Employees' Retirement System of Rhode Island

Retirement Board Meeting

March 15, 2017

10:00 A.M.

Seth Magaziner, General Treasurer, Chairman

Frank J. Karpinski, Executive Director

ERSRI Memorandum

Date: March 8, 2017

To: Retirement Board

From: Frank J. Karpinski, Executive Director

Subject: March 2017 Monthly Board Meeting

The Governance Subcommittee will be meeting at **9 a.m.** on **Wednesday, March 15, 2017** on the 2nd Floor Room at 50 Service Avenue, Warwick with an estimated time of 1 hour.

Immediately following will be the **Monthly Meeting of the Retirement Board** which will be held at **10:00 a.m.** The estimated time of the Board meeting will be 1 hour.

Lastly, the **Administration Subcommittee** meeting will be meeting at 11 a.m. or at the rise of the Board meeting with an estimated time of 1 hour.

Parking is available in front of our building. Additional parking is available in the parking lot as you pass through the gate which will open using your identification. You can enter either by the back parking lot entrance to come up the stairs to the 2nd floor or you can walk around to the main entrance which is in the front of the building to enter.

If you are unable to attend any of the meetings, please contact me at 462-7610.

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND

Governance Subcommittee

Wednesday March 15, 2017, 9:00 a.m.

2nd Floor Conference Room, 50 Service Avenue, Warwick, RI

I. Call to Order

II. Roll Call of Members

III. Selection of Vice Chairperson

IV. Review and Finalize Draft Governance Committee Charter for Board Approval

V. Discussion and Review of Legislative Subcommittee and Potential Legislation for 2017 General Assembly Session

VI. Overview of Governance Committee Duties

VII. Adjournment

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND
CHARTER FOR THE GOVERNANCE SUBCOMMITTEE

INTRODUCTION & AUTHORITY

1) The primary purpose of the Governance Subcommittee ("Subcommittee") is to assist the Retirement Board ("Board") in fulfilling its oversight responsibilities with respect to Board governance, review of retirement laws, board member education, board evaluation, strategic planning, and oversight of senior staff.

2) All actions taken by the Subcommittee shall comply with applicable law, including the Rhode Island General Laws. In the event of a conflict between the terms of this Charter and the Rhode Island General Laws, the Rhode Island General Laws shall control.

COMPOSITION & MEETINGS

3) The Subcommittee shall consist of at least five members of the Board. The Board chair shall serve on the Subcommittee ex-officio.

4) ~~The Subcommittee shall select a Subcommittee chair and vice chair.~~ The Board Chairperson shall recommend a chairperson for each of the standing committees and special committees, with the advice and consent of the Board. Each committee shall select a vice chairperson. ~~-~~The chair shall preside at all meetings. In the absence of the chair, the vice chair shall preside.

5) The Executive Director shall designate an employee of the Employees' Retirement System of the State of Rhode Island (the "System") to assist the Subcommittee with the performance of its duties.

6) Subcommittee meetings shall be conducted in accordance with the Rhode Island General Laws governing Open Meetings §42-46-1 *et seq.*, General Administrative Rules of the Retirement Board, and other legal requirements.

7) The Subcommittee shall meet as many times per year as the Subcommittee chair deems necessary or appropriate to perform the Subcommittee's duties. The Subcommittee shall meet at such times as determined by the Subcommittee chair, after consulting with the Executive Director and Subcommittee members. Meetings shall be subject to the Open Meetings Law. RIGL § 42-46-1 *et seq.*

8) The chair shall develop an annual agenda calendar for Subcommittee meetings, which shall be incorporated into the Board's annual Agenda Calendar (as defined in 120-RICR-10-00-1.1, ~~Regulation No. 1,~~ General Administrative Rules of the Retirement Board). The chair shall generally oversee the performance of the work assigned to the Subcommittee in the Agenda Calendar.

DUTIES AND RESPONSIBILITIES

The Subcommittee has the following responsibilities:

Board Governance

9) Develop and/or review standard formats for describing the content of Board meeting books, with input from other subcommittees, as necessary.

