and Exhibits. Petitioner would emphasize certain of those Joint stipulations for purposes of this case:

- 1.) Greenville County, during this disputed time frame, utilized a unique, hybrid method of providing indigent criminal defense services. What was formerly an office of full time assistant public defenders, was replaced with private attorneys, who handled the full time indigent defense case load, in addition to their private law practices.
- 2.) Petitioner, while employed by the Public Defender Office and not Greenville County, handled one of these full time case loads, in addition to his private law practice. The Defender Office listed Petitioner as part time so that no additional benefits and tax consequences would attach, and this designation allowed Petitioner to maintain his private law practice as well. The designation as part time employee on the Request for Service Verification Form reflects this bureaucratic necessity and not the quantity of work performed.
- 3.) Former 13th Circuit Solicitor and former Circuit Judge Joe Watson handled one of these hybrid full time, indigent defense caseloads from 1982 until 1985, in addition to his private law practice. Respondent allowed Mr. Watson to purchase

full time earned service credit for these three years and to credit them to his retirement in the same System as that now requested by Petitioner. For purposes of determining full time earned service credit, the work performed by Petitioner and Mr. Watson was identical.

ARGUMENTS

1. RESPONDENTS ARE CREATURES OF THE SC LEGISLATURE CHARGED WITH THE EQUITABLE AND CONSTITUTIONAL ADMINISTRATION OF THE SC RETIREMENT SYSTEM.

¹³¹⁰
Section 9-1-130(A), South Carolina Code of Laws, 1976, as amended, created the Respondents for the administration of the SC Retirement system:

A) *The South Carolina Public Employee Benefit Authority and the State Budget and Control Board, or its successor, are cotrustees of the retirement system as "retirement system" is defined in Section 9-16-10(8) in performing the functions imposed on them by law in the governance of the Retirement System. Notwithstanding any other provision of law, any reference in law to the trustee of the Retirement System must be construed to conform to the cotrusteeship as provided in this subsection. (emphasis added).*

There can be no dispute that Agencies are children of state legislative action, charged with observing fiduciary standards in the administration of the SC Retirement System.. The duties of a fiduciary are composed of care, loyalty and good faith. *Menezes v. RL Ross & Co., LLC*, 403 SC 522, 744 SE2nd 178 (S.Ct. 2013).

Similarly, it is well-established in the common law of South Carolina that a confidential, or fiduciary, relationship exists when one reposes a special confidence in another, so that the latter, in equity and in good conscience is bound to act in good faith, with fair dealing and with full disclosure with respect to the interest of the beneficiary. *FutureGroup II v. NationsBank*, 478 SE2nd 45 (S.Ct. 1996); *Guignard v. Atkins*, 317 SE2d 137, (S.C.Ct.App. 1984); *Ramage v.*

Ramage, 322 SE2d 22, (Ct.App. 1984)("A trustee is held to something stricter than the morals of the marketplace." p.28).

Based on the statutory and common-law, *supra*, Agencies were obligated to treat Petitioner's application for Earned Service Credit as trustees, charged with the fair dealing and good faith due from a trustee to a beneficiary.

2. AGENCIES BREACHED THEIR FIDUCIARY DUTIES OWED TO PETITIONER, BY DENYING PETITIONER'S APPLICATION FOR EARNED SERVICE CREDIT.

Agencies denied Petitioner's application for Earned Service Credit. Petitioner supplied Agencies with proof that, in an earlier case presenting identical facts, (the "Joe Watson case"), Agencies granted the Earned Service Credit to the earlier applicant. A comparison of the earlier, cited case¹ and Petitioner's case confirms that the Agencies have failed to meet the duties of their trusteeship by inconsistent treatment of applicants presenting identical facts. By failing to consistently observe fundamental fairness in their administration of the retirement system, Agencies have, therefore, failed to observe their common-law duties of good faith and fair dealing owed to Petitioner. *Lesesne v. Lesesne*, 413 SE2nd 847 (Ct.App. 1991); *Manning v. Dial*, 245 SE 2nd 120 (S.Ct. 1978); *Rodgers v. Herron*, 85 SE2nd 104 (S.Ct. 1954).

¹ Joe Watson worked for Greenville County; Petitioner worked for Defender Corporation of Greenville County. In the context of this dispute, there is no difference between the two employers for neither participates directly in the SC Retirement System. Or, in the words of Justice Sanders: "Whatever doesn't make any difference doesn't matter." *McCall v. Finley*, 294 SC 1, 4, 362 SE2nd 26, 28 (Ct.App. 1987).

Likewise, Agencies have failed to observe their statutory fiduciary duties to Petitioner:

Absolute equality of treatment to similarly situated beneficiaries is the hallmark of a qualified defined benefits pension plan.

Kennedy v. SC Retirement Sys., 345 SC 339, 549 SE2nd 243 (S.Ct.2001)(pp. 353, 254);

Petitioner asks that this Court correct Agencies' failure to observe their fiduciary duties in rejecting Petitioner's application for his Earned Service Credit. *Duvall v. SC Budget and Control Board, et al.*, 659 SE2nd 124 (S.Ct. 2008)("Retirement statutes should be liberally construed in favor of those to be benefitted and object sought to be accomplished."127); *King v. SC Retirement Sys.*, 319 SC 822, 461 SE 2nd 822 (S.Ct. 1995)("By adopting the term "earned service credit," it is apparent that the legislature intended to give broader coverage than just for employees engaged in actual service." 823, 823)

3 AGENCIES VIOLATED CONSTITUTIONAL EQUAL PROTECTION STANDARDS, IN DENYING PETITIONER'S APPLICATION FOR EARNED SERVICE CREDIT.

Agencies are state-created managers of a state retirement system. In their management of the state retirement system, the acts of Agencies are acts of the State of South Carolina. In effect, administrative decisions are state actions which, in turn, must comport with the constitutional guarantee of equal protection of laws. *United States Constitution*, 14th Amendment, *South Carolina Constitution*, Article 1, Section 3. *Kennedy, supra*;

Petitioner provided Agencies with evidence of their earlier decision, the "Joe Watson case," on an application for Earned Service Credit, where the facts were basically identical to Petitioner's case. Agencies granted the application in the "Joe Watson Case;" Agencies, however, denied Petitioner's identical application. Agencies attempt to draw a distinction



between the "Joe Watson case" and Petitioner's case. The distinction does not survive review because, the essential, underlying facts of the cases are identical. Clearly, Agencies' denial of Petitioner's application, when collated with the earlier, "Joe Watson case, application, presents a constitutionally infirm denial of equal protection of law to Petitioner. Petitioner asks this Court to correct Agencies' unconstitutional misconduct.

**4. AGENCIES CANNOT CLAIM PETITIONER'S CLAIM WAS STALE DUE
AGENCIES' BREACH OF FIDUCIARY DUTIES AND DUE TO APPLICATION
OF COLLATERAL ESTOPPEL AND EQUITABLE ESTOPPEL.**

Agencies rely on the doctrine of *Laches*, asserting that Petitioner has filed his request for Earned Service Credit too late, due to the passage of time. A party seeking the protection of *Laches* must prove the affirmative defense by showing

.... the proponent of an action unreasonably delayed instituting the action
and that such delay is unexplainable and negligent in light of what should
have been done.

Lindler v. Adcock, 250 SC 383, 158 SE2nd 192 (1967).

More recently, the Supreme Court has held that in order to prove the affirmative defense of *Laches*, the burden is on the party asserting *Laches* to establish (1) delay, (2) unreasonable delay, (3) prejudice. *Ables v. Gladdin*, 378 SC 558, 664 SE2nd 442 (S.Ct. 2008).

Petitioner asserts that Agencies' reliance on laches as a basis to deny his claim is ill-founded for three reasons.

First, Agencies, in breach of their fiduciary duties, did not timely and fully advise Petitioner of the similar "Joe Watson case" which would have provided Petitioner with clear



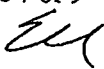
signal to then avail himself of his right to apply for, and to receive, his Earned Service Credit.²¹

Leaving aside the issue of Agencies' breach of fiduciary duty, *arguendo*, Petitioner cannot be held to have failed to assert a right of which he was unaware, due to Agencies' inaction.

Second, collateral estoppel operates to bar the invocation of *Laches*. In the "Joe Watson case," the earlier application for Earned Service Credit was granted. The "Joe Watson case" presented the same facts and issues as presented by Petitioner's application. Agencies are bound by the outcome of the "Joe Watson case" which established a precedent for Petitioner's application, under the applicable doctrine of collateral estoppel. *S.C. Prop. & Ca. Ins. Guaranty Assoc. v. Wal-Mart Stores, Inc.* 403 SE2d 625 (S.Ct. 1991); cf: **RESTATEMENT (SECOND) OF JUDGMENTS**, §§27-29 (1982. In light of their earlier ruling in the "Joe Watson case" which established a precedent for applications for Earned Service Credit under Petitioner's circumstances, Agencies should be collaterally estopped from asserting that Petitioner has worked a prejudice or disadvantage to Agencies, (as required by *Ables, Lindler, supra*) . Quite simply, in the absence of prejudice, the same case should produce the same outcome, regardless of the passage of time.

Third, Petitioner argues that the doctrine of equitable estoppel applies to bar Agencies' use of *Laches* to deny Petitioner's current application. Equitable estoppel arises where: (1) conduct by the party estopped amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. To claim an estoppel that bars Agencies' reliance on *Laches*, Petitioner must demonstrate: (1) Petitioner's lack of knowledge, and lack of access to

² Petitioner notes that, as fiduciaries, Agencies had a duty to speak, and that in failing to advise Petitioner of the "Joe Watson case" Agencies' non-disclosure was constructive fraud. *Manning v. Dial, supra*.



knowledge, of the truth as to facts in question; (2) Petitioner's reliance upon conduct of the party estopped; and (3) Petitioner's prejudicial change in position. *Regions Bank v. Schmauch*, 354 SC 648, 582 SE2d 648 (Ct. App. 2003). The application of equitable estoppel does not require an intentional misrepresentation. *Regions Bank, supra*.

Consistent with the *Regions Bank case, supra*, Agencies (1) concealed the material fact of the "Joe Watson case" from Petitioner, despite their fiduciary duty of disclosure, (2) with the intention that Petitioner act on that concealment by accepting Agencies' offer of part time credit, and (3) Agencies had knowledge of the true facts that the "Joe Watson case" resulted in an offer of **full time credit** to Joe Watson, rather than the offer of **part-time credit** made to Petitioner. Petitioner lacked knowledge of the "Joe Watson case" at the time of his earlier, initial application and, therefore, Petitioner could not have discovered those facts due to the confidential nature of Agencies files, (2) Petitioner relied on Agencies' conduct and accepted Agencies' offer of part time earned service credit, and (3) Petitioner suffered from a prejudicial change in position through the loss of full time credit.

Petitioner asserts that Agencies are collaterally and equitably estopped from relying on Petitioner's alleged failure to act timely in appealing the Agencies' 2002 determination. The 2002 Agencies determination violated the fiduciary duty owed by Agencies to Petitioner. Additionally, there can be no prejudice to Agencies by granting Petitioner's application. Petitioner notes that his case presents a unique factual scenario which, due to the change of Greenville County's hybrid indigent defense system, is incapable of replication.

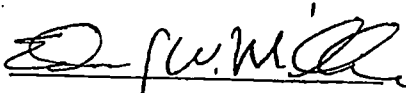
CONCLUSION

Based on the foregoing, Petitioner asks this Court to reverse Agencies' denial of



Petitioner's full time Earned Service Credit and to grant the right to purchase that Credit to
Petitioner. Petitioner also asks that the purchase of the wrongfully denied Earned Service Credit
be made pursuant to the purchase cost in effect at the time of the denial in 2002.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "E. W. Miller", written over a horizontal line.

Edward W. Miller, Petitioner

July 6, 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

v.

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

Respondent.

**RESPONDENT'S
MEMORANDUM OF LAW**

DOCKET NO. 14-ALJ-30-0539-CC

By an Order for Continuance and Scheduling Order issued in this matter on May 7, 2015, the Court, upon motion of the parties, agreed to hear the above-referenced case as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. Pursuant to that Order, Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("Retirement Systems"), hereby submits this Memorandum of Law in support of its position in this case.

BACKGROUND

The Honorable Edward W. Miller ("Petitioner") is an active member of the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS" or "System"), who has approximately 12 years of earned service credit and 16 years of purchased service credit in the System. Petitioner's membership in JSRS commenced on September 3, 2002, when he was seated as a Circuit Court Judge, having been elected to that position by the South Carolina General Assembly in May 2002. Prior to his election to the Circuit Court, Petitioner was employed as an assistant public defender with the Greenville County Public Defender's Office between May 1986 and June 2002, in addition to maintaining a full private law practice during that period. As set forth below, Petitioner now seeks review of the determination made by JSRS in December 2002 regarding the amount of service credit he was eligible to purchase in the System in connection with his employment with the public defender's office.

After his election to the bench, but prior to being seated, Petitioner contacted the Retirement Systems in late July 2002 to inquire about purchasing public service credit in the

JSRS for his prior employment with the Greenville County Public Defender's Office. During these communications, Petitioner's employment with the public defender's office was characterized as part-time employment. As a result of those discussions, by a letter dated July 25, 2002, the Retirement Systems forwarded a Request for Service Verification form to Petitioner to obtain the verification of his employment with the public defender's office necessary to process his service purchase request. (Ex. #1.) On December 16, 2002, the Retirement Systems received the completed service verification form signed by Petitioner and the public defender's office. (Ex. #2.) In the member information section of the form, Petitioner indicated that he had been employed by the defender's office between May 12, 1986, and June 30, 2002, but that the employment had not been "full time" service. (Ex. #2, at 1, Question #3.) Similarly, in the employer verification section of the form, the public defender's office confirmed that Petitioner had been employed by the office as an assistant public defender between May 1986 and June 2002 and that the service had not been "full time" service, but had been part-time service equal to 60% of full-time employment. (Ex. #2, at 2, Question 3, Columns (D)-(E).) The defender's office also verified on the form that Petitioner's total earnings for the sixteen years of his employment with the office had been \$302,086.84.¹ (Ex. #2, at 2, Question 3.)

Based upon the verification form, the Retirement Systems determined that Petitioner was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS in connection with his part-time employment with the Greenville County Public Defender's Office between May 1986 and June 2002, for a cost of \$43,963.02.² (Ex. #3, at 2.) By a letter dated December 23, 2002, the System mailed Petitioner a Member Service Payment Invoice for the purchase of the 9 years, 8 months, and 5 days of public service credit. (Ex. #3.) Subsequently, on August 1, 2003, Petitioner completed the purchase of the public service credit as invoiced. (Ex. #4.)

¹ This form also reflects that Petitioner was employed by the public defender's office in a full-time position between April 1980 and June 1981. Petitioner participated in the South Carolina Retirement System in connection with that employment, withdrawing his contributions upon leaving the position in 1981. Petitioner established full credit for that year and three months of withdrawn service in JSRS at the same time as the public service purchase in question in this matter. The calculation of the purchase of this withdrawn service is not in dispute.

² This 9 years, 8 months, and 5 days of credit was determined by applying the 60% part-time percentage reported on the verification form to the 16 years, 1 month, and 18 days of the total duration of Petitioner's employment for the public defender's office.

By telephone contacts and correspondence with the System beginning in March 2014, Petitioner began inquiring as to whether the amount of public service credit he was eligible to purchase had been properly calculated by JSRS in 2002. Ultimately, by a letter dated August 7, 2014, Petitioner submitted a letter requesting formal review of the December 2002 determination of the amount of public service credit he was eligible to purchase in JSRS for his employment with the Greenville County Public Defender's Office. (Ex. #5.) By Final Agency Determination No. 14-015, the Retirement Systems found that Petitioner's request for review of that December 2002 determination was not timely filed and should be dismissed. (Ex. #6.) Petitioner now seeks review of that Final Agency Determination in this contested case proceeding.

DISCUSSION

The Court should rule in favor of the Retirement Systems in this matter. The parties have stipulated that there is no genuine dispute regarding the material facts of the timing of Petitioner's 2014 request for review of the Retirement Systems' December 2002 determination of the public service credit he was eligible to purchase in JSRS. And, because of Petitioner's delay in seeking such review, it is clear that Petitioner failed to exhaust his administrative remedies under the applicable claims procedures, such that he is precluded from having his claim heard on its merits before this Court as a matter of law.

In his request of review before the Retirement Systems, Petitioner sought to "appeal [the] agency's decision in December of 2002 to allow [him] to purchase only 60% of [his] allowable service credit for the time period of May 12, 1986 through June 30, 2002." (Ex. #5, at 1.) In particular, Petitioner asserted that the part-time service reported on the Request for Service Verification form completed by Petitioner and the defender's office in December 2002 reflected only his nominal classification as a part-time assistant public defender for staffing and benefit purposes, but did not reflect his true workload in that position, which was consistent with the caseload and time demands of a full-time public defender. In addition, Petitioner contends that other members of JSRS have been allowed to purchase full-time service credit in the System for similar work. However, as set out below, this claim was not timely made under the applicable claims procedures and statutes and should be dismissed.

The time of the decision for which Petitioner seeks review in this matter and the time of the filing of his request for review bridge two sets of administrative procedures. When JSRS reached its decision on the amount of public service credit he was eligible to purchase in

December 2002, the proper recourse for a member of JSRS who disagreed with a determination made by the System, including a determination involving the purchase of service credit, was to seek administrative review of that determination under the System's internal administrative review procedures. See Internal Administrative Review Procedures for the South Carolina Retirement Systems § 1(a)(6) (1997) [hereinafter Administrative Review Procedures] (copy attached). Under those procedures, the member would initiate the administrative review by requesting that the appropriate department manager review the disputed decision and issue a formal administrative ruling in the matter, which could, in turn, be appealed to the appropriate Deputy Director of the South Carolina Retirement Systems and then the Director of the Retirement Systems. Administrative Review Procedures §§ 2(a)-(b), 3(a). In order to properly initiate review of a decision of the System, the member was required to make the initial request for formal review by the department manager within thirty days of his notification of the determination at issue. Administrative Review Procedures § 2(a) ("The request for formal review must be made within thirty (30) days after notification of the determination.") (emphasis added). And, if the member failed to timely make that request, or otherwise failed to comply with the administrative review procedures, the review of the determination would terminate and the System's initial decision would "be deemed the final decision of the agency and the Budget and Control Board." Administrative Review Procedures § 1(c).

These internal administrative review procedures were supplanted by the enactment of the South Carolina Retirement Systems Claims Procedures Act in 2003. See S.C. Code Ann. § 9-21-10 et seq. (Supp. 2014). For claims filed after July 1, 2003, the Claims Procedures Act, and the procedures set forth therein, "constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member or a member's designated beneficiary arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina," and any claim presenting such a dispute "must be resolved in accordance with the procedures and provisions provided in [the Claims Procedures Act]." Id. § 9-21-30. In order to timely file a claim with the retirement systems under the Claims Procedures Act,

[a] member or the member's designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member's designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems.

Id. § 9-21-50(A) (emphasis added). If a member does not timely file a claim pursuant to Section 9-21-50 with regard to a decision of the retirement systems, the member has failed to exhaust his or her agency remedies under the Claims Procedures Act and is precluded from seeking a contested case hearing before this Court to challenge the decision in question. See id. § 9-21-20(5) (Supp. 2014) (stating that the first prerequisite to the “exhaustion of agency remedy” under the Claims Procedures Act is for the member to have “filed a timely claim pursuant to Section 9-21-50 containing the information required pursuant to that section”) (emphasis added); id. § 9-21-60 (Supp. 2014) (providing that a claimant under the Claims Procedures Act may only seek review of a retirement systems’ decision with the Administrative Law Court “[u]pon exhaustion of the agency remedy set out in this chapter”); see generally Richard H. Seamon, Paige J. Gossett and John D. Geathers, Administrative Agencies—General Concepts and Principles, in South Carolina Administrative Practice and Procedure 1, 92-93, 102-104 (Randolph R. Lowell ed., 3d ed. 2013) (noting that, when a person entirely foregoes his or her administrative remedies by failing to timely pursue those remedies before seeking judicial review (rather than simply seeking judicial review prematurely or in addition to administrative remedies), that failure to timely exhaust his or her administrative remedies generally precludes judicial review altogether (rather than merely delaying such review); and noting further that, where the exhaustion requirement is a statutory one, this bar to review by the courts may be jurisdictional).

In the instant matter, by a Member Service Payment Invoice prepared December 20, 2002, and mailed to Petitioner on December 23, 2002, the Retirement Systems notified Petitioner of its determination of the amount of public service credit he was eligible to purchase in JSRS based upon his employment with the Greenville County Public Defender’s Office between 1986 and 2002. (Ex. #3.) The invoice clearly specified that the total public service credit Petitioner was eligible to purchase for his employment between May 12, 1986, and June 30, 2002, was 9 years, 8 months, and 5 days, based upon 60% of full-time equivalent service credit for that period. However, upon receipt of the invoice, Petitioner did not seek review of the calculation reflected on that invoice or otherwise contact the Retirement Systems to inquire about the accuracy of the service purchase invoice. To the contrary, Petitioner purchased the service as invoiced, and without protest, in August 2003. (Ex. #4.) Then, in August 2014, some eleven years after the issuance and payment of that invoice, Petitioner sought formal review of the

calculation of the public service credit he was eligible to purchase as reflected on that invoice. (Ex. #5.)

Petitioner's August 2014 request for review of the December 2002 invoice is untimely both under the provisions of the Retirement Systems' internal administrative review procedures that were in effect at the time the invoice was issued and under the provisions of the Claims Procedures Act that were in effect at the time Petitioner's request for review was submitted. Specifically, the request for review was not filed within thirty days of Petitioner's notification of the public service he was eligible to purchase upon his receipt of the December 2002 invoice, see Administrative Review Procedures § 2(a), nor was it filed within one year of the date of that invoice, see S.C. Code Ann. § 9-21-50(A). Rather, the request for formal review was not submitted with the Retirement Systems until some eleven years had elapsed since the invoice was issued and paid. Therefore, because Petitioner did not timely submit a written appeal of the December 2002 invoice, his untimely request for further review of that determination was properly dismissed by the Retirement Systems. See Administrative Review Procedures § 1(c); S.C. Code Ann. § 9-21-50(A). Furthermore, by failing to timely file his claim, Petitioner also failed to exhaust his agency remedy under the Claims Procedures Act and is now precluded from pursuing his claim on its merits before the Administrative Law Court as a matter of law because of his failure to exhaust those remedies. S.C. Code Ann. §§ 9-21-20(5)(a), 9-21-60; see, e.g., Elizabeth L. Hehn v. S.C. Public Employee Benefit Auth., S.C. Ret. Sys., Docket No. 14-ALJ-30-0427-CC (S.C. Admin. Law Ct. Dec. 18, 2014) (granting summary judgment in favor of the Retirement Systems because of petitioner's failed to exhaust her administrative remedies by timely seeking review of the denial of her disability retirement application under the Claims Procedures Act); Ernest Legette v. S.C. Budget & Control Bd., S.C. Ret. Sys., Docket No. 10-ALJ-30-0714-CC (S.C. Admin. Law Ct. Jan. 13, 2011) (dismissing petitioner's case for his failure to exhaust his administrative remedies with the Retirement Systems because he had failed to seek review of the denial of his disability retirement application within one year of his notice of the decision); Mark Campbell v. S.C. Budget & Control Bd., S.C. Ret. Sys., Docket No. 07-ALJ-30-0527-CC (S.C. Admin. Law Ct. Mar. 27, 2008) (granting the Retirement Systems' motion for summary judgment where a disability retiree failed to exhaust his administrative remedies with the Retirement Systems by failing to timely seek review of the decision to discontinue his benefits through the Retirement Systems' claims procedures).

