

THE STATE OF SOUTH CAROLNA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

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Appellate Case No. 2019-000895

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Keith E. Turner, .....Respondent,

v.

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

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INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE ISSUE ON APPEAL

ARE THE TRUSTEES AND ADMINISTRATORS OF THE SOUTH CAROLINA RETIREMENT SYSTEMS POWERLESS TO RECOUP OVERPAYMENTS OF BENEFITS FROM THE SYSTEMS' TRUST FUNDS IF NO FUTURE PAYMENTS ARE DUE?

## STATEMENT OF THE CASE

By a request for a contested case hearing filed with the South Carolina Administrative Law Court on December 29, 2015, Respondent Keith E. Turner ("Turner") initiated this matter, in which he seeks review of Final Agency Determination No. 15-020 issued by Appellant South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("PEBA"), on November 30, 2015. (Turner's Request for Contested Case Hearing.) In that Final Agency Determination, PEBA found that Turner had received an overpayment of disability retirement benefits from the South Carolina Retirement Systems in 2014 as a result of his earnings from gainful employment during the year and that he was required to repay that overpayment of benefits to the Systems. (PEBA's Ex. #11.) Turner does not dispute the earnings he received from gainful employment during 2014, but contends that he should not be required to repay an overpayment of disability retirement benefits resulting from those earnings because he was provided with inaccurate information, primarily from his employer, the City of Charleston, regarding how the statutory earnings limitation operates. (PEBA's Ex #10; Tr. p. 6 line 17 to p. 8 line 5; Tr. p. 13 line 25 to p. 15 line 10.)

A contested case hearing in this matter was held before the Honorable S. Phillip Lenski ("ALJ") at the Administrative Law Court on June 16, 2016, and, on July 28, 2017, the ALJ issued an initial Final Order and Decision in this matter. (Final Order and Decision.) In the Final Order and Decision, the ALJ found that Turner had received an

overpayment of disability retirement benefits in the amount of \$15,613.94 in 2014, but further concluded, sua sponte, that PEBA lacked the statutory authority to recoup that overpayment of benefits, except through reductions to future benefits due to Turner, if any. (Final Order and Decision at 9, 13.) PEBA timely filed a Motion to Alter or Amend the ALJ's Final Order and Decision on August 14, 2017. (PEBA's Motion to Alter or Amend Final Order.) In the Motion, PEBA requested that the Final Order and Decision be amended to reflect that PEBA's authority to recoup overpayments of benefits from the Retirement Systems' trust funds is not limited solely to adjustments of future payments due. (PEBA's Motion to Alter or Amend Final Order at 1.) On May 6, 2019, the ALJ issued an Amended Final Order in this matter, which affirmed the holdings from the initial Final Order and Decision. (Amended Final Order.) By a Notice of Appeal filed and served on May 28, 2019, PEBA appealed the ALJ's Amended Final Order to this Court, resulting in the instant proceeding.

### **STANDARD OF REVIEW**

The standard of review for an appeal to this Court of a final decision of an ALJ is set out in the Administrative Procedures Act at Section 1-23-610(B) of the Code of Laws. S.C. Code Ann. § 1-23-610(B) (Supp. 2019). Pursuant to that section, while this Court is constrained from reweighing the evidence presented to the ALJ, the Court may reverse or modify the ALJ's decision if the ALJ's findings or conclusions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;

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

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

Id.; see also, e.g., Kiawah Dev. Partners II v. S.C. Dep't of Health & Env'tl. Control, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018). In particular, in reviewing whether an ALJ's decision is in violation of a statutory provision or affected by an error of law, the South Carolina Supreme Court has recognized that "questions of statutory interpretation are questions of law, which [appellate courts] are free to decide without any deference to the court below." Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013).

## BACKGROUND

One of the benefits available under the South Carolina Retirement Systems is a disability retirement benefit that allows a member to receive monthly retirement benefits prior to reaching normal retirement eligibility if the member is disabled from continuing employment. See generally S.C. Code Ann. §§ 9-1-1540, 9-11-80 (2019). Because these benefits are intended to assist disabled members who can no longer work, a member's eligibility to receive these disability retirement benefits is capped based upon the member's ability to earn compensation from a gainful occupation. Id. §§ 9-1-1580, 9-11-80(4). Specifically, a member of the Retirement Systems is only entitled to a disability retirement benefit to the extent that the benefit, when added to his or her ability to earn compensation from gainful employment, does not exceed the average final compensation the member earned while employed under the Retirement Systems. Id. Put another way,

a member is not entitled to receive a disability retirement benefit if the receipt of that benefit would cause the member to earn more as a disability retiree than the member did as an active employee.

Respondent Keith Turner is a retired member of the South Carolina Police Officers' Retirement System and the South Carolina Retirement System ("Retirement Systems"), who retired on a disability retirement benefit from employment as a fire engineer with the City of Charleston on March 9, 2014, as a result of injuries to his back. (PEBA's Ex. #11, at 1.) At the time of his retirement, Turner was forty-one years old, had accrued approximately 11 years and 7 months of service credit in the Retirement Systems, and had earned an average final compensation of \$48,393.89. (PEBA's Ex. #11, at 1.) Directly after his retirement from public employment with the City, Turner returned to gainful employment with private employers. (PEBA's Ex. #8, at 1-2; PEBA's Ex. #10, at 2.) As a result, for the portion of 2014 after his retirement on March 9, Turner earned compensation from private gainful employment in the amount of approximately \$43,470.00, while also receiving disability retirement benefits in the amount of \$20,537.80, for total income of over \$64,000 for those ten months. (PEBA's Ex. #6; PEBA's Ex. #8, at 1-2; Amended Final Order at 6.)

