

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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SC Court of Appeals

Keith E. Turner,

Docket No. 15-ALJ-30-0586-C

Petitioner,

vs.

AMENDED FINAL ORDER

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

Respondent.

APPEARANCES: For the Petitioner: Keith E. Turner, *Pro se*
For the Respondent: Justin R. Werner, Esquire

STATEMENT OF THE CASE

This matter came before the South Carolina Administrative Law Court (ALC or court) pursuant to S.C. Code Ann. § 9-21-60 (Supp. 2015) upon the request for a contested case hearing filed by Keith Turner (Petitioner). The Petitioner contested the Final Agency Determination issued by South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (PEBA or Respondent), which determined that the Petitioner received an overpayment of disability retirement benefits in the amount of \$20,537.80, which was his full disability benefit in 2014. The sole issue in this case was whether the Petitioner received an overpayment which he must repay. After the court filed its Final Order and Decision on July 28, 2017, the Department filed a Motion to Alter or Amend the Final Order on August 14, 2017. The court now issues this Amended Final Order, addressing the new issues raised by the Department in its motion and further clarifying the court's position.

FINDINGS OF FACT

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

The Petitioner worked as a firefighter with the City of Charleston for several years, until he fractured his back during a high-rise fire. The Petitioner applied for disability retirement benefits on February 7, 2014, and was ultimately approved for disability retirement. He retired on

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March 9, 2014, having accrued nearly twelve (12) years of service credit combined in the South Carolina Retirement Systems (SCRS or Retirement Systems) and Police Officer Retirement System (PORS) with an estimated average final compensation (AFC) of \$48,393.89. PEBA uses the AFC to calculate the estimated benefits, which is based on the twelve (12) highest consecutive quarters of salary posted to the system on the date of termination.

Prior to his retirement, the Petitioner consulted City of Charleston human resources personnel concerning the ramifications of taking a private sector job after his disability retirement. He testified that he was informed that as long as his earnings did not exceed his AFC, he would suffer no reduction in disability retirement benefits. The Petitioner testified that he received a job offer in the private sector making approximately \$45,000 a year selling firetrucks. The Petitioner accepted this private sector job because he believed he would still be able to receive his full monthly retirement benefit since it was slightly below his AFC of \$48,393.89. The Petitioner also testified that he worked a second weekend job (teaching security officers) to make extra money.

Two months following his retirement, PEBA sent the Petitioner a document entitled "Notice of Retirement Eligibility and Estimated Benefit," dated May 14, 2014. The document notified the Petitioner of his estimated AFC and his estimated monthly benefit.¹ On that same date, PEBA also sent the Petitioner another document entitled "Information for Retired Members." In a paragraph on page two (2) of this document, PEBA informed the Petitioner:

If you receive disability benefits and return to employment earning less than your Average Final Compensation (AFC), adjusted for inflation, your disability allowance will be reduced to an amount so that your disability benefits plus your earnings equal the amount of your AFC, adjusted for inflation. If your compensation then or anytime thereafter is equal to, or greater than the adjusted AFC, your disability benefits *will be discontinued*. (Emphasis Added).

Almost a year after his retirement, and after he had already received \$20,538 in disability benefits, the Petitioner received another letter from PEBA. The letter, dated February 25, 2015, informed the Petitioner for the first time of his "annual earnings limitation" for the year 2015, which was \$23,114.19--the difference between his AFC for 2015 (\$48,539.07) and his estimated disability retirement allowance for 2015 (\$25,424.88). (Respondent's Exhibit 7). The letter also explained that if he chose to work in 2015, his annual earnings from public or private employment

¹ It was not until October 21, 2014, that PEBA issued another letter to the Petitioner, informing him that his "retirement account had been updated and that the Petitioner's AFC was now \$48,393.89, and his monthly benefit was to be \$1,820.73. (Respondent's Exhibit 4).

could not exceed his "annual earnings limitation" of \$23,114.19, which represents the difference between [his] average final compensation adjusted for inflation (\$48,539.07) and [his] projected disability retirement benefits for 2015 (\$25,424.88).²

The Petitioner became alarmed because the letter also informed him that if his earnings from employment in 2015 exceeded the annual earnings limitation of \$23,114.19, that his disability retirement benefits would be reduced by the amount in excess of the earnings limitation, and that he "would be required to repay any overpayment of disability retirement benefits..." PEBA also requested the Petitioner provide copies of his W-2 statements for 2014. The Petitioner testified at the hearing that this was the first inkling that he might have a problem for 2014, because he had never received any information regarding his 2014 annual earnings limitation. The Petitioner promptly submitted his 2014 W-2 Forms for his 2014 jobs (\$39,808 from ACFT; \$7,680 (American Citadel Guard-job ended in November 2014) which totaled \$47,488. He also submitted a W-2 from a job that ended in January 2014 from the American LaFrance for \$6,790 (American LaFrance-job ended in January 2014 because company closed). He also received a payout for sick leave in February 2014 for \$2,403, as well as disability payments from the PORS (\$17,737.36) and the South Carolina Retirement System (\$2800.44), which totaled \$20,538 in retirement payments. Lastly, he submitted a W-2 Form for a payment from an insurance settlement for \$7,100 received in February 2014.

