

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
19 DST 05261

Kirk Justin Barefoot

Petitioner,

v.

NC Retirement Systems Division

Respondent.

**FINAL  
DECISION**

1. THIS MATTER COMES before the Undersigned on Respondent N.C. Department of State Treasurer, Retirement Systems Division's ("Department") Motion for Summary Judgment ("Motion"). The Department seeks summary judgment pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure.

2. The Undersigned, having carefully considered the Motion, the parties' materials submitted in support of and in opposition to the Motion, and other appropriate matters of record, concludes that the Motion should be GRANTED for the reasons set forth below.

*Kirk Justin Barefoot, pro se.*

*North Carolina Department of Justice by Katherine Adele Murphy, Assistant Attorney General, and Victor A. Unnone, III, Associate Attorney General, for Respondent N.C. Department of State Treasurer.*

T.S. Jacobs, Administrative Law Judge.

## I. PROCEDURAL AND FACTUAL BACKGROUND

The entry of findings of fact is not necessary when an Administrative Law Judge grants a motion for summary judgment. *Hyde Ins. Agency, Inc. v. Dixie*

*Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975); N.C. Gen. Stat. § 150B-34(e). Nonetheless, the Undersigned summarizes the following facts to provide context for her ruling. *See, e.g., Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 (“[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which [s]he considers are not at issue and which justify entry of judgment.”)

1. Petitioner is a member of the Local Government Employee’s Retirement System (“LGERS”) and applied for disability retirement in March 2018. (Cosbey Aff., ¶ 4)

2. Immediately prior to retirement, Petitioner worked for the City of Raleigh (“City”) as an Information Response Technician (“IRT”) earning a salary of \$50,590.19. (Dunn Aff., ¶¶ 11, 13) Petitioner began the IRT position on 2 September 2017. Effective 30 September 2017, the IRT position was reclassified to the “Administrative Technician” position due to the City’s implementation of a new City-wide Job Classification and Compensation System. (*Id.* at ¶ 12) Prior to the reclassification, the salary range for the IRT position was \$28,930.53 - \$48,012.04. (*Id.*) Afterwards, the salary range changed to \$32,506 - \$52,554. (*Id.*) Petitioner held the IRT position until 1 June 2018, the effective date of his disability retirement. (*Id.* at ¶ 13).

3. Petitioner was initially hired by the City in June 2012 as a pre-hire in the Administrative Services Division of the Raleigh Police Department; he later began law enforcement officer (“LEO”) training and was eventually reclassified by

the City as a sworn law enforcement officer in March 2013. (Dunn Aff., ¶ 5) Petitioner became incapacitated for duty as the natural and proximate result of an injury incurred while performing duties as a LEO and, it was on this basis, that the Department approved his disability retirement application. (Cosbey Aff., ¶ 4)

4. In the Final Agency Decision<sup>1</sup> issued on 12 September 2019, the Department explains how it calculated Petitioner’s disability retirement benefit including its adjustment to Petitioner’s benefit based on Petitioner’s ability to engage in gainful employment. The Department’s adjustment resulted in a reduction of Petitioner’s monthly disability retirement benefit from \$1,423.00 to \$100.04. (Final Agency Decision, pp. 2-3)

5. Petitioner filed a Petition for a Contested Case Hearing (“Petition”) in the Office of Administrative Hearings on 19 September 2019 contesting the Final Agency Decision.

6. On 13 January 2020, the Department filed the Motion and materials in support thereof. Petitioner submitted his response to the Motion on 28 January 2020. The Motion is now ripe for adjudication.

## II. ANALYSIS

### A. Standard of Review

1. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

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<sup>1</sup> A copy of the Final Agency Decision is attached to R’s Prehearing Statement and Document Constituting Agency Action filed in this contested case on 22 October 2019.

entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56. An Administrative Law Judge is authorized to grant summary judgment in contested case proceedings at the OAH. N.C. Gen. Stat. § 150B-34(e).

2. The party seeking the entry of summary judgment bears “the burden of clearly establishing lack of a triable issue to the trial court.” *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (internal quotations and citations omitted). In determining whether this burden is met, the moving party’s “papers are carefully scrutinized, and all inferences are resolved against him.” *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

3. When a motion for summary judgment is made and supported by affidavits and requests for admissions, as the Motion is in this contested case, Rule 56 provides:

The adverse party *may not rest upon the mere allegations or denials of his pleadings*, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.

N.C. R. Civ. P. Rule 56(e) (emphasis added). If the adverse party fails to do so, “summary judgment, if appropriate, shall be entered against him.” *Id.*

B. Analysis

4. Subsection (c) of General Statute 128-127 provides the circumstances under which a member of LGERS may be retired on a disability retirement allowance. It provides in part:

[A] member who is a law enforcement officer, an eligible firefighter as defined in G.S. 58-86-2, or an eligible rescue squad worker as defined in G.S. 58-86-2, and becomes incapacitated for duty as the natural and proximate result of injuries incurred while in the actual performance of his or her duties, and meets all other requirements for disability retirement benefits, may be retired by the Board of Trustees on a disability retirement allowance.

The disability retirement allowance for a LEO that retires under such circumstances is calculated on “the member’s average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.” N.C. Gen. Stat. § 128-127(d4).

5. It is undisputed that Petitioner qualified to be retired on a disability retirement allowance under subsection (c) of General Statute 128-127 due to becoming incapacitated for duty as the natural and proximate result of an injury incurred while performing duties as a LEO. Moreover, the record is devoid of any evidence that the Department’s calculation of Petitioner’s disability retirement allowance, as set out in both the Department’s Memorandum and Final Agency Decision, is contrary to law or otherwise incorrect. *See* R’s Memorandum, pp. 3-4 (The calculation of the pre-adjusted disability retirement benefit); Final Agency Decision, pp. 1-2 (Determination of Disability Retirement Benefit Before Adjustment for Ability to Engage in Gainful Employment).

6. Rather, the parties' dispute stems from the Department's adjustment to Petitioner's disability retirement allowance for his ability to engage in gainful employment.

7. For a LGERS member to receive disability benefits, the Medical Board shall "determine if the member is able to engage in gainful employment and, if so, the member may still be retired *and the disability retirement allowance as a result thereof shall be reduced as in subsection (e)*" of General Statute 128-27. N.C. Gen. Stat. § 128-27(c) (emphasis added).

8. Subsection (e) of General Statute 128-27 explains the impact of gainful employment on a LGERS member's disability retirement allowance:

The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. *If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement.*

Emphasis added.

9. There appears to be no dispute between the parties that Petitioner was able to engage in gainful employment and, as a result, his disability allowance was subject to reduction. But the parties do disagree on the Department's application of the gainful employment provisions to Petitioner's case and, more specifically, its methodology for determining the amount of compensation Petitioner can earn through such means.

10. General Statute 128-27 does not specify how the Department is to obtain the amount a disability beneficiary can earn through gainful employment. Here, the Department, in applying the gainful employment requirement to adjust Petitioner's disability allowance, used "the amount Petitioner was actually earning at the time he was approved for disability retirement benefits" as the "measure of the amount that Petitioner is capable of earning." R's Memorandum, p. 7. The Department argues that its methodology and application of the statutory requirements of General Statute 128-27, and, consequently, its resulting measure of Petitioner's gainful occupation, is "fair and reasonable." *Id.* Petitioner disagrees; he contends that the Department "is using a very unreasonable standard for determining [his] "ability to earn" through gainful employment and, as a result, requests a "recalculation of his projected disability benefits using a reasonable and fair standard for determining his "ability to earn" through gainful employment." P's Prehearing Statement, §§ 1 and 2.

11. Although there is no North Carolina case law specifically addressing wage-earning capacity in the context of disability retirement payments as applied in General Statute 128-27, North Carolina courts have reviewed the issue within the

framework of the State's disability wage laws. For example, in considering a plaintiff's wage-earning capacity in the context of the State's Workers Compensation Act, the North Carolina Supreme Court recognized that a worker's post-injury earnings are evidence of their capacity to earn wages. *See, e.g., Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 807 (1986). However, the court further recognized that such earnings, on their own, are not conclusive as they may, under certain conditions, not accurately reflect an individual's earning capacity. The determination as to whether such conditions exist generally focus on whether the earnings reflect an individual's ability to compete for wages in an open labor market. *See, e.g., Id.* at 438, 342 S.E.2d at 806 (citing earnings from "make-work" positions, those which have been "so modified because of the employee's limitations" and from employment where "other employers would not hire the employee with the employee's limitations at a comparable wage level" as examples of employment that "would not accurately reflect earning capacity.")

12. Other jurisdictions have also employed similar standards in determining an individual's wage-earning capacity for purposes of disability wages. The Federal Employee's Compensation Act, which Petitioner cites in support of his case, determines an individual's wage-earning capacity "by his actual earning if his actual earnings fairly and reasonably represent his wage-earning capacity." 5 U.S.C. § 8115(a); *see, e.g., M.S., Appellant & U.S. Postal Serv., Post Office, Atlanta, Ga, Employer*, No. Docket No. 19-0692, 2019 WL 6770196, at \*3 (Nov. 18, 2019) (discussing 5 U.S.C. § 8115(a) and further explaining that, "[g]enerally, wages earned

are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.”)

13. Considering the foregoing most closely analogous authorities, the Undersigned concludes that the use of actual earnings, absent conditions indicating otherwise, is a fair and reasonable standard to determine a LGERS' members “ability to earn” for purposes of General Statute 128-27.

14. Petitioner argues that the use of his actual earnings immediately prior to seeking disability retirement is an “unreasonable standard for determining [his] “ability to earn” through gainful employment” because his salary was “inflated.” P's Prehearing Statement, § 2.A. But the Department's evidence demonstrates otherwise: Petitioner's position was a full-time civilian position within the Raleigh Police Department's Crime Reporting Center. The position “has been included in the Raleigh Police Department budget since 2008 and, like other openings with the City of Raleigh, it is listed on the City of Raleigh's website.” R's Memorandum, p. 8. Petitioner's salary, at the time of his departure, was within the current salary range for the position. Petitioner, as noted by the Department, “admits that . . . he was physically capable of continuing his work in the position.” R's Memorandum, Attachment. Notably, the Department, in the Final Agency Decision, considered similar facts in its review of Petitioner's disability retirement claim. *See* Final Agency Decision, p. 3 (noting that the Petitioner's IRT position was “an open position,” “not created specifically for [Petitioner],” that the salary “was commensurate with the

skills and abilities required,” and medical documentation “indicated that [Petitioner] could have continued employment in that position.”)

15. In light of the Department’s evidence, the burden shifts to Petitioner to produce facts, as opposed to mere allegations, to defeat the Motion. “The purpose of Rule 56 is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present.” *Kidd*, 289 N.C. at 352, 222 S.E.2d at 410. Petitioner has only produced allegations in this contested case and has failed to present any admissible evidence that there is, in fact, an issue of disputed fact regarding the reasonableness or fairness of the Department’s methodology and its resulting measure of the amount Petitioner is able to earn through gainful employment. *See, e.g., Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 470 (1988) (recognizing that a party’s “unverified pleadings are insufficient to defeat a motion for summary judgment since they do not comply with the requirements of Rule 56 (e).”)

16. Accordingly, given the foregoing, the Undersigned concludes that the Department is entitled to summary judgment and that the Motion should therefore be GRANTED.

#### IV. FINAL DECISION

17. THEREFORE, IT IS ORDERED that the Motion for Summary Judgment is GRANTED. Summary Judgment is entered in Respondent’s favor and Petitioner’s contested case is hereby dismissed.

NOTICE OF APPEAL

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 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. General Statute 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.

**SO ORDERED**, this the 30th day of July, 2020.



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Tenisha S Jacobs  
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 30th day of July, 2020.



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