Upon receipt and review of Turner's 2014 earnings records in early 2015, PEBA notified Turner by a letter dated April 22, 2015, that he was not entitled to any disability retirement benefits for 2014 and the entire \$20,537.80 he had received in disability retirement benefits during the year was an overpayment of benefits that must be repaid.<sup>1</sup>

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<sup>1</sup> This letter also notified Turner that, because his earnings capacity had exceeded his inflation-adjusted average final compensation, he was no longer eligible for a monthly disability retirement benefit and his disability retirement benefit would be suspended

(PEBA's Ex. #9.) By a letter received May 12, 2015, Turner submitted an appeal of the calculation of his overpayment of benefits to PEBA (PEBA's Ex. #10), and, on November 30, 2015, PEBA issued Final Agency Determination No. 15-020, which affirmed the initial determination that Turner's entire disability retirement benefit for 2014 was an overpayment of benefits that he must repay to the Retirement Systems (PEBA's Ex. #11).

Turner sought review of that Final Agency Determination in a contested case proceeding before the Administrative Law Court. (Turner's Request for Contested Case Hearing.) After conducting a contested case hearing on June 16, 2016, the ALJ issued a Final Order and Decision in this matter over a year later on July 28, 2017. (Final Order and Decision.) In the Final Order, the ALJ found that Turner "was overpaid \$15,613.91 in 2014 in retirement disability benefits" under the statutory earnings limitation applicable to his receipt of disability retirement benefits. (Final Order and Decision at 9, 13.) In particular, the ALJ concluded that, as a result of his earnings from private employment after retirement, Turner was only entitled to receive disability retirement benefits from the South Carolina Retirement Systems for 2014 in the amount of \$4,923.89.<sup>2</sup> (Final Order and Decision at 6, 9.) Accordingly, because Turner had

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indefinitely. (PEBA's Ex. #9.) Turner did not challenge that determination before the Administrative Law Court, and that finding is not before the Court in this matter. (See Amended Final Order at 1 ("The sole issue in this case was whether [Turner] received an overpayment which he must repay."))

<sup>2</sup> This \$4,923.89 represents the difference between the full-year average final compensation of \$48,393.89 used to calculate Turner's retirement benefit and his prorated post-retirement earnings from gainful employment in the amount of \$43,470.00 during 2014. (Final Order and Decision at 6, 9.) As noted above, by law, a member of the South Carolina Retirement Systems is not entitled to disability retirement benefits to the extent those benefits, combined with his earnings from gainful employment, would exceed his average final compensation. See S.C. Code Ann. §§ 9-1-1580, 9-11-80(4).

received benefits from the Systems in the amount of \$20,537.80 during 2014, the ALJ held that he had received an overpayment of benefits from the Systems of \$15,613.91. (Final Order and Decision at 6, 9, 13.)

Although the ALJ concluded that Turner had received disability retirement benefits from the South Carolina Retirement Systems during 2014 in excess of the amount allowed by law, he further concluded that PEBA had “no explicit statutory authority allowing [it] to collect repayment of the overpaid funds, other than through an adjustment in future payments.” (Final Order and Decision at 9.) Because Turner was no longer eligible for future disability retirement benefits as a result of his ability to earn in excess of his average final compensation, this holding effectively concluded that PEBA had no authority to recoup, and Turner had no liability to repay, the overpayment of benefits made to Turner from the South Carolina Retirement Systems’ trust funds. (Final Order and Decision at 12 (holding that PEBA “has no explicit or implicit statutory authority to compel [Turner] to repay the overpayment”); Final Order and Decision at 13 (finding that, while PEBA may adjust future payments to Turner, it “is without statutory authority to require [Turner] to repay the overpayment”).) Notably, the question of whether PEBA has the statutory authority to recoup overpayments of retirement benefits by means other than adjustments to future payments was not raised by Turner, either during his appeal with PEBA or at the Administrative Law Court, but was raised by the ALJ, sua sponte, in his Final Order and Decision. (PEBA’s Ex. #10; Tr. p. 6 line 17 to p. 8 line 5.)

In response to the ALJ’s sua sponte holding that PEBA lacks statutory authority to recoup overpayments of benefits from the South Carolina Retirement Systems except

through adjustments to future payments, PEBA timely filed a Motion to Alter or Amend the ALJ's Final Order and Decision on August 14, 2017. (PEBA's Motion to Alter or Amend Final Order.) In the Motion, PEBA requested that the Final Order and Decision be amended to reflect that PEBA's authority to recoup overpayments of benefits from the Retirement Systems' trust funds is not limited to adjustments of future payments due. (PEBA's Motion to Alter or Amend Final Order at 1.) Nearly two years later, on May 6, 2019, the ALJ issued an Amended Final Order in this matter, which affirmed the holdings from the initial Final Order and Decision, including the finding that PEBA does not have statutory authority to collect repayment of overpayments of retirement benefits, other than through an adjustment to future benefits due, if any. (Amended Final Order at 9, 17.) Because that decision misreads PEBA's statutory authority as trustee and administrator of the Retirement Systems and is affected by errors of law, PEBA now seeks review of the ALJ's decision before this Court.