On April 22, 2015, PEBA's Benefits Payment Department informed the Petitioner in a letter that he was "required by law to repay any overpayment of disability retirement benefits" and that his entire 2014 disability retirement benefit, totaling \$20,537.80 was an overpayment. Specifically, the letter found that the Petitioner's wages for 2014 were \$63,984.60³ and that his "wages" exceeded his Adjusted AFC of \$48,393.89 and, therefore, his full disability benefit in 2014 was an overpayment. The letter informed the Petitioner that he could elect to satisfy this balance with a lump-sum payment or arrange a payment plan. (Respondent's Exhibit 9). Lastly, PEBA informed the Petitioner that since he was "earning a salary that is more than [his] adjusted

² The Petitioner never received any such letter detailing any limitations on earnings for 2014, since it was as late as October 2014, when PEBA finally sent the Petitioner a final AFC and monthly benefit amount.

³ Though the letter from PEBA at Respondent's Exhibit 9 listed a total of \$63,985 in 2014 earnings, it failed to explain how PEBA arrived at that figure.

AFC, [he] was no longer eligible for a monthly annuity” and that PEBA was “suspending [his] disability retirement benefit indefinitely pursuant to S.C. Code Ann. 9-1-1580.” Therefore, the Petitioner has not received a disability retirement payment since April 2015.

The Petitioner immediately challenged the determination that he was overpaid \$20,538 in disability retirement benefits for 2014 and that he must repay that overpayment. In particular, the Petitioner related that it was not until he received the February 2015 letter that informed him of his 2015 annual earnings limitation, he realized that he had been given incorrect information. The only information he had been given prior to that was that his salary from his post-retirement employment could not exceed his AFC. He testified that, had he known the truth, he would have chosen Option B, which was to defer his retirement until he reached retirement age “or my back finally completely gives out.” (R. E. 10). He stated he was still “having major problems with my back as a result of the injury and looking to have to spend \$22,000 out of pocket to fix it or at least try and get below a 3 on the pain scale to make it tolerable.” He also stated “when we lost the retirement this month, it was felt immediately in our house. A total loss of the retirement would devastate our livelihood and financial well-being. Especially since I do not know how long my back will allow me to keep working.” (R.E. 10). He asked the agency if he could be allowed to place his retirement disability into deferment and not have to pay back the \$20,538 under the circumstances. The Petitioner also stated that he did not want to retire, but there was no job in the fire department that he could still perform after his injury.

The Petitioner also argued that he received a great deal of his 2014 income prior to his retirement date of March 9, 2014, and those prior payments were for 1) a disability insurance settlement related to his fractured back, 2) a salary from a company that went out of business in January 2014, and 3) a payout for sick leave/vacation time.

The Petitioner further contended that the calculation of his overpayment of benefits should be adjusted to exclude any income paid to him in 2014 prior to his March 9, 2014, retirement date. Both the Petitioner and the Respondent agreed, at the hearing, that the Petitioner’s pro-rated salary from March 9, 2014 through the end of the year amounted to \$43,470.

On November 30, 2015, PEBA issued its Final Agency Determination (Determination) concluding that the Petitioner was overpaid \$20,537.80 and that he must repay this overpayment. The Determination letter cited to S.C. Code § 9-11-80(4) which regards PORS disability retirees,

which states “if the system certifies that the member’s disability has been removed and that he has regained his earning capacity” then his allowance may be discontinued.

The Determination then referenced S.C. Code § 9-1-1580, which provides for the mechanics of the earnings limitation calculation under the South Carolina Retirement System. That section provided that, if the “disability beneficiary” was reported to be “engaged in or is able to engage in gainful occupation” paying more than the difference between the retirement allowance and the average final compensation, then the “amount of his disability retirement allowance must be reduced to an amount which, together with the amount earnable by him, equals the amount of his average final compensation.”

PEBA informed the Petitioner that not only was he not entitled to receive any disability retirement benefits for that period, but “disability retirement benefits paid in excess of the earnings limitation are overpayments of benefits that may be recouped by PEBA. See id. § 9-1-1670(A).” (R.E. 11, Determination). The Determination also listed as its authority for recoupment of the overpayment a New Mexico Court of Appeals case, as well as a New York Superior Court case and an Oregon Court of Appeals retirement case.⁴ The Department’s Determination, for the first time, listed a “pro-rated average final compensation of \$39,378.04” which it calculated using the date of his disability retirement in March 2014. The Determination cited no authority that would allow it to pro-rate the Petitioner’s AFC.

Apart from retirement case law from other states, and S.C. Code Ann. § 9-1-1670(A), PEBA listed no other case law or statutory authority for recoupment of payments. Likewise, PEBA’s Determination did not provide any statutory authority for using a reduced or “pro-rated” average final compensation instead of the “average final compensation” previously listed for the Petitioner at \$48,393.89. PEBA’s “pro-rated” AFC of \$39,378.04 was never mentioned previously in its April 22, 2015, letter to the Petitioner, and appears to be in response to the Petitioner’s arguments that his earnings and/or wages should be pro-rated for 2014 from his retirement date.

At the hearing in this matter, the Petitioner corrected his previously listed total from his May 12, 2015 appeal letter, to a total pro-rated combined salary of \$43,470. At the hearing, the

⁴ *State v. ex rel Pub. Employees Ret. Ass’n v. Longacre*, 33 P. 3d 906, 911 (N.M. Ct. App. 2001); *rev’d on other grounds*, 59 P. 3d 500 (2002). PEBA also argued in this Determination of November 2015, that it has a duty to protect the corpus of the trust, and cited to *City of New York v. Ret. Bd. Of Teachers’ Ret. Sys.*, 455 N.Y.S. 2d 703, 705 (Sup. Ct. 1982), and *Anderson v. Pub. Employees Ret. Bd.*, 895 P. 2d 1377, 1381-82 (Or. Ct. App. 1995).

Respondent agreed that this was the actual pro-rated amount for the Petitioner's 2014 post-retirement earnings.

The Petitioner reiterated that he is currently not able to perform duties as a firefighter, and is still having back problems as a result of the spinal fractures that occurred in the course of the performance of his duties as a firefighter. His decision to retire was not voluntary, and he retired solely because there was no other job he could perform within the fire department. He testified that the job he currently holds involves selling fire trucks and is a "desk job."

This court finds that the Petitioner is without fault concerning any overpayments of PORS disability retirement benefits, and that he has performed no act or omission that resulted in an overpayment of PORS retirement disability payments. Likewise, at no time did the Petitioner fail to disclose material facts, nor did he accept a payment that he knew or should have known to be erroneous.

Respondent offered no testimony from any witnesses. The case file was entered into evidence by the Respondent, without objection, and constituted the Respondent's entire case. There was no evidence or testimony offered that the Petitioner's disability was removed. The Petitioner's AFC in 2014 was \$48,393.89 and his earnings from gainful employment amounted to \$43,470 in 2014 (prorated from March 9, 2014). The Petitioner's disability payment in 2014 was \$20,537.80. The difference between the AFC and retirement allowance (\$20,537.80) was \$27,856.09, also referred to as the annual earnings limitation. This amount, minus the Petitioner's pro-rated 2014 earnings from gainful employment equals \$15,613.91, which was the amount of the overpayment to the Petitioner. Alternatively stated, the amount of the Petitioner's AFC for 2014 minus the earnings from gainful employment (\$43,470), was \$4,923.89, which was the amount the Petitioner could receive in disability payments in 2014. Subtracting this amount (\$4,923.89) from the total disability payment the Petitioner received in 2014 (\$20,537.80) amounted to an overpayment to the Petitioner of \$15,613.91. This amount of overpayment is lower only because of the use of the pro-rated wages earned, which the Respondent agreed to at the hearing.

CONCLUSIONS OF LAW

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

This court has jurisdiction over this contested case pursuant to S.C. Code Ann. § 9-21-60 (Supp. 2015), S.C. Code Ann. § 1-23-600(A) (Supp. 2015), and S.C. Code Ann. § 1-23-310 *et seq.* (Supp. 2015). As the moving party in this matter, the Petitioner bears the burden of establishing by a preponderance of the evidence that he is entitled to the relief he seeks from the Retirement Systems. *See Leventis v. S.C. Dep't. of Health & Envtl. Control*, 340 S.C. 118, 132-133, 530 S.E. 2d 643, 651 (Ct. App. 2000). As the fact-finding body, this court must weigh and pass upon the credibility of the evidence presented. *S.C. Cable Television Ass'n v. Southern Bell and Tel. Co.*, 308 S.C. 216, 417 S.E. 2d 586 (1992).

Retirement statutes should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished.” *King v. South Carolina Retirement Systems*, 319 S.C. 373, 461 S.E. 2d 822 (1995). The retirement system is a creature of statute and can only exercise that authority expressly delegated to it or delegated by necessary implication. *Fowler v. Beasley*, 322 S.C. 463, 472 S.E. 2d 630 (1996).

Members of the South Carolina Police Officers’ Retirement Service (PORS) who are “disabled as a result of an injury arising out of and in the course of the performance of the member’s duties . . . may be retired by the retirement board . . . if the system, after a medical examination of the member, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.” S.C. Code Ann. § 9-11-80(1) (Supp. 2015).

The statutory section that allows for the reduction or discontinuation of a PORS disability retirement allowance is found in S.C. Code Ann. § 9-11-80(1) (Supp. 2014). That section provides that:

Upon determination by the department that member retired on disability is able to reenter the job market and work is available, the retirement system *may adjust the benefit* paid by the system in accordance with Sections 9-1-1580, 9-1-1590, 9-9-60, and 9-11-90. (Emphasis Added).

S.C. Code Ann. § 9-11-80(1) (Supp. 2014).

In more general terms, the mechanics of the annual earnings limitation for all disability retirees is set forth in S.C. Code Ann. § 9-1-1580 (Supp. 2015), which provides:

Should the system report and certify to the Board that the disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between his retirement allowance and his average final compensation⁵ and should the Board concur in the report, then the amount of his disability retirement allowance must be reduced to an amount which, together with the amount earnable by him, equals the amount of his average final compensation.

S.C. Code Ann. § 9-1-1580 (Supp. 2015).

Neither of the above-listed statutory sections allows for anything other than a reduction of a PORs disability retirement allowance. The Respondent agrees, and cites only to S.C. Code Ann. § 9-1-1670(A) (Supp. 2014) as its statutory authority for recoupment of any overpayment directly from the Petitioner in a lump-sum or a payment plan. This section provides that if:

a change or error in the records results in a member or beneficiary receiving from the system more or less than he would have been entitled to receive had the records been correct the board shall correct the error and, so far as practicable, *adjust the payment* so that the actuarial equivalent of the benefit to which the member or beneficiary was correctly entitled is paid.

Id (Emphasis Added).

In issues involving statutory construction, the first question is to determine whether the statute's meaning is clear on its face. If the language of the statute is "plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E. 2d 890, 892 (1995). "The 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). In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id* at 499, 640 S.E.2d at 459.

⁵ See S.C. Code § 9-1-10(4) (Supp. 2015).

Statutory sections which are part of the same general statutory law must be construed together and each one given effect. *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). However, an agency's interpretation of its own statutes will not be overruled without cogent reasons. *See Read Phosphate Co. v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722 (1933) and *Marchant v. Hamilton*, 279 S.C. 497, 309 S.E. 2d 781 (1983).

DISCUSSION

PEBA does not argue that the Petitioner's disability has been removed, under the provisions of Section 9-11-80(4), even though it cited this section in its Determination. Instead, it argues that it has overpaid the Petitioner in the amount of \$20,537.80 (the entire amount paid him in 2014), and that it is now entitled to recoup that amount under the provisions of S.C. Code Ann. § 9-1-1310(A) (Supp. 2014) as the trustee of the retirement system, as well as Section 9-1-1670(A). This court disagrees, and finds that though the Petitioner was overpaid \$15,613.91 in 2014 in retirement disability benefits, there is no explicit statutory authority allowing the Respondent to collect repayment of the overpaid funds, other than through an adjustment in future payments. *See* S.C. Code Ann. § 9-1-1670(A) (Supp. 2014).

Annual Earnings Limitation. As a disability retiree, the Petitioner was subject to the annual earnings limitation set forth in S.C. Code Ann. § 9-1-1580. The Petitioner never received specific information concerning his annual earnings limitation for the 2014 year, but when he received the 2015 annual earnings limitation for 2015 on February 25, 2015 (R.E. 7), he became alarmed and promptly took action. Though PEBA did not provide the Petitioner with his annual earnings limitation for 2014, it appears that this would have been an annual earnings from public or private employment in 2014 that was not to exceed \$27,856.09, which was the difference between his 2014 AFC (\$48,393.89) and his 2014 disability retirement benefits (\$20,537.80). Since the Petitioner and PEBA agreed that the Petitioner's pro-rated earnings from gainful occupation (from the time of his retirement in March 2014) for 2014 was \$43,470,⁶ then it appears the overpayment to the Petitioner in 2014 amounted to \$15,613.91, rather than \$20,537.80, as PEBA originally concluded.

⁶ The parties agreed that the Petitioner earned \$6,200 at his employment with Citadel Guard and \$37,187 for his employment with Atlantic Coast Fire Trucks. The Petitioner retired on March 9, 2014.

Statutory Authority for Recoupment of Overpayment. The next question this court must decide is whether PEBA has the authority to recoup the overpayment of \$15,614 by requiring the Petitioner to remit a repayment either in a lump sum amount or through installment payments. This court concludes that though the Respondent may recoup the overpayment by withholding future payments, it has no statutory authority to require the Petitioner repay the overpayment in a lump sum or in installments.

PEBA admits that it has no explicit statutory authority to recoup overpayments from this Petitioner, but argues that it has implicit authority in §§ 9-1-1580 and 9-1-1670(A). These sections, however, only allow for adjustments in the payment through a reduction or discontinuation of the Petitioner's disability retirement allowance. Section 9-1-1580 requires the disability retirement allowance "be reduced to an amount which, together with the amount earnable by him, equals the amount of his average final compensation." This Section further provides that if the amount of the disability retirement allowance "is eliminated as a result of this section for a period of five consecutive years, all rights in and to his disability retirement allowance are revoked."

The Respondent argues its implicit statutory authority for recoupment of the overpayment is found in S.C. Code Ann. § 9-1-1670(A) (Supp. 2014). This section, however, is nearly identical to the above cited statutes, and allows PEBA to "correct the error" and "adjust the payment so that the actuarial equivalent of the benefit to which the member or beneficiary was correctly entitled is paid." In short, though the Section clearly allows PEBA to correct the error or omission and adjust all future payments accordingly, it does not allow for a recoupment of overpayment as PEBA seeks under the facts of this case. There is no dispute that PEBA has already eliminated retirement disability payments to the Petitioner since April 2015.

This State's retirement system is a creature of statute and can only exercise that authority expressly delegated to it or delegated by necessary implication. *Fowler v. Beasley*, 322 S.C. 463, 472 S.E. 2d 630 (1996). This court finds that Respondent's argument that it has implicit statutory authority is untenable, especially considering that this state has enacted statutes that allow for recovery of benefits and overpayments in other areas. Specifically, S.C. Code Ann. § 41-41-40 allows the Department of Employment and Workforce to obtain a full repayment of unemployment benefits, not only through an adjustment of future benefits, but also allows the Department to attempt to collect the overpayment through the Department of Revenue in accordance with Section 12-56-10, *et. seq.* Likewise, the Department of Health and Human

Services requires recouplement of overpayments against Medicaid providers as well as recipients of benefits. The statutes involving retirement benefits, however, are silent with regard to collection of overpayments in any other way than to adjust future payments.

The Respondent next argues its authority for recouplement also lies “in general trust fund law, as reflected in cases such as *Anderson v. Public Employees Retirement Board*, 134 Or. App. 422, 895 P. 2d 1377 (Ct. of Appeals of Oregon 1995).” What the Respondent ignores, however, is that the cases it cites in support of its position concern other state’s constitutional or statutory authority that differs significantly from South Carolina. In *State v. ex rel Pub. Employees Ret. Ass’n v. Longacre*, 133 N.M. 20, 59 P. 3d 500 (2002), the backdrop of the case involved a purported violation of Article IV, Section 32 of the New Mexico Constitution, which provides in pertinent part:

No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court.

N.M. Const. art. IV, § 32 (as amended 1958).

The New Mexico Supreme Court examined whether a statute permitting its retirement association to recover overpayments, but only for a period of up to one year prior to the date the error or omission was discovered, was a constitutional statute considering the New Mexico constitutional provision. The court in New Mexico determined that the statute was constitutional, because it was not intended to release obligations or liabilities “held or owned by or owing to the state.” *Id.* at 509, 29. Additionally, to further distinguish New Mexico, that state also has a constitutional provision that requires that the state retirement board hold all funds in the retirement system in trust for its members.⁷ Though the Respondent argues that S.C. Code Ann. § 9-1-1310 supports its general trust law argument, and that the retirement system funds are not funds of the State, but are instead held in trust as provided in Section 9-16-20, this statute relates more to the duties of the Retirement System Investment Commission and its duties of investing, reinvesting and managing the funds. S.C. Code Ann. § 9-1-1310 and § 9-16-20 (Supp. 2014).

⁷ N.M. Const. Article XX. §22. “All funds, assets, proceeds, income, contributions, gifts and payments from any source whatsoever paid into or held by a public employees retirement system created by the laws of this state shall be held by each respective system in a trust fund....”

Likewise, South Carolina, unlike other states, has no statutory provision that gives the Respondent implicit authority to take any and all necessary actions to protect the funds. An Arizona statute, for example, gives that state's retirement board the authority to "do all acts whether expressly or authorized, which may be deemed necessary or proper for the protection of the fund." *See* A.R.S. § 38-803. Similarly, an Oregon statute allows for adjustments through reduction of the monthly payment, but also states that "any person who receives a payment from the PERB and who is not entitled to receive that payment, including a member of the system who receives an overpayment, holds that improperly made payment in trust subject to the boards' recovery of that payment under this section or by a civil action or other proceeding." *See* O.R.S. § 238.715.

In its Motion to Alter or Amend the Final Order, the Respondent delved deeper into this argument that its authority to recoup the funds lies in general trust law. Specifically, it argues at length how the assets of the Retirement Systems are held in trust and how the administration of the Retirement Systems is subject to trust law.⁸ As such, it maintains that PEBA, as trustee and administrator of the Retirement Systems, has the statutory authority to recoup overpayments of the Retirement Systems' trust funds. In support of this argument, the Respondent cites numerous sources asserting a basic trust principle that trustees have a duty to protect and preserve trust assets, which generally includes the duty to bring an action to protect and preserve trust property as necessary. *See* Respondent's Motion to Alter or Amend the Final Order at pp. 5-8.

The Respondent vigorously argues in its motion that because trustees and administrators of trusts have the authority to bring an action or otherwise seek recovery of trust assets, as necessary, to protect and preserve trust property, this entitles PEBA to recover the amount overpaid to the Petitioner in this case. However, the Respondent appears to confuse the authority to seek recovery with the authority to recover. In other words, there is a significant difference between a statutory authority to demand repayment, and the power or standing to bring

⁸ Contrary to the Respondent's assertion that the court "reject[ed] the notion that general principles of trust law apply to the administration of the [Retirement Systems], and [found] that the provisions of the South Carolina Code of Laws that declare that the Retirement Systems' funds are held in trust do not relate to the administration of retirement benefits," the court did no such thing. *See* Respondent's Motion to Alter or Amend the Final Order at p. 1. Rather, the court simply noted that a specific statute utilized by the Respondent in support of its argument that its authority to recover lies in general trust law, S.C. Code Ann. § 9-1-1310, largely concerns the Retirement System Investment Commission's investing and managing guidelines for the funds. Final Order and Decision at p. 11. The court never addressed the applicability of general trust principles to the administration of the Retirement Systems' funds in its Final Order.

a civil suit in a court of general jurisdiction for recovery in law or equity. Nowhere in its Final Order did the court hold that the Retirement Systems' trustees or administrators lack standing or authority to bring a civil suit seeking to correct administrative errors, such as an overpayment of funds. Nevertheless, the precise issue before the court is not whether the Respondent has the ability to seek recovery from the Petitioner for the overpayment but whether PEBA has the statutory authority to demand repayment of the funds. As such, any authority PEBA has under general trust law to seek recovery of improperly dispersed funds is irrelevant to the issue presently before the court.

Moreover, the Respondent also argues in its Motion to Alter or Amend the Final Order that the court's "constricted interpretation of [S.C. Code Ann. § 9-1-167] leads to an absurd result that could affect the fiscal integrity of the [Retirement Systems]" and "would preclude PEBA from recovering overpayments of the [Retirement Systems'] trust funds in all instances where the recipient of the overpayment is not entitled to ongoing benefit payments from the [Retirement] Systems." Respondent's Motion to Alter or Amend the Final Order at p. 11. Accordingly, the Respondent cites new authority in its motion, including three previous decisions from this court, that it argues supports its broader interpretation of S.C. Code Ann. § 9-1-1670.

First, as stated above, the Respondent contends that the court's reading of Section 9-1-1670 could affect the financial soundness of the Retirement Systems, and would act as a bar to recovery in every instance where the recipient is not entitled to ongoing benefit payments. Respondent's Motion to Alter or Amend the Final Order at p. 11. In support of this argument, the Respondent cites *Kennedy v. S.C. Ret. Systems*, in which this court held that the Retirement Systems' statutes should be interpreted based upon the assumption that "the legislature intends to maintain the soundness of the State Retirement System." *Kennedy v. S.C. Ret. Systems*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001). However, the Respondent fails to note that the issue in *Kennedy* was whether retirement benefits, for members as a whole, had been miscalculated to the sum of \$1.177 billion in unfunded liability. To be clear, the court's holding in this case is limited to the specific facts presently before the court. Thus, the court is not saying that PEBA does not have the ability to recover under any circumstances where the recipient of the overpayment is not entitled to ongoing benefit payments from the Retirement Systems, but merely that the Respondent does not have the statutory authority to recover from the Petitioner in this case. Furthermore, as previously stated, the Respondent is free to pursue other legal and equitable remedies under which

recovery may be possible.⁹ As such, there is a significant difference from the implications to PEBA in this case when compared to the substantial sum at issue in *Kennedy*. Therefore, the court does not believe its order in the instant case would have any substantial effect on the soundness of the Retirement Systems or their financial integrity. Moreover, the court does not believe that the narrow holdings contained herein would act as a complete bar to recovery in any circumstance where the recipient of the overpayment is not entitled to ongoing benefit payments from the Retirement Systems.

Second, the Respondent argues that “Section 9-1-1670 does not speak only to the adjustments of future payments due, but more broadly authorizes PEBA to ‘adjust the payment’ made to a member or beneficiary so far as practicable to ensure the correct amount is paid to the member or beneficiary.” Respondent’s Motion to Alter or Amend the Final Order at p. 11. Stated another way, the Respondent argues that Section 9-1-1670 impliedly authorizes retroactive adjustments to prior payments. The court declines to accept this argument. The Respondent’s forced, unnatural reading of the plain language of Section 9-1-1670 goes beyond what this court is willing to consider. As an initial matter, the court takes the position that prior payments cannot be adjusted due to the fact that they have already been distributed in the original amount. A “retroactive adjustment” could only be accomplished by seeking recovery from a member or beneficiary and, as such, would not be an adjustment of the prior distribution itself but rather a new action for recovery. Moreover, the Respondent requests a lump sum repayment or installments pursuant to a repayment plan for recovery of the overpayment at issue here, which bears no transactional relationship to the original distributions the Petitioner received other than the total amount that is seeking to be recovered. Thus, the “retroactive adjustment” phraseology used by the Respondent is a misnomer. Furthermore, this reading of Section 9-1-1670 runs counter to the previously discussed principles of statutory interpretation. Surely, if the General Assembly intended for recovery of prior distributions, it would more clearly provided for that in the statute. As such, the court declines to accept the Respondent’s interpretation of Section 9-1-1670 that allows for “retroactive adjustments.”

⁹ Interestingly, although the Respondent seems to reject or ignore the legal and equitable theories it could pursue for the recovery of the overpayments at issue here, the Respondent admits that, while it is not aware of any valid defenses in the instant matter, “an overpaid member or beneficiary . . . may be able to establish a defense in law or equity under his or her specific circumstances that would counsel against the recoupment of overpayments from the member or beneficiary.” Respondent’s Motion to Alter or Amend the Final Order at p. 13.

The Respondent's final contention in its Motion to Alter or Amend the Final Order concerns three cases from this court that it argues "did not construe[] Section 9-1-1670 to be so narrow in the recovery it allows." Respondent's Motion to Alter or Amend the Final Order at p. 12. These cases are: *Cook v. S.C. Budget & Control Bd.*, Docket No. 11-ALJ-30-0336-CC (S.C. Admin. Law Ct. Dec. 7, 2011), 2011 WL 7119342; *McAlister v. S.C. Pub. Employee Benefit Auth.*, Docket No. 16-ALJ-30-0464-CC (S.C. Admin. Law Ct. Mar. 20, 2017), 2017 WL 1105619; and *Hocin v. S.C. Pub. Employee Benefit Auth.*, Docket No. 15-ALJ-30-0115-CC (S.C. Admin. Law Ct. June 18, 2015), 2015 WL 3929247.¹⁰

In *Cook*, the Petitioner contested a final agency decision, in which it was determined that "deductions were properly being made from [the Petitioner's] benefits to recoup substantial overpayments of disability retirement benefits she received . . ." *Cook* at p. 1. In upholding the final agency decision, the court found that the deductions from the Petitioner's ongoing benefits in accordance with Section 9-1-1670(A) was proper. *See Cook* at pp. 8-10. However, the authority to reduce future benefit payments to recoup overpaid funds is not disputed by the court in the instant case. Moreover, the court in *Cook* did not address to any degree the issue of whether PEBA has the authority to demand repayment of funds in the absence of future benefit payments and, as such, is not relevant to the issue presently before the court.

Further, in *McAlister*, the Petitioner challenged a final agency decision, in which it was determined that the Petitioner received an overpayment of retirement benefits in the amount of \$3,501.78, and that the Petitioner must repay the overpayment. *McAlister* at p. 1. In upholding the final agency decision, the court in *McAlister* found that the "Petitioner must repay the overpayment of

¹⁰The court would note that while administrative law judges (ALJs) may give due consideration to the decisions and reasoning of other ALJs, their rulings are not binding upon other ALJs. *See, e.g., Schiffner v. Motorola, Inc.*, 697 N.E.2d 868, 871 (Ill. App. Ct. 1998) ("Stare decisis requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts."); *Shook v. State*, 244 S.W.2d 220, 221 (Tex. Crim. App. 1951) ("It is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction. The power to establish precedent is lodged in courts of superior jurisdiction."); *People v. Hill*, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007) ("A decision of a court of co-ordinate jurisdiction is not a binding precedent."); *Nationwide Mut. Ins. Co. v. Yungwirth*, 940 A.2d 523, 528 n.5 (Pa. Super. 2008) ("While the Superior Court is bound to give due consideration to the decisions and reasoning of the Commonwealth Court, this Court is not bound to follow such decisions as controlling precedent."). Likewise, trial judges simply are not bound by the rulings of other trial judges. *See State v. Riley*, 698 So.2d 374, 376 n.1 (Fla. Dist. Ct. App. 1997) ("While we understand the trial court's desire to maintain uniformity within the county court, we note that decisions of one county court are not binding precedent on another county court because '[t]rial court's [sic] do not create precedent.'" (internal citation omitted); *see generally* 20 Am. Jur. 2d Courts § 141 (2014). Moreover, the ALC has a specific procedure to create binding precedent. Pursuant to ALC Rule 70, only "en banc decisions by the administrative law judges are binding upon all individual administrative law judges in all subsequent cases . . ." But even *en banc* decisions are not binding if "a majority of the judges determine otherwise."

retirement benefits . . . , pursuant to section 9-1-1790.”¹¹ *McAlister* at pp. 5-6. The court in *McAlister* cites Section 9-1-1670 in concluding that SCRS is required to “act to resolve any error associated with a member’s account, including instances where a member receives an overpayment.” *McAlister* at p. 5. While this court agrees that the court in *McAlister* applied Section 9-1-1670 in accordance with the Respondent’s interpretation, this court finds the decision in *McAlister* unpersuasive. In *McAlister*, there was absolutely no substantive exploration of PEBA’s authority to demand repayment of funds in the absence of future benefit payments to any degree. Rather, the court simply accepted PEBA’s interpretation of the statute without reasoning or questioning.

Likewise, in *Hocin*, the Petitioner contested a final agency decision, in which it was determined that the Petitioner received an overpayment of disability retirement benefits in the amount of \$16,373.33. The sole issue before the court in *Hocin* was “whether [the] Petitioner received an overpayment which must be repaid.” *Hocin* at p. 1. Though the court reduced the Petitioner’s liability, the court held that the Petitioner was required to repay \$7,017.13 in overpayment in installments of at least \$100 per month until the balance is paid off. The court further noted in its order that if the Petitioner’s earning capacity decreased and he became eligible for benefits once again, then “the payments shall cease and [PEBA] may recover any remaining amounts due pursuant to S.C. Code Ann. § 9-1-1670.” *Hocin* at pp. 6-7. Since PEBA’s entitlement to recover the overpayment was not challenged in that case, the question of PEBA’s authority to demand repayment was again not addressed by that court but rather accepted as fact. Further, the statute at issue in the present case, Section 9-1-1670, was not substantively explored by the court in *Hocin* to any extent, including the scope of authority provided by it for PEBA to recover overpayments. In fact, the sole reference to Section 9-1-1670 in *Hocin* seems to imply that the statute is only applicable when the member is actually receiving benefits. Consequently, this court fails to see how *Hocin* bolsters the Respondent’s interpretation of Section 9-1-1670.

Finally, after reviewing the agency file, and the letters listed in the findings of fact, this court concludes that PEBA failed to adequately explain to the Petitioner his earnings

¹¹ As an aside, the court believes the citation to S.C. Code Ann. § 9-1-1790 by the court in *McAlister* as authority for repayment was erroneous. Section 9-1-1790 concerns the earning limitations upon return to covered employment for members of the Retirement Systems and does not contain any language that could arguably be construed as creating an obligation for members to repay overpaid funds. Moreover, the court does not use this statute as authority for repayment of overpaid funds elsewhere in the order.

limitations for 2014.¹² If PEBA had adequately notified the Petitioner of the details concerning his earnings limitations, it likely would have prevented the issue before this court. Given these unique facts, and given that “retirement statutes should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished,” this court declines to find that the Respondent has the authority, in this case, to require the Petitioner to repay the overpayment. See *King v. South Carolina Retirement Systems*, 319 S.C. 373, 461 S.E. 2d 822 (1995). The retirement system is a creature of statute and can only exercise that authority expressly delegated to it or delegated by necessary implication. *Fowler v. Beasley*, 322 S.C. 463, 472 S.E. 2d 630 (1996). In the absence of explicit statutory authority or applicable state case law, this court declines to hold otherwise.

There is no dispute between the parties that the Petitioner has received an overpayment, through no fault of his own, in 2014 in the amount of \$15,613.94. There is also no dispute that the Respondent can take action, just as it did, and adjust and curtail monthly retirement disability payments in the future in accordance with S.C. Code Ann. § 9-1-1670(A). (Supp. 2014). The Respondent, however, has no explicit or implicit statutory authority to compel the Petitioner to repay the overpayment.

ORDER

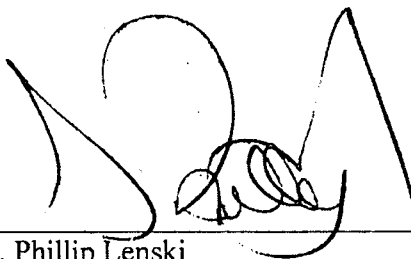
Based upon the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that Petitioner was overpaid \$15,613.94 by the Police Officers' Retirement System for 2014.

IT IS FURTHER ORDERED that in accordance with S.C. Code § 9-1-1670(A), the Respondent shall correct the error and adjust future payments to the Petitioner. However, under the facts of this case, this court holds that the Respondent is without statutory authority to require the Petitioner to repay the overpayment. The Determination that the Petitioner affirmatively repay this amount to the Respondent is **REVERSED**.

¹² The only information PEBA used to argue that it properly informed the Petitioner of the possible recoupment of any overpayment was buried in a form letter inside a paragraph at the bottom of the page on the second page of the form letter. The information made no reference to a repayment requirement, and provided no details unique to the Petitioner. It was not until nearly one year after the Petitioner actually retired that he finally received a detailed earnings limitation letter that specified what he was allowed to earn in 2015. It is also important to note that PEBA never mailed the Petitioner a 2014 earnings limitation letter, even though his retirement occurred in the first three months of 2014.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Phillip Lenski', written over a horizontal line.

S. Phillip Lenski
Administrative Law Judge

May 6, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Erika S. Easler, 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).



Erika S. Easler
Judicial Law Clerk

May 6, 2016
Columbia, South Carolina

FILED

MAY 06 2019

SC ADMIN. LAW COURT