

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
18 DST 07133

<p>Laura M Riddick Petitioner,</p> <p>v.</p> <p>Dept of State Treasurer, Retire Sys Div; Dale Folwell State Treasurer(in ofc capacity only); Steven C Toole Dir Retire Syst Div(in ofc cap only); NC Retire System Comm Bd of Trustees(in ofc cap only) Respondent.</p>	<p style="text-align: center;"><b>FINAL DECISION</b></p>
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UPON CONSIDERATION of the cross-Motions for Summary Judgment filed by the parties, the responses thereto, the arguments of the parties, the parties' agreement that there are no genuine issues of material fact and that this matter can be decided as a matter of law, and for good cause shown, the Undersigned hereby GRANTS in part and DENIES in part the Petitioner's Motion for Summary Judgment, and GRANTS in part and DENIES in part the Respondents' Motion for Summary Judgment as follows:

**APPEARANCES**

For Petitioner:        Robert F. Orr  
                              Robert F. Orr, Attorney at Law, PLLC

                              Joseph E. Zeszotarski, Jr.  
                              Gammon, Howard & Zeszotarski, PLLC

For Respondents:     Joseph A. Newsome, Special Deputy Attorney General  
                              North Carolina Department of Justice

**STANDARD OF REVIEW**

Summary judgment is granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quotation marks and citations omitted).

The purpose of summary judgment "is to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only." *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972).

## ISSUES

1. Whether the Retirement System properly applied the felony forfeiture provisions of N.C. Gen. Stat. § 128-38.4A to Petitioner's retirement benefits from the Local Governmental Employees' Retirement System (LGERS)?
2. Whether the calculations of eligible years of service and benefits to be paid to Petitioner were correctly determined by the Retirement System as set forth in the letter of Steven Toole dated 25 September 2018 and served upon the Petitioner?
3. Whether the Retirement System properly determined that Petitioner's years accrued in employment in the Teachers' and State Employees' Retirement System (TSERS) before becoming Register of Deeds, were forfeited upon Petitioner's transfer of her time accrued in TSERS into her LGERS account in 2017 before her retirement from LGERS?
4. Whether the Retirement System properly determined that Petitioner's accrued sick leave could not be added to her retirement years of service as of her retirement from LGERS on 31 March 2017?
5. Whether the Retirement System properly determined that Petitioner's retirement benefits from the Registers of Deeds' Supplemental Pension Fund (RODSPF) as set out in N.C. Gen. Stat. § 161-50.4(c), as amended by N.C. Session Law 2018-84, was forfeited upon her felony conviction on 24 August 2018 both retroactively to her retirement date on 31 March 2017 and prospectively?
6. Did the Retirement System err by utilizing the 1 December 2012 date for determining forfeiture of Petitioner's benefits rather than 9 July 2013 when Session Law 2013-288 was passed amending N.C. Gen. Stat. § 128-26(x) to make it applicable to N.C. Gen. Stat. § 128-38.4A?

## UNDISPUTED FACTS

1. Petitioner, Laura M. Riddick, was the elected Register of Deeds of Wake County, North Carolina from 1 December 1996 through 31 March 2017 and a member of LGERS. Before her service with Wake County, she was an employee of the N.C. Department of Cultural Resources from 8 October 1990 through 30 November 1996 and a member of TSERS.
2. Petitioner retired on 31 March 2017, and began receiving retirement benefits from LGERS and RODSPF.
3. On 24 August 2018, Petitioner pleaded guilty to six Class C felony violations of N.C. Gen. Stat. § 14-92, "Embezzlement by a Public Official in Excess of \$100,000." These convictions arose from felonies committed while Petitioner was serving as a public official, Register of Deeds for Wake County.

4. In entering the Judgment for Petitioner's pleas of guilty, Superior Court Judge Paul C. Ridgeway made no finding of any aggravating factors under N.C. Gen. Stat. § 15A-1340.16 (d), including the (d)(9) aggravator.

5. Upon learning of Petitioner's guilty pleas, the Retirement Systems Division of the North Carolina Department of State Treasurer (Retirement System) determined that the felonies to which Petitioner pleaded guilty were "directly related" to Petitioner's "employment" and occurred while Petitioner was in active service. *See* N.C. Gen. Stat. § 128-38.4A (2018).

6. Based upon its interpretation of the applicable statutes, the Retirement System then applied the felony forfeiture provisions of N.C. Gen. Stat. § 128-38.4A and N.C. Gen. Stat. § 161-50.4(c) to Petitioner's retirement benefits from LGERS and RODSPF.

7. As a result of its interpretation of the applicable statutes, the Retirement System determined that Petitioner had forfeited all creditable time that was credited to her LGERS account after 1 December 2012. Included in the creditable service forfeited and removed was 4 years and 4 months (4.3333) of LGERS membership service, 2 years and 7 months (2.5833) of unused sick leave remaining at the time she retired, and 6 years and 2 months (6.1667) of service that was transferred from TSERS, all of which the Retirement System deemed to have accrued in Petitioner's LGERS account after 1 December 2012. Of the sick leave in Petitioner's account at her retirement, 1.3333 years of that sick leave was accrued before 1 December 2012.

8. These adjustments, as calculated by the Retirement System, reduced the total creditable service used to calculate Petitioner's monthly retirement benefit amount from 29 years and 1 month (29.0833) to 16 years (16.0000), leaving Petitioner ineligible to retire. As a result, the retirement benefits paid to Petitioner from 1 April 2017 through 31 August 2018 were deemed not due to her, and an overpayment was therefore assessed in the amount of \$100,790.28 from LGERS and \$25,500 from RODSPF for a total gross amount of \$126,290.28.

9. The contributions made by Petitioner for the creditable service that was forfeited plus interest were deemed refunded to Petitioner, pursuant to N.C. Gen. Stat. § 128-38.4A. The gross amount of the refund was \$62,795.75 and, after taxes in the amount of \$15,070.98 were withheld, the net amount of \$47,724.77 was applied to the assessed overpayment, leaving an outstanding overpayment balance of \$78,565.51.

10. The determinations and forfeitures made by the Retirement System were contained in a Final Agency Decision issued to Petitioner on 25 September 2018. Petitioner contests the determinations of the Retirement System. Petitioner timely appealed by the filing of this Petition for a Contested Case Hearing on 20 November 2018.

### **CONCLUSIONS OF LAW**

Based upon the above undisputed Findings of Fact, the Undersigned concludes as follows:

1. The parties are properly before the North Carolina Office of Administrative Hearings (“OAH”), and the OAH has subject matter jurisdiction over the matters raised in this contested case.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

**Issue 1. Whether the Retirement System properly applied the felony forfeiture provisions of N.C. Gen. Stat. § 128-38.4A to Petitioner’s retirement benefits from LGERS?**

3. N.C. Gen. Stat. § 128-38.4A provides, in pertinent part, that:

(a) Except as provided in G.S. 128-26(x), the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony under federal law or the laws of this State if all of the following apply:

(1) The offense is committed while the member is in service.

(2) The conduct resulting in the member's conviction is directly related to the member's office or employment.

(b) Subdivision (2) of subsection (a) of this section shall apply to felony convictions where the court finds under G.S. 15A-1340.16(d)(9) or other applicable State or federal procedure that the member's conduct is directly related to the member's office or employment.

N.C. Gen. Stat. § 128-38.4A (2019). N.C. Gen. Stat. § 128-26(x) provides as follows:

(x) If a member who is in service and has not vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. If a member who is in service and has vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member is not entitled to any creditable service that accrued after December 1, 2012.

N.C. Gen. Stat. § 128-26(x) (2019).

4. Petitioner challenges the Retirement System’s application of this statute to her LGERS benefits, arguing that if N.C. Gen. Stat. § 128-38.4A applies to Petitioner, the statute requires that the Superior Court Judge presiding over the felony conviction determine whether subsection (a)(2) was met by the specific finding of the (d)(9) aggravating factor and that the

Retirement System has no unilateral statutory authority to make that determination absent such a finding by the Judge presiding.

5. The Retirement System properly made the determination that both subdivisions (1) and (2) were applicable to Petitioner. The procedure set out in subsection (b) is a means by which subdivision (2) shall be determined, but it is not the sole means. The Retirement System has the obligation to administer the statutes that govern the various retirement plans under their purview, and the System properly applied N.C. Gen. Stat. § 128-38.4A to Petitioner's retirement benefits where she had pleaded guilty to six felonies that were directly related to her office and that were committed while she was in active service.

6. The Retirement System properly determined that Petitioner forfeited all of the time she accrued in LGERS after 1 December 2012.

**Issue 2. Whether the calculations of eligible years of service and benefits to be paid to Petitioner were correctly determined by the Retirement System as set forth in the letter of Steven Toole on 25 September 2018 and served upon the Petitioner?**

7. From the undisputed facts, it appears that the eligible years of service and benefits paid to Petitioner, before the application of any forfeiture, were correctly determined as set out in the letter of Steven Toole to Petitioner on 25 September 2018.

**Issue 3. Whether the Retirement System properly determined that Petitioner's years accrued in employment in TSERS before becoming Register of Deeds, were forfeited upon Petitioner's transfer of her time accrued in TSERS into her LGERS account in 2017 before her retirement from LGERS?**

8. Petitioner transferred 6.1677 years of TSERS time into her LGERS account before her retirement in 2017. Petitioner was vested in this service because she served more than five years in TSERS.

9. The Retirement System erred by determining that Petitioner should forfeit this time. As Petitioner had a vested right to this service before 1 December 2012, it was not subject to forfeiture, and Petitioner is entitled to have this time counted toward her retirement. The mere transfer of this time from Petitioner's TSERS account to her LGERS account does not change the character of her TSERS time from vested and accrued.

**Issue 4. Whether the Retirement System properly determined that Petitioner's accrued sick leave could not be added to her retirement years of service as of her retirement from LGERS on 31 March 2017?**

10. At the time of her retirement, Petitioner had 2.5833 years of unused sick leave. Pursuant to N.C. Gen. Stat. § 128-26(e), if sick leave remains in a member's account at retirement, it is counted when computing creditable service for determining a member's benefit.

11. The Retirement System determined that all of Petitioner's sick leave should be forfeited because it accrued at the time of retirement. The Retirement System erred by determining that forfeiture applied to sick leave that Petitioner accrued before 1 December 2012. The sick leave accrued by Petitioner after 1 December 2012 was properly forfeited. Petitioner did not forfeit the sick leave that she accrued before 1 December 2012. Thus, 1.333 years of sick leave (as currently calculated by the Retirement System) should be used when counting Petitioner's creditable service toward retirement.

**Issue 5. Whether the Retirement System properly determined that Petitioner's retirement benefits from the RODSPF as set out in N.C. Gen. Stat. § 161-50.4(c), as amended by N.C. Session Law 2018-84, were forfeited upon her felony conviction on 24 August 2018 both retroactively to her retirement date on 31 March 2017 and prospectively?**

12. The forfeiture of Petitioner's benefits in LGERS occurred when the Retirement System made its decision, as memorialized in the Final Agency Decision letter dated 25 September 2018.

13. This forfeiture occurred after the effective date of N.C. Session Law 2018-84 and, thus, the amendment creating N.C. Gen. Stat. § 161-50.4(c) applies to Petitioner's case.

14. N.C. Gen. Stat. § 161-50.4(c) provides as follows: "A county register of deeds who is otherwise eligible to receive a monthly pension under this Article shall cease to be eligible upon forfeiture of any retirement benefits under G.S. 128-38.4 or G.S. 128-38.4A." N.C. Gen. Stat. § 161-50.4(c) (2019). Petitioner was eligible to receive the RODSPF benefits until the Retirement System properly determined under N.C. Gen. Stat. § 128-38.4A that Petitioner ceased to be eligible "upon forfeiture."

15. Petitioner was entitled to receive the RODSPF pension benefits she was receiving until the Retirement System determined that her eligibility ceased upon the forfeiture required by N.C. Gen. Stat. § 128-38.4A. Petitioner is not entitled to any RODSPF benefits on and after 25 September 2018. She was entitled to receive the RODSPF benefits before that date.

**Issue 6. Did the Retirement System err by utilizing the 1 December 2012 date for determining forfeiture of Petitioner's LGERS benefits rather than 9 July 2013 when Session Law 2013-288 was passed amending N.C. Gen. Stat § 128-26(x) to make it applicable to N.C. Gen. Stat. § 128-38.4A?**

16. Session Law 2013-288 was a technical corrections bill and while its effective date was 9 July 2013, it was appropriately applied to the 1 December 2012 date of the previously enacted provision, N.C. Gen. Stat. § 128-26(x).

### **FINAL DECISION**

Based on the foregoing undisputed facts, Conclusions of Law, and applicable standard of review, the Undersigned finds that there are no questions of material fact and GRANTS in part

and DENIES in part Petitioner's Motion for Summary Judgment, and GRANTS in part and DENIES in part Respondents' Motion for Summary Judgment as follows:

1. The Retirement System properly applied the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A to Petitioner's LGERS account, and Petitioner forfeits the 4.3333 years of LGERS service she accrued after 1 December 2012.

2. The Retirement System erred by forfeiting the 6.1677 years of TSERS time transferred to Petitioner's LGERS account. Petitioner is entitled to count that service toward her retirement.

3. The Retirement System erred by forfeiting the sick leave which Petitioner accrued before 1 December 2012. Petitioner is entitled to count 1.3333 years of sick leave toward her retirement as presently calculated by the Retirement System.

4. The Retirement System properly applied N.C. Gen. Stat. § 161-50.4(c) to Petitioner's prospective RODSPF benefits after 25 September 2018. Petitioner became ineligible for the RODSPF benefits on the day she forfeited her LGERS benefits, 25 September 2018. She was entitled to receive the RODSPF benefits she received before 25 September 2018. She is not entitled to receive any RODSPF benefits after that date.

5. The Retirement System is directed to recalculate Petitioner's LGERS retirement benefit and administer it consistent with this Final Decision.

### **NOTICE OF APPEAL**

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Article 2, this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**IT IS SO ORDERED.**

This the 9<sup>th</sup> day of April, 2019.



Linda Stephens  
Temporary Administrative Law Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 9<sup>th</sup> day of April, 2019.



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