10) Periodically review Board subcommittee structure and propose any changes to the Board.

11) Oversee the Board's annual Agenda Calendar (as defined in 120-RICR-10-00-1.1 ~~Regulation No. 1,~~ General Administrative Rules of the Retirement Board) and recommend changes as may be necessary or appropriate to ensure that the Board's annual strategic plan is accomplished.

12) Every [two/three] years, review subcommittee charters, consider amendments to subcommittee charters (including amendments proposed by other subcommittees), and propose any amendments to the Board.

13) Every [two/three] years, review 120-RICR-10-00-1.1 ~~Regulation No. 1,~~ General Administrative Rules of the Retirement Board, consider amendments, and propose any amendments to the Board.

14) Every [two/three] years, review Board governance policies and procedures, consider amendments, and propose any amendments to the Board.

Review of Retirement Laws

15) Consider proposed or potential legislation relating to the retirement laws and make such recommendations to the Board as it deems appropriate.

16) Upon Board approval, work with the General Assembly regarding proposed or potential amendments to the retirement laws.

Board Education & Evaluation

17) Develop and review policies for training and evaluating Board members, including the Board Education Policy and Board Self-Evaluation Policy.

18) Oversee Board self-evaluation.

19) Evaluate Board member skill sets and competencies and recommend Board member development and training.

20) Collaborate with System staff to ensure that Board members are familiar with RIGL governing Ethics, Open M~~m~~eetings Act, Access to Public R~~r~~ecords Act and

retirement system standards and arrange for Board member training as appropriate.

21) Collaborate with System staff to ensure that Board members are familiar with Board governance documents, including the General Administrative Rules of the Board, the subcommittee charters, and Board policies and procedures, and provide training as appropriate.

Strategic Planning

22) Oversee the System's strategic planning process.

23) Collaborate with staff to plan and lead the annual strategy development retreat.

24) Propose any changes to the Board's Strategic Plan prior to the Board's annual review.

Oversight of System Staff

25) Periodically review System personnel policies and procedures. Recommend any changes to such policies and procedures to the Board.

26) Periodically review the job description of the Executive Director and revise as necessary to accurately reflect the Board's delegation of authority to the Executive Director.

27) Collaborate with System staff to oversee leadership succession planning and organizational development.

28) Oversee searches for the Executive Director.

29) On an annual basis, develop goals for the Executive Director and oversee the evaluation of the Executive Director.

30) Recommend discipline or termination of the Executive Director to the Board, if appropriate.

31) Oversee the Executive Director's goal-setting and evaluation of the Assistant Executive Director, which shall be conducted on an annual basis.

Reporting

32) With respect to reporting, the Subcommittee chair shall:

a) Report to the Board about Subcommittee activities, issues, and related recommendations at each regularly scheduled Board meeting following a Subcommittee meeting;

b) Provide copies of Subcommittee meeting minutes to be distributed or made available to all Board members; and

c) To the extent feasible, provide draft agendas for upcoming Subcommittee meetings to the Executive Director to be distributed or made available to all Board members prior to the Board meeting that immediately precedes the Subcommittee meeting.

Other Responsibilities

33) Periodically review System regulations, policies and procedures related to Board governance, review of relevant retirement laws, board member education, board evaluation, strategic planning, and oversight of senior staff. The Subcommittee shall recommend any changes to such System regulations, policies and procedures to the Board.

34) Perform such other activities related to the Subcommittee's functions and duties as are reasonably appropriate or are requested by the Board from time to time.

SELF-EVALUATION

35) At least every [two][three] years, the Subcommittee shall review the existing Charter, and propose any amendments to Board for consideration.

36) The Subcommittee and each Subcommittee Member shall comply with the Board's Self-Evaluation Policy and processes and participate in any independent fiduciary reviews.

HISTORY

37) This Charter was adopted by the Board on _____, 2017~~6~~.