In sum, because Petitioner's request for review of the December 2002 invoice was not timely made, it was properly dismissed by the Retirement Systems under the plain terms of the applicable claims procedures and constitutes a failure of Petitioner to exhaust his administrative remedies such that it cannot be heard by this Court on its merits. Accordingly, the Court should rule in favor of the Retirement Systems as a matter of law and dismiss Petitioner's claim.

It should be noted that, in this matter, Petitioner does not contest the fact that he did not timely submit his request for review within the period allowed under the applicable claims procedures. Rather, he seeks to have his claim heard on its merits notwithstanding that it was not timely made. However, as set out above, such review is precluded under the applicable law as a result of his failure to timely exhaust his administrative remedies. In fact, the complications implicated in Petitioner's request for review are precisely the sort of problems that the deadlines in the applicable claims procedures, and other similar statutes of limitation, are designed to prevent. For example, in large part, the merits of Petitioner's claim involve using documents generated in 2014 to call into question the service verification executed in 2002 that itself addresses work performed dating back to 1986. It is the difficulty faced in resolving these sorts of stale claims that the deadlines in the administrative claims procedures are intended to avoid. See Scarborough v. S.C. Dep't of Rev., Docket No. 08-ALJ-17-0563-CC (S.C. Admin. Law Ct. Mar. 23, 2009) (discussing the rationale for statutes of limitation in the administrative claims context).

CONCLUSION

For the reasons set forth above, Respondent South Carolina Retirement Systems hereby requests that the Court issue an order dismissing Petitioner's claim.

Respectfully Submitted,


Justin R. Werner
Legal Counsel
South Carolina Public Employee Benefit Authority,
South Carolina Retirement Systems
Post Office Box 11960
Columbia, South Carolina 29211-1960
Telephone: (803) 737-6894
Facsimile: (803) 737-7746

July 6, 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller;

Petitioner,

v.

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

Respondent.

REPLY BRIEF OF PETITIONER

DOCKET NO. 14-ALJ-30-0539-CC

Petitioner respectfully incorporates herein all of the arguments previously filed with this Court in his "BRIEF OF PETITIONER".

REPLY

In its Reply Brief, Respondent acknowledges that it has a fiduciary relationship with Petitioner. Respondent acknowledges that they granted the relief requested herein to a similarly situated member of the Plan prior to their denial of Petitioner's application (the Watson Case). Respondent does not dispute any of the law contained in Petitioner's Brief. Respondent's bald-faced assertion that it "strongly disputes that it violated its fiduciary duties to Petitioner or constitutional equal protection guarantees" is unsupported by any evidence.

Respondent fails to address the central question of this Appeal: did Respondent's breach of fiduciary duty, through the 2002 failure of Respondent to inform Petitioner of the "Watson Case", estop Respondent from claiming a failure by Petitioner to timely appeal the 2002 denial of service purchase eligibility benefits to Petitioner?

Had Respondent fulfilled its fiduciary duty to Petitioner in 2002 by informing him of the "Watson Case" Petitioner would have appealed Respondent's denial at that time

and there would be no question of the timeliness of the appeal. Respondent cannot now be allowed to profit from its 2002 violation of its legal and equitable duties to Petitioner by claiming untimeliness, statutory or otherwise. Respondent cannot rely on a statutory time limitation to deny Petitioner when their own misconduct concealed the "Watson Case" from Petitioner in violation of their fiduciary duties of disclosure and equal treatment of like beneficiaries.

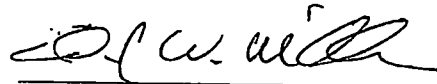
Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Moore v. Moore*, 360 SC 241, 599 SE2d 467 (Ct App 2004). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. *Southern Land and Golf C. Ltd. V. South Carolina Public Service Authority*, 311 SC 29, 426 SE2d 748 (1993).

Petitioner emphasizes that there is no prejudice to Respondent in the grant of relief herein requested, and there is no likelihood that these circumstances will be repeated.

CONCLUSIONS

For the reasons stated above and in his original brief, Petitioner requests that this Court issue its Order granting the relief requested by Petitioner.

Respectfully Submitted,



Edward W. Miller
Petitioner

7/16/15

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

v.

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

Respondent.

**RESPONDENT'S REPLY TO
PETITIONER'S BRIEF**

DOCKET NO. 14-ALJ-30-0539-CC

Pursuant to the Order for Continuance and Scheduling Order issued in this matter on May 7, 2015, the parties to the above-captioned case filed stipulations of fact, joint exhibits, and memoranda of law on July 6, 2015, for the adjudication of this matter by the Court as a matter of law. Under that Order, the parties were also afforded the opportunity to file a reply brief in response to the issues or arguments raised in the opposing party's memorandum of law within ten (10) days after the filing of the memorandum of law. Accordingly, Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("Retirement Systems"), hereby submits this Reply to the Brief filed by Petitioner in this matter.

REPLY

The basic issue presented in this matter is whether Petitioner's 2014 request for administrative review of a determination made in December 2002 regarding the amount of public service credit he was eligible to purchase in the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS") was timely made before the Retirement Systems, such that it could be heard on its merits by the Retirement Systems and by this Court under the South Carolina Retirement Systems Claims Procedures Act. (See Stipulations of Fact ¶¶ 9, 10; Ex. #6 (describing the final agency determination that is under review in this matter).) However, in the Brief filed by Petitioner in this case, Petitioner raises three issues for review by this Court that relate solely to the underlying merits of his disagreement with the 2002 determination made regarding his service purchase request, and only states one issue for review that relates to the timeliness question regarding his 2014 appeal, which is the sole issue properly before the Court

in this case. As set out below, the three issues concerning the underlying service purchase details are not properly before this Court and the fourth issue that addresses the timeliness of Petitioner's appeal misconstrues the legal basis upon which his appeal was found untimely.

As explained in the Retirement Systems' Memorandum of Law filed in this matter, under the South Carolina Retirement Systems Claims Procedures Act, a party must have exhausted his agency remedies before the Retirement Systems regarding a claim in order to properly invoke this Court's jurisdiction to review the merits of that claim in a contested case proceeding. S.C. Code Ann. § 9-21-60 (Supp. 2014). And, to exhaust those agency remedies, the party must have first "filed a timely claim pursuant to Section 9-21-50" regarding the matter. *Id.* § 9-21-20(5)(a) (emphasis added). Section 9-21-50, in turn, requires that, to be timely, a claim concerning an administrative decision of the Retirement Systems must be filed in writing with the Director of the Retirement Systems within one year of the decision for which review is sought. *Id.* § 9-21-50(A). Consequently, if a party does not timely file a written claim seeking review of a decision of the Retirement Systems within one year of that decision, the party has failed to exhaust his agency remedies regarding that decision, such that the party is precluded from seeking review of that decision before this Court under the plain terms of the South Carolina Retirement Systems Claims Procedures Act.

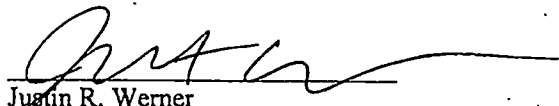
Such is the case here. The Retirement Systems made a written determination of the amount of public service credit that Petitioner was eligible to purchase in JSRS in December 2002. (Ex. #3.) Petitioner did not seek review of that determination at that time, and, in fact, completed the service purchase based upon that determination. (Ex. #4.) Rather, Petitioner did not file a written claim for review of that December 2002 determination until August 2014, nearly twelve years later. (Ex. #5.) Because of that delay in seeking review, the Retirement Systems dismissed Petitioner's claim as untimely (Ex. #6), and Petitioner now seeks review of that decision in this Court. However, under the plain terms of the Claims Procedures Act, because Petitioner did not timely file his claim regarding his service purchase eligibility within one year of the decision regarding his eligibility, his claim was properly dismissed by the Retirement Systems as untimely, and Petitioner must be found to have failed to exhaust his agency remedies regarding that claim, such that he is precluded from seeking review of the merits of that claim before this Court. See S.C. Code Ann. §§ 9-21-20(5)(a), 9-21-50(A), 9-21-60.

The issues and arguments raised by Petitioner in his Brief do not affect this conclusion. On the one issue related to the timeliness of Petitioner's appeal, Petitioner argues that the Retirement Systems should not have applied the doctrine of laches to deny his claim. However, as explained above, the Retirement Systems did not dismiss Petitioner's claim based upon the equitable doctrine of laches, but under the statutory terms required for a timely claim under the South Carolina Retirement Systems Claims Procedures Act. Similarly, it is the statutory provisions of the Claims Procedures Act, and not any equitable doctrines, that limit this Court's jurisdiction to review claims regarding administrative decisions of the Retirement Systems to those claims in which the party has timely exhausted his agency remedies. Moreover, it is clear that, because the sole issue presented in this matter is whether Petitioner timely filed his claim, such that review of the merits of that claim is available before the Retirement Systems and this Court, Petitioner's other three issues on appeal that address the underlying merits of his service purchase dispute are not properly before the Court in this case. It is only if the Court were to find that Petitioner's claim was timely made that his arguments regarding the appropriateness of the Retirement Systems' service purchase determination would be germane. Finally, although the merits of Petitioner's service purchase dispute are not before this Court, it should be noted that the Retirement Systems strongly disputes that it violated its fiduciary duties to Petitioner or constitutional equal protection guarantees with regard to the determination of Petitioner's service purchase eligibility in December 2002.

CONCLUSION

For the reasons set forth above, Respondent South Carolina Retirement Systems hereby requests that the Court issue an order dismissing Petitioner's claim.

Respectfully Submitted,



Justin R. Werner
Legal Counsel
South Carolina Public Employee Benefit Authority,
South Carolina Retirement Systems
Post Office Box 11960
Columbia, South Carolina 29211-1960
Telephone: (803) 737-6894
Facsimile: (803) 737-7746

July 10, 2015

STATE OF SOUTH CAROLINA
Administrative Law Court

Ralph K. Anderson, III
Chief Judge

Jana E. Cox Shealy
Clerk



PHONE: (803) 734-0550
FAX: (803) 734-6400
WEB: WWW.SCALC.NET

December 2, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29201

Re: Edward W. Miller v. South Carolina Public Employee Benefit Authority, South Carolina
Retirement System
ALC Docket No. 14-ALJ-30-0539-CC

Dear Clerk Kitchings:

The Petitioner has contacted the Court and Creel Court Reporting Service in regards to the preparation of any transcripts in the above matter. A hearing was scheduled in this matter, however, it was continued at the parties request and Judge Durden subsequently issued an order without a hearing on the merits. Petitioner then filed a Motion for Reconsideration and Judge Durden's office sent an email notice that she would conduct a teleconference on the Motion on September 24, 2015. It is not standard practice for the Court to engage court reporters for telephone conferences/hearings or motion hearings unless a party requests one. Therefore, there is no transcript to be requested in this proceeding.

Please let me know if you have any questions or need any further information.

With warm personal regards, I am,

Sincerely,

A handwritten signature in cursive script, appearing to read "Jana E. Shealy".
Jana E. Shealy
Clerk

JES/

cc: ✓ The Honorable Edward W. Miller
Justin Werner, Esquire

Edgar A. Brown Building • 1205 Pendleton Street, Suite 224 • Columbia, South Carolina 29201-3755

Miller, Edward W.

From: Miller, Edward W.
Sent: Monday, November 30, 2015 11:23 AM
To: 'Chelsea Clark'; Kitchings, Jenny
Cc: Robin Coleman; jwerner@retirement.sc.gov; Deborah B. Durden
Subject: RE: Miller v. SCPEBA, Appellate Case No. 2015-002228, ALC Docket No. 14-ALJ-30-0539-CC

Ms. Clark:

My e-mail to the court reporting service, used by the ALC, dated November 24, 2015 (attached below), requesting a copy of the transcript of the Hearing cited in the Order of Judge Durden, dated September 28, 2015, was made pursuant to South Carolina Appellate Court Rule 207(b). The Clerk of the Court of Appeals was copied so that the Appellate Court would know that a diligent effort was being made to comply with the Rules. The September 28, 2015 Order specifically states that a "telephonic hearing" was held and the ALJ cited statements, allegedly made by the Appellant herein, from which the ALJ made findings of fact upon which the decision was made.

If you have the authority to do so, please formally certify (in compliance with the Appellate Court Rules) that no transcript of the referenced "telephonic hearing" was ever made. Also please certify that no formal notice of this "telephonic hearing" was ever served in this case.

I hope that this e-mail clarifies for you what this issue concerns.

Yours very truly,

Edward W. Miller

From: Chelsea Clark [mailto:cclark@scalac.net]
Sent: Tuesday, November 24, 2015 3:14 PM
To: Miller, Edward W.; Kitchings, Jenny
Cc: Robin Coleman; jwerner@retirement.sc.gov; Deborah B. Durden
Subject: Miller v. SCPEBA, Appellate Case No. 2015-002228, ALC Docket No. 14-ALJ-30-0539-CC

Dear Judge Miller:

I am happy to conduct all communication in writing. This email is an attempt to clarify some issues for you and to address any questions the Court of Appeals may have, relating to your letter request for a transcript filed November 4, 2015. As you noted, I previously responded by email to your request for a transcript with the contact information for the service that handles court reporting for the ALC. As you mentioned, the court reporting service does not have a record of your case. At the time of the email, I was not yet familiar with your case, not having been Judge Durden's staff attorney at the time the case was adjudicated. However, after reviewing the case file, I discovered that no hearing was ever conducted in your case, and that it therefore stands to reason that the court reporting service would not have a record.

You may recall that this case was adjudicated as a matter of law, pursuant to a request from both yourself and Mr. Werner filed May 5, 2015. In an Order filed May 7, 2015, Judge Durden stated that she would rule on the stipulations, exhibits, and memoranda of the parties as cross motions for summary judgment. You and Mr. Werner then filed joint stipulations and exhibits. Mr. Werner filed a memorandum of law and you filed a "Brief of Petitioner," which was accepted by the Court as a memorandum of law in support of a motion for summary judgment (as stated in a letter

dated July 9, 2015 from Judge Durden). Mr. Werner filed a reply to your filing on July 10, 2015, to which you then replied, in a filing on July 17, 2015. In an Order filed August 24, 2015, Judge Durden granted Respondent's motion for summary judgment and dismissed the case with prejudice.

You subsequently filed a "motion to alter or amend," on September 2, 2015. In an effort to clarify your arguments, a teleconference was initiated by Judge Durden and included you and Mr. Werner. I understand that this teleconference took place on September 24, 2015 at 10:30am. Because this was a conference on your motion and no testimony was had, there was no recording or transcript of this call, as is the standard practice of this court. On September 28, 2015, an Order was issued denying your motion to alter or amend. You responded to the Order via email to Judge Durden's aide, Robin, objecting to the term "telephonic hearing" to describe the conference call and expressing other concerns. Judge Durden responded your email, and noted that because no factual issues were considered, no testimony taken, and no factual findings made from the informal telephonic hearing, no record was made. You wrote a further email to Judge Durden on October 2, 2015, to which there was no response that I am aware of. Mr. Werner was included in all above emails.

On November 2, 2015, a letter to you from the Court of Appeals was filed, and on November 4, 2015, your letter requesting a transcript "from the hearing referenced in your Order denying Petitioner's Motion to Alter or Amend dated September 28, 2015" was filed. You were put in touch with our external court reporting service, which found no such record. As previously explained, this is because there was never a hearing on the record in your case, which was dismissed on summary judgment.

If Ms. Kitchings, or anyone from her office, has any questions regarding the history of your case, I would be glad to address them. My contact information is below. Additionally, our Clerk of Court, Jana Shealy, also handles inquiries on closed cases, and can be reached at 803-734-6411.

Sincerely,

Chelsea J. Clark
Staff Counsel to Deborah Brooks Durden
South Carolina Administrative Law Court
1205 Pendleton St, Suite 224
Columbia SC, 29201
cclark@scalc.net
803-734-3227

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court.

From: Miller, Edward W. [<mailto:emilleri@sccourts.org>]
Sent: Tuesday, November 24, 2015 1:36 PM
To: Chelsea Clark <cclark@scalc.net>
Subject: Miller v. PEBA; Transcript for 14-AJ-30-0539-CC

Ms. Clark:

Subsequent to my e-mail to Crystal with Creel Court Reporting, sent this morning, my wife informed me that you had called my home and requested that I call you back. Based on my previous dealings with the Administrative Law Court, I prefer that all communications be conducted in writing. Please let me know how I can be of assistance and if there is anything you require of me.

Yours very truly,

Edward W. Miller

From: Miller, Edward W. [<mailto:emilleri@sccourts.org>]

Sent: Tuesday, November 24, 2015 11:10 AM

To: crystal@creelreporting.com

Cc: Chelsea Clark <cclark@scalp.net>; Deborah B. Durden <ddurden@scalp.net>; jwerner@retirement.sc.gov; Kitchings, Jenny <jkitchings@sccourts.org>

Subject: Miller v. PEBA 14-ALJ-30-0539-CC; Edward W. Miller v. SCPEBA, Appellate Case No. 2015-002228

Crystal:

This e-mail is to follow our phone conversation of November 6, 2015 concerning my request for a transcript in the above matter. You were notified of this request via an e-mail on November 6, 2015 from Chelsea Clark, Staff Attorney with the S.C. Administrative Law Court, which included an attached copy of my letter requesting the transcript. In our conversation you indicated that you could not locate a transcript but would continue to look. Please confirm whether or not you have been able to locate a transcript in this matter.

Yours very truly,

Edward W. Miller

Edward W. Miller
44 West Avondale Drive
Greenville, South Carolina 29609

November 3, 2015

The Honorable Deborah Brooks Durden
South Carolina Law Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

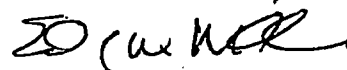
RE: Edward W. Miller v. SC Public Employee Benefit Authority, SC Retirement Systems, Docket No. 14-ALJ-30-0539-CC

Dear Judge Durden:

Pursuant to South Carolina Appellate Court Rule 207 (b), I request a copy of any and all transcripts in the above referenced matter. Specifically, I request a transcript from the hearing referenced in your Order denying Petitioner's Motion to Alter or Amend dated September 28, 2015.

I look forward to receipt of the transcript within the (60) day time period as prescribed by SCACR 207 (b) (2).

Yours very truly,



Edward W. Miller
Appellant

Cc: Jenny Abbott Kitchings, Clerk of the S.C. Court of Appeals

Justin R. Werner, Counsel for Respondent

FILED

NOV 04 2015

SC ADMIN. LAW COURT

Miller, Edward W.

From: Miller, Edward W.
Sent: Friday, October 02, 2015 10:06 AM
To: 'Deborah B. Durden'
Cc: jwerner@retirement.sc.gov; Robin Coleman
Subject: RE: Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Order

The September 24, 2015 telephonic communication between the parties and the Court has been characterized as a Hearing in the Order of the Court which has been published on the internet. One parties' comments in that communication have been cited in the Order. No notice was given as to what the purpose of the telephone communication was to be and certainly no notice was given that it would be a hearing of any type, formal or informal. I do not concur with any characterization of any statement made in that conversation.

This case was submitted to the Court for decision on the merits, based on stipulated facts and exhibits. It was not submitted for decision by way of a Motion for Summary Judgment. The Court was to decide the issues based on the stipulated facts, inferences from those facts and the stipulated exhibits submitted by the parties. By way of example, it was up to the Court to decide whether Respondent had violated a fiduciary duty, it was not for the parties to stipulate such a finding. The same is true with respect to unequal treatment of similarly situated beneficiaries. Paragraph A. 11 of the Joint Stipulations of Fact, and (the jointly stipulated Exhibit) Joe Watson's letter both show that this unequal treatment has taken place. It is not up to the parties to stipulate this uncontroverted fact as a "finding" as indicated in the Court's e-mail.

This claim would have arisen in 2002 had Respondent fulfilled its fiduciary obligation of full disclosure. However, because Respondent failed in its duty, this claim arose when Petitioner became aware of the unequal treatment of like situated beneficiaries in 2014. As soon as Petitioner learned of the inequality, a claim was filed. Therefore, either Respondent is estopped from asserting a timeliness issue, or the Court must consider this claim as arising when the Petitioner learned of the inequality and brought this action.

South Carolina Code section 9-1-290 speaks to rules and regulations being adopted by the governing Board of the System to prevent injustices and inequalities.

From: Deborah B. Durden [mailto:ddurden@scalc.net]
Sent: Wednesday, September 30, 2015 12:36 PM
To: Miller, Edward W.
Cc: jwerner@retirement.sc.gov; Robin Coleman
Subject: RE: Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Order

Judge Miller,

No transcript or recording of the September 24 teleconference was made. The sole purpose of the phone conference was to allow you an additional opportunity to fully explain your legal position on the issue you raised in your motion for reconsideration concerning the procedural posture of the case. No factual issues were considered and no testimony was taken during the telephonic hearing; no findings of fact were made based upon our telephonic conversation. It is not this court's practice to conduct such informal telephonic hearings on the record.

However, if you feel that I have misunderstood, or my order mischaracterized, your oral statements in that phone conference, I hope you will respond to this e-mail with a copy to Mr. Werner to explain where you believe I am in error.

The order did not address your equal protection argument because to do so would require me to reach the merits of the case. It would be inappropriate to reach that issue for two reasons: 1) my conclusion that the contested case was untimely; and 2) because the stipulations of fact submitted by the parties did not include stipulated findings necessary to decide the issue.

Regards,
Deborah Brooks Durden

From: Robin Coleman
Sent: Wednesday, September 30, 2015 10:59 AM
To: Deborah B. Durden <ddurden@scal.net>
Subject: FW: Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Order

Judge Durden: Please see below e-mail and advise.

Thank you.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

From: Miller, Edward W. [mailto:emillerj@sccourts.org]
Sent: Wednesday, September 30, 2015 10:24 AM
To: Robin Coleman <rcoleman@scal.net>; jwerner@retirement.sc.gov
Subject: RE: Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Order

I have received, via e-mail, the September 28, 2015 order of Judge Durden.

The Order declares that a "telephonic hearing" was conducted by the Court. The Order recites that "Petitioner acknowledged..." and "He stated..." (referring to the Petitioner) certain factual matters which were then used as a basis for the Court's findings. This telephonic communication was initiated by the Judge's office and was characterized in two e-mails as a teleconference to discuss Petitioner's Motion for Reconsideration. At no time was I given notice that this telephonic communication was to be treated as a formal hearing which would provide a basis for the findings by the Court. Consequently, please send me a copy of the transcript of this hearing or the name of the court reporter so that I can obtain the transcript directly from the reporter. This transcript will be included in the Record on Appeal, along with this e-mail and the e-mails initiating the telephonic communication.