## ARGUMENT

### **THE ABILITY OF THE TRUSTEES AND ADMINISTRATORS OF THE SOUTH CAROLINA RETIREMENT SYSTEMS TO RECOUP OVERPAYMENTS OF BENEFITS FROM THE SYSTEMS' TRUST FUNDS IS NOT LIMITED TO ADJUSTMENTS TO FUTURE PAYMENTS.**

The ALJ's holding that PEBA has no statutory authority to recoup overpayments of benefits from the South Carolina Retirement Systems, other than through an adjustment in future payments, disregards PEBA's explicit and implicit statutory authority as the trustee and administrator of the Systems' trust funds and leaves PEBA powerless to fulfill its fiduciary duties to protect the funds held in trust for the beneficiaries of those Systems. One of the most fundamental legal protections provided for the benefits available from the South Carolina Retirement Systems is that the funds of

those Systems are held in trust for the exclusive benefit of the members of the Systems and their beneficiaries. Accordingly, if there is an overpayment of benefits made from those trust funds, PEBA has the right—and the duty—as the trustee and administrator of those funds to recoup the overpayment and preserve the trust funds for the payment of benefits that are lawfully due.

When future payments are due to a person who has been overpaid from the Retirement Systems, garnishments from those future benefits are the most convenient and most effective means of recouping the overpayment of benefits. Not surprisingly, then, such garnishments are the method of collection preferred by PEBA. However, if there are no future benefit payments due to a person who receives an overpayment of benefits, the adjustment or garnishment of future benefits is simply not available as a means of recouping the overpayment. Most notably, garnishment of future benefits would not be available to recoup any overpayment of benefits made as part of a one-time, lump-sum benefit payment, such as a refund of contributions upon termination of employment or a lump-sum death benefit. Plainly, garnishment of future benefits would also not be available to recoup an overpayment of benefits if a member's eligibility for ongoing benefits has been extinguished.

For example, in the case at hand, the member received an overpayment of disability retirement benefits, but is no longer entitled to receive disability benefits as a result of his capacity to earn compensation from gainful employment. Consequently, there are no future disability retirement payments owed to the member that could be adjusted or garnished to recoup that overpayment. Under the ALJ's holding in this case, PEBA would therefore have no authority to recoup the overpayment of disability

retirement benefits from the member, and the overpaid member would have no liability to repay the excess benefits he received. In short, this holding would prevent PEBA, as trustee of the Retirement Systems' trust funds and administrator of those Systems, from preserving those trust funds for the payment of benefits that are properly due under the law, and would allow a member to retain payments from those trust funds to which he is not statutorily entitled. As set out in greater detail below, this holding is in violation of the statutes governing the administration of the Retirement Systems, affected by errors of law, and should be reversed.

**A. The assets of the South Carolina Retirement Systems are held in trust and the administration of the Systems is subject to trust law.**

The Amended Final Order in this matter erroneously rejects the notion that general principles of trust law apply to the administration of the South Carolina Retirement Systems. In addressing the basic statutory provisions that place the funds of the Retirement Systems in trust and designate PEBA as trustees of those funds, the ALJ found that those provisions do not support the position that the administration of the Retirement Systems is governed by general principles of trust law, but instead concluded that those statutes "relate[] more to the duties . . . of investing, reinvesting and managing the funds." (Amended Final Order at 11.) By disregarding these provisions, the ALJ ultimately decided that "any authority PEBA has under general trust law to seek recovery of improperly dispersed funds is irrelevant to the issue presently before the court." (Amended Final Order at 13.) These troubling conclusions of law misapprehend the legal status of the South Carolina Retirement Systems under the South Carolina Constitution and Code of Laws and weaken basic legal protections provided for the funds of those Systems. The decision should be reversed to clarify that the assets of the South Carolina

Retirement Systems are held in trust and that the administration of the Systems is subject to principles of trust law.

**1. The assets of the Retirement Systems are held in trust.**

There is no question under South Carolina law that the assets of the South Carolina Retirement Systems are held in trust for all purposes, including the administration of retirement benefits as well as the investment of the Systems' assets. At the most fundamental level, the South Carolina Constitution places the assets of the South Carolina Retirement Systems in trust, providing that all "[a]ssets and funds established, created and accruing for the purpose of paying obligations to members of the several retirement systems of the State and political subdivisions shall not be diverted or used for any other purpose." S.C. Const. art. X, § 16. The South Carolina Code of Laws, in turn, specifies that "[t]he funds and assets of the various state retirement systems are not funds of the State, but are instead held in trust as provided in Section 9-16-20," S.C. Code Ann. § 9-1-1310(C) (2019), and that "[a]ll assets of a retirement system are held in trust," *id.* § 9-16-20(A). See also *id.* § 9-16-20(C) ("The board shall hold the assets of the retirement systems in a group trust[.]"). Consistent with the Retirement Systems' funds being held in trust, the Code of Laws designates the PEBA Board of Directors as the statutory trustees and custodian of the Retirement Systems' funds. *Id.* § 9-1-1310(A) ("The South Carolina Public Employee Benefit Authority . . . are cotrustees of the retirement system . . . in performing the functions imposed on them by law in the governance of the Retirement System."); *id.* § 9-1-1320(A) ("The board is the custodian of the assets of the Retirement System[.]"); *id.* § 9-16-10(9) (defining the "trustee" of the Retirement Systems as "the Board of Directors of the South Carolina Public Employee Benefit

Authority”); see also, e.g., id. § 9-12-10(1) (defining the “Board” for the qualified excess benefit arrangement statutes as “the Board of Directors of the South Carolina Public Employee Benefit Authority acting as trustee of the retirement systems”). And, as trustee, PEBA is given full responsibility for the management and administration of the Retirement Systems, with the sole exception of the investment authority delegated to the South Carolina Retirement System Investment Commission. See id. §§ 9-1-20, 9-8-20, 9-9-20, 9-10-20(B), 9-11-20(1).