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND

Administration, Audit, Risk & Compliance Subcommittee

Wednesday March 15, 2017, 11:00 a.m.

2nd Floor Conference Room, 50 Service Avenue, Warwick, RI

I. Call to Order

II. Roll Call of Members

III. Selection of Vice Chairperson

IV. Review and Finalize Draft Administration Committee Charter for Board Approval

V. Overview of The System's Budgeting Process, Human Resources, Preparation of Annual Actuarial Valuation, Annual Audit Process and Technology and Cybersecurity Plans

VI. Adjournment

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND
CHARTER FOR THE ADMINISTRATION, AUDIT, RISK & COMPLIANCE SUBCOMMITTEE

INTRODUCTION & AUTHORITY

1) The primary purpose of the Administration Subcommittee ("Subcommittee") is to assist the Retirement Board ("Board") in fulfilling its oversight responsibilities with respect to procurement, financial planning, budgeting, accounting, business continuity, information technology, internal controls, internal audit, external audit, financial statements, compliance, and risk assessment and data security.

2) The Subcommittee's responsibility is one of oversight, recognizing that the Retirement System is responsible for preparing the financial statements and that the Auditor General is statutorily responsible for compliance auditing consistent with RIGL § 36-8-19.

3) All actions taken by the Subcommittee shall comply with applicable law, including the Rhode Island General Laws. In the event of a conflict between the terms of this Charter and the Rhode Island General Laws, the Rhode Island General Laws shall control.

COMPOSITION & MEETINGS

4) The Subcommittee shall consist of at least five members of the Board. The Board chair shall serve on the Subcommittee ex-officio.

5) ~~The Subcommittee shall select Subcommittee a chair and vice chair~~. The Board Chairperson shall recommend a chairperson for each of the standing committees and special committees, with the advice and consent of the Board. Each committee shall select a vice chairperson. The chair shall preside at all meetings. In the absence of the chair, the vice chair shall preside.

6) The Executive Director shall designate an employee of the Employees' Retirement System of the State of Rhode Island (the "System") to assist the Subcommittee with the performance of its duties.

7) Subcommittee meetings shall be conducted in accordance with the Rhode Island General Laws governing Open Meetings §42-46-1 *et seq.*, General Administrative Rules of the Retirement Board, and other legal requirements.

8) The Subcommittee shall meet as many times per year as the Subcommittee chair deems necessary or appropriate to perform the Subcommittee's duties. The Subcommittee shall meet at such times as determined by the Subcommittee chair, after consulting with the Executive Director and Subcommittee members. Meetings shall be subject to the Open Meetings Law. RIGL § 42-46-1 *et seq.*

9) The chair shall develop an annual agenda calendar for Subcommittee meetings, which shall be incorporated into the Board's annual Agenda Calendar (as defined in 120-RICR-10-00-1.1 ~~Regulation No. 1~~, General Administrative Rules of the Retirement Board). The chair shall generally oversee the performance of the work assigned to the Subcommittee in the Agenda Calendar.

DUTIES AND RESPONSIBILITIES

The Subcommittee has the following responsibilities:

Procurement

10) Collaborate with System staff to periodically review 120-RICR-10-00-1.2 ~~Regulation No. 2~~, Rules Concerning the Procurement of Supplies, consider amendments, and propose any amendments to the Board.

11) Collaborate with System staff to periodically review 120-RICR-10-00-1.3 ~~Regulation No. 3~~, Rules Concerning the Selection of Consultants, consider amendments, and propose any amendments to the Board.

Financial Planning, Budgeting & Accounting Oversight

12) Oversee the System's budgeting process and recommend a yearly budget for the System (excluding those monies allocated for Treasury personnel assigned to the System) to the Board;

13) Oversee the collection and retention of data as may be necessary for the preparation of the mortality and service tables and for the compilation of such other information as may be required for the actuarial valuation of the assets and liabilities of the System.

14) Collaborate with System staff to recommend the services of an actuary to the Board for approval.

15) Oversee the preparation of an annual actuarial report by System staff.