I am also concerned that the Court failed to address all of the issues raised in Petitioner's Motion to Alter or Amend, particularly paragraph five (5) which concerns Respondent's unequal treatment of similarly situated beneficiaries.

Ned Miller

From: Robin Coleman [mailto:rcoleman@scal.net]
Sent: Monday, September 28, 2015 2:59 PM
To: Miller, Edward W.; jwerner@retirement.sc.gov
Subject: Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Order

The Honorable Miller, Mr. Werner: Please see attached Judge Durden's Order Denying Petitioner's Motion to Alter or Amend and Certificate of Service in the above-referenced case. The attachment has also been mailed to the Petitioner.

Please reply to indicate that you have received this e-mail.

Thank you.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate
<https://cn.arx.com/?options=7&bselected=MTU2>

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Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate  
<https://cn.arx.com/?options=7&bselected=MTU2>

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate  
<https://cn.arx.com/?options=7&bselected=MTU2>

**Miller, Edward W.**

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**From:** Robin Coleman <rcoleman@scalcn.net>  
**Sent:** Wednesday, September 23, 2015 2:23 PM  
**To:** Miller, Edward W.; jwerner@retirement.sc.gov  
**Subject:** Edward W. Miller v. S.C. PEBA, S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Teleconference

The Honorable Miller, Mr. Werner: A teleconference in the above-referenced case will be held tomorrow at 10:30 to discuss Petitioner's Motion for Reconsideration filed with this Court on September 2, 2015.

As a reminder, I will initiate the teleconference and call the following numbers: (864) 467-8559 and (803) 737-6894. Please let me know if you would prefer I call another number instead of the ones I have listed.

Thank you.

Robin E. Coleman  
Judicial Aide to Judge Deborah Brooks Durden  
S.C. Administrative Law Court  
1205 Pendleton Street, Suite 224  
Columbia, South Carolina 29201  
(803) 734-6407

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate  
<https://cn.arx.com/?options=7&bselected=MTU?>

**Miller, Edward W.**

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**From:** Robin Coleman <rcoleman@scalcn.net>  
**Sent:** Monday, September 21, 2015 2:23 PM  
**To:** Miller, Edward W.; jwerner@retirement.sc.gov  
**Subject:** Edward W. Miller v. S.C. PEBA; S.C. Retirement Systems; Docket No. 14-AJ-30-0539-CC; Teleconference

The Honorable Miller, Mr. Werner: Judge Durden is requesting a teleconference in the above-referenced case. She would like to discuss Petitioner's Motion for Reconsideration filed with this Court on September 2, 2015.

Please let me know if you will not be available on any of the following dates:

Tuesday, Sept. 22<sup>nd</sup>  
Thursday, Sept. 24<sup>th</sup>

I will initiate the teleconference and call the following numbers: (864) 467-8559 and (803) 737-6894. Please let me know if you would prefer I call another number instead of the ones I have listed.

Thank you.

Robin E. Coleman  
Judicial Aide to Judge Deborah Brooks Durden  
S.C. Administrative Law Court  
1205 Pendleton Street, Suite 224  
Columbia, South Carolina 29201  
(803) 734-6407

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate  
<https://cn.arx.com/?options=7&bselected=MTU2>



- 4.) This Court failed to rule whether or not Respondent's violation of its fiduciary duty to Petitioner should equitably estop Respondent from invoking any timeliness bar pursuant to any statutory rule or administrative regulation.
- 5.) This Court failed to rule whether or not Respondent's different treatment of identically situated beneficiaries violated the Constitutional mandate of equal protection under the law and the common law requirement that Respondent observe absolute equality of treatment to similarly situated beneficiaries, which are hallmarks of a qualified defined benefits pension plan.
- 6.) This Court failed to rule whether there is any evidence to support Respondent's assertion that it strongly disputes that it violated its fiduciary duties to Petitioner or constitutional equal protection guarantees.

#### CONCLUSIONS

For the reasons stated above and in his original and reply briefs, Petitioner requests that this Court issue its Order granting the relief requested by Petitioner.

Respectfully Submitted,



Edward W. Miller  
Petitioner

Dated: 9/2/15

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Edward W. Miller,

Petitioner,

v.

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

Respondent.

**JOINT STIPULATIONS OF FACT AND  
EXHIBITS**

**DOCKET NO. 14-ALJ-30-0539-CC**

Pursuant to the Order for Continuance and Scheduling Order issued on May 7, 2015, in the above-captioned matter, this Court, upon motion of the parties, agreed to adjudicate this case as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties to this case. Pursuant to that Order, ALC 25(C), and Rule 43(k), SCRCF, Petitioner Edward W. Miller ("Petitioner") and Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("Retirement Systems") hereby enter into, and submit, the following stipulations for the adjudication of this matter:

**A. Stipulations of Fact**

Petitioner and the Retirement Systems hereby jointly submit the following Stipulations of Fact in this matter:

1. Petitioner Edward W. Miller is an active member of the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS" or "System"), who has approximately 12 years of earned service credit and 16 years of purchased service credit in the System. Petitioner's membership in JSRS commenced on September 3, 2002, when he was seated as a Circuit Court Judge, having been elected to that position by the South Carolina General Assembly in May 2002.
2. Prior to his election to the Circuit Court, Petitioner was employed as an assistant public defender with the Greenville County Public Defender's Office between May 1986 and June 2002, in addition to maintaining a full private law practice during that period.

3. After his election to the bench, but prior to being seated, Petitioner contacted the Retirement Systems in July 2002 to inquire about purchasing public service credit in the JSRS for his prior employment with the Greenville County Public Defender's Office. As a result of that contact, by a letter dated July 25, 2002, the Retirement Systems forwarded a Request for Service Verification form to Petitioner to obtain the verification of his employment with the public defender's office necessary to process his service purchase request.
4. On December 16, 2002, the Retirement Systems received the completed service verification form signed by Petitioner and the public defender's office.
5. Based upon the verification form, the Retirement Systems determined that Petitioner was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS in connection with his prior employment with the Greenville County Public Defender's Office between May 1986 and June 2002, for a cost of \$43,963.02.
6. By a letter dated December 23, 2002, the Retirement Systems mailed Petitioner a Member Service Payment Invoice for the purchase of the 9 years, 8 months, and 5 days of public service credit.
7. Subsequently, on August 1, 2003, Claimant completed the purchase of the public service credit as invoiced.
8. By telephone contacts and correspondence with the Retirement Systems beginning in March 2014, Petitioner began inquiring as to whether the amount of public service credit he was eligible to purchase had been properly calculated by the Systems in 2002. By a letter dated August 7, 2014, Petitioner submitted a request for formal review of the December 2002 determination of the amount of public service credit he was eligible to purchase in JSRS for his employment with the Greenville County Public Defender's Office.
9. By Final Agency Determination No. 14-015 issued on October 17, 2014, the Retirement Systems found that Petitioner's request for review of the December 2002 calculation of the public service credit he was eligible to purchase for his employment with the Greenville County Public Defender's Office was not timely filed and should be dismissed.

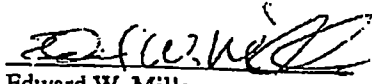
10. Petitioner now seeks review of that Final Agency Determination in this contested case proceeding.
11. Petitioner is aware of another member of JSRS who was found eligible to establish full-time service credit in JSRS for a period of performing indigent criminal defense contract work for Greenville County. Although this member was employed directly by Greenville County, rather than by the Greenville County Public Defender's Office, the member performed substantially similar work in that employment to the work performed by Petitioner that is the subject of Petitioner's service purchase appeal.

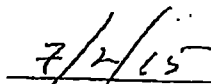
**B. Joint Exhibits**

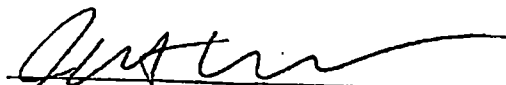
Petitioner and the Retirement Systems hereby jointly submit, and stipulate to the admissibility of, the following Exhibits in this matter:

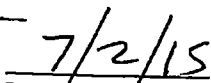
1. Letter from the Retirement Systems to Petitioner dated July 25, 2002.
2. Request for Service Verification received by the Retirement Systems on December 16, 2002.
3. Letter from the Retirement Systems to Petitioner dated December 23, 2002, enclosing Member Service Payment Invoice dated December 20, 2002.
4. Letter from the Retirement Systems to Petitioner dated August 1, 2003, acknowledging the receipt of service purchase payment.
5. Letter from Petitioner to the Retirement Systems dated August 7, 2014, and attached documents.
6. Final Agency Determination No. 14-015 issued by the Retirement Systems on October 17, 2014.

**WE SO STIPULATE:**

  
Edward W. Miller  
Petitioner

  
Date

  
Justin R. Werner  
Attorney for Respondent

  
Date

Jim Hodges, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

James A. Lander  
Comptroller General

**State Budget and Control Board**  
**South Carolina Retirement Systems**



(803) 737-8800

Peggy G. Boykin, CPA  
Director

1-800-868-8002

SER LTR TO MBR

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Harrell, Jr.  
Chairman,  
Ways and Means Committee

Frank W. Fusco  
Executive Director

July 25, 2002

Mr. Edward W. Miller  
44 West Avondale Drive  
Greenville, SC 29809

Re: SSN [REDACTED]  
JSRS

Dear Mr. Miller:

In follow up to our telephone conversation on July 25, 2002, concerning the purchase of additional service under the Judges Solicitors Retirement System (JSRS), I am pleased to provide the following information.

As discussed, I am enclosing a Request for Service Verification form for obtaining verification of your part time employment rendered with the Greenville County Public Defender Corp. Please complete Part I and forward to your former employer for completion of Part II.

If you should have any further questions, please feel free to contact me at 803-737-7491.

Sincerely,

Sharon Pligage  
Service Department

enclosure



Fontaine Business Center, 202 Arbor Lake Drive, Post Office Box 11960, Columbia, South Carolina 29211-1960

Please Print or  
Type in Black Ink

**REQUEST FOR SERVICE VERIFICATION**  
State Budget and Control Board  
South Carolina Retirement Systems  
Service Department  
PO Box 11960, Columbia SC 29211-1960

**RECEIVED**

DEC 16 2002

SERVICE

**PART I - MEMBER INFORMATION** - To be completed by the member. A separate form must be completed for each employer verification to be made.

|                                                |              |                                      |  |                                                          |
|------------------------------------------------|--------------|--------------------------------------|--|----------------------------------------------------------|
| Last Name & Suffix (Sr., Jr., etc.):<br>Miller |              | First Name/Middle Name:<br>Edward W. |  | Social Security Number:<br>[REDACTED]                    |
| Address:<br>44 W. Avondale Dr.                 |              |                                      |  | Telephone:<br>Work (864) 467-8559<br>Home (864) 232-6334 |
| City:<br>Greenville                            | State:<br>SC | Zip + 4:<br>29609                    |  |                                                          |

1. List the employer name, address and dates of service:

|                                                             |               |      |    |      |    |    |      |
|-------------------------------------------------------------|---------------|------|----|------|----|----|------|
| Employer Name:<br>Defender Corporation of Greenville County |               | From |    |      | To |    |      |
| Address:<br>Room 123, Greenville County Courthouse          |               | MM   | DD | YYYY | MM | DD | YYYY |
| City:<br>Greenville                                         | State:<br>SC  | 04   | 01 | 1980 | 06 | 30 | 1981 |
|                                                             | Zip:<br>29601 | 05   | 12 | 1986 | 05 | 30 | 2002 |

|                                                                     |                                                                                                 |                                                                                                                                                             |
|---------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2. Full name at time service was rendered, if different from above: | 3. Was this service full time?<br><input type="radio"/> Yes <input checked="" type="radio"/> No | 4. Were you covered by a public retirement system or plan?<br><input type="radio"/> Yes <input checked="" type="radio"/> No<br>If "yes", give name of plan: |
|---------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|

5. Additional comments that may help in verifying this service (if any):

6. Indicate any additional employer(s) for which you are seeking to obtain service verification other than that listed above:

|       |       |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

I hereby request and authorize the release of the information requested on this form and any additional information necessary to document this claim for service.

Member Signature: Edward W. Miller

Date: 12/11/02

PLEASE FORWARD THIS FORM TO THE EMPLOYER FROM WHICH YOU ARE SEEKING VERIFICATION TO COMPLETE PART II.

Call our Customer Service Department with any questions: 1-800-888-9002 (In state) or 803-251-1234

**EXHIBIT**

2

Page 2:

**PART II - EMPLOYER VERIFICATION - To be completed by an authorized employee of the verifying entity.**

1. Name of former employee as shown on records: Edward W. Miller 2. Former employee's Social Security #: [REDACTED]

3. Indicate, in the chart below, position title(s), exact dates of employment and amount(s) of earnings by fiscal year (July 1 - June 30). Please indicate in Column (A) whether the employee held a 9, 10, 11 or 12 month position. Indicate "Yes" or "No" for columns (B) - (D): Column (B)-was work classified as "student employment"? (employment performed by an individual at an institution in which he/she was enrolled. This does not apply to student bus driving.) Column (C)-were retirement contributions withheld from employee's pay? Column (D)-was employment full time? Column (E)-if employment was part-time, indicate percentage of time worked relative to full time employment or hourly rate of pay. If employee was a substitute teacher show number of days taught or duty rate of pay.

| (A)<br>Contract<br>Period | Position Title      | From<br>MM DD YYYY | To<br>MM DD YYYY | Earnings   | (B)<br>Student<br>Employment? | (C)<br>Retirement<br>Withheld? | (D)<br>Full-<br>Time | (E)<br>Part-<br>Time % |
|---------------------------|---------------------|--------------------|------------------|------------|-------------------------------|--------------------------------|----------------------|------------------------|
| 12                        | Asst. Pub. Defender | 04 01 1980         | 06 30 1981       | 22,437.96  | No                            | Yes                            | Yes                  | No                     |
| 12                        | Asst. Pub. Defender | 05 12 1986         | 06 30 2002       | 302,086.84 | No                            | No                             | No                   | 60%                    |
|                           |                     |                    |                  |            |                               |                                |                      |                        |
|                           |                     |                    |                  |            |                               |                                |                      |                        |

4. Did this employee receive credit for this service under any retirement/pension plan?  
☒ Yes ☐ No If "Yes," give name of plan: 1986-2002 Non withheld  
1980-1981, S.C. Retirement System

5. Was entity public or private at the time service was performed? Check one: ☐ Public ☒ Private

6. If you are unable to verify the service indicated in Part I, please explain.

**RECEIVED**  
 DEC 16 2002  
 SERVICE

On the basis of official records, I certify that the individual herein identified was engaged in above stated employment, and that said individual received compensation for this service as documented above. I also certify that I am currently employed by said employer.

Prepared by (please print) Frances J. Garrett Agency Name/State Public Defender Office, South Carolina  
 Signature/Title [Signature] Date 12-11-2002 Telephone (864) 467-8522

**PLEASE FORWARD THIS FORM TO THE APPROPRIATE RETIREMENT SYSTEM OR PLAN ADMINISTRATOR TO COMPLETE PART III.**

**PART III - RETIREMENT SYSTEM/ PLAN ADMINISTRATOR VERIFICATION - To be completed by the retirement system or plan administrator and then returned to the S.C. Retirement Systems.**

The individual identified in Part I of this form wishes to establish credit with the S.C. Retirement Systems for above stated service. S.C. law does not permit the purchase of this credit if the individual is eligible to receive a benefit in another defined benefit plan. Please complete the information below, indicating this individual's eligibility for retirement benefits from your system/plan.

1. Type of plan: ☐ defined benefit plan (check one) ☐ defined contribution plan 2. Were contributions remitted by: ☐ employer ☐ employee  
 3. Has this individual withdrawn contributions? ☐ Yes ☐ No 4. Is this individual receiving, or entitled to receive, a benefit based on the employment indicated in Part II? ☐ Yes ☐ No  
 If "Yes", give date of withdrawal: MM-DD-YYYY

Prepared by (please print) \_\_\_\_\_ Retirement System/Plan Administrator \_\_\_\_\_  
 Signature/Title \_\_\_\_\_ Date \_\_\_\_\_ Telephone \_\_\_\_\_

Please return completed form to:  
 S.C. Retirement Systems, P.O. Box 11980 Columbia, SC 29211-1980

Call our Customer Service Department with any questions: 1-800-868-8002 (In state) or 803-737-6800

Jim Hodges, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

James A. Lander  
Comptroller General

**State Budget and Control Board**  
**South Carolina Retirement Systems**



(803) 737-6800

Peggy G. Boykin, CPA  
Director

1-800-868-8002

**SER PA LTR 12/23/02**

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Harrell, Jr.  
Chairman,  
Ways and Means Committee

Frank W. Fusco  
Executive Director

December 23, 2002

The Honorable Edward W. Miller  
44 West Avenue Drive  
Greenville, SC 29611

Re: SSN [REDACTED]  
JSRS

Dear Judge Miller:

We have calculated a cost in the amount of \$5,676.75 to establish 1 year 3 months of service credit under the Judges Solicitors Retirement System. This represents a period of service previously withdrawn from the South Carolina Retirement System while employed as an Assistant Public Defender with Greenville County.

Also, I am enclosing a separate payment invoice for public service reflecting the cost to establish an additional period of service rendered with the Defender Corporation of Greenville County.

These costs are valid through June 18, 2003. In addition, I am enclosing additional information pertaining to the various payment options available for purchasing service credit.

If you should have any questions regarding this information, please feel free to contact me at 803-737-7491.

Sincerely,

Sharon Pigage  
Service Department

enclosures

Fontaine Business Center, 202 Arbor Lake Drive, Post Office Box 11960, Columbia, South Carolina 29211

**EXHIBIT**

**3**

# South Carolina Retirement Systems

## Member Service Payment Invoice

EDWARD WALTER MILLER  
44 WEST AVE DR  
GREENVILLE SC 29611

Date: December 20, 2002  
Invoice Number: [REDACTED] 875001  
Employer Code: 1.00  
System: JSRS

The following is provided to allow you to establish: **PUBLIC SERVICE**

| <u>Begin Date</u> | <u>End Date</u> | <u>FTE%</u> | <u>Service Credit</u>      |
|-------------------|-----------------|-------------|----------------------------|
| 05-12-1988        | 08-30-2002      | 060         | 09 Years 08 Months 05 Days |

Total Service Credit:

09 Years 08 Months 05 Days

Member Payment Required \$ 43,963.02

Invoice Expiration Date: June 18, 2003

You must be an active contributing member at the time your payment is remitted. Please make all checks payable to the South Carolina Retirement Systems and remit a copy of this invoice with payment. Retirement benefits contingent on this service purchase will not be effective until full payment is received.

Upon processing your service payment or payroll deduction request, an additional review will be performed. If this results in changes to the amount of your payment or your service credit, you will be notified.

If you wish to select the payroll deduction option, complete the following portion of this invoice for an estimate. After processing, you will receive a Payroll Withholding Authorization form indicating a payroll deduction amount for your review and signature.

Member Payment Required: \$ \_\_\_\_\_

Down Payment (Optional): \$ \_\_\_\_\_ (Do Not Send Payment with this Form)

Amount to be Financed :  
(Member Payment less Down Payment) \$ \_\_\_\_\_

Number of Months to be Financed: \_\_\_\_\_ Pay Frequency: \_\_\_\_\_ (Checks Received Per Year)

State Budget and Control Board \* South Carolina Retirement Systems  
Fontaine Business Center \* 202 Arbor Lake Drive \* Post Office Box 11960 \* Columbia, South Carolina 29211  
803-737-8500 \* 800-888-9002 (SC only)

Mark Sanford, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

Richard Eckstrom  
Comptroller General

# State Budget and Control Board South Carolina Retirement Systems



1-800-888-9002  
(803) 737-6800

Peggy G. Boykin, CPA  
Director

FAX (803) 737-6810

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Hamell, Jr.  
Chairman,  
Ways and Means Committee

Frank Fusco  
Executive Director

August 01, 2003

EDWARD WALTER MILLER  
44 WEST AVE DR  
GREENVILLE SC 29611

RE: Invoice Num [REDACTED] 875001  
Invoice Amt: \$43,963.02

SSN: 250-80-7618

Dear Member:

We acknowledge the receipt of your payment in the amount of \$43,963.02 to establish PUBLIC SERVICE credit for the time representing a total service credit of 9 year(s) 8 month(s) and 5 day(s).

If you should have any questions, please contact our Customer Service Department at (803) 737-6800 or (800) 868-9002 (in state members only).

EXHIBIT

4



**RECEIVED**

AUG 11 2014

PEBA LEGAL

State of South Carolina

**The Circuit Court of the Thirteenth Judicial Circuit**

Edward W. Miller  
Judge

Greenville County Courthouse  
305 E. North Street, Suite 219  
Greenville, SC 29609-4761  
Phone: (864) 487-8558  
Fax: (864) 233-4173

August 7, 2014

Mr. Stephen Van Camp, Esq.  
SC PEBA  
P.O. Box 11960  
Columbia, SC 29211-1960

Dear Mr. Van Camp:

Please allow this letter to serve as the vehicle by which I appeal your agency's decision in December of 2002 to allow me to purchase only 60% of my allowable service credit for the time period of May 12, 1986 through June 30, 2002. I understand that the basis for this decision was the declaration on page two of your form "Request for Service Verification", submitted by the Greenville County Public Defender's office and received by your agency on December 16, 2002. The declaration described my service with the Defender office as 60% part-time employee.

At the time I received your decision I was a brand new Circuit Court Judge and was in the process of absorbing the heavy responsibilities that come with that office. I did not question the decision of the agency and, I confess, I did not fully understand the reasoning behind the agency's determination. As a result of my request to purchase service time, I purchased the amounts which are listed in your letter to me dated December 23, 2002 and the enclosed invoices. Then, in December of 2005, pursuant to a change in the law, at a much higher cost, I was allowed to purchase an additional 5 years and 25 days. Again, at that time, I was unaware of the issues which I am now raising in this appeal. I became aware of these circumstances as a result of a presentation made by Mr. Ronald Davis, of the PEBA Agency, in the spring of 2014 to the annual Circuit Judges Association meeting.

EXHIBIT

5

It is my position that the agency decision in 2002 was wrong and that I should have been allowed to purchase 100% of my earned service time from May 1986 until June 2002, in addition to my purchased service from April, 1980 through June 1981. It is further my position that, during this disputed time-frame, I was, in fact, performing a full-time workload and I should have been given credit as a full-time employee for purposes of the purchase of earned service time. It is further my position that the declaration describing my service at the Public Defender office on page two of the "Request for Service Verification" form is misleading, and incorrect for purposes of determining earned service credit.

I, therefore, respectfully request that I be allowed to purchase 15 months of earned service time, which was previously disallowed, at the cost which was in effect at the time of my original purchase in 2003. I also request that the cost of my second purchase in 2005 be recomputed at the cost rate applicable in 2003 and that any overpayment be refunded to me (or that any refundable amount be applied first to the purchase of the additional 15 months of service I am now seeking to purchase). I would point out that during my last three semesters in law school, I was employed at the Richland County Public Defender office as a law clerk; I did not request, in 2002, that I be allowed to purchase this time, and, therefore, I now request that I be allowed to pursue this purchase as well.