Construing these provisions, the South Carolina Attorney General’s Office has recognized that the General Assembly has created a statutory trust for the assets of the Retirement Systems, under which the statutory trustees hold legal title to the Systems’ assets on behalf of and in trust for the beneficiaries of the trust and have been charged with the administration of the Systems. See Op. S.C. Att’y Gen. of Nov. 16, 2011 (issued to Robert L. Borden), 2011 WL 6120331, at 11 (“Section 9-16-20 does make it clear that ‘[a]ll assets of a retirement system are held in trust.’”), id. at 16 (“[T]he General Assembly has established the structure for the administration of the State Retirement System, which constitutes a statutory trust.”), id. at 16 (recognizing that the statutory trustees of the Retirement Systems hold “the ‘legal title’ to such assets on behalf of and in trust for the beneficiaries of the trust” and that the Retirement Systems “are placed under the administration” of those trustees); Op. S.C. Att’y Gen. of Apr. 20, 2012 (issued to The Honorable Curtis M. Loftis, Jr.), 2012 WL 1561869, at 1, 2 (same).<sup>3</sup> That the assets

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<sup>3</sup> Because these opinions pre-date the passage of Act 278 of 2012, the opinions discuss the State Budget and Control Board as the statutory trustees of the Retirement Systems. However, nothing in the transfer of trusteeship over the Retirement Systems from the Budget and Control Board to the PEBA Board in Act 278 of 2012 or in Act 13 of 2017 would affect the conclusions reached by the Attorney General’s Office in those opinions.

of the Retirement Systems are held in trust by law and are subject to administration by the statutorily designated trustees has also been recognized by the South Carolina Supreme Court, see Hamiter v. Ret. Div. of the S.C. Budget & Control Bd., 326 S.C. 93, 96-97, 484 S.E.2d 586, 587-88 (1997); see also Op. S.C. Att’y Gen. of Nov. 16, 2011, 2011 WL 6120331, at 13, and by the South Carolina Administrative Law Court, see McAlister v. S.C. Pub. Emp. Benefit Auth., Docket No. 16-ALJ-30-0464-CC (S.C. Admin. Law Ct. Mar. 20, 2017), 2017 WL 1105619, at 4 (recognizing the assets of the Retirement Systems as being held in trust and PEBA’s role as trustee of those assets pursuant to Sections 9-1-1310(A) and (C) of the Code of Laws); 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, at 7 (same). Courts in other jurisdictions have likewise had little trouble in finding that similar statutory public pension plans are “a classic example of a ‘statutory’ trust” and are subject to the administration of the designated trustees, both “[b]y the very use of the term ‘Trustee,’ as well as by the allocation of responsibilities to them.” Dadisman v. Moore, 384 S.E.2d 816, 821-22 (W. Va. 1989).

It is important to emphasize that recognition of the Retirement Systems’ funds as trust funds is no mere technicality or legal formality. A finding by a court that the Retirement Systems’ assets are not held fully in trust for all purposes, including benefit administration, would not only threaten critical protections for those assets as being held separate and apart from the other funds of the State, see S.C. Const. art. X, § 16, but would also jeopardize the tax advantages the Retirement Systems enjoy under the Internal Revenue Code as qualified plans, see 26 I.R.C. § 401(a)(2); 26 C.F.R. § 1.401-1(a)(3); 26 C.F.R. § 1.401-2 (all providing that a pension plan must be established as a “qualified

trust” in order to meet the requirements for tax-deferred status). One suspects that not only the members of the Retirement Systems, but also the State, as plan sponsor of the Systems, would be startled and troubled to learn that a court has concluded that the funds set aside in trust for the benefits payable from the Retirement Systems are not protected by basic principles of trust law and are potentially subject to immediate taxation.

**2. The administration of the Retirement Systems is subject to principles of trust law.**

By explicitly placing the assets of the Retirement Systems in trust under the administration of the PEBA Board as trustees, the General Assembly has directed that the administration of the Retirement Systems be subject to general principles of trust law. In addressing the question of what responsibilities were granted to the statutory trustees of the Retirement Systems by virtue of their status as trustees, the South Carolina Attorney General’s Office has concluded that:

[W]e believe a court would determine that the duties of the . . . Board as “trustee” would be in keeping with the usual and customary duties imposed upon a trustee under the common law, South Carolina statutes and general authorities. It is well recognized in South Carolina that there is a presumption that the common law remains in full force, absent a clear change by an unambiguous statute.

Op. S.C. Att’y Gen. of Nov. 11, 2011, 2011 WL 6120331, at 12. In that same opinion, the Attorney General’s Office further noted that the South Carolina Supreme Court in Hamiter had “recognized that general principles of trust law are applicable to the . . . Board’s duties as trustee” of the Retirement Systems. Id. at 13. In short, it has been well-recognized under South Carolina law that the statutory trustee of the Retirement

Systems “has been placed ‘in a fiduciary relationship’ with the trust and its participants,” and that, “[a]s trustee, the Board possesses all common law responsibilities as trustee, in addition to its statutory duties.” Id. at 16; Op. S.C. Att’y Gen. of Apr. 20, 2012, 2012 WL 1561869, at 3 (same); cf., e.g., Dadisman, 384 S.E.2d at 822, 826. Further, as noted above, the application of general principles of trust law to the administration of the Retirement Systems has also been recognized by the Administrative Law Court. See McAlister, 2017 WL 1105619, at 4; Cook, 2011 WL 7119342, at 7. By the very nature of the statutory trust established for the Retirement Systems’ assets, the administration of those trust funds is subject to general principles of trust law and is unlike many other State programs that are not subject to such rules.

The Amended Final Order in this matter should be reversed to the extent that it disregards these basic protections provided by South Carolina law for the funds of the Retirement Systems—protections that ensure the assets of the South Carolina Retirement Systems are held in trust for all purposes and that the administration of the Systems is subject to principles of trust law.