16) Collaborate with System staff to develop and review accounting policies and procedures. The Subcommittee shall recommend any changes to such policies to the Board.

17) Oversee overall operations and cost effectiveness of the System.

18) Collaborate with System staff to oversee periodic compensation studies regarding compensation policies for the Executive Director and Assistant Executive Director.

Business Continuity Oversight

19) Oversee the System's business and operations continuity planning and testing process and recommend the approval of a business continuity plan to the Board.

Information Technology & Data Security

20) Oversee information technology plans and budgets.

21) Develop and review cybersecurity, data security and privacy policies and procedures. The Subcommittee shall recommend any changes to such policies to the Board.

Reporting

22) With respect to reporting, the Subcommittee chair shall:

a) Report to the Board about Subcommittee activities, issues, and related recommendations at each regularly scheduled Board meeting following a Subcommittee meeting;

b) Provide copies of Subcommittee meeting minutes to the Executive Director to be distributed or made available to all Board members; and

c) To the extent feasible, provide draft agendas for upcoming Subcommittee meetings to the Executive Director to be distributed or made available to all Board members prior to the Board meeting that immediately precedes the Subcommittee meeting.

Internal Controls

23) With respect to internal controls, the Subcommittee shall:

a) Review the effectiveness of the internal controls;

b) Understand the scope of internal and external auditors' review of internal control; and

c) Ensure the internal control function includes monitoring compliance with laws and regulations and the results of staff's investigation and follow-up of any instances of noncompliance.

Internal Audit

24) With respect to the internal audit function, the Subcommittee shall:

a) Meet at least annually with the Executive Director and the internal auditor to review and approve the Internal Audit Charter, plans, objectives,

coordination, scope of audits, and the organizational structure of the internal audit division;

b) Ensure the scope of the internal audit includes assessment of internal controls as well as operational matters;

c) Ensure there are no unjustified restrictions or limitations on the internal auditor;

d) Review and consult with the Executive Director the evaluation and appointment or dismissal of the internal auditor (if applicable);

e) Review the effectiveness of the internal audit activity; and

f) Receive and consider internal auditor recommendations and propose any changes to the Board.

25) Periodically review and discuss with staff the System's major risk exposures (whether financial, operating or otherwise) and the measures the System has taken to monitor, measure and control such exposures, including the guidelines and policies that govern the process by which risk assessment and management is undertaken and elicit recommendations for the improvement of the System's risk assessment and mitigation procedures.

External Audit

26) With respect to the external financial audit function, the Subcommittee shall:

a) Review the external auditor's proposed audit scope and approach, including coordination of audit effort with internal audit;

b) Review and confirm the independence of the external auditor.

27) With respect to the System's statutorily mandated compliance audit, the Subcommittee shall review the findings and the System's responses.

28) Every [two to four] years, the Subcommittee shall commission an independent benchmarking study to monitor and evaluate the cost and performance of investments and administration, making comparisons to peers and advising as to best practices.

Financial Statements

29) With respect to the published financial statements, the Subcommittee shall:

a) Review significant accounting and reporting issues;

b) Review with staff and the external auditors the results of the annual financial audit, including any difficulties encountered; and

c) Review the annual financial statements, and consider whether they are complete, consistent with information known to Subcommittee members, and reflect appropriate accounting principles.

30) Oversee preparation of the annual financial report by System staff.

Compliance

31) With respect to compliance, the Subcommittee shall:

a) Review the findings of any examination by regulatory agencies, and any auditor observations;

Risk Assessment

32) The Subcommittee shall review the effectiveness of the System's processes for risk management, including risk identification, assessment, mitigation and appropriate reporting, and recommend any changes to the Board.

33) The Subcommittee shall review the System's enterprise risk framework and management process and recommend any changes to the Board.

34) The Subcommittee shall oversee the steps the System's staff has taken to monitor and control enterprise risk.