A better understanding of the nature of my employment with the Public Defender office during the time frame of May 1986 through June 2002 requires some background and explanation. Greenville County uses a hybrid system to handle indigent defense services. In 1981 Greenville County Council stopped funding the Public Defender office and began hiring private attorneys on a contractual basis to represent indigent defendants. All full-time assistant Public Defender positions were eliminated. The Public Defender office continued operating on a limited budget without any funding from Greenville County. A number of attorneys, in private practice, individually contracted with Greenville County to perform indigent defense representation. These contract attorneys essentially took over full time assistant Public Defender duties, in addition to their individual law practices. Former Circuit Judge Joe Watson was one of these contract attorneys for a three year period (please see the first paragraph on the second page of his attached letter). Although I was employed by the Public Defender office and not Greenville County, I performed the same duties as the contract attorneys, and I handled a caseload as large, or larger, than the contract attorneys. My caseload at the Public Defender office regularly exceeded 400 open, active files (please see the paragraph three of the Affidavit of Fran Garrett) and I believe that the relevant American Bar Association's guidelines recommended less than half that number.

The declaration contained on the "Request for Service Verification" form that I was a 60% part-time employee is misleading. I performed a full-time job at the Greenville County Public Defender office; I handled a full caseload for the entire time that I was employed there. I performed the duties and had the responsibilities of a full time assistant Public Defender. In fact, during the 1980's and early 1990's, as Mr. Partee approached retirement, I handled almost every jury trial from the two caseloads assigned to that office, whether it was assigned to either Mr. Partee or me (other than capital cases). After Mr. Mauldin became Public Defender and he began hiring full-time assistants, I helped mentor those new young lawyers in addition to handling a full caseload (please see the attached letter from Caroline Horlbeck). I also

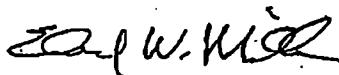
maintained a full private practice, first in a small firm and then in a solo practice. The reason I was described as a part-time employee was because the Public Defender office did not have the resources to hire full-time assistants; and it allowed me to pursue the private practice of law (please see paragraph six of the Affidavit of Fran Garrett).

Enclosed please find: an affidavit from Fran Garrett, who filled out and signed the 2002 "Request for Service Verification" and was the office manager for the Public Defender office throughout this time period; a letter from Caroline Horlbeck, who is one of the young attorneys who I helped mentor; and a letter from Joe Watson, the former 13<sup>th</sup> Circuit Solicitor and Circuit Court Judge. I understand that you are already in possession of a letter from current Circuit Defender John Mauldin. I rely on each of these communications to support my position.

Significantly, I believe Joe Watson's letter is directly on point. Mr. Watson worked as a Greenville County contract indigent defense attorney in one of the positions I have described above. I performed the same duties and had the same responsibilities as Mr. Watson for the service credit I am seeking to purchase. The agency allowed Mr. Watson to purchase 100% of his claimed service. My service stands in the same posture as that already approved, allowed and sanctioned by the agency for Mr. Watson. My claim was denied because of a simple misunderstanding and what amounts to a misleading answer on the "Request for Service Verification" form.

Thank you in advance for your review and consideration of this appeal. I believe my position is meritorious and fully supported by abundant credible evidence. If you require more information or submissions in support of my position, I will be happy to obtain and provide the same. If I can help in any other fashion please let me know. I look forward to hearing from you, and with kind regards, I am

Yours very truly,



Edward W. "Ned" Miller

**JOE WATSON**

ATTORNEY AT LAW

650 E WASHINGTON STREET  
GREENVILLE, SOUTH CAROLINA 29601

TELEPHONE (864) 467-0380  
FACSIMILE (864) 672-1406  
EMAIL [JOE@JOEWATSONLAW.COM](mailto:JOE@JOEWATSONLAW.COM)

July 29, 2014

**RECEIVED**

AUG 11 2014

**PEBA LEGAL**

Stephen Van Camp  
SC PEBA  
PO Box 11960  
Columbia, SC 29211-1960

Re: Edward W. Miller

Dear Stephen:

Judge Miller has asked that I write to you regarding his work with the Greenville County Public Defender's Office between 1986 and 2002. During this time I served as the Thirteenth Circuit Solicitor and worked closely with Judge Miller.

Let me back up and give you a little bit of history. I served as an Assistant Solicitor from 1978 to 1982 and was in private practice from 1982 to 1985. In the Spring of 1981, Greenville County Council voted to strip all funding to the Greenville County Public Defender's Office and directly contracted with private attorneys to provide indigent services. That left Greenville County with dual Public Defender Systems; one paid for and administered by Greenville County and the other, a State funded office which was manned only by Pete Partee.

I took office as Solicitor on July 1, 1985. Judge Miller was hired in May of 1986 as the only Assistant Solicitor under Pete Partee. From 1986 to 1992, when Mr. Partee retired, Judge Miller was the defacto Public Defender. Judge Miller carried a full-time case load and was the person I generally dealt with, as Solicitor, when it came to public defender matters. Mr. Partee retired in 1992 and John Mauldin assumed the position of Greenville County Public Defender. Judge Miller continued to carry a full case load with the Public Defender's Office until July of 2002 when he went on the bench. During this time I worked with him as Solicitor, and later as Circuit Court Judge, on matters relating to the Greenville Public Defender's Office.

Page 2  
Van Camp letter  
July 29, 2014

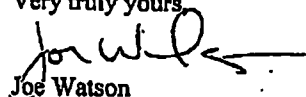
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**RECEIVED**  
AUG 11 2014  
PEBA LEGAL

It is my understanding that Judge Miller is attempting to credit some of his time as Assistant Public Defender towards his Judicial Retirement. As a side note, when I was in private practice between 1982 and 1985, I had one of the aforementioned contracts through Greenville County to handle indigent defense cases on a part-time basis. I was allowed to purchase these three years when I was on the bench and credit them to my retirement.

I hope this information is helpful to you. If you have any questions, please feel free to give me a call.

Very truly yours

  
Joe Watson

JJW/da

**RECEIVED**

AUG 11 2014

PEBA LEGAL

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

AFFIDAVIT

Appears before me the undersigned, Fran Garrett, who first being duly sworn hereby deposes and says:

I was an employee of the Greenville County Public Defender's Office as an Office Manager and Administrative Assistant from January 1985, in a full-time and part-time capacity, until 2012.

In 1986, Ned Miller was employed on a contractual basis as an Assistant Public Defender. Mr. Pete Partee was the County Public Defender. Ned Miller was the only other attorney in the office. In 1992, Mr. Partee retired and was replaced by Mr. John Mauldin. Ned Miller continued as an Assistant Public Defender until 2002 when he was elected Circuit Judge.

Throughout the course of Ned Miller's employment at the Public Defender's Office he handled a full case load. He regularly had an active case load of greater than 400 cases. Mr. Miller's duties with the Public Defender office were in addition to his private practice of law.

After Mr. Mauldin became the County Public Defender, the office began to add other part-time assistant and full-time assistant Public Defenders. Each of these carried the same caseload with the same responsibilities.

I was responsible for filling out Ned Miller's Request for Service Verification Form which was prepared for the South Carolina Retirement Systems. I was responsible for listing him as a 60% part-time Public Defender on page 2 of that form.

The reason that Ned Miller was listed as a part-time Public Defender, although he was performing full-time duties, was because he was not designated in our office records as a full-time employee. Such a designation would have required that he be provided other benefits and be subject to a different status with the County government, including tax requirements; it would have prevented him from operating his private law practice as well. The office did not have the resources to employ full time persons and the arrangement with Mr. Miller allowed for full time work without the commensurate cost and expense.

Consequently, the fact that Ned Miller was listed as a part-time employee is misleading. He did as much or more indigent defense work as other private attorneys who contracted with Greenville County to perform Indigent Defense Services, although those persons were not connected with the Public Defender's Office and contracted independently with Greenville County. His part time designation was the vehicle which allowed the Public Defender office to provide representation to indigents in the hybrid indigent defense system employed by Greenville County. This hybrid system continued throughout my employment and caseloads remained the same for part time and full time employees the entire time.

I believe he should be given credit for Retirement System Services as a full-time employee because of the amount of work he performed and his role as an assistant in the Public Defender's Office.

Further Affiant sayeth not.

DATED this 5<sup>th</sup> day of Aug., 2014.

Ikron Barrett  
Signature of Affiant

SUBSCRIBE AND SWORN before me this 5<sup>th</sup> day of August, 2014.

Bernice G. Bauldakov  
Notary Public

My Commission Expires: 11-8-2014

CAROLINE M. HORLBECK  
ATTORNEY AT LAW

101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601  
horlbecklawfirm@gmail.com

(864) 315-9919  
Fax (864) 232-4756

July 31, 2014

**RECEIVED**

AUG 11 2014

PEBA LEGAL

Stephen Van Camp  
SC PEBA  
Post Office Box 11960  
Columbia, SC 29211-1960

Re: Edward W. Miller

Dear Stephen:

Circuit Judge Ned Miller asked that I contact you regarding his work with the Greenville County Public Defender Office. Ned was a part-time Assistant Public Defender when I became a full-time Assistant PD in 1996. I worked with Ned until he became a Judge in 2002.

During the time period referenced above, it was common knowledge in the PD Office that part-time attorneys maintained a full-time caseload. This increased caseload was a direct result of limited funding and a yearly increase in the number of cases appointed to the PD Office. During Ned's employment, the PD Office was funded solely with limited State money. Low funding coupled with a yearly increase in appointed cases forced the PD Office to utilize part-time positions to cover full-time responsibilities.

As a part-time Assistant PD, Ned assumed the same responsibilities as a full-time PD. Support staff was limited during this time and all attorneys, part-time included, were expected to pick up the slack. Despite limited assistance from staff, Ned met with clients, reviewed files, conducted research, negotiated with solicitors, and appeared in court for bond hearings, preliminary hearings, plea hearings and jury trials.

I am currently in private practice and have been a part-time Assistant PD since 2005. Funding for the PD Office has now increased and the office now employs eleven full-time Assistant PD's, eight part-time Assistant PD's and support staff. Although it is now easier to maintain a part-time position in the PD Office, this position always has and always will require a great deal of work. I ask that you take this information into consideration as you make your decision. Please contact me if you have any questions regarding this letter.

Yours very truly,

*Caroline M. Horlbeck*  
Caroline M. Horlbeck

**OFFICE OF THE PUBLIC DEFENDER  
13<sup>TH</sup> JUDICIAL CIRCUIT  
Greenville County Courthouse  
305 East North Street, Room 123  
GREENVILLE, SOUTH CAROLINA 29601**

John I. Mauldin  
Public Defender

TEL (864) 467-8522  
FAX (864) 467-8521

April 18, 2014

**RECEIVED**

JUN 20 2014

**CUSTOMER INTAKE**

Sharon Pigage  
SC PEBA  
P. O. Box 11960  
Columbia, SC 29211-1960

Re: Edward W. Miller

Dear Sharon:

Circuit Judge Ned Miller asked that I contact you offering clarification of his work with the Greenville County Public Defender Office prior to being elected circuit judge. Ned was originally hired as a fulltime Assistant Public Defender in April 1980. At that time, the office was fully staffed and receiving funding from the state as well as Greenville County. I was serving on the Board of Directors of the Defender Corporation and we had a total of 7 lawyers including the Chief Public Defender, Pete Partee.

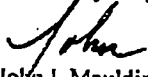
In the spring of 1981, the Board received notice that Greenville County Council had voted to eliminate funding support for the office and institute an independent contractor system for delivery of the legal representation. The Council refused to reconsider this position and as a result, six Assistant Public Defenders including Ned Miller, were fired effective June 30, 1981. The Defender Office continued to function on state funding with Mr. Partee the only fulltime lawyer.

In May of 1986, the Board offered to re-hire Ned as an Assistant PD. Due to the fact that our funding was still very low (state money only) and we had only minimum office space provided by the county, Ned returned to the staff as a contractor. He was the only assistant and his caseload was that equivalent of a fulltime lawyer.

Mr. Partee retired in 1992 and I was appointed to the Chief Public Defender position. Ned continued to work for me in the Defender Office until June 30, 2002. Because of funding shortages as well as limited office space, the Defender Office was forced to utilize part-time positions to cover fulltime responsibilities.

During all the years from 1986 until he was elected judge in 2002, Ned carried and was responsible for handling a full case load. If you have any questions, don't hesitate to give me a call.

Yours very truly,

  
John I. Mauldin

JIM/bab

cc: The Honorable Edward W. Miller, Circuit Judge

South Carolina  
PUBLIC EMPLOYEE BENEFIT AUTHORITY

**PEBA**

Peggy O. Boykin, CPA  
Executive Director  
Retirement Benefits

**FINAL AGENCY DETERMINATION**

**NO. 14-015**

In Re: Edward W. Miller, SSN XXX-XX-7618

This Final Agency Determination is issued in accordance with the South Carolina Retirement Systems Claims Procedures Act set out at S.C. Code Ann. §§ 9-21-10 et seq. (Supp. 2013) and the South Carolina Retirement Systems Claims Procedure (2005). In this matter, Claimant Edward W. Miller ("Claimant") seeks review of the determination made by the Retirement System for Judges and Solicitors in 2002 regarding the amount of the public service credit he was eligible to purchase in connection with his employment with the Greenville County Public Defender's Office between 1986 and 2002.

**BACKGROUND**

Claimant Edward W. Miller is an active member of the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS" or "System"), who has approximately 12 years of earned service credit and 16 years of purchased service credit in the System. Claimant's membership in JSRS commenced on September 3, 2002, when he was seated as a Circuit Court Judge, having been elected to that position by the South Carolina General Assembly in May 2002. Prior to his election to the Circuit Court, Claimant was employed as an assistant public defender with the Greenville County Public Defender's Office between May 1986 and June 2002, in addition to maintaining a full private law practice during that period. As set forth below, Claimant now seeks review of the determination made by JSRS in December 2002 regarding the amount of service credit he was eligible to purchase in the System in connection with his employment with the public defender's office.

After his election to the bench, but prior to being seated, Claimant contacted JSRS in late July 2002 to inquire about purchasing public service credit in the System for his prior employment with the Greenville County Public Defender's Office. During these communications, Claimant's employment with the public defender's office was characterized as

Street Address:  
202 Arbor Lake Drive  
Columbia, South Carolina 29223

[www.retirement.sc.gov](http://www.retirement.sc.gov)  
803-737-6800  
800-868-9002 (within S.C. only)

Mailing Address:  
Columbia, Sou

**EXHIBIT**

6

part-time employment. As a result of those discussions, by a letter dated July 25, 2002, the System forwarded a Request for Service Verification form to Claimant to obtain the verification of his employment with the public defender's office necessary to process his service purchase request. On December 16, 2002, JSRS received the completed service verification form signed by Claimant and the public defender's office. In the member information section of the form, Claimant indicated that he had been employed by the defender's office between May 12, 1986, and June 30, 2002, but that the employment had not been "full time" service. Similarly, in the employer verification section of the form, the public defender's office confirmed that Claimant had been employed by the office as an assistant public defender between May 1986 and June 2002 and that the service had not been "full time" service, but had been part-time service equal to 60% of full-time employment. The defender's office also verified on the form that Claimant's total earnings for the sixteen years of his employment with the office had been \$302,086.84.<sup>1</sup>

Based upon the verification form, JSRS determined that Claimant was eligible to purchase 9 years, 8 months, and 5 days of public service credit in the System in connection with his part-time employment with the Greenville County Public Defender's Office between May 1986 and June 2002, for a cost of \$43,963.02.<sup>2</sup> By a letter dated December 23, 2002, the System mailed Claimant a Member Service Payment Invoice for the purchase of the 9 years, 8 months, and 5 days of public service credit. Subsequently, on August 1, 2003, Claimant completed the purchase of the public service credit as invoiced.

By telephone contacts and correspondence with the System beginning in March 2014, Claimant began inquiring as to whether the amount of public service credit he was eligible to purchase had been properly calculated by JSRS in 2002. Ultimately, by a letter dated August 7, 2014, Claimant submitted a letter requesting formal review of the December 2002 determination of the amount of public service credit he was eligible to purchase in JSRS for his employment

---

<sup>1</sup> This form also reflects that Claimant was employed by the public defender's office in a full-time position between April 1980 and June 1981. Claimant participated in the South Carolina Retirement System in connection with that employment, withdrawing his contributions upon leaving the position in 1981. Claimant established full credit for that year and three months of withdrawn service in JSRS at the same time as the public service purchase in question in this matter. The calculation of the purchase of this withdrawn service is not in dispute.

<sup>2</sup> This 9 years, 8 months, and 5 days of credit was determined by applying the 60% part-time percentage reported on the verification form to the 16 years, 1 month, and 18 days of the total duration of his employment for the public defender's office.

with the Greenville County Public Defender's Office. This Final Agency Determination is issued in response to that request for review.

#### DISCUSSION

In this matter, Claimant seeks to "appeal [the] agency's decision in December of 2002 to allow [him] to purchase only 60% of [his] allowable service credit for the time period of May 12, 1986 through June 30, 2002." In particular, Claimant contends that the part-time service reported on the Request for Service Verification form completed by Claimant and the defender's office in December 2002 reflected only his nominal classification as a part-time assistant public defender for staffing and benefit purposes, but did not reflect his true workload in that position, which was consistent with the caseload and time demands of a full-time public defender. Unfortunately, as set forth below, I find that Claimant's request for review of the December 2002 calculation of the public service credit he was eligible to purchase was not timely filed and should be dismissed.

The time of the decision for which Claimant seeks review in this matter and the time of the filing of his request for review bridge two sets of administrative procedures. When JSRS reached its decision on the amount of public service credit he was eligible to purchase in December 2002, the proper recourse for a member of JSRS who disagreed with a determination made by the System, including a determination involving the purchase of service credit, was to seek administrative review of that determination under the System's internal administrative review procedures. See Internal Administrative Review Procedures for the South Carolina Retirement Systems § 1(a)(6) (1997) [hereinafter Administrative Review Procedures]. Under those procedures, the member would initiate the administrative review by requesting that the appropriate department manager review the disputed decision and issue a formal administrative ruling in the matter, which could, in turn, be appealed to the appropriate Deputy Director of the South Carolina Retirement Systems and then the Director of the Retirement Systems. Administrative Review Procedures §§ 2(a)-(b), 3(a). In order to properly initiate review of a decision of the System, the member was required to make the initial request for formal review by the department manager within thirty days of his notification of the determination at issue. Administrative Review Procedures § 2(a) ("The request for formal review must be made within thirty (30) days after notification of the determination.") (emphasis added). And, if the member failed to timely make that request, or otherwise failed to comply with the administrative review

procedures; the review of the determination would terminate and the System's initial decision would "be deemed the final decision of the agency and the Budget and Control Board." Administrative Review Procedures § 1(c).

These internal administrative review procedures were supplanted by the enactment of the South Carolina Retirement Systems Claims Procedures Act in 2003. See S.C. Code Ann. § 9-21-10 et seq. (Supp. 2013). For claims filed after July 1, 2003, the Claims Procedures Act, and the procedures set forth therein, "constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member or a member's designated beneficiary arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina," and any claim presenting such a dispute "must be resolved in accordance with the procedures and provisions provided in [the Claims Procedures Act]." Id. § 9-21-30. In order to timely file a claim with the retirement systems under the Claims Procedures Act,

[a] member or the member's designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member's designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems.

Id. § 9-21-50(A) (emphasis added). If a member fails to timely file such a claim, the member is considered to have failed to exhaust his or her agency remedy regarding the dispute and no further review of the claim is available. See id. §§ 9-21-20(5)(a), 9-21-60.

In the instant matter, by a Member Service Payment Invoice prepared December 20, 2002, and mailed to Claimant on December 23, 2002, the System notified Claimant of its determination of the amount of public service credit he was eligible to purchase in JSRS based upon his employment with the Greenville County Public Defender's Office between 1986 and 2002. The invoice clearly specified that the total public service credit Claimant was eligible to purchase for his employment between May 12, 1986, and June 30, 2002, was 9 years, 8 months, and 5 days, based upon 60% of full-time equivalent service credit for that period. However, upon receipt of the invoice, Claimant did not seek review of the calculation reflected on that invoice or otherwise contact the System to inquire about the accuracy of the service purchase invoice. To the contrary, Claimant purchased the service as invoiced, and without protest, in August 2003. Some eleven years after the issuance and payment of that invoice, Claimant has

now sought formal review of the calculation of the public service credit he was eligible to purchase as reflected on that invoice.

This August 2014 request for review of the December 2002 invoice is untimely both under the provisions of the System's internal administrative review procedures that were in effect at the time the invoice was issued and under the provisions of the Claims Procedures Act that were in effect at the time his request for review was submitted. Specifically, the request for review was not filed within thirty days of his notification of the public service he was eligible to purchase upon his receipt of the December 2002 invoice, see Administrative Review Procedures § 2(a), nor was it filed within one year of the date of that invoice, see S.C. Code Ann. § 9-21-50(A). Rather, the request for formal review was not submitted with the System until some eleven years had elapsed since the invoice was issued and paid. Therefore, because Claimant's request for review of the December 2002 invoice was not timely made, it should be dismissed without a determination on its merits and the December 2002 invoice must be considered a final decision of the System that is no longer subject to review.

Moreover, even if Claimant had timely submitted a request for review of the December 2002 invoice, it does not appear that the service credit available for purchase pursuant to the invoice was improperly calculated. Under the criteria for the purchase of public service in effect at the time, the amount of service available for purchase for a period of part-time employment was determined based upon what percentage the part-time employment constituted of a full-time equivalent position. When Claimant made his service purchase request in 2002, both he and the public defender's office characterized his employment with the defender's office as part-time employment, including certifying in at least two places on the Request for Service Verification form that the employment was part-time. In addition, that verification form indicated that Claimant's total compensation for the sixteen years of his employment with the defender's office was \$302,086.84, for an annual average salary of about \$18,880 for the period, an amount which would more likely reflect part-time, rather than full-time, employment for an attorney. Finally, the record also reflects that Claimant maintained a full private practice with a small firm and then in a solo practice during the entire period of his employment with the public defender's office. Therefore, although the System does not contest the letters and affidavit submitted by Claimant with his current appeal asserting that he maintained a caseload as a part-time public defender that was similar to the caseloads of full-time public defenders, the record as a whole supports the

finding that his employment with the public defender's office was something less than full-time employment as a public defender, such that he would not have been eligible to purchase full-time public service credit for that period of employment in 2002.

CONCLUSION

Therefore, for the reasons set forth above, I find that Claimant's request for review of the December 2002 calculation of the public service credit he was eligible to purchase for his employment with the Greenville County Public Defender's Office was not timely filed and should be dismissed.

  
Peggy G. Boykin, CPA  
Director, South Carolina Retirement System

October 17, 2014  
Columbia, South Carolina

# South Carolina Retirement Systems

## Member Service Payment Invoice

EDWARD WALTER MILLER  
44 WEST AVONDALE DRIVE  
GREENVILLE SC 29611

Date: December 15, 2005  
Invoice Number: XXXXX76180887001  
Employer Code: 1.00  
System: JSRS

The following is provided to allow you to establish: **PUBLIC SERVICE (P)**

| <u>Begin Date</u>            | <u>End Date</u> | <u>FTE%</u> | <u>Service Credit</u>             |
|------------------------------|-----------------|-------------|-----------------------------------|
| 07-01-1986                   | 06-30-1998      | 040         | 04 Years 08 Months 18 Days        |
| 07-01-1998                   | 06-30-1999      | 100         | 00 Years 03 Months 07 Days        |
| <b>Total Service Credit:</b> |                 |             | <b>05 Years 00 Months 25 Days</b> |

**Member Payment Required \$ 55,487.27 Invoice Expiration Date: June 13, 2006**

You must be an active contributing member at the time your payment is remitted. Please make all checks payable to the South Carolina Retirement Systems and remit a copy of this invoice with payment. Retirement benefits contingent on this service purchase will not be effective until full payment is received.

Upon processing your service payment or payroll deduction request, an additional review will be performed. If this results in changes to the amount of your payment or your service credit, you will be notified.

If you wish to select the Installment payroll deduction option, complete and return the following portion of this invoice for an estimate. After processing, you will receive a Payroll Withholding Authorization form indicating a payroll deduction amount for your review and signature.

Select Payment Method: ☐ Deferred (pre-tax) ☐ Non-deferred (after tax)

Member Payment Required: **\$ 55,487.27**

Less Optional Down Payment: ☐ **< \_\_\_\_\_ > (Do Not Send Payment with this Form)**  
(Please check if the down payment is a rollover)

Amount to be Financed: **\$ \_\_\_\_\_**  
(Member Payment less Down Payment)

Number of Months to be Financed: \_\_\_\_\_ Pay Frequency: \_\_\_\_\_ (Checks Received Per Year)

**P.S. A MEMBER MAY NOT PURCHASE MORE THAN 16 YEARS OF SERVICE CREDIT IN JSRS. ACCORDING TO OUR RECORDS YOU HAVE PREVIOUSLY PURCHASED SERVICE CREDIT TOTALING 10 YEARS 11 MONTHS 5 DAYS. THEREFORE, THE ABOVE REPRESENTS THE REMAINING BALANCE OF SERVICE ELIGIBLE FOR PURCHASE.**

Mark Sanford, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

Richard Eckstrom  
Comptroller General

## State Budget and Control Board South Carolina Retirement Systems



1-800-868-9002  
(803) 737-6800

Peggy G. Boykin, CPA  
Director

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Daniel T. Cooper  
Chairman,  
Ways and Means Committee

Frank Fusco  
Executive Director

FAX (803) 737-6810

June 08, 2006

EDWARD WALTER MILLER  
44 WEST AVONDALE DRIVE  
GREENVILLE SC 29611

RE: Invoice Num: XXXXXX76180887001  
Invoice Amt: 55,487.27

Dear Member:

All service payments are reviewed for accuracy by the Financial Services Department. We have received your partial payment of \$22,795.50 to establish PUBLIC SERVICE (P) credit; however, there is a remaining balance due in the amount of \$32,691.77 to complete the service purchase transaction.

The following options are available to you concerning your purchase of additional service credit.

- ☐ 1. Remit payment for the remaining balance due in the amount of \$32,691.77 to complete the service purchase transaction.
- ☐ 2. Request a refund of the partial payment previously remitted in the amount of \$22,795.50 and cancel the service purchase.
- ☐ 3. Prorate the service purchase based on the partial amount paid of \$22,795.50.
- ☐ 4. Finance the remaining balance of \$32,691.77 through the Installment Accounting Program.

Please select one of the options listed above, sign and date the bottom of this document and return it to our office in the enclosed envelope. If we do not receive your response by 06-13-2006, your service purchase will be prorated based on the partial amount already paid. If you have any questions, please contact our Customer Service Department at (803) 737-6800 or you may call toll free in South Carolina (800) 868-9002.

Financial Services

Enclosure

\_\_\_\_\_  
Member Signature

\_\_\_\_\_  
Social Security Number

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Date

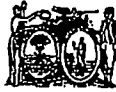
Please note that service purchases are irrevocable. Once posted to your account, these funds will be subject to the same refund provisions as other contributions contained in your account.

Mark Sanford, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

Richard Eckstrom  
Comptroller General

## State Budget and Control Board South Carolina Retirement Systems



Peggy G. Boykin, CPA  
Director

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Daniel T. Cooper  
Chairman,  
Ways and Means Committee

Frank Fusco  
Executive Director

1-800-868-9002  
(803) 737-6800

FAX (803) 737-6810

June 23, 2006

EDWARD WALTER MILLER  
44 WEST AVONDALE DRIVE  
GREENVILLE SC 29611

RE: Invoice Num XXXXX76180887001  
Invoice Amt: \$55,487.27

SSN: XXX-XX-7618

Dear Member:

We acknowledge the receipt of your payment in the amount of \$32,691.77 to establish PUBLIC SERVICE (P) credit for the time representing a total service credit of 5 year(s) 0 month(s) and 25 day(s).

If you should have any questions, please contact our Customer Service Department at (803) 737-6800 or (800) 868-9002 (in state members only).

Jim Hodges, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

James A. Lander  
Comptroller General

## State Budget and Control Board South Carolina Retirement Systems



(803) 737-6800

Peggy G. Boykin, CPA  
Director

1-800-888-8002

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Harrell, Jr.  
Chairman,  
Ways and Means Committee

Frank W. Fusco  
Executive Director

December 23, 2002

The Honorable Edward W. Miller  
44 West Avenue Drive  
Greenville, SC 29611

Re: SSN : -7618  
JSRS

Dear Judge Miller:

We have calculated a cost in the amount of \$5,676.75 to establish 1 year 3 months of service credit under the Judges Solicitors Retirement System. This represents a period of service previously withdrawn from the South Carolina Retirement System while employed as an Assistant Public Defender with Greenville County.

Also, I am enclosing a separate payment invoice for public service reflecting the cost to establish an additional period of service rendered with the Defender Corporation of Greenville County.

These costs are valid through June 18, 2003. In addition, I am enclosing additional information pertaining to the various payment options available for purchasing service credit.

If you should have any questions regarding this information, please feel free to contact me at 803-737-7491.

Sincerely,

Sharon Pigage  
Service Department

enclosures

Fontaine Business Center, 202 Arbor Lake Drive, Post Office Box 11960, Columbia, South Carolina 29211-1960

# South Carolina Retirement Systems

## Member Service Payment Invoice

EDWARD WALTER MILLER  
44 WEST AVE DR  
GREENVILLE SC 29611

Date: December 20, 2002  
Invoice Number: 7618875001  
Employer Code: 1.00  
System: JSRS

The following is provided to allow you to establish: **PUBLIC SERVICE**

| <u>Begin Date</u> | <u>End Date</u> | <u>FTE%</u> | <u>Service Credit</u>      |
|-------------------|-----------------|-------------|----------------------------|
| 05-12-1986        | 06-30-2002      | 060         | 09 Years 08 Months 05 Days |

Total Service Credit: 09 Years 08 Months .05 Days

Member Payment Required \$ 43,963.02 Invoice Expiration Date: June 18, 2003

You must be an active contributing member at the time your payment is remitted. Please make all checks payable to the South Carolina Retirement Systems and remit a copy of this invoice with payment. Retirement benefits contingent on this service purchase will not be effective until full payment is received.

Upon processing your service payment or payroll deduction request, an additional review will be performed. If this results in changes to the amount of your payment or your service credit, you will be notified.

If you wish to select the payroll deduction option, complete the following portion of this invoice for an estimate. After processing, you will receive a Payroll Withholding Authorization form indicating a payroll deduction amount for your review and signature.

Member Payment Required: \$ \_\_\_\_\_

Down Payment (Optional): \$ \_\_\_\_\_ (Do Not Send Payment with this Form)

Amount to be Financed  
(Member Payment less Down Payment) \$ \_\_\_\_\_

Number of Months to be Financed: \_\_\_\_\_ Pay Frequency: \_\_\_\_\_ (Checks Received Per Year)

State Budget and Control Board \* South Carolina Retirement Systems  
Fontaine Business Center \* 202 Arbor Lake Drive \* Post Office Box 11960 \* Columbia, South Carolina 29211  
803-737-6800 \* 800-868-9002 (SC only)

Mark Sanford, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

Richard Eckstrom  
Comptroller General

## State Budget and Control Board South Carolina Retirement Systems



1-800-868-9002  
(803) 737-6800

Peggy G. Boykin, CPA  
Director

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Harrell, Jr.  
Chairman,  
Ways and Means Committee

Frank Fusco  
Executive Director

FAX (803) 737-6810

July 30, 2003

EDWARD WALTER MILLER  
44 WEST AVE DR  
GREENVILLE SC 29611

RE: Invoice Num 37618852001  
Invoice Amt: \$5,676.75

SSN: 250-80-7618

Dear Member:

We acknowledge the receipt of your payment in the amount of \$5,676.75 to establish NON-MEMBER/STATE WITHDRAWAL credit for the time representing a total service credit of 1 year(s) 3 month(s) and 0 day(s).

If you should have any questions, please contact our Customer Service Department at (803) 737-6800 or (800) 868-9002 (in state members only).

Mark Sanford, Chairman  
Governor

Grady L. Patterson, Jr.  
State Treasurer

Richard Eckstrom  
Comptroller General

## State Budget and Control Board South Carolina Retirement Systems



Peggy G. Boykin, CPA  
Director

Hugh K. Leatherman, Sr.  
Chairman,  
Senate Finance Committee

Robert W. Harrell, Jr.  
Chairman,  
Ways and Means Committee

Frank Fusco  
Executive Director

1-800-868-9002  
(803) 737-6800

FAX (803) 737-6810

August 01, 2003

EDWARD WALTER MILLER  
44 WEST AVE DR  
GREENVILLE SC 29611

RE: Invoice Num .....7618875001  
Invoice Amt: \$43,963.02

SSN: 250-80-7618

Dear Member:

We acknowledge the receipt of your payment in the amount of \$43,963.02 to establish PUBLIC SERVICE credit for the time representing a total service credit of 9 year(s) 8 month(s) and 5 day(s).

If you should have any questions, please contact our Customer Service Department at (803) 737-6800 or (800) 868-9002 (in state members only).

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Dated: 4/4/2016

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APR 12 2016  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 12 2016  
SC Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

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Deborah Brooks Durden, Administrative Law Judge  
Case No. 14-ALJ-30-0539-CC

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Edward W. Miller

Appellant,

V.

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

Respondent.

---

BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This case arises from Appellant's August 7, 2014 letter, to Respondent, requesting formal review of Respondent's December 2002 determination of the amount of public service credit which Petitioner was eligible to purchase in the Judges and Solicitors Retirement System (hereinafter JSRS or System) for his employment with the Greenville County Public Defender Office (R. pp. 60-62). In his letter to Respondent, Appellant asserted that he should be allowed to purchase an additional 15 months of earned service credit at the cost in effect in 2003 (R. p. 61). By Final Agency Determination No. 14-015, Respondent found that Appellant's request for review of the December 2002 Determination was not timely filed and Appellant's request would, therefore, not be granted (R. pp. 70-75). Appellant sought a review of the Final Agency Determination in a contested case proceeding before the South Carolina Administrative Law Court. Appellant filed a Request for Contested Case Hearing with the ALC on November 20, 2014 (R. p. 16).

By way of letter, dated May 2, 2015, the parties submitted Appellant's claim to the ALC (R. p.17). Therein the parties agreed to waive an evidentiary hearing and submit the matter to the ALC for decision as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. The ALC issued an Order Granting Respondent's Motion for Summary Judgment, dated August 24, 2015 (R. pp. 6-12). On September 2, 2015, in re-

sponse to that Order, Appellant filed a Motion to Alter or Amend (R. pp. 49-50). On September 23, 2015, the ALC sent an email scheduling a “teleconference” with the parties (R. pp. 47-48); this telephonic communication was held on September 24, 2015. On September 28, 2015, the ALC issued its Order Denying Appellant’s Motion to Alter or Amend (R. pp. 1-5). In the Order the ALC refers to the September 24, 2015 telephonic communication and called it a “telephonic hearing” and recited alleged comments made by the Petitioner as partial basis for the ruling (R. p. 2). Appellant initiated an email chain requesting a transcript of the “telephonic hearing” (R. pp. 44-46). Appellant expressed concern that there had been no notice given to him that the September 24, 2015 communication was to be a *hearing* (R. pp. 44-46). The ALC acknowledged that no record of any type was made from the September 24, 2015 communication. (R. p. 44-46)

On October 27, 2015, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals. In compliance with Appellate Court Rules, Appellant continued to seek a transcript of the September 24, 2015 “telephonic hearing” (R. pp. 40-43). On December 2, 2015, the Clerk of the ALC formally acknowledged to the South Carolina Court of Appeals, that no transcript of the “telephonic hearing” was made and, consequently no record of the “telephonic hearing” exists (R. p. 39).

## **STATEMENT OF FACTS**

Appellant is an active member of the JSRS. Appellant has more than 13 years of earned service credit and 16 years of purchased service credit in the System. Appellant’s membership in the System commenced on September 3, 2002, when he was seated as a Circuit Court Judge, after his election to that position by the South Carolina General Assembly in May of 2002. Prior

to election to the Circuit Court, Appellant was employed as an assistant Public Defender with the Greenville County Public Defender Office between May 1986 and June 2002. Appellant also maintained a full private law practice during that period.

In July 2002 Appellant began the process of purchasing public service credit for his work with the Greenville County Public Defender Office. Appellant acquired earned service credit, in 2003, for two different time frames of Public Defender work. Appellant purchased earned service credit for his employment as an assistant Public Defender for the period of April 1980 to June 1981 (R. p. 57, 79, 81). This determination of earned service credit is not in dispute in this case. Appellant also sought to purchase earned service credit for employment with the Public Defender Office for the time frame from May, 1986 to June, 2002 (hereinafter the “disputed time frame”). On the forms provided by Respondent to Appellant to purchase service credit, Appellant’s service during the disputed time frame was characterized as “part-time” service and was computed at a value of 60% of full-time employment (R. pp. 54-56). Respondent determined that Appellant was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS based on Appellant’s employment with the Greenville County Public Defender Office during the disputed time frame (R. pp. 58-59). Appellant purchased all of this allowed earned service credit on August 1, 2003 (R. pp. 79-82). As a result of the 2003 earned service credit purchase, Appellant had purchased a total of 10 years, 11 months and 5 days of earned service credit at a cost of \$49,639.77 (R. p. 79-82). It is also not disputed that, in December 2005, pursuant to a change in the law, Appellant was allowed to purchase an additional 5 years and 25 days at a cost of \$55,487.27 (R. pp. 76-78).

The dispute in this matter centers on the failure of Respondent to allow Appellant to purchase 100% of the earned service credit for the disputed time frame at the purchase price in effect at the time of the original purchase.

From July 1981 and throughout the disputed time frame, Greenville County utilized a unique, hybrid method of providing indigent criminal defense services. The former office staff of full-time assistant Public Defenders was replaced, in July 1981, with private attorneys (R. pp. 60-69). These private attorneys handled a full-time indigent defense caseload on a contract basis, in addition to their private law practices (R. p. 60-69). Appellant handled one of these indigent defense caseloads throughout the disputed time frame. Greenville County contracted with, and provided funding for, all of these private attorneys except for Appellant, whose employment was with the Greenville County Public Defender Office, funded by the state (R. pp. 61, 63, 65, 69). There was no material difference between Appellant's state-funded employment and the Greenville County-funded indigent defense contract attorneys for purposes of this appeal. Appellant's contract indigent defense caseload was equal to the caseloads carried by full-time assistant Public Defenders prior to the initiation of the hybrid contract system in 1981 (R. pp. 61, 63, 65, 67, 69).

The Greenville County Public Defender Office, operating on a tight financial budget, designated Appellant as a part-time employee (even though he performed full-time service) so that no employment benefits or tax consequences would attach to this employment (R. pp. 62, 65). The part-time designation also allowed Appellant to operate his private law practice concurrently with the indigent defense contract (R. pp. 62, 64, 65, 67).

In the record of this case, it is undisputed that another member of the System (former Thirteenth Circuit Solicitor and Circuit Court Judge, Joe Watson) handled one of these hybrid,

full-time indigent caseloads from 1982 until 1985, in addition to his private law practice (R. p. 63-64). It is undisputed that the work performed by this other member [hereinafter Watson] was identical to the work performed by Appellant which is the subject of the dispute in this matter. It is further undisputed that Respondent found Watson eligible to purchase and allowed him to purchase these three years of service as full-time earned service credit for purposes of the System's retirement benefits (R. p. 64). It is undisputed that Respondent, in failing to allow Appellant to purchase the disputed 15 months of earned service credit, is treating identically situated members (Appellant and Watson) disparately and unequally.

Appellant did not learn of this unequal treatment of like-situated beneficiaries until the Spring of 2014 when he initiated this case through a letter request for review sent to Respondent (R. pp. 60-62). As the sole basis for denying Appellant's requested relief, Respondent relies on Appellant's failure to appeal, in 2003, the denial of full-time earned service credit for the disputed time frame. Respondent asserts that Appellant's current claims are barred by regulatory statutes of limitation through his failure to exhaust his administrative remedies in 2003 (R. pp. 27-33). Respondent ignores the fact that Appellant was unaware of Respondent's prior award of full-time earned service credit to Watson, who was an identically-situated beneficiary of the System, until 2014, at which time he initiated this claim. In 2002, Respondent ignored its fiduciary duty of full and timely disclosure of the material fact that another member of the System, Watson, had received full-time earned service credit for work identical to that claimed by Appellant.

**I. THE ADMINISTRATIVE LAW COURT (hereinafter ALC) ERRED IN FINDING THAT RESPONDENT WAS NOT A FIDUCIARY OF APPELLANT AND DID NOT OWE APPELLANT FIDUCIARY DUTIES OF FULL AND FAIR DISCLOSURE OF MATERIAL FACTS.**

It is axiomatic that Respondents are creatures of state legislative action, charged with observing fiduciary standards in the administration of the SC Retirement System, for the benefit of and in the best interests of System participants and beneficiaries. “[T]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature.” *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). An undefined statutory term must be interpreted in accord with its usual and customary meaning. *Stretcher v. Lexington County Recreation Commission*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998). A trustee is defined as “[o]ne who holds legal title to property ‘in trust’ for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property. The trustee owes a fiduciary duty to the beneficiary.” See *Black’s Law Dictionary* 1514 (6th ed. 1990) (Citing *Reinecke v. Smith*, 289 U.S. 172, 53 S.Ct. 570 (1933)).

Section 9-1-1310(A), South Carolina Code of Laws, 1976, as amended, created the Respondents for the administration of the SC Retirement system:

*A) The South Carolina Public Employee Benefit Authority and the State Budget and Control Board, or its successor, are cotrustees of the retirement system as "retirement system" is defined in Section 9-16-10(8) in performing the functions imposed on them by law in the governance of the Retirement System. Notwithstanding any other provision of law, any reference in law to the trustee of the Retirement System must be construed to conform to the cotrusteeship as provided in this subsection. (emphasis added).*

Section 9-16-40, South Carolina Code of Laws, 1976, as amended, provides, in part:

*A trustee, commission member or other fiduciary shall discharge duties with respect to the retirement system:*

*(1) solely in the interest of the retirement systems, participants, and beneficiaries;*

- (2) *for the exclusive purpose of providing benefits to participants and beneficiaries...*
- (4) *impartially, taking into account any differing interests of participants and beneficiaries...*

Section 9-16-10 (4), South Carolina Code of Laws, 1976, as amended, provides in part:

- (4) *“Fiduciary” means a person who:*
  - (a) *exercises any authority to invest or manage assets of a system.....*

The duties of a fiduciary are composed of care, loyalty and good faith. *Menezes v. RL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 183 (2013). Similarly, it is well-established in the common law of South Carolina that a confidential, or fiduciary, relationship exists when one reposes a special confidence in another, so that the latter, in equity and in good conscience is bound to act in good faith, with fair dealing and with full disclosure with respect to the interest of the beneficiary. *FutureGroup II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996); *Guignard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137, (Ct.App.1984); *Ramage v. Ramage*, 283 S.C. 239, 247, 322 S.E.2d 22, 28 (Ct.App. 1984)(“A trustee is held to something stricter than the morals of the marketplace.”).

Based on the statutory and common-law, *supra*, Respondent was obligated to treat Petitioner’s application for earned service credit as trustee, charged with fair dealing, full and forthcoming disclosure, and good faith due from a trustee to a beneficiary.

The ALC Order, entitled “Order Granting Respondent’s Motion for Summary Judgment,” dated August 24, 2015, did not address Appellant’s argument concerning Respondent’s status as a fiduciary with respect to Appellant (R. pp. 6-12). Appellant again raised this issue in his Motion to Alter or Amend (R. pp. 49-50). Respondents, in their Reply brief submitted to the ALC, dated July 10, 2015, acknowledge the fiduciary relationship through their denial therein of a

breach of the duty (R. p. 36-38). The ALC Order Denying Petitioner's Motion to Alter or Amend, dated September 28, 2015, however, held that no fiduciary duty existed between Respondent and Appellant (R. p. 3). Totally ignoring the legislative intent evidenced in the plain wording of the relevant statutes, the ALC ruled that: "The Respondent did nothing to induce confidence on the part of its members that it was acting on their behalf..." (R. p. 3) The ALC further ruled that the Respondent did not owe a fiduciary duty of full and fair disclosure of material facts: "I conclude that PEBA did not owe a fiduciary duty to the Petitioner (*Appellant herein*) to advise him of the circumstances of other claimant's dealings with the agency" (R. p. 3). Respondent's nondisclosure of the material fact of the unequal treatment of beneficiaries resulted in significant prejudice to Appellant.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004). South Carolina Code of Law section 9-1-320 mandates that beneficiaries' records are confidential. In 2002 at the time of the initial application to purchase earned service credit, Appellant had no way of knowing that a like-situated member (Watson) had been awarded full-time service credit for identical work as that claimed by Appellant. Respondents had full knowledge of the previous award and failed to disclose that Appellant's claim, based on the earlier treatment of Watson, was properly eligible for similar treatment and qualified for full-time earned service credit. Silence, where there is a duty to speak, when it is intended, or when it has the effect of misleading a party, may give rise to equitable estoppel. *Southern Land and Golf Co. Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993).

## **II. THE ALC ERRED IN FAILING TO FIND THAT RESPONDENT**

**ENGAGED IN THE PRACTICE OF UNEQUAL TREATMENT OF  
LIKE-SITUATED BENEFICIARIES BY DENYING APPELLANT'S  
CLAIM, HAVING PREVIOUSLY GRANTED AN IDENTICAL  
CLAIM TO AN IDENTICALLY SITUATED BENEFICIARY.**

Respondents are state-created managers of a state retirement system. In their management of the state retirement system, the acts of Respondents are acts of the State of South Carolina. In effect, administrative decisions are state actions which, in turn, must comport with the constitutional guarantee of equal protection of laws. *United States Constitution*, 14<sup>th</sup> Amendment, *South Carolina Constitution*, Article 1, § 3. *Kennedy v. SC Retirement Sys.*, 345 S.C. 339, 549 S.E.2d 243 (2001).

Appellant supplied Respondents with proof that, in an earlier case presenting identical facts, (the “Watson case”), Respondents granted full-time earned service credit to Watson (R. p. 64). A comparison of the Watson case and Appellant’s case confirms that the Respondents have failed to meet the duties of their trusteeship by their diametrically inconsistent treatment of applicants presenting identical facts. By failing to consistently observe fundamental fairness in their administration of the retirement system, Respondents have, therefore, failed to observe their common-law duties of good faith and fair dealing owed to Appellant. *Lesesne v. Lesesne*, 307 S.C. 67, 413 S.E.2d 847 (Ct.App.1991); *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Rodgers v. Herron*, 226 S.C. 317, 85 S.E.2d 104 (1954). **“Absolute equality of treatment to similarly situated beneficiaries is the hallmark of a qualified defined benefits pension plan.”** *Kennedy*, 345 S.C. at 353, 549 S.E.2d at 254. (emphasis added).

Likewise, Respondents have failed to observe their statutory fiduciary duties to Appellant. In addition to the impartiality requirements of South Carolina Code of Laws §§ 9-1-1310, 9-16-10

and 9-16-40 cited above, § 9-1-290 speaks to rules and regulations being adopted by the governing Board of the System to prevent injustices and inequalities.

Appellant asks this Court to correct Respondents' failure to observe their fiduciary duties through their rejection Appellant's application for full-time earned service credit during the disputed time frame. *Duvall v. SC Budget and Control Board, et al.*, 377 S.C. 36, 41, 659 S.E.2d 125, 127 (2008) ("Retirement statutes should be liberally construed in favor of those to be benefited and object sought to be accomplished."); *King v. SC Retirement Sys.*, 319 S.C. 373, 376, 461 S.E.2d 822, 823 (1995) ("By adopting the term 'earned service credit,' it is apparent that the legislature intended to give broader coverage than just for employees engaged in actual service.").

**III. THE ALC ERRED IN FAILING TO RULE THAT RESPONDENT WAS ESTOPPED FROM ASSERTING A TIMELINESS BAR TO APPELLANT'S CLAIM BECAUSE OF RESPONDENT'S BREACH OF FIDUCIARY DUTY OF FULL AND TIMELY DISCLOSURE TO APPELLANT WHICH CAUSED APPELLANT'S DELAY IN FILING HIS CLAIM.**

The ALC failed to address a central question of Appellant's claim: did Respondent's breach of fiduciary duty, through the 2002 failure of Respondent to inform Appellant of the circumstances of the "Watson Case," estop Respondent from claiming a failure of Appellant to timely administratively appeal the 2002 denial of full-time service purchase eligibility benefits to Appellant?

Had Respondent fulfilled its fiduciary duty to Appellant in 2002 by informing him of the circumstances of the "Watson Case," Appellant would have appealed Respondent's denial at that time and there would be no question of the timeliness of the 2014 claim. Respondent cannot now be allowed to profit from its 2002 violation of its legal and equitable duties to Appellant by claiming untimeliness, statutory or otherwise. Respondent cannot rely on a statutory time limita-

tion to deny Appellant's claim when its own misconduct concealed the "Watson Case" from Petitioner in violation of their fiduciary duties of disclosure and equal treatment of like beneficiaries. The undisputed fact that Appellant paid \$55,487.27, in 2005, to purchase 5 years and 25 days (R. p. 76-78) (when in 2003 Appellant paid \$49,639.77 to purchase 10 years, 11 months and 5 days (R. pp. 79-82)) demonstrates that Appellant would have purchased the disputed time in 2003 (at a much lower price) had he been properly informed of his right to make that purchase.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. *Moore v. Moore*, 360 S.C. at 251, 599 S.E.2d at 472. Silence, when it is intended, or when it has the effect of misleading a party, may raise an equitable estoppel. *Southern Land and Golf Co. Ltd.*, 311 S.C. at 34, 426 S.E.2d at 751. Respondents' silence in 2002 misled Appellant to believe he was not entitled to full-time service credit for the disputed time frame.

Collateral estoppel, also known as issue preclusion, operates to prevent the invocation of a timeliness bar. In the "Watson case" the earlier application for full-time earned service credit was granted. The "Watson case" presented the same facts and issues as presented by Appellant's application. Respondents are bound by the outcome of the "Watson case" which established a binding precedent for Appellant's application, under the applicable doctrine of collateral estoppel. "...when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same claim or a different claim." *Catawba Indian Nation v. State* 407 S.C. 526, 536, 537, 756 S.E.2d 900 (2014), *S.C. Prop. & Cas. Ins. Guaranty Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625 (1991); Re-

statement (Second) of Judgment, §§ 27-29 (1982). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Catawba Indian Nation*, 407 S.C. at 536-537, 756 S.E.2d at 908; *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779,782 (Ct.App.2009).

“While the traditional use of collateral estoppel required mutuality of parties to bar re-litigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.” *Kunst v. Loree*, 404 S.C. 649, 653-654, 746 S.E.2d 360, 362 (Ct.App.2013); *Snively v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct.App.2008).

In light of Respondents’ earlier ruling in the “Watson case,” which established a precedent for applications for full-time earned service credit under Appellant’s circumstances, Respondents should be collaterally estopped from asserting that the Appellant failed to timely appeal the 2003 decision. Respondents have failed to show that the timing of the filing of Appellant’s claim in this case has worked a prejudice or disadvantage to Respondents. Quite simply, in the absence of prejudice, the same case should produce the same outcome, regardless of the passage of time.

Appellant also argues that the doctrine of equitable estoppel applies to bar Respondents’ use of a timeliness bar to deny Appellant’s claim. Equitable estoppel arises where: (1) conduct by the party estopped amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. To claim an estoppel that bars Respondents reliance on a timeli-

ness bar, Appellant must demonstrate: (1) Appellant's lack of knowledge, and lack of access to knowledge, of the truth as to facts in question; (2) Appellant's reliance upon conduct of the party estopped; and (3) Appellant's prejudicial change in position. *Regions Bank v. Schmauch*, 354 S.C. 648, 674-675, 582 S.E.2d 432, 446 (Ct. App.2003). The application of equitable estoppel does not require an intentional misrepresentation. *Id* at 675,446.

Consistent with *Regions Bank*, Respondents (1) concealed the material fact of the "Watson case" from Appellant, despite their fiduciary duty of disclosure, (2) with the intention that Appellant act on that concealment by accepting Respondents offer of part-time credit, and (3) Respondents had knowledge of the true facts that the "Watson case" resulted in an offer of **full-time credit** to Watson, rather than the offer of **part-time credit** made to Appellant. Appellant lacked knowledge of the Watson case at the time of the 2003 application and, therefore, (1) Appellant could not have discovered those facts due to the confidential nature of Respondents files, (2) Appellant relied on Respondents conduct and accepted Respondents offer of part time earned service credit, and (3) Appellant suffered from a prejudicial change in position through the loss of full time earned service credit.

Appellant asserts that Respondents are collaterally and equitably estopped from relying on Appellant's alleged failure to act timely in appealing the Respondents 2003 determination. The Respondents' 2003 determination violated the fiduciary duty owed by Respondents to Appellant and caused Appellant's delay in pursuing his claim. Additionally, there can be no prejudice to Respondents by granting Appellant's claim. Appellant notes that his case presents a factual scenario which, due to the change of Greenville County's hybrid indigent defense system, is incapable of replication.

**IV. THE ALC ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANT, DUE TO THE PRESENCE OF AT LEAST A SCINTILLA OF EVIDENCE IN THE RECORD PRESENTING GENUINE, TRIABLE ISSUES OF FACT.**

In Respondents' May 5, 2015 letter to the ALC, Respondents informed the ALC that the parties had agreed to submit Appellant's claim to the ALC for decision as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties (R.p p. 17, 51-53). The ALC, *sua sponte*, ruled that it would decide this case as if it were submitted by way of cross motions for summary judgment, even though no such motions were ever filed by any party (R. p. 13-15).

The ALC bound itself to the standard of proof contained in Rule 56 of the South Carolina Rules of Civil Procedure which provides for the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c) SCRPC*. The burden of demonstrating the absence of a genuine issue of material fact rests with the moving party. *Lord v. D&J Enterprises*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014); *Baughman v. Am.Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 64 (2004); *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct.App.2005). Summary judgment is a drastic remedy and should be cautiously invoked. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). **Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.** *Nelson v. Charleston*

*County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004) (emphasis added).

In this case the ALC simply adopted the arguments of the Respondents and, in granting the Respondents summary judgment, found that Appellant was time barred because he did not exhaust his administrative remedies in 2003 by failing to appeal the denial of full-time earned service credit for the disputed time frame. The ALC, in its August 24, 2015 Order, refused to address any of the issues raised in Appellant's submissions (R. pp. 6-12). The ALC held that the parties had stipulated that there was no genuine dispute regarding the material facts "relevant to a decision in this case" (R. p. 8). The ALC never delineated what it considered to be the material facts "relevant to a decision." The ALC's Order did not address the issue of Respondents' fiduciary duty to Appellant, Respondents' breach of that duty, whether Respondents were estopped from asserting a timeliness bar, nor Respondents' unequal treatment of like-situated beneficiaries.

On September 28, 2015, the ALC issued its Order Denying Petitioner's Motion to Alter or Amend. The Order held that Respondents did not owe Appellant a fiduciary duty of full disclosure of material information, nor that Respondents were estopped from asserting a timeliness bar. In footnote 1 on page 2 of that Order, the ALC voiced a profound misunderstanding of the authority of the Court and of the posture in which this case was submitted for decision. The ALC held that the case must be decided either "on a motion for summary judgment or by conducting an evidentiary hearing" (R. p. 2). The ALC did not honor the parties' agreement that the case had been submitted to the ALC for final decision, as a matter of law, based on stipulations of fact, jointly submitted exhibits and memoranda of law. By their agreement, the parties conferred the role of law giver as well as fact finder on the ALC, thereby charging the ALC with

making a decision on the merits, based on the submissions of the parties and all inferences arising therefrom. On page 3, of its September 28, 2015 Order, the ALC held that, because the parties had not stipulated that a breach of fiduciary duty had occurred, such a finding was beyond the scope of the order issued by the ALC on August 24, 2015 (R. p. 3). On page 4, of its September 28, 2015 Order, the ALC held that, because there was no stipulated breach of fiduciary duty by Respondents, Appellant could not rely on Respondents' failure to disclose material information as a ground to estop Respondents from asserting a timeliness bar (R. p. 4). Further, the ALC never addressed the unequal treatment of similarly situated beneficiaries, even though this issue had been raised in Appellant's November 20, 2014 Request for Contested Case Hearing submitted to the ALC (R. p. 16). The ALC's reasoning for failing to address this fundamental issue is found in a post-Order email, dated September 30, 2015, in which the ALC stated that the Order did not address Appellant's "equal protection argument because to do so would require me to reach the merits of the case." (R. p. 41)

Despite the posture in which the case was submitted to the ALC for decision, the ALC decided the case by applying the summary judgment standard and, consequently, that is the standard to be used in this appeal. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 374 534 S.E.2d 688, 692 (2000).

While the stipulated evidentiary facts are not in dispute, there are numerous inferences which can be drawn from the stipulated facts and joint exhibits which show a genuine dispute as to material issues and facts. The jointly submitted letter of Joe Watson (R. pp. 63-64), which has never been disputed, establishes unequal treatment of like-situated beneficiaries. At a minimum, this Watson letter presents a *scintilla* of evidence to support Appellant's claims. The only reasonable inference from this letter is that Respondents were aware of the previously granted full-

time earned service credit, for identical work, at the time of Appellant's claim; that Appellant had no contemporaneous knowledge of the previous award; that Respondents made an offer to Appellant without full and fair disclosure to Appellant of this material fact; that Appellant relied on Respondents' offer, trusting in their fiduciary obligations of good faith, fair dealing and full disclosure; and Appellant acted on Respondents' offer resulting in prejudice to Appellant.

The only reasonable inference, from the fact that in 2005 Appellant paid a higher purchase price for less than one-half the amount of earned service credit as that paid in 2003 (Appellant paid more than double the 2003 price), is that had Appellant known of the "Watson case" he would have pursued the claim in 2003. A further inference from this fact is that Appellant cannot be said to have exhausted his administrative remedies in 2003 because he did not know they existed, as a result of Respondents' failure of full disclosure and breach of fiduciary duty.

From the above stated inferences, there is at least a *scintilla* of evidence that Respondents should be estopped from asserting a timeliness bar as a result of the Respondents' 2003 conduct; or that Appellant's claim did not arise until 2014 when he learned of the disparate and unequal treatment of like-situated beneficiaries.

**V. THE ALC DENIED DUE PROCESS AND EQUAL PROTECTION TO APPELLANT BY CONDUCTING A HEARING WITHOUT FULL AND FAIR NOTICE TO APPELLANT AND WITHOUT PRESERVING A RECORD OF THE HEARING.**

The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *S.C. Const. Art. 1, § 22; Stono River Env'tl. Protection Ass'n v. S.C. Dep't of Health and Env'tl Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). In *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 726 S.E.2d 9 (Ct.App.2012), the South Carolina Court of Appeals held that:

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. *China v. Parrott*, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968). However, the reconstructed record must allow for meaningful appellate review. *State v. Ladson*, 373 S.C. 320, 321, 644 S.E.2d 271,271 (Ct.App.2007). A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review. *Id.* at 325, 644 S.E.2d at 274. ... The South Carolina Constitution provides that in procedures before administrative agencies: No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard... *Art.I, § 22.*

In this case the ALC notified the parties, via email dated September 23, 2015, that the ALC would conduct a “teleconference” on September 24, 2015, to discuss Appellant’s Motion for Reconsideration (R. pp. 47-48). In the ALC Order Denying Petitioner’s Motion to Alter or Amend, dated September 28, 2015, the ALC declared on page 2 that a “telephonic hearing was conducted” (R. p. 2). At no time before or during the telephonic communication was the Appellant told that it was to be considered a “hearing.” The ALC Order contained alleged comments attributed to the Appellant and the ALC made factual findings based on the alleged comments (R. p. 2). This Order has been published on the official website of the South Carolina Administrative Law Court. Appellant requested a copy of the transcript and the name of the court reporting service (R. p. 43). The ALC informed the Appellant that, not only was no transcript made of this unnoticed “telephone hearing,” it is the regular practice of the ALC to conduct these types of hearings without a transcription. An email exchange between the ALC and the Appellant, dated from September 28, 2015 through October 2, 2015, confirms the ALC’s regular practice of con-

ducting hearings without a transcription or record of any kind, thereby preventing any meaningful appellate review (R. pp. 44-46).

The Clerk of the Administrative Law Court confirmed in a letter, dated December 2, 2015, that the ALC has a standard practice of conducting telephone hearings without a transcription “unless a party requests one” (R. p. 39). A party cannot, however, know to request a court reporter for a hearing if the ALC does not give the party notice that the communication will be considered a hearing in a published Order. The ALC used the terms telephone conference and telephone hearing as if they were interchangeable. There is a significant and clear constitutional difference between a hearing and a conference. In litigation concerning private property rights, it is an unconstitutional violation of due process rights when a party is not given notice that a communication will be characterized, after the fact, as a hearing.

In this case, and as its regular practice, the ALC has violated Appellant’s Due Process rights, guaranteed by the South Carolina Constitution Article 1, § 22, and by the Fifth and Fourteenth Amendments of the U.S. Constitution, through its failure to give Appellant notice of its intention to conduct a hearing in this pending contested case. The ALC’s failure to give notice of a hearing, of any type, prevented Appellant from being heard in a meaningful way at the “un-noticed” hearing. The ALC’s failure to keep a record of the proceeding prevents the South Carolina Court of Appeals from conducting a meaningful appellate review, all in violation of specific constitutional mandates.

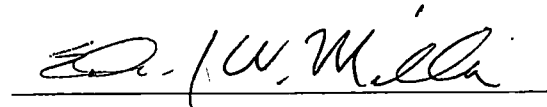
### **CONCLUSION**

For the reasons set forth above, Appellant urges this Court to reverse the rulings of the ALC in this matter and to grant Appellant the relief requested in his applications and petitions

previously submitted to the Respondents in the underlying administrative proceeding. In the alternative, Appellant requests this Court fully vacate all Orders and rulings of the ALC to date, and remand this case for an expedited hearing on the merits to address what Appellant has been wrongfully denied to date.

Respectfully Submitted,

Dated: April 7, 2016

A handwritten signature in cursive script, appearing to read "Ed. W. Miller", written over a horizontal line.

Edward W. Miller  
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SC ID No.: 3978  
(864) 467-8559  
*Appellant*

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

APR 12 2016

SC Court of Appeals

Deborah Brooks Durden, Administrative Law Judge  
Case No. 14-ALJ-30-0539-CC

Edward W. Miller

Appellant,

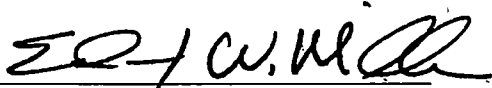
V.

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

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that he/she has served the Appellant's Final Brief, Appellant's Reply Brief, and the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 9, 2016, addressed to their attorney of record, Justin R. Werner, Esq., Post Office Box 11960, Columbia, South Carolina 29211-1960.



Edward W. Miller  
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Greenville, South Carolina 29609  
(864) 467-8559  
SC ID No.: 3978  
Appellant

Dated: 4/9/2016

THE STATE OF SOUTH CAROLNA  
In The Court of Appeals

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APR 29 2016

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2015-002228

Edward W. Miller, .....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW JUDGE CORRECTLY FIND THAT, WHERE APPELLANT'S CHALLENGE TO A DECEMBER 2002 DECISION BY THE SOUTH CAROLINA RETIREMENT SYSTEMS WAS NOT FILED UNTIL AUGUST 2014, HIS CLAIM COULD NOT BE HEARD ON ITS MERITS BY THE COURTS BECAUSE HE HAD FAILED TO EXHAUST HIS AGENCY REMEDIES FOR HIS CLAIM?

## STATEMENT OF THE CASE

By a letter received by Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("Retirement Systems"), on August 11, 2014, Appellant Edward W. Miller ("Appellant") sought to appeal the decision made by the Retirement Systems in December 2002 regarding the amount of public service credit Appellant was eligible to purchase in the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS") in connection with his prior employment with the Defender Corporation of Greenville County between 1986 and 2002. (R. pp. 60-62.) On October 17, 2014, the Retirement Systems issued Final Agency Determination No. 14-015, finding that Appellant's August 2014 challenge to the December 2002 calculation of his public service credit available for purchase was not timely filed under the South Carolina Retirement Systems Claims Procedures Act and should be dismissed. (R. pp. 70-75.)

By a Request for a Contested Case Hearing filed on November 20, 2014, Appellant sought review of the Retirement Systems' Final Agency Determination before the South Carolina Administrative Law Court. (R. p. 16.) By a letter to the court dated May 5, 2015, the parties notified the administrative law judge ("ALJ") assigned to hear the case that they had conferred and had determined that it would not be necessary to hold an evidentiary hearing in the matter and that the case could be adjudicated by the

court as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. (R. p. 17.) By an Order for Continuance and Scheduling Order dated May 7, 2015, the ALJ granted the parties' request to have the matter heard as a matter of law upon stipulated facts, stating that the matter would be adjudicated as if upon cross-motions for summary judgment. (R. p. 13-15.) Pursuant to that agreement and order, the parties submitted a set of Joint Stipulations of Fact and Exhibits to the ALJ on July 6, 2015. (R. pp. 51-75.) In addition, on July 6, 2015, both parties submitted their memoranda of law in support of their positions to the ALJ. (R. pp. 18-26; R. pp. 27-33.) On July 10 and 16, the parties submitted reply memoranda to the initial memoranda of law. (R. pp. 34-35; R. pp. 36-38.)

By an Order dated August 24, 2015, the ALJ granted summary judgment in favor of the Retirement Systems, finding that Appellant's August 2014 challenge to the Retirement Systems' December 2002 determination on his service purchase request could not be heard by the court on its merits as a result of Appellant's failure to timely exhaust his agency remedies for the claim. (R. pp. 6-12.) On September 2, 2015, Appellant filed a motion for reconsideration of the ALJ's order, arguing, among other things, that the procedural posture of the case had been mischaracterized. (R. pp. 49-50.) In response to Appellant's motion, the ALJ held a conference call with the parties on September 24, 2015, to confirm that she had correctly understood the nature of the parties' request to have the matter adjudicated by the court as a matter of law based upon the stipulated facts and exhibits. (R. p. 2.) During the conference call, the parties confirmed their agreement to have the matter decided by the ALJ as a matter of law based upon stipulated facts. (R.

p. 2.) By an Order dated September 28, 2015, the ALJ denied Appellant's motion for reconsideration. (R. pp. 1-5.)

By a Notice of Appeal dated October 27, 2015, Appellant appealed the ALJ's September 28, 2015 order denying his motion for reconsideration to this Court, resulting in the instant proceeding.<sup>1</sup>

### FACTS

Appellant Edward W. Miller ("Appellant") is an active member of the Retirement System for Judges and Solicitors of the State of South Carolina ("JSRS"), who has earned approximately 12 years of service credit in JSRS and has purchased the maximum 16 years of service credit in JSRS. (R. p. 51 (Joint Stipulation of Fact #1).) Upon his election to the Circuit Court in 2002, Appellant inquired with the Retirement Systems about purchasing public service credit in JSRS for his prior employment as an assistant public defender with the Defender Corporation of Greenville County between 1986 and 2002. (R. p. 3 (Joint Stipulation of Fact #3).) In connection with that inquiry, on December 16, 2002, the Retirement Systems received a completed service verification form signed by Appellant and the defender corporation that verified the details of Appellant's employment with the defender corporation. (R. pp. 55-56 (Joint Exhibit #2).) In the member information section of the form, Appellant indicated that he had been employed by the defender corporation between May 12, 1986, and June 30, 2002, but that

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<sup>1</sup> Although Appellant's Notice of Appeal only recites that he is appealing the ALJ's September 28, 2015 order denying his motion for reconsideration, the Retirement Systems presumes that Appellant is also seeking review of the ALJ's August 24, 2015 Order Granting Respondent's Motion for Summary Judgment. Therefore, while not conceding or acquiescing in any expansion of the matters identified in the Notice of Appeal, the Retirement Systems, in an abundance of caution, will address both orders in this brief.

the employment had not been “full time” service. (R. p. 55 (Joint Exhibit #2, Part I, Question #3).) Similarly, in the employer verification section of the form, the defender corporation confirmed that Appellant had been employed by the office as an assistant public defender between May 1986 and June 2002 and that the service had not been “full time” service, but had been part-time service equal to 60% of full-time employment. (R. p. 56 (Joint Exhibit #2, Part II, Question 3, Columns (D)-(E)).)

Based upon the verification form, the Retirement Systems determined that Appellant was eligible to purchase 9 years, 8 months, and 5 days of public service credit in JSRS in connection with his part-time employment with the defender corporation between May 1986 and June 2002, for a cost of \$43,963.02.<sup>2</sup> (R. p. 58 (Joint Exhibit #3).) By a letter dated December 23, 2002, the Retirement Systems mailed Appellant a Member Service Payment Invoice for the purchase of the 9 years, 8 months, and 5 days of public service credit. (R. pp. 57-58 (Joint Exhibit #3).) Appellant did not appeal or otherwise seek review of the Retirement Systems’ determination of the public service credit he was found eligible to purchase on that invoice. Rather, on August 1, 2003, Appellant completed the purchase of the public service credit as invoiced. (R. p. 59 (Joint Exhibit #4).)

Some eleven years later, by telephone contacts and correspondence with the Retirement Systems beginning in March 2014, Appellant began inquiring as to whether the amount of public service credit he was eligible to purchase had been properly calculated in 2002. (R. p. 52 (Joint Stipulation of Fact #8).) Ultimately, by a letter dated

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<sup>2</sup> This 9 years, 8 months, and 5 days of credit was determined by applying the 60% part-time percentage reported on the verification form to the 16 years, 1 month, and 18 days of the total duration of Appellant’s employment for the defender corporation.

August 7, 2014, Appellant submitted a letter requesting formal review of the December 2002 determination of the amount of public service credit he was eligible to purchase in JSRS for his employment with the Defender Corporation of Greenville County.<sup>3</sup> (R. pp. 60-62 (Joint Exhibit #5).) By Final Agency Determination No. 14-015, the Retirement Systems found that Petitioner's request for review of that December 2002 determination was not timely filed and should be dismissed. (R. pp. 70-75 (Joint Exhibit #6).) Appellant sought review of that determination in a contested case proceeding before the South Carolina Administrative Law Court. (R. p. 16.) In that proceeding, the parties agreed that it was not necessary for the administrative law judge to conduct an evidentiary hearing in the matter and requested that the ALJ adjudicate the case as a matter of law based upon the stipulated facts, joint exhibits, and memoranda of law submitted by the parties. (R. p. 17.) By an Order dated August 24, 2015, the ALJ found in favor of the Retirement Systems, concluding that Appellant's claim was properly dismissed by the Retirement Systems and could not be heard by the court on its merits because of his failure to timely exhaust his agency remedies on his claim.. (R. p. 6-12.) The ALJ confirmed her decision in response to Appellant's motion for reconsideration and the instant appeal followed. (R. p. 1-5.)

### **ARGUMENT**

**THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT, WHERE APPELLANT'S CHALLENGE TO A DECEMBER 2002 DECISION BY THE SOUTH CAROLINA RETIREMENT SYSTEMS WAS NOT FILED UNTIL AUGUST 2014, HIS CLAIM COULD NOT BE HEARD ON ITS MERITS BY THE**

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<sup>3</sup> Because Appellant has already purchased the maximum sixteen years of purchased service credit allowed under JSRS, his claim is not for the purchase of additional years of service credit, but simply for a revised service purchase cost for service he purchased in 2002 and 2005.

**COURTS BECAUSE HE HAD FAILED TO EXHAUST HIS AGENCY REMEDIES FOR HIS CLAIM.**

The Court should affirm the decision of the administrative law judge in this matter. Based upon the stipulated facts in this case, it is clear that, as a matter of law, Appellant's nearly twelve-year delay in seeking review of the Retirement Systems' December 2002 determination on his service purchase request foreclosed his opportunity to have review of that claim by the courts.

**A. Appellant failed to timely exhaust his agency remedies regarding his challenge to the Retirement Systems' December 2002 determination on his service purchase request, thus depriving the courts of jurisdiction to hear his claim on its merits.**

In his request for review before the Retirement Systems, Appellant sought to "appeal [the] agency's decision in December of 2002 to allow [him] to purchase only 60% of [his] allowable service credit for the time period of May 12, 1986 through June 30, 2002." (R. p. 60.) In particular, Appellant asserted that the part-time service reported on the Request for Service Verification form completed by Appellant and the Defender Corporation of Greenville County in December 2002 reflected only his nominal classification as a part-time assistant public defender for staffing and benefit purposes, but did not reflect his true workload in that position, which was consistent with the caseload and time demands of a full-time public defender. (R. pp. 61-62.) In addition, Appellant contends that other members of JSRS have been allowed to purchase full-time service credit in JSRS for similar work. (R. p. 62.) However, as set out below, this claim was not timely made under the applicable statutory claims procedures and is therefore precluded from review by the courts.

The South Carolina Retirement Systems Claims Procedures Act (“Claims Procedures Act”), and the procedures set forth therein, “constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member or a member’s designated beneficiary arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina,” and any claim presenting such a dispute “must be resolved in accordance with the procedures and provisions provided in [the Claims Procedures Act].” S.C. Code Ann. § 9-21-30 (Supp. 2015). In order to timely file a claim with the Retirement Systems under the Claims Procedures Act,

[a] member or the member’s designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member’s designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems.

S.C. Code Ann. § 9-21-50(A) (Supp. 2015) (emphasis added). If a member does not timely file a claim pursuant to Section 9-21-50 with regard to a decision of the Retirement Systems, the member has failed to exhaust his or her agency remedies under the Claims Procedures Act. S.C. Code Ann. § 9-21-20(5) (Supp. 2015) (stating that the first prerequisite to the “exhaustion of agency remedy” under the Claims Procedures Act is for the member to have “filed a timely claim pursuant to Section 9-21-50 containing the information required pursuant to that section”) (emphasis added). And, because the exhaustion of agency remedies is a condition precedent to review by the Administrative Law Court, the failure to timely exhaust those remedies precludes review of the merits of the member’s claim before the Administrative Law Court and any subsequent review by the judicial branch courts. S.C. Code Ann. § 9-21-60 (Supp. 2015) (providing that a claimant under the Claims Procedures Act may only seek review of a Retirement

Systems' decision with the Administrative Law Court "[u]pon exhaustion of the agency remedy set out in this chapter").

In short, the requirement that a member timely file a claim under the Claims Procedures Act is a statutory condition precedent to any review of the merits of that claim before the courts, such that failure to make a timely claim precludes the courts from taking jurisdiction over the merits of the claim. See Sadisco of Greenville, Inc. v. Greenville Cty Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (holding that the time for serving a notice of appeal for review of an administrative decision "is a jurisdictional requirement, and [the] Court has no authority to extend or expand the time in which the Notice of Appeal must be served"); Burnett v. S.C. State Highway Dep't., 252 S.C. 568, 167 S.E.2d 571 (1969) (holding that the statutory method for seeking review of a decision of the board of condemnation was exclusive and that the court has not authority to extend the time for taking an appeal under those statutory provisions); Perkins v. Dep't of Med. Assistance, 555 S.E.2d 500, 502, 503 (Ga. Ct. App. 2001) (noting that "[i]t must be remembered that the constitutional separation of powers between the executive branch and the judicial branch prevents courts from involvement in review of administrative decisions unless there exists specific legislative empowerment for the judiciary to act regarding executive branch functions; when such delegation of power exists, appeals to the courts must follow such statutory procedures as a condition precedent to obtaining subject matter jurisdiction; because such conferred powers over executive branch functions are statutorily circumscribed" and holding that the lower court had no jurisdiction to review the party's challenge to an administrative decision "because [the party] had no right to appeal to the superior court unless and until it had as a

condition precedent exhausted its administrative remedies through a timely administrative appeal”); see generally Richard H. Seamon, Paige J. Gossett and John D. Geathers, Administrative Agencies—General Concepts and Principles, in South Carolina Administrative Practice and Procedure 1, 102 (Randolph R. Lowell ed., 3d ed. 2013) (noting that, unlike the judicially developed doctrine of exhaustion of administrative remedies, “[i]f a statute is interpreted to both (1) require exhaustion prior to judicial review and (2) provide the exclusive means of judicial review, then the failure to meet the exhaustion requirement . . . could defeat jurisdiction”). Further, this limitation has been routinely recognized by the Administrative Law Court. See, e.g., Elizabeth L. Hehn v. S.C. Public Employee Benefit Auth., S.C. Ret. Sys., Docket No. 14-ALJ-30-0427-CC (S.C. Admin. Law Ct. Dec. 18, 2014) (granting summary judgment in favor of the Retirement Systems because of petitioner’s failure to exhaust her administrative remedies by timely seeking review of the denial of her disability retirement application under the Claims Procedures Act); Ernest Legette v. S.C. Budget & Control Bd., S.C. Ret. Sys., Docket No. 10-ALJ-30-0714-CC (S.C. Admin. Law Ct. Jan. 13, 2011) (dismissing petitioner’s case for his failure to exhaust his administrative remedies with the Retirement Systems because he had failed to seek review of the denial of his disability retirement application within one year of his notice of the decision); Mark Campbell v. S.C. Budget & Control Bd., S.C. Ret. Sys., Docket No. 07-ALJ-30-0527-CC (S.C. Admin. Law Ct. Mar. 27, 2008) (granting the Retirement Systems’ motion for summary judgment where a disability retiree failed to exhaust his administrative remedies with the Retirement Systems by failing to timely seek review of the decision to discontinue his benefits through the Retirement Systems’ claims procedures).

In the instant matter, by a Member Service Payment Invoice prepared December 20, 2002, and mailed to Appellant on December 23, 2002, the Retirement Systems notified Appellant of its determination of the amount of public service credit he was eligible to purchase in JSRS based upon his employment with the Defender Corporation of Greenville County between 1986 and 2002. (R. pp. 57-58.) The invoice clearly specified that the total public service credit Appellant was eligible to purchase for his employment between May 12, 1986, and June 30, 2002, was 9 years, 8 months, and 5 days, based upon 60% of full-time equivalent service credit for that period. However, upon receipt of the invoice, Appellant did not seek review of the calculation reflected on that invoice or otherwise contact the Retirement Systems to inquire about the accuracy of the service purchase invoice. To the contrary, Appellant purchased the service as invoiced, and without protest, in August 2003. (R. p. 59.) Then, in August 2014, some eleven years after the issuance and payment of that invoice, Appellant sought formal review of the calculation of the public service credit he was eligible to purchase as reflected on that invoice. (R. pp. 60-62.) However, because this claim was not timely filed within one year of the Retirement Systems' decision, Appellant failed to exhaust his agency remedies under the Claims Procedures Act, such that this claim was properly dismissed by the Retirement Systems. See S.C. Code Ann. §§ 9-21-20(5)(a), 9-21-50(A). And, by failing to timely file his claim and exhaust his agency remedies, Appellant is precluded from pursuing his claim on its merits before the courts as a matter of law. See S.C. Code Ann. §§ 9-21-20(5)(a), 9-21-60. Finally, it should be emphasized this preclusion is no mere procedural technicality. In fact, the complications implicated in Appellant's request for review are precisely the sort of problems that the deadlines in the

Claims Procedures Act and other administrative procedures acts are designed to prevent. For example, in large part, the merits of Appellant's claim involve using documents generated in 2014 to call into question the service verification executed in 2002 that itself addresses work performed dating back to 1986. It is the difficulty faced in resolving these sorts of stale claims that the deadlines in the administrative claims procedures are intended to avoid.

In sum, because Appellant's request for review of the December 2002 invoice was not timely made, it was properly dismissed by the Retirement Systems under the plain terms of the Claims Procedures Act and constitutes a failure of Appellant to exhaust his administrative remedies such that, as a matter of law, it cannot be heard by the courts on its merits. Accordingly, the Court should affirm the ALJ's order dismissing Appellant's claim.

**B. There is no basis in law or in the stipulated facts or exhibits in this matter for any estoppel, tolling, or other excusal of the statutory bar to a hearing on the merits of Appellant's untimely claim.**

In this matter, Appellant does not contest the fact that he did not timely submit his request for review within the period allowed under the Claims Procedures Act. Rather, he seeks to have his claim heard on its merits notwithstanding the fact that he failed to timely exhaust his agency remedies. In particular, he argues that the statutory condition precedent for review of his claim should be excused under various theories, including breach of fiduciary duty, collateral estoppel, and equitable estoppel. However, there is no basis in law or in the agreed-upon facts in this matter to support such an excusal.

As set forth above, the exhaustion of agency remedies requirement of the Claims Procedures Act is a statutory condition precedent to the right to review of a dispute with

the Retirement Systems before the courts. As such a condition precedent, the failure to satisfy that exhaustion requirement precludes the courts from taking jurisdiction to hear the claim on its merits. Moreover, as discussed earlier, the courts have generally found such statutory conditions precedent to a right to appeal to be jurisdictional in nature and not subject to expansion or excusal by the courts. Although Appellant cites to general definitions of fiduciary duties, collateral estoppel, and equitable estoppel in his brief, he does not identify any authorities that hold that, contrary to other conditions precedent to appeal, the Claims Procedures Act's statutory exhaustion requirement may be estopped, tolled, or otherwise excused by the courts, such that Appellant's untimely claim can be heard on its merits.

Further, even if the Claims Procedures Act's exhaustion requirement were subject to being excused based upon the legal theories advanced by Appellant, the undisputed facts in the record do not support any such excusal. Whether couched as a breach of fiduciary duty or some form of estoppel, Appellant's arguments are premised on three basic facts that are simply not in the record in this matter: (1) that a similarly situated member of JSRS was allowed to purchase service credit that Appellant was denied the opportunity to purchase, (2) that the Retirement Systems was aware of this similarly situated member who was treated differently than Appellant, and (3) that the Retirement Systems concealed knowledge of this differential treatment from Appellant. Without establishing those facts, Appellant's arguments on those theories cannot be supported.

As discussed above, the parties to this case agreed during the contested case proceeding before the Administrative Law Court that it was not necessary for the ALJ to hold an evidentiary hearing and requested that the ALJ decide the case as a matter of law

based upon stipulated facts, joint exhibits, and memoranda of law submitted by the parties. There is only a single stipulated fact that relates to Appellant's claim of differential treatment of similarly situated individuals, which read as follows:

11. Petitioner is aware of another member of JSRS who was found eligible to establish full-time service credit in JSRS for a period of performing indigent criminal defense contract work for Greenville County. Although this member was employed directly by Greenville County, rather than by the Greenville County Public Defender's Office, the member performed substantially similar work in that employment to the work performed by Petitioner that is the subject of Petitioner's service purchase appeal.

While this stipulation recognizes that this other member performed similar work as a public defender, it falls far short of providing the evidence Appellant needs to support his arguments. For example, although the stipulation acknowledges that both Appellant and this other member had similar duties as public defenders, it does not establish that they were similarly situated in their employment situations. On its face, the stipulation states that Appellant and this member had different employers, one working for the non-profit Defender Corporation and one working directly for Greenville County. In addition, the stipulation does not address whether the other member was classified as full-time or part-time by his employer, what compensation was paid to the other member, or any other basic employment information that would be necessary to determine whether the circumstances of his employment were similar to those of Appellant.

Further, regardless of whether Appellant and this other member had similar employment situations, this stipulation also does not provide any evidence that the Retirement Systems was contemporaneously aware of any such similarity. There is no evidence in the record that establishes what information was provided or reported to the Retirement Systems in connection with the other member's service purchase. For

example, the other member's employer may have reported his service to the Retirement Systems as full-time employment, unlike Appellant's employer who reported his service as part-time employment. And, finally, without factual support for a finding that the Retirement Systems was aware of any such similarity between Appellant and the other member at the time of Appellant's service purchase, there can be no finding that the Retirement Systems, either intentionally or unintentionally, concealed such a fact from Appellant. Put simply, despite Appellant's multiple assertions that this other member's service purchase has "identical facts" to his own request, the facts in the record in this matter simply cannot support such a finding. And, any efforts to read additional facts into the record that were not presented below in an attempt to make such a showing are impermissible at this stage in the appellate process. See Rule 210(c), (h), SCACR.

**C. The Administrative Law Judge followed the proper procedure—as agreed to by the parties—in adjudicating this matter.**

Lastly, Appellant's challenges to the procedures used by the administrative law judge are without merit, and are somewhat confounding in light of the parties' stipulations in this matter.

As described in the Statement of the Case above, the parties to this case conferred and agreed early in the proceedings before the Administrative Law Court that it would not be necessary to hold an evidentiary hearing in this case and that this case could be decided as a matter of law based upon a set of undisputed stipulated facts and joint exhibits. (R. p. 17.) The ALJ consented to the parties' request to have this case adjudicated as a matter of law on the stipulated facts, and, in her order confirming that process, the ALJ characterized her review as deciding the case on cross-motions for summary judgment. (R. pp. 13-14.) Appellant did not object to this characterization, and

based upon their agreement and the ALJ's order, the parties signed and submitted stipulations of fact and joint exhibits as the entire factual record upon which the ALJ would decide the case as a matter of law. (R. pp. 51-75.)

However, once the ALJ issued her order deciding this case as a matter of law, Appellant filed a motion for reconsideration, contending that the characterization of the matter as being heard as cross-motions for summary judgment was inaccurate. (R. pp. 49-50.) As a result of that motion, the ALJ held a conference call with the parties to confirm that she had properly understood the parties' request to have the case heard as a matter of law based upon stipulated facts. (R. p. 2.) During the call, the parties confirmed their request and their understanding that the case would be decided as a matter of law on the undisputed facts submitted. (R. p. 2.) The ALJ did not take any evidence or hear arguments from the parties during the call.

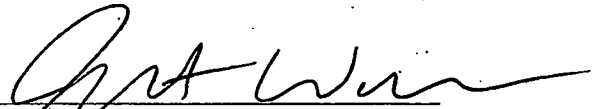
On appeal, Appellant again contends that the adjudication of this matter was mischaracterized as being decided on summary judgment. Although Appellant disagrees with the ALJ's conclusion on the legal issues raised in this case, it appears that the standard of review used by the ALJ in adjudicating this matter is precisely that requested by the parties. It is immaterial whether that review is characterized as adjudicating cross-motions for summary judgment or as deciding the case as a matter of law based upon the undisputed stipulated facts and joint exhibits submitted by the parties. In either event, the court is reviewing a set of undisputed facts and determining whether a judgment may be entered in a party's favor as a matter of law based upon that set of facts. In addition, Appellant further contends that the telephone conference held by the ALJ to confirm her understanding of the parties' requested process for adjudication of the case violated his

due process rights. While the ALJ's order denying Appellant's motion for reconsideration does refer to the telephone call as a "telephonic hearing" in one instance, the ALJ did not take evidence during the call or hear arguments from the parties, but simply confirmed the parties' agreement of the procedural posture of the case. It does not appear that the ALJ's decision to hold a conference call to ensure she had not misunderstood Appellant's agreement to have the case adjudicated as a matter of law could constitute a violation of his due process rights.

### CONCLUSION

For the reasons set forth above, Respondent South Carolina Retirement Systems requests that this Court affirm the decision below by the administrative law judge.

Respectfully submitted,



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April 29, 2016  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APR 29 2016

**SC Court of Appeals**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2015-002228

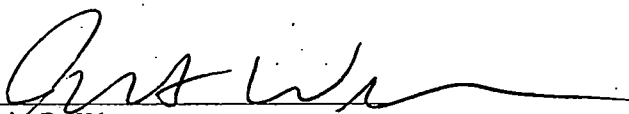
Edward W. Miller, .....Appellant,

v.

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

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems, complies with Rule 211(b), SCACR.

  
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April 29, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APPEAL FROM THE ADMINISTRATIVE LAW COURT APR 29 2016

Deborah Brooks Durden, Administrative Law Judge

**SC Court of Appeals**

Appellate Case No. 2015-002228

Edward W. Miller, .....Appellant,

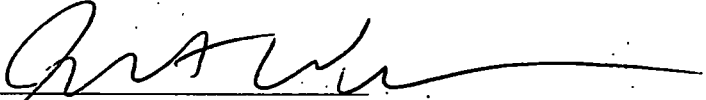
v.

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

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served a copy of the Final Brief of Respondent  
on all parties to this matter by depositing the same in the United States Mail, postage  
paid, and addressed as follows:

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Attorney for Respondent

April 29, 2016

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

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Deborah Brooks Durden, Administrative Law Judge  
Case No. 14-ALJ-30-0539-CC

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APR 12 2016

SC Court of Appeals

Edward W. Miller,

Appellant,

V.

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

Respondents.

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REPLY BRIEF OF APPELLANT

---

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SC ID No.: 3978  
*Appellant*

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Resulting Due Process Violation .....4**

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## **I. Respondent Wrongly Asserts that Appellant's Current Claim Arose in 2002**

In its brief, Respondent erroneously asserts that the current claim arose in 2002 when Appellant's original application for benefits was filed with Respondent. (Resp. Br. pp. 10-11). Respondent, in so asserting, fails to acknowledge that this claim actually arose in 2014 when Appellant first learned of the Watson Case, and when Appellant, therefore, was first put on notice of Respondent's 2002 breaches of Fiduciary Duty. Appellant's 2014 discovery resulted in the initiation of this claim (R. pp. 60-62). Therefore, Respondent cannot assert that a timeliness bar arises based on Appellant's lack of knowledge of events from twelve (12) years earlier. Appellant could not have exhausted his administrative remedies in 2002 due to lack of notice. Respondent's assertion that resolving this claim is hindered because of the passage of time (from 2002 until 2016) disingenuously ignores Respondent's failure to abide by its Fiduciary Duty of Disclosure in 2002. Disclosure in 2002 would have resulted in an appeal of the part time award *at that time*, to which no timeliness bar could then have been asserted.

## **II. Respondent Acknowledges Genuine Disputes as to Material Facts**

Respondent welcomes the application of the Summary Judgment Standard of Review, and wholly supports the ALJ's unilateral decision to apply that standard to this case. In its brief, however, Respondent acknowledges that there are material facts in dispute: 1) whether another member was similarly situated to Appellant; 2) whether Respondent knew of the other member and the differing treatment<sup>1</sup>; and 3) whether Respondent concealed its knowledge of the unequal treatment. Respondent used two pages of its brief to argue why these stipulated facts and exhibits do not support Appellant's position. (Resp. Br. pp. 12-14). Respondent's dispute, with the facts and the reasonable inferences drawn therefrom, highlights that this case presents triable

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<sup>1</sup> Respondent's assertion here is disingenuous as it was the party which granted the Watson award and is the confidential custodian of the records pertaining to it;

issues of fact requiring adjudication by the trier of fact. Clearly there are genuine issues as to material facts which, when viewed in a light most favorable to the non-moving party, *per* the Summary Judgment Standard of Review, require factual adjudication. That the ALJ should have required development of these facts, prior to any decision based on the drastic remedy of Summary Judgment, is an inescapable conclusion. The ALJ decided to apply the Summary Judgment standard, but failed to fairly and properly apply this Standard of Review.

### **III. Respondent Fails to Address its Fiduciary Duty and Breach Thereof**

Nowhere in its brief does Respondent address or deny the existence of the Fiduciary Duties owed to Appellant by Respondent, *i.e.* the Duty of Disclosure of material facts and the obligation to treat similarly situated beneficiaries equally. Nowhere in its brief does Respondent deny that it breached its duties to Appellant. (Resp. Br. pp. 11-14). Respondent's failure to address and to deny these central issues constitutes an admission that these duties were owed to Appellant and that Respondent breached these duties. Respondent's silence demonstrates that Respondent cannot formulate any argument that can excuse the breaches of these duties.

Respondent raises, for the first time, at the appellate level, that there is not enough evidence in the record to support Appellant's positions. (Resp. Br. pp. 12-14). Rather than denying that it has breached its Fiduciary Duties to Appellant, Respondent's theory is that its assertion of insufficient evidence should excuse its Breach of Fiduciary Duties, and Respondent should be allowed to treat similarly situated beneficiaries unequally. Respondent's pursuit of this argument is a further implicit admission that Respondent has breached the fiduciary and common-law trustee duties it owes to the beneficiaries that it was legislatively created to serve.

#### **IV. Respondent Erroneously Attempts to Justify the ALJ's Unnoticed Hearing and Resulting Due Process Violation**

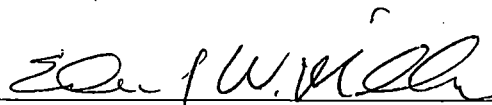
It is beyond dispute that the ALJ conducted a “telephonic hearing” with no notice to Appellant, nor notice that the “telephonic hearing” would comprise a part of the ALJ’s rulings in this case. There is no transcription or record of any kind of the “telephonic hearing” (R. p. 39). The September 28, 2015 Order of the ALJ contains alleged statements of the Appellant, purportedly made during the “telephone hearing,” among its findings of fact. Further compounding its Constitutionally incorrect treatment of the Appellant, the ALJ than used Appellant’s alleged, undocumented statements as a partial *basis* for its ruling (R. pp. 1-5). Respondent attempts to excuse this manifest Constitutional infirmity by relying on the same specious, undocumented “facts” cited by the ALJ from the unrecorded “hearing:” *i.e.* that no evidence was taken and that no arguments were advanced. (Resp. Br. pp. 15-16). A record of this hearing would remove any question about the discussions contained therein and allow for meaningful appellate review. Appellant strongly disagrees with the Respondents’ defense of the Constitutionally infirm use of an unnoticed and undocumented “hearing” as a partial basis for the ALJ’s ruling. Respondent’s brief fallaciously represents that no evidence was taken and no arguments were made at the “telephonic hearing,” despite the clear language of the September 28, 2015 Order, where the ALJ cites alleged comments of the Appellant made during the “telephonic hearing.” Respondent asserts that this Court should ignore the clear language of the ALJ’s September 28, 2015 Order so as to gloss over the ALJ’s violation of Appellant’s Constitutional Due Process rights.

### CONCLUSION

For the foregoing reasons this Court should reverse the ALJs' Orders and grant Appellant's requested relief, or, in the alternative, reverse the ALJs' Orders and remand the case for proceedings to address what Appellant has been wrongfully denied to date.

Respectfully Submitted,

Dated: April 7, 2016

  
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*Appellant*

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

APR 12 2016

SC Court of Appeals

Deborah Brooks Durden, Administrative Law Judge  
Case No. 14-ALJ-30-0539-CC

Edward W. Miller

Appellant,

V.

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

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that he/she has served the Appellant's Final Brief, Appellant's Reply Brief, and the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 9, 2016, addressed to their attorney of record, Justin R. Werner, Esq., Post Office Box 11960, Columbia, South Carolina 29211-1960.



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SC ID No.: 3978  
Appellant

Dated: 4/9/2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Edward W. Miller, Appellant,

v.

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

Appellate Case No. 2015-002228

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Appeal From The Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

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Unpublished Opinion No. 2018-UP-074  
Heard October 4, 2017 – Filed February 7, 2018

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**AFFIRMED**

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Howard W. Paschal, Jr., of Price, Paschal & Ashmore,  
PA, of Greenville; Edward W. Miller, of Greenville, both  
for Appellant.

Justin Richard Werner, of the South Carolina Public  
Employee Benefit Authority, of Columbia, for  
Respondent.

---

**PER CURIAM:** Edward W. Miller (Appellant), appeals the administrative law  
court's (ALC's) order granting summary judgment in favor of the South Carolina

Public Employee Benefit Authority and South Carolina Retirement Systems (collectively, Respondents), arguing the ALC erred in failing to find Respondents (1) owe Appellant the fiduciary duty to fully and fairly disclose material facts, (2) violated Appellant's right to equal protection by classifying him differently than another similarly situated beneficiary, and (3) are estopped from asserting a timeliness bar to Appellant's claim. Appellant further contends the ALC denied him due process by conducting a hearing without full and fair notice and by failing to preserve a proper record. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. Although we agree that the ALC erred in failing to find Respondents owe Appellant the fiduciary duty to fully and fairly disclose material facts, we nevertheless affirm in result as there has been no fiduciary violation. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."); *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) ("The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature."); S.C. Code Ann. § 9-16-10(4) (Supp. 2017) (defining "fiduciary" as a person who "exercises any authority to invest or manage assets of a system"); S.C. Code Ann. § 9-16-10(10)(a) (Supp. 2017) (defining "trustee" as "the Board of Directors of the South Carolina Public Employee Benefit Authority"); S.C. Code Ann. § 9-16-40 (Supp. 2017) (providing the duties "[a] trustee, commission member, or other fiduciary shall discharge . . . with respect to a retirement system" including but not limited to "care, skill, and caution," "impartially," and "good faith"); *Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning."); *Trustee*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term "trustee" as "[s]omeone who stands in a fiduciary or confidential relation to another; esp[ecially], one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary"); *Anthony v. Padmar, Inc.*, 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App. 1995) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.").

2. Because Appellant indicated he was employed "part-time" on his service verification form and his employer also designated him as a part-time employee, Appellant cannot establish an equal protection violation. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998) ("In order to

establish an equal protection violation, a party must show that similarly situated persons received disparate treatment.").

3. The ALC properly declined to rule that Respondents are estopped from asserting a timeliness bar to Appellant's challenge of the System's December 2002 determination. *See* S.C. Code Ann. § 9-21-50(A) (Supp. 2017) ("A member or the member's designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member's designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems."); S.C. Code Ann. § 9-21-20(5) (Supp. 2017) (explaining a member has exhausted his administrative remedies if that member has "(a) filed a timely claim pursuant to Section 9-21-50 containing the information required pursuant to that section; (b) participated in the agency claims procedure established by the board; and (c) obtained a final retirement system decision").

4. Because the record reflects the parties submitted undisputed and stipulated facts and joint exhibits, agreed the case would be decided as a matter of law based upon these submissions, and agreed no evidentiary hearing was necessary, the ALC neither erred in viewing these submissions as cross-motions for summary judgment nor in granting summary judgment in favor of Respondents. *See* SCALC Rule 68 (stating the rules of civil procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules); Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009) ("Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.").

5. Although the ALC's order denying Appellant's motion to alter or amend refers to a teleconference with the parties as a "telephonic hearing" and recites comments allegedly made by Appellant as a partial basis for its ruling, we note the ALC held the teleconference to confirm the parties' agreement to have the case adjudicated as a matter of law based on the stipulated facts and joint exhibits; it neither accepted evidence nor heard arguments from the parties during the call.

**AFFIRMED.**

**WILLIAMS, THOMAS, and MCDONALD, JJ., concur.**

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

Edward W. Miller,

Appellant

v.

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

Respondent

**RECEIVED**

**MAR 07 2018**

**SC Court of Appeals**

Appeal from the Administrative Law Court  
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-074  
Heard October 4, 2017 - Filed February 7, 2018

**APPELLANT'S PETITION FOR REHEARING**

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In its *per curiam* Opinion, (“Opinion”), filed in the instant case on February 7, 2018, the Court of Appeals, (“Court”), affirmed the Administrative Law Court’s, (“ALC’s”) order granting summary judgment in favor of Respondent. Pursuant to SC Appellate Court Rules 221, 240 and 242, Appellant hereby petitions this Court for a rehearing of his appeal, on the grounds detailed below.

The appellant will explain with particularity each item which the Court of Appeals overlooked or misapprehended in the above referenced opinion as required by Rule 221. Additionally, the Appellant asserts that even if the Court of Appeals was not in error on the items discussed below, the appropriate remedy for this Court’s ruling recognizing the ALC erred in failing to find the existence of a fiduciary duty, would be to remand the case for an evidentiary hearing on these issues rather than affirming and dismissing it in full. As a result, the Appellant prays that this Court rehear this matter and remand this case for a full evidentiary hearing.

Appellant asserts the Court of Appeals overlooked or misapprehended the law in the following items as listed in the opinion #2008-UP-074.

**1. This Court, in the first paragraph of its Opinion, correctly held that the ALC erred in failing to hold that Respondent owes fiduciary duties to Appellant; this Court, however, erred in affirming the ALC’s grant of summary judgment finding, without a full, factual record required for proper adjudication, that there had been no breach of Respondent’s fiduciary duties to Appellant.**

In South Carolina jurisprudence, it is well-established that the existence of a fiduciary relationship, and attendant fiduciary duties, is a question of law. The determination of whether a breach of fiduciary duties has occurred, on the other hand, is a question of fact. *Turpin v. Lowther*, 404 SC 581, 745 SE2nd 397 (S.C. 2013); *Vortex Sports and Entertainment, Inc. v. Ware and Associates, Inc.*, 378 SC 197, 662 SE 2<sup>nd</sup> 444 (S.C. Ct. App. 2008). In this case, the ALC did not reach the issue of whether Respondent had breached its fiduciary duties to Appellant because the ALC did not recognize, as this Court has, that Respondent was a fiduciary. Though this court has correctly held that Respondent is a fiduciary, this court incorrectly held that there had been no breach of the fiduciary duty by Respondent without a full, factual record before the Court.

Alternatively, it is uncontested that this appeal arises from the ALC Court's adjudication of Appellant's claims for breach of fiduciary duty by Respondent. Thus, this case is one in equity. This Court may, therefore, find facts, *de novo*, according to its own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (S.C. 2011). In this case, however, there is **no** factual record available for review of an action in equity by this Court. Due to the lack of adequate factual record for review, Appellant submits that the finding of this Court that there was no breach of fiduciary duty is unsupported by any factual record from the ALC.

This Court's error should be corrected by remanding this case to the ALC for the development of a full factual record to determine whether Respondent breached its fiduciary duties owed to Appellant.

**2. In the second Paragraph of the Opinion, this Court held that Appellant was a "part-time" employee and therefore cannot establish unequal treatment of like situated beneficiaries; however, there is nothing in the Record on Appeal with which to compare that designation which would substantiate that ruling; the sole basis for the Court's ruling was an assertion made by counsel for Respondent elicited during oral argument; in relying in the Opinion on the unsubstantiated assertion by counsel for Respondent, this Court has denied due process to Appellant, in violation of SC and US Constitutions.**

The Record on Appeal is replete with significant evidence that Appellant's designation as a part-time employee was only nominal and for clerical, administrative purposes. The actual work performed was identical to that performed by Joe Watson, who received full-time earned service credit. This undisputed fact is found in the Record on Appeal in three separate affidavits, which are ignored in the Opinion of the Court.

Reference to the audiotape of the oral argument of this case will show that one of the Panel Judges asked counsel for Respondent if Joe Watson's application (which is not in the Record on Appeal) was identical to Appellant's application. Counsel for Respondent replied that Watson's application did not contain a part-time designation and was treated differently. This assertion cannot be found in any material contained in the Record on Appeal. That the Judges had to reach outside the Record on Appeal and elicit unsubstantiated "testimony" from counsel

for Respondent to form the basis of the Court's decision establishes the following:

1. There was a scintilla of evidence and, therefore, a genuine triable issue of fact about the similarity and/or difference between Appellant's treatment and Watson's treatment, which was not in the Record on Appeal of this case;

2. The Court based its affirmation of the ALC's Order on a fact which was not in the Record on Appeal but which was disclosed at oral argument by counsel for Respondent, which establishes that the ALC Trial Court's Order was not founded on adequately established fact(s);

3. The answer by counsel for Respondent to the Judge's question violates the Respondent's statutory duty of confidentiality owed to Watson, exemplifies Respondent's failure to understand its fiduciary duties owed to beneficiaries (Watson in this instance), and demonstrates the Respondent's willingness to violate its fiduciary duty to the Appellant in handling Appellant's application to purchase additional retirement coverage;

4. Admittedly, Appellant's application job description was "part-time," however it is undisputed Appellant and Watson had the same caseload and same employment requirements. Respondent's reliance on this superficial difference between Watson and Appellant violates Respondent's fiduciary duty to look past the superficial and to treat Appellant with full good faith and fair dealing as a fiduciary, and the mandatory requirement of equal treatment of like-situated beneficiaries;

5. This Appellate Court's reliance on unsubstantiated evidence, not in the Record on Appeal in this case, which formed the basis for its decision herein, violates Appellant's constitutional right of due process during this stage of the proceeding;

6. Because this Court has violated Appellate Rules by reaching outside of the Record on Appeal, Appellant now informs the Court that he has, since the initiation of this Appeal, become aware of another judicial member, similarly situated to Appellant and Watson, who has been treated similarly to Watson by being allowed to purchase full-time earned service credit, further emphasizing the unequal and disparate treatment given to Appellant, and the Respondent's failure in exercising its fiduciary duties.

Based on the foregoing, Appellant seeks the remand of this case to the ACL Trial Court to establish a full, proper record for adjudication of the parties' positions.

**3. In the third Paragraph of the Opinion, this Court, while correctly holding that Respondent was a fiduciary, incongruously held that the ALC properly declined to rule that Respondent was equitably estopped from asserting a timeliness bar to Appellant's application for additional retirement coverage; this Court erred in failing to recognize that had Respondent made proper and timely disclosure to Appellant, then Appellant would have made a timely application for additional retirement coverage.**

The Court overlooks three matters in this regard:

Initially, at oral argument this Court recognized that this case presents a **novel issue of law** in South Carolina jurisprudence: whether or not a "discovery rule" should apply, under these circumstances, to toll the running of the time limitation which would allow Appellant to pursue the relief sought herein. The Court, however failed to address this seminal issue in its opinion. As a practical matter, Respondent may well have not been consciously aware of the Watson case when it made its inequitable determination in 2002 with respect to Appellant. However, Respondent did possess that knowledge as the sole, and statutorily confidential, custodian of that information. It is undisputed that Appellant neither knew of nor had any access to that information, which resulted in the unequal treatment of like-situated beneficiaries. This conundrum presents the quintessential dilemma, involving important constitutional, statutory and common law rights, which can only be remedied by the imposition of a relevant discovery rule.

Second, the Respondent is a fiduciary. Respondent's fiduciary duty requires that it not simply sit mute. Rather the Respondent owes its primary, affirmative duty of vigilance and care for the beneficiaries of the retirement system of which the Respondent is the legislatively-created trustee. By affirming the ALC's Order this Court allows the Respondent to circumvent its fiduciary duties by availing itself of the use of an equitable defense to avoid its unequal treatment of a beneficiary. It is to this Court that Appellant has come seeking the enforcement of equitable, fiduciary principles on Respondent's management of the retirement system. In the Opinion, this Court held that Appellant had not made timely application for the purchase of additional coverage in the retirement system. Respondent, as a fiduciary, failed to make full disclosure to Appellant that other parties had previously, under identical circumstances, been allowed to purchase additional coverage in the retirement system. Respondent's failure to disclose, as required by Respondent's fiduciary duty, under these circumstances invites the

application of equitable estoppel to correct Respondent's gross violation of Respondent's fiduciary obligations of fair dealing, full disclosure, and honesty in fact.

Finally, the Record on Appeal demonstrates that, at no time, did Respondent comply with its fiduciary duty of disclosing that Appellant had a right to purchase additional retirement coverage. Only during the litigation of this case did Respondent acknowledge Watson's purchase of additional retirement coverage under circumstances similar to Appellant's. As a result, it is **uncontested** that the Appellant had neither knowledge nor notice to form any constructive knowledge of Mr. Watson's purchase. As a result, Appellant could not have known he had a claim for full-time earned service credit or that the claim had been denied for these retirement benefits. See *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (S.C. 2009), holding a "waiver is a voluntary and intentional abandonment or relinquishment of a **known right**." 384 S.C. at 480, 682 S.E.2d at 807. The Court overlooks the fact that one can only surrender a **known right**.

For these reasons, Appellant urges this Court to remand this case with instructions to the ALC to establish a full record on which to enforce fiduciary and constitutional duties owed to Appellant by Respondent.

**4. In the fourth Paragraph of the Opinion, this Court held that the parties voluntarily submitted "undisputed and stipulated facts and joint exhibits" which justified the ALC granting summary judgment; however, Respondent conceded that the parties differed in interpretation of the facts before the ALC; the existence of disputed inferences reasonably drawn from a common factual record constitutes the presence of a scintilla of evidence of genuine, triable issues of fact which precludes granting of summary judgment.**

It is axiomatic that a summary judgment cannot be granted where there is a scintilla of evidence that gives rise to a genuine, triable issue of fact. Where there is dispute as to the inferences from the facts in the record, then summary judgment cannot be granted. *Nelson v. Charleston County Parks and Recreation*, 362 S.C. 1, 3, 605 S.E.2d 744, 746 (S.C. Ct. App. 2004) ("Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.")

As referenced above, the Record on Appeal is replete with material facts which are in

dispute. Respondent acknowledged in its brief herein, that it disputes, not only the facts of the case, but the reasonable inferences which may be drawn therefrom. This case is not ripe for a decision made pursuant to the strict and harsh rule of Summary Judgment. The ALC erred in failing to require the parties to fully develop a complete evidentiary record when making its decision.

In its opinion, this Court failed to address, with any specificity to allow for further appellate review, the incomplete evidentiary record below, the clearly delineated disputed facts and the clearly delineated disputed inferences reasonably drawn from those facts.

Because there is a scintilla of evidence which defeats summary judgment in this case, the case should be remanded for trial, or for development of a full factual record.

**5. In the fifth Paragraph of the Opinion, this Court incorrectly held that it was not error for the ALC to rely on an unscheduled, unrecorded telephone call, in part, for the ALC's Order, but that it was permissible for the ALC to reject other communications made during the telephone call; Appellant asserts that such judicial procedure is unconstitutional and warrants appellate correction to establish proper protocol for telephonic judicial conferences with litigants and counsel.**

That the telephone call was unscheduled and unrecorded presents three errors which need correction:

First, Respondent asserts that the alleged agreement between counsel and the ALC Trial Judge during the telephone call constituted a "settlement" of certain procedural issues. By issuing an Opinion which upholds the ALC's finding that the parties agreed to a "settlement" on the telephone without any record or publication in open court violates Rule 43(k) of the SCRCF.

Rule 43(k) of the South Carolina Rules of Civil Procedure provides no agreement between counsel shall be binding unless reduced in writing and entered into the record or "unless made in open court and noted upon the record." The purpose of Rule 43(k) is:

[T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

*Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (S.C. 1995) (quoting 83 C.J.S. *Stipulation* § 4 (1953)); see also *Motley v. Williams*, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (S.C. Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement). The policy behind Rule 43(k) applies to the telephone call: there is a dispute as to the scope of the parties' settlement of issues, made in an unrecorded teleconference. As set forth, *supra*, the terms and validity of the parties' unrecorded agreement must be settled at the trial court level, rather than take up valuable appellate court time.

The second issue posed by this Court's affirmation of the ALC's use of an unrecorded telephone conversation between the Court and counsel is constitutional: the procedural propriety of the granting of summary judgment by the ALC rests on the contents of an unrecorded judicial telephonic hearing. At the heart of the notion of "due process" rests the right to appear and to be heard. ALC's use of an unrecorded telephone conversation between the Court and counsel is unconstitutional: The failure of notice and to make a record alone requires a new trial. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review. *S.C. Const.* Art. 1, Section 22 and *Adams v H.R. Allen, Inc*, 397 S.C. 652, 726 SE.2d 9 (S.C. Ct. App. 2012). A denial of the right to appear and to be heard, without a recorded agreement by Appellant, does not comport with the "fundamental fairness" of due process as guaranteed to Appellant by US Constitution, Amendment V and SC Constitution Article 3. Appellant suggests that the ALC's reliance on a telephonic hearing, enforced against Appellant without a record, does not comport with the constitutional requirements. *supra*. Appellant asserts that there should be specific guidelines for participation in telephonic hearings between a court and counsel and litigants, to protect the constitutional rights of all parties.

Finally, the Court of Appeals finds that the ALC "neither accepted evidence nor heard arguments of the parties during the call." The Court of Appeals overlooks or misapprehends that this is the exact injury that the Appellant suffered. The Motion to Alter or Amend was the time to raise these issues and allow the ALC to address the issue of a breach of a fiduciary duty and other issues raised. With the complete failure to give notice, conduct a legitimate hearing or

create a record, the Appellant was unfairly and wrongfully prevented from pursuing and protecting his rights.

Appellant asserts that this error should be corrected by remanding the case to the ALC to develop a full and proper record on which the ALC might properly rule.

### CONCLUSION

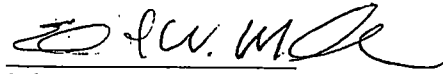
Respondent owes two kinds of duties to Appellant. First, Respondent owes fiduciary duties of good faith, fair deal and, and full disclosure to Appellant. Second, Respondent as a state agency, owes constitutional duties of due process and equal protection of the law to Appellant. The ALC and the opinion of this Court have failed to properly correct Respondents' breaches of fiduciary and constitutional duties.

Additionally, and for purposes of further appellate review as may be necessary, Appellant requests specific rulings on the specific issues raised in Appellant's briefs and in this Petition for Rehearing. Further, Appellant asks for rulings from this Court, *inter alia*, on whether there is, or is not, a scintilla of evidence in the Record on Appeal which proves or disproves Respondent's breach of fiduciary duty and whether Respondent has breached its fiduciary duty by failure to disclose material facts to Appellant.

Based on the foregoing, Appellant asks this Court to reverse the Opinion to require Respondent to sell additional coverage in the retirement program, as it did for Watson, or, in the alternative, to remand this case to the ALC Trial Court to develop a full factual record for the proper constitutional and statutory adjudication of Appellant's claims.

Date:

3/6/18



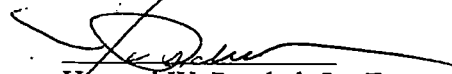
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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

RECEIVED

MAR 07 2018

Deborah Brooks Durden, Administrative Law Judge  
Case No. 14-ALJ-30-0539-CC

SC Court of Appeals

Edward W. Miller

Appellant,

V.

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

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served a copy of the Appellant's Petition for Rehearing on all parties in this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

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SC ID No.: 3978  
Appellant

Dated: \_\_\_\_\_

3/6/18

# The South Carolina Court of Appeals

Edward W. Miller, Appellant,

v.

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

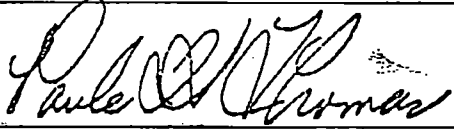
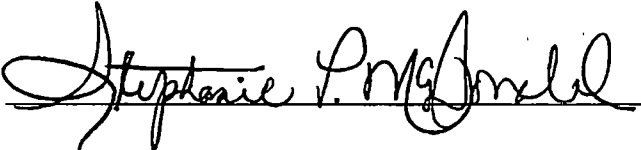
Appellate Case No. 2015-002228

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_  
J.  
  
\_\_\_\_\_  
J.  
  
\_\_\_\_\_  
J.

Columbia, South Carolina

cc:

Justin Richard Werner, Esquire  
Howard W. Paschal, Jr., Esquire  
Edward W. Miller, Esquire

**FILED**

May 24, 2018

EDWARD W. MILLER, JUDGE  
**The Circuit Court of the Thirteenth Judicial Circuit**  
GREENVILLE COUNTY COURTHOUSE, SUITE 219  
305 EAST NORTH STREET  
GREENVILLE, SOUTH CAROLINA 29601-2100

Mr. Daniel E. Shearouse  
Clerk of Court

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