**B. As trustee and administrator of the Retirement Systems, PEBA has the statutory authority to recoup overpayments of Retirement Systems’ trust funds.**

Flowing from the failure to properly recognize the nature of PEBA’s trusteeship of the Retirement Systems’ funds, the Amended Final Order in this matter finds that PEBA has no statutory authority “to collect repayment of overpaid funds, other than through an adjustment in future payments.” (Amended Final Order at 9; see also id. at 10 (stating that PEBA “has no statutory authority to require [that] [Turner] repay the overpayment in a lump sum or installments”); id. at 17 (stating that PEBA “has no

explicit or implicit statutory authority to compel [Turner] to repay the overpayment”).) As set forth below, this finding fails to recognize PEBA’s inherent statutory powers as trustee and administrator of the Retirement Systems’ trust funds and is based upon an unduly constricted interpretation of Section 9-1-1670 of the South Carolina Code of Laws. This holding in the Amended Final Order should be reversed accordingly. In particular, it should be held that PEBA has broad statutory authority to recoup overpayments made from the Retirement Systems’ trust funds and that PEBA’s authority to seek recovery of such overpayments is not limited solely to offsetting overpayments against any future benefits due.

**1. PEBA has inherent statutory authority to recover overpayments.**

By designating PEBA as the trustee and administrator of the Retirement Systems’ trust funds, the General Assembly has granted PEBA the inherent statutory authority to recover overpayments of trust funds, including overpayments made to trust beneficiaries. See Op. S.C. Att’y Gen. of Nov. 16, 2011, 2011 WL 6120331, at 16 (“As trustee, the Board possesses all common law responsibilities as trustee, in addition to its statutory duties.”).

**a. PEBA has the general power of a trustee to protect trust property.**

One of the most basic powers, and duties, of a trustee is the responsibility to collect and protect the property subject to the trust. This responsibility includes taking reasonable steps to enforce claims to recoup monies due to the trust and to defend actions that could result in a loss of trust assets. This authority, and duty, of a trustee to collect

and preserve trust funds is universally recognized in the common law and statutory law of trusts, including

- the Restatement of Trusts, see Restatement (Third) of Trusts § 76(2) (Am. Law Inst. 2007) (“In administering the trust, the trustee’s responsibilities include performance of the following functions: . . . (b) collecting and protecting trust property[.]”); id. § 76 cmt. d (stating that “[t]he duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate,” including a duty to “bring such actions as a prudent person would for the protection and preservation of trust property”),
- the Uniform Trust Code, see Unif. Trust Code § 809 (Unif. Law Comm’n 2000) (“A trustee shall take reasonable steps to take control of and protect the trust property.”); id. § 811 (“A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.”); id. § 812 (“A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee[.]”); id. § 816 (“[A] trustee may: (1) collect trust property . . . [and] (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property[.]”),<sup>4</sup>
- the South Carolina Trust Code, see S.C. Code Ann. § 62-7-809 (Supp. 2019) (“A trustee shall take reasonable steps to take control of and protect the trust

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<sup>4</sup> The Comment to Section 816 of the Uniform Trust Code recognizes that “[t]he power to collect trust property is an incident of the trustee’s duty to administer the trust” and is related to the trustee’s duties “to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property” and “to collect trust property from a former trustee or other person holding trust property.” Id. § 816 cmt.

property.”); id. § 62-7-811 (“A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.”); id. § 62-7-816(1), (24) (“[A] trustee may: (1) collect trust property . . . [and] (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property[.]”), and,

- the leading commentaries on the law of trusts, see George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 541 (Rev. 2d ed. 1993) (“The trustee has the duty to collect and preserve the property made subject to the trust.”); id. § 582 (Rev. 2d ed. 1980) (“The trustee has a duty to protect the trust property[.]”); id. § 592 (“As part of the process of assuming control of the trust property, the trustee has the duty of collecting choses in action which are a part of the trust estate.”); id. § 594 (stating that “[t]he powers of the trustee naturally include the authority to maintain such suits and actions as are necessary to the execution of the trust and incident to the powers expressly or impliedly granted,” including the power to bring “a suit to follow trust property” and “to collect debts due himself as trustee,” among other actions); see also, e.g., Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott & Ascher on Trusts §§ 17.7, 17.8, and 17.9 (5th ed. 2007) (recognizing the duty of the trustee to take reasonable steps to secure and keep control of trust property, preserve the trust property, and enforce all claims held by the trust).<sup>5</sup>

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<sup>5</sup> As a general matter, the basic powers of a trustee are very broadly framed as encompassing all powers over the trust property that a legally competent, unmarried individual would have over individually owned property. See, e.g., S.C. Code Ann. § 62-7-815(a)(2)(A); Restatement (Third) of Trusts § 85(1)(a).

These authorities further recognize that this responsibility of the trustee to collect trust property and pursue claims for monies that belong to the trust includes the power, and duty, to maintain a claim against a beneficiary of the trust who has received trust property to which he is not entitled. See, e.g., Restatement (Third) of Trusts § 104 cmt. g(3) (“[I]f a beneficiary receives trust property to which the beneficiary is not entitled (whether or not . . . resulting from a breach of trust, and without regard to whether the beneficiary knew the distribution was improper), the beneficiary is liable to the trust for the improper distribution, except to the extent that a defense to restitution applies.”); Bogert & Bogert, supra, § 592 (“If the trustee holds a claim against the beneficiary he has a duty to collect it[.]”); Scott, Fratcher & Ascher, supra, § 25.2 (discussing the liability of a beneficiary to the trust estate generally). While this responsibility to collect improper trust payments made to a beneficiary includes the authority to offset the debt against the beneficiary’s interest in the trust property, it is not limited to that means of collection, and the trustee may pursue a beneficiary’s non-trust property in order to collect amounts owed to the trust. See, e.g., Bogert & Bogert, supra, § 814 (stating that, if a trustee has made “an improper payment to a beneficiary, the trustee can recover it from him, either out of his non-trust property or from sums later due the beneficiary under the trust”); Scott, Fratcher & Ascher, supra, § 25.2.4 (recognizing that an overpayment of trust funds made to a beneficiary may be collected by offsetting the overpayment against the beneficiary’s interest in the trust or by recouping the overpayment directly from the beneficiary).

In short, as the statutory trustee and administrator of the Retirement Systems’ trust fund, PEBA not only has the right, but also the duty, to protect the Retirement

Systems' trust funds by recovering overpayments of benefits. See, e.g., McAlister, 2017 WL 1105619, at 4 ("Further, as the trustee of the assets of the Retirement Systems, Respondent has the right and the duty to protect the trust by recovering overpayments of benefits."); Cook, 2011 WL 7119342, at 7 ("[A]s recognized in both the mandatory language of Section 9-1-1670(A) and in basic retirement trust law, the trustees of the Police Officers' Retirement System may not simply ignore an overpayment of benefits, but have a fiduciary duty 'to recover the overpayment as simply, expeditiously and inexpensively as possible.'").

**b. PEBA has the general power of a governmental body to recover mistaken payments**

Beyond the authority granted to PEBA under trust law to recoup overpayments of benefits from the Retirement Systems, PEBA also has the inherent statutory authority as the governmental agency charged with the responsibility for the administration of the Retirement Systems to recoup any mistaken payments of public benefits. Importantly, courts have routinely recognized that this authority to recover erroneous payments is not contingent upon specific statutory authorization, but is inherent in the powers held by the administrator of the benefits in question. As explained well by the New Jersey Supreme Court in a case involving overpayments of welfare benefits:

A county welfare board has been given the general power to sue and be sued. While [the applicable statute] does not specifically provide for the recovery of overpayments of AFDC assistance, such power must be implied in the delegation of authority to administer the program. The welfare board is authorized to make payments only in amounts authorized by law. When an overpayment has been made, the public interest requires

that the board have the power to seek out the recipient and recover the amount of the overpayment if the person has the means or ability to repay.

The right and the power to seek to recoup benefits illegally paid, unless specifically prohibited, is inherent in the delegation of authority to administer the program.

Redding v. Burlington County Welfare Bd., 323 A.2d 477, 480 (N.J. 1974); see also, e.g., Am. Nat'l Bank & Trust Co. v. U.S., 23 Cl. Ct. 542, 547 (Cl. Ct. 1991) (“Established law clearly provides that the Government may recover funds which its agents have wrongfully, erroneously, or illegally paid. No statute is necessary to authorize the Government to sue in such a case.”); Cross v. Elected Officials Ret. Plan, 325 P.3d 1001, 1007 (Ariz. Ct. App. 2014) (declining to narrowly construe a retirement system’s error correction statute to preclude recoupment of certain overpayments, stating that the court “will not infer such a limitation, particularly when the general rule is that public bodies may recover monies mistakenly paid, whether the mistake is one of fact or law”); City of New York v. Ret. Bd. of the Teachers’ Ret. System of the City of New York, 455 N.Y.S.2d 703, 705 (N.Y. Spec. Term 1982) (holding that the power of the trustees of a retirement system to recoup payments made in error “need not rest on specific statutory authority”).

Under basic trust law and the law of public benefit agencies, PEBA has the inherent statutory authority and responsibility as trustee and administrator of the Retirement Systems to recover overpayments of benefits made from the Systems.

**2. PEBA has express authority to recoup overpayments pursuant to Section 9-1-1670.**

In addition to PEBA's inherent statutory authority to recover overpayments of benefits from the Retirement Systems' trust funds, PEBA has express statutory authority under Section 9-1-1670 of the Code of Laws to recoup monies in order to correct an error that results in an individual receiving more benefits from the Systems than he is entitled to receive. See S.C. Code Ann. § 9-1-1670(A) (2019). However, the Amended Final Order in this matter found that, "though [Section 9-1-1670(A)] 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." (Amended Final Order at 10.) This finding is the result of an unduly constricted reading of Section 9-1-1670 that would lead to the absurd result of leaving PEBA powerless to recoup mistaken payments of trust funds in many instances and allowing the overpaid persons to retain benefits to which they are not entitled under the law. The Amended Final Order should be reversed to correct that finding.

Although the South Carolina Supreme Court has acknowledged that the statutes governing the Retirement Systems "should be liberally construed in favor of those to be benefited and the objects sought to be accomplished," King v. S.C. Ret. Sys., 319 S.C. 373, 376, 461 S.E.2d 822, 822 (1995), the Court has also recognized that the Retirement Systems are "administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds," Wehle v. S.C. Ret. Sys., 363 S.C. 394, 399, 611 S.E.2d 240, 242 (2005), and 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. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001). In particular, the Court has found that a liberal construction of the Retirement Systems' statutes should be rejected if that interpretation would lead to an absurd result that jeopardizes the fiscal integrity of the Retirement Systems. Id. at 351-52, 249-50 (rejecting an interpretation of the statutory provisions related to the calculation of a member's average final compensation that would damage the fiscal integrity of the Retirement Systems). Further, as discussed at length above, these statutes should also be construed in light of the nature of the Retirement Systems as being held in trust and subject to general principles of trust law. See Op. S.C. Att'y Gen. of Nov. 16, 2011, 2011 WL 6120331, at 12 (“[W]e believe a court would determine that the duties of the . . . Board as ‘trustee’ would be in keeping with the usual and customary duties imposed upon a trustee under the common law, South Carolina statutes and general authorities.”).

With that backdrop in mind, Section 9-1-1670(A) 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.

S.C. Code Ann. § 9-1-1670(A). This section has two operative clauses. First, the section provides that, if updated records reveal that a member or beneficiary has received more benefits than he is entitled to receive from the Retirement Systems, PEBA “shall correct the error.” Id. That is, in keeping with the trust law discussed above, PEBA is directed

by Section 9-1-1670 to take reasonable steps to correct an overpayment of benefits made to a member or beneficiary. Second, the section provides that, where such an error has occurred, PEBA may “adjust the payment” made to the member or beneficiary—“so far as practicable”—to ensure that the benefit “to which the member or beneficiary was correctly entitled is paid.” *Id.* Where the member or beneficiary is entitled to ongoing or additional benefit payments, this adjustment to correct for an overpayment of benefits is most conveniently accomplished by making deductions from future benefit payments to recoup the amount overpaid. However, where an overpayment is made to a member or beneficiary who is not entitled to any additional benefit payments, such as upon a refund of contributions paid to a member or a lump-sum death claim paid to a beneficiary, it is no longer “practicable” to recoup that overpayment through deductions from future payments that do not exist, and the overpayment must be recovered directly from the overpaid member or beneficiary. In that instance, the adjustment to the payment authorized by Section 9-1-1670 is not an adjustment to future annuity payments, but is a corrective adjustment to the prior payment already made to the member or beneficiary. Recoupment by offsets against future benefit payments may also be impracticable where the amount of the overpayment to be recouped far exceeds any future benefit payments due, such that deductions from those payments will not recover the amount due in a reasonable time. In such cases, it may prudent to both make deductions from future benefits due and seek recovery directly from the overpaid member or beneficiary.

The construction of Section 9-1-1670 in the Amended Final Order in this matter would preclude recovery of overpayments of Retirement Systems’ benefits by any means other than adjustments to future benefits due. As a textual matter, this construction reads

a temporal requirement into Section 9-1-1670 that is not found in the plain language of the statute. Section 9-1-1670 does not speak only to the adjustment 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. In short, nothing in the plain language of Section 9-1-1670 limits the adjustments in payments authorized by that section only to adjustments of prospective payments or precludes adjustments to prior payments made to members or beneficiaries, so long as the adjustment is practicable. Cf. U.S. v. Brandon, 781 F.2d 1051 (4<sup>th</sup> Cir. 1986) (reversing the district court’s holding that a provision prohibiting educational assistance from being paid to veterans for courses that do not count toward graduation only applied to prospective payments and did not allow for recoupment of overpayments, because such a reading would render the statute “almost meaningless” and would frustrate “its Congressional purpose of ensuring that benefits are paid only to those veterans” who are entitled to the benefits).

Further, and most importantly, this constricted interpretation of Section 9-1-1670 leads to an absurd result that could affect the fiscal integrity of the Retirement Systems. As noted earlier, this restrictive construction of Section 9-1-1670 would preclude PEBA from recovering overpayments of Retirement Systems’ trust funds in all instances where the recipient of the overpayment is not entitled to ongoing benefit payments from the Systems. For example, under that construction, PEBA would have no statutory authority to recover overpayments of trust funds from a member who receives an overpayment of benefits as part of a refund of contributions upon termination of covered employment, a beneficiary who receives an overpayment of benefits in a lump-sum death benefit paid

upon a member's death, or, like in this case, a member who receives an overpayment of disability retirement benefits but is no longer entitled to receive disability benefits. It would be an absurd reading of Section 9-1-1670, and the Retirement Code generally, to conclude that a member or beneficiary who receives an overpayment of benefits in such circumstances is not liable to repay the Retirement Systems' trust funds for the benefits that he was not entitled under the law to receive. While the inability to recoup such overpayments may not render the Retirement Systems actuarially unsound, the construction of Section 9-1-1670 to preclude such recovery plainly affects the fiscal integrity of the Retirement Systems' trust funds and cannot be squared with "the objects sought to be accomplished" by the error correction provisions of Section 9-1-1670. See King, 319 S.C. at 376, 461 S.E.2d at 822.

Notably, in at least three prior cases before the Administrative Law Court, the court has not construed Section 9-1-1670 to be so narrow in the recovery it allows. See McAlister, 2017 WL 1105619, at 4; Cook, 2011 WL 7119342, at 7; Hocin v. S.C. Pub. Emp. Benefit Auth., Docket No. 15-ALJ-30-0115-CC (S.C. Admin. Law Ct. June 18, 2015), 2015 WL 3929247, at 5. In particular, in two of those cases, the court specifically required a member to repay an overpayment of benefits to the Retirement Systems directly from the member's assets and not solely from deductions from future payments. See McAlister, 2017 WL 1105619, at 4; Hocin, 2015 WL 3939247, at 5. Courts in other jurisdictions have likewise been unwilling to narrowly circumscribe the authority of retirement plan trustees to seek recovery of overpayments of benefits. See, e.g., Cross, 325 P.3d at 1007 (declining to limit the circumstances under which the retirement plan could correct errors resulting in overpayments); City of New York, 455 N.Y.S.2d at 705

(holding that the retirement plan trustees had broad, inherent powers, and duties, to recover overpayments “as simply, expeditiously and inexpensively as possible”).

**C. PEBA has the authority to recoup the overpayment made in the instant case.**

In the case at hand, there is no dispute that Turner received an overpayment of disability retirement benefits in the amount of \$15,613.91 in 2014. (Amended Final Order at 6, 9.) And, Turner is not currently entitled to the receipt of future disability retirement benefits from the Retirement Systems because he has gained an earnings capacity from gainful employment that exceeds his inflation-adjusted average final compensation. See S.C. Code Ann. §§ 9-1-1580, 9-11-80(4) (2019). Accordingly, the suspension of Turner’s disability retirement benefits for 2015 going forward was not intended to, and does not, recoup any amount of the overpayment of benefits he received in 2014, but is a measure to ensure that he does not receive future overpayments of benefits. (See PEBA’s Ex. #9 (“Since you are earning a salary that is more than your adjusted AFC, you are no longer eligible for a monthly annuity. Based upon your earnings during calendar year 2014, PEBA is suspending your disability retirement benefit indefinitely pursuant to S.C. Code Ann. 9-1-1580.”).) In fact, it is because Turner is not currently entitled to future disability retirement benefits that PEBA sought to recover the overpayment of benefits he received in 2014 from Turner directly, rather than through deductions from future benefit payments. However, the Amended Final Order in this matter concludes that PEBA does not have such authority and would render PEBA unable to recover the overpayment of retirement benefits Turner received from the Retirement Systems’ trust fund, allowing Turner to retain the excess benefits he received. For all of the reasons set out above, this conclusion fails to properly account for PEBA’s

inherent statutory powers as trustee and administrator of the Retirement Systems and its express statutory powers under Section 9-1-1670 of the Code of Laws. Therefore, the Amended Final Order should be reversed and it should be held that PEBA has broad statutory authority to recoup overpayments made from the Retirement Systems' trust funds and, in particular, that PEBA's authority to seek recovery of such overpayments is not limited solely to offsetting overpayments against any future benefits due.

It should be noted that this corrected holding would not mean that the Retirement Systems' trust funds would be entitled to recovery of overpayments in every instance. Although PEBA is not aware of any valid defenses in the instant matter, an overpaid member or beneficiary in any particular case 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. See, e.g., Restatement (Third) of Trusts § 104 cmt. g(3). Further, this corrected holding would not prohibit an ALJ from shaping the relief he or she grants in any particular case, for example, by establishing a repayment schedule for an overpayment of benefits that appropriately balances the interests of the overpaid member and the Retirement Systems. A prior case before the Administrative Law Court involving the disability retirement earnings limitation, Hocin v. South Carolina Public Employee Benefit Authority, is instructive on this point. Hocin v. SC. Pub. Emp. Benefit Auth., Docket No. 15-ALJ-30-0115-CC (S.C. Admin. Law Ct. June 18, 2015), 2015 WL 3929247. In Hocin, like the instant case, a disability retiree had received an overpayment of benefits for the prior year and was no longer eligible for future disability payments as a result of his earnings from private gainful employment. Id. At the Administrative Law Court, the ALJ identified the "sole issue" in the case as

whether the member “received an overpayment which must be repaid.” Id. at 1; cf. Amended Final Order at 1. In her Final Order and Decision, the ALJ in Hocin found that the member had received an overpayment of disability retirement benefits and ordered the member to repay the overpayment in direct payments to PEBA of at least \$100 per month until the overpayment was recouped. Hocin, 2015 WL 3929247, at 5. In crafting this relief, the ALJ further specified that, if the member were later to become eligible to receive future benefit payments, any balance owed could then be recovered from deductions from those payments. Id. Put simply, the approach of the ALJ in Hocin appropriately recognizes that PEBA has the authority to recoup, and a member is liable to repay, a prior overpayment of benefits from the Retirement Systems’ trust funds, even if no future payments are due to the member. Unfortunately, the Amended Final Order in the current matter fails to recognize that authority and should be reversed accordingly.

## CONCLUSION

The holding of the Amended Final Order that PEBA does not have statutory authority to recoup overpayments of benefits from the South Carolina Retirement Systems, except through adjustments to future payments, should be reversed, and this matter should be remanded to the Administrative Law Court with instructions for the ALJ to determine a repayment schedule for Turner to repay the overpayment of disability retirement benefits he received in 2014.

Respectfully submitted,



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August 23, 2019

Attorney for Appellant

THE STATE OF SOUTH CAROLNA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2019-000895

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AUG 23 2019  
SC Court of Appeals

Keith E. Turner, .....Respondent,

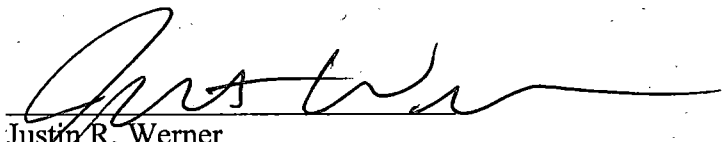
v.

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

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served a copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be included in the Record on Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

Keith E. Turner  
216 Two Pond Loop  
Ladson, SC 29456



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August 23, 2019

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**SC Court of Appeals**

**By Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201


RE: Keith E. Turner v. S.C. Public Employee Benefit Authority, S.C. Retirement Systems, Appellate Case No. 2019-000895

Dear Ms. Kitchings:

Please find enclosed for filing the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal in the above-referenced matter, along with an accompanying Certificate of Service reflecting service of these documents on Respondent by mail.

If you have any questions or concerns regarding these filings or this matter generally, please call me at (803) 737-6894.

Sincerely,

  
Justin R. Werner  
Deputy General Counsel

Enclosures

cc: Keith E. Turner, Respondent (by U.S. Mail)