Reporting

35) With respect to reporting, the Subcommittee chair shall:

a) Report to the Board about Subcommittee activities, issues, and related recommendations at each regularly scheduled Board meeting following a Subcommittee meeting;

b) Provide copies of Subcommittee meeting minutes to be distributed or made available to all Board members;

c) To the extent feasible, provide draft agendas for upcoming Subcommittee meetings to the Executive Director to be distributed or made available to all Board members prior to the Board meeting that immediately precedes the Subcommittee meeting; and

d) Provide an open avenue of communication between internal audit, the external auditors, staff, the Board and its subcommittees.

Other Responsibilities

36) Periodically review System regulations, policies and procedures related to procurement, financial planning, budgeting, accounting, business continuity,

information technology and data security. The Subcommittee shall recommend any changes to such System regulations, policies and procedures to the Board.

37) Periodically review System regulations, policies and procedures related to internal controls, internal audit, external audit, financial statements, compliance, and risk assessment. The Subcommittee shall recommend any changes to such System regulations, policies and procedures to the Board.

38) Perform such other activities related to the Subcommittee's functions and duties as are reasonably appropriate or are requested by the Board from time to time.

SELF-EVALUATION

39) At least every [two][three] years, review the existing Charter and propose any amendments to Governance Subcommittee for consideration.

40) The Subcommittee and each Subcommittee Member shall comply with the Board's Self-Evaluation Policy and processes and participate in any independent fiduciary reviews.

HISTORY

41) This Charter was adopted by the Board on _____, 2017~~6~~.

Month	Disability Subcommittee		Full Board All Members	
	Friday before Board Meeting	9:00am to 10:00am	10:00am to 11:00am	11:00am to 12:00pm
March 15	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	Governance Subcommittee *John P. Maguire Michael DiBiase Roger P. Boudreau Brian M. Daniels Patrick Marr (GT)	Limited	Administration Subcommittee *Thomas A. Mullaney Paul L. Dion Claire M. Newell Jean Rondeau Kelly Rogers (GT)
April 12	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	Governance Subcommittee *John P. Maguire Michael DiBiase Roger P. Boudreau Brian M. Daniels Patrick Marr (GT)	Limited	Member Services Subcommittee *Marcia B. Reback Marianne F. Monte Roger P. Boudreau Mark A. Carruolo Bea Lanzi (GT)
May 10	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)		Full Meeting 2016 Experience Study	
June 14	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	Administration Subcommittee *Thomas A. Mullaney Paul L. Dion Claire M. Newell Jean Rondeau Kelly Rogers (GT)	Limited	Member Services Subcommittee *Marcia B. Reback Marianne F. Monte Roger P. Boudreau Mark A. Carruolo Bea Lanzi (GT)
July 12	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	Governance Subcommittee *John P. Maguire Michael DiBiase Roger P. Boudreau Brian M. Daniels Patrick Marr (GT)	Limited	Administration Subcommittee *Thomas A. Mullaney Paul L. Dion Claire M. Newell Jean Rondeau Kelly Rogers (GT)
August 9			No Meeting	
September 13	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)		Full Meeting Budget	

Month	Disability Subcommittee		Full Board All Members	
	Friday before Board Meeting	9:00am to 10:00am	10:00am to 11:00am	11:00am to 12:00pm
October 11	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	**Governance Subcommittee** *John P. Maguire Michael DiBiase Roger P. Boudreau Brian M. Daniels Patrick Marr (GT)	**Limited**	**Member Services Subcommittee** *Marcia B. Reback Marianne F. Monte Roger P. Boudreau Mark A. Carruolo Bea Lanzi (GT)
November 8	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)	**Member Services Subcommittee** *Marcia B. Reback Marianne F. Monte Roger P. Boudreau Mark A. Carruolo Bea Lanzi (GT)	**Limited**	**Administration Subcommittee** *Thomas A. Mullaney Paul L. Dion Claire M. Newell Jean Rondeau Kelly Rogers (GT)
December 13	*William B. Finelli Brian M. Daniels Thomas M. Lambert Laura Shawhughes Amy Crane (GT)		**Full Meeting** **2017 Valuation**	

*Chairperson

Full Meeting – The Board will be meeting to consider the matters noted.

All other meetings - The Full Board will meet to approve disabilities, receive updates from committee chairs if applicable and adjourn. Those members on the applicable committees will subsequently convene.

Disability Subcommittee meets 1 week before Board meeting

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND

RETIREMENT BOARD MONTHLY MEETING

Wednesday, March 15, 2017
10:00 a.m.
2nd Floor Conference Room
50 Service Avenue, Warwick, RI

I. Chairperson Call to Order

II. *Approval of the Draft Meeting Minutes and the Draft Executive Session Minutes of the February 8, 2017 Retirement Board Meeting

III. Chairperson's Report

IV. Executive Director's Report

- Cyber Insurance – 2017 Policy Premium Approval

V. Administrative Decisions

- Disability Appeal – *Wayne D. Cushman vs. ERSRI*
- Administrative Appeal – *Robert J. Perfetto vs. ERSRI*

VI. Approval of the February Pensions as Presented by ERSRI

VII. Legal Counsel Report

VIII. Committee Report

Disability Subcommittee

IX. Adjournment

** The Board may seek to convene in executive session to review and/or discuss the sealed executive session minutes from the January 11, 2017 Board meeting, pursuant to RIGL §42-46-5(a)(2), as they contain confidential communications and discussion related to litigation strategy involving the Retirement Board in the matter of The Retirement Board of the Municipal Employees' Retirement System of Rhode Island v. Kevin Lang PC 2015-3380.*

Attachment I

Disability Applications and Hearings on Friday, March 3, 2017

Lisa Armor

Daniel Nuey

Andrew Henault

Jean Slaugher

Joyce Garrett

Sean Carmody

Anthony Bucci

George Pursche

Brian Fagnant

Kathleen Lee

James Walters

Employees' Retirement Board of Rhode Island
Monthly Meeting Minutes
Wednesday, February 8, 2017
9:00 a.m.
2nd Floor Conference Room, 50 Service Avenue

The Monthly Meeting of the Retirement Board was called to order at 9:02 a.m. Wednesday, February 8, 2017, in the 2nd Floor Conference Room, 50 Service Avenue, Warwick, RI.

I. Roll Call of Members

The following members were present at roll call: General Treasurer Seth Magaziner; Vice Chair William B. Finelli; Mark A. Carruolo; Brian M. Daniels; Michael DiBiase; Paul L. Dion, Ph.D.; Thomas M. Lambert; John P. Maguire; Marianne F. Monte; Thomas A. Mullaney; Claire M. Newell; Marcia B. Reback; Jean Rondeau and Dr. Laura Shawhughes.

Also in attendance: Frank J. Karpinski, ERSRI Executive Director and Attorney Michael P. Robinson, Board Counsel.

Recognizing a quorum, Treasurer Magaziner called the meeting to order.

II. Approval of Minutes

On a motion by John P. Maguire and seconded by Claire M. Newell, it was unanimously

VOTED: To approve the draft regular minutes and the draft executive session minutes of the January 11, 2017 meeting of the Retirement Board of the Employees' Retirement System of Rhode Island.

III. Chairperson's Report

Treasurer Magaziner apprised the Board that revised Regulation No. 1, which establishes the new Board structure will become effective for the next meeting. As part of that regulation, he said the Treasurer must submit Chairpersons of the committees to the full Board for their advice and consent. The Treasurer noted that Board members were assigned to committees based on their preference and said the Director provided the Board a list of the committees and his recommended committee Chairpersons.

On a motion by Paul L. Dion, Ph.D. and seconded by Marianne F. Monte, it was unanimously

VOTED: To approve the Treasurer's recommended Chairpersons for the following committees: Disability – William B. Finelli; Member Services – Marcia B. Reback; Administration – Thomas A. Mullaney, and Governance – John P. Maguire

Quarterly Update on the Investment Portfolio as of December 31, 2016 by interim Chief Investment Officer Tim Nguyen

Treasurer Magaziner apprised the Board that interim Chief Investment Officer Tim Nguyen will provide the December 31, 2016 quarterly update/year-end review of the investment performance for both the Defined Benefit Plan and the Defined Contribution Plan. Also, Kimberly A. Shockley, Associate Director of the College and Retirement Savings Plans, will provide an update on Defined Contribution outreach.

Mr. Nguyen said positive factors affected ERSRI portfolio in the month of December, where on a percentage basis, the portfolio increased 1.35% return matching both the plan benchmark and basic 60% global equity/40% fixed income allocation. This in turn achieved a mixed performance for the 4th quarter of 2016, where on a calendar perspective with the portfolio's 7.35% performance exceeding the benchmark's 6.32% and 60% global equity/40% fixed income portfolio benchmark of 5.92% return, while protecting against steep investment losses during a challenging year for all investors. He said on a fiscal year-to-date perspective, ERSRI's portfolio's 4.57% return exceeded the 3.99% blended benchmark and well surpassed the 2.86% 60% global equity/40% fixed income return.

The Board asked questions of Mr. Nguyen.

Ms. Shockley then provided an update to the Board a report on TIAA's Outreach performance of the 4th quarter for 2016 and year-to-date performance summary. She said both communications and outreach outperformed for 2016 surpassing the combination of both 2014 and 2015 calendar numbers.

Ms. Shockley reported the 4th quarter Defined Contribution fund balance as $585 million in total assets with 90% invested in the Target Date Vanguard funds which are the lowest possible share cost. Treasurer Magaziner asked Ms. Shockley to inform the Board on the upcoming RFP for the DC Plan. She said she expects to have it out in the next week and have the recommendation presented to the State Investment Commission (SIC) at their April 26, 2017 meeting.

Treasurer Magaziner thanked Mr. Nguyen and Ms. Shockley for their presentations.

Presentation by Gabriel Roeder, Smith and Company (GRS) on Capital Market Assumptions and Plan Return Assumption

Treasurer Magaziner apprised the Board that today's focus is on the experience study of plan assumptions and specifically the rate of return assumptions. The Treasurer noted that there will be no votes taken today as this is an educational introduction. He said the full study and vote will be in May.

Messrs. Joseph Newton and Paul Wood provided an overview on the process of the 2017 Actuarial Experience Study and the types of actuarial assumptions that the study will consider. Mr. Wood said in summary that the three components, namely, benefits security, contribution policy and intergenerational equities will all formulate GRS's recommendations for the experience study.

The Board asked questions of Mr. Newton and Mr. Wood regarding their presentation.

Presentation by Pension Consulting Alliance (PCA) on Capital Market Assumptions and Plan Return Assumption

Mr. John Burns, CFA, of PCA, the State Investment Commissions (SIC) investment consultant provided a presentation on his firm's 2017 Capital Market Assumptions

report to the Board. Mr. Burns discussion focused on the return assumption noting that every January investment consulting firms and money managers perform studies as to the expectations of what they believe will happen in the next decade. In summary, Mr. Burns said the most significant changes PCA has seen within the last 3 years are lower expected returns for risk assets, namely equity and real estate, slightly higher returns for fixed income going forward and increased volatility due to the unknown future's financial view.

Jean Rondeau left the meeting at 10:30 a.m.

Presentation by State Street Global Advisors (SSBA) on Capital Market Assumptions and Plan Return Assumption

Mr. Gregory Balewicz, Relationship Manager for SSBA, said the focus the presentation is based on what is seen in an economic perspective in the global economy that is driving the returns to low levels that would be expected with high volatility.

Ms. Simona Mocuta, Senior Economist for SSBA, provided her presentation to the Board. She discussed long term trends influencing investment returns and 2017 global economic outlook.

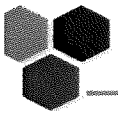
The Board asked questions of Ms. Mocuta during her presentation on her economic perspective.

IV. Executive Director's Report

Director Karpinski apprised the Board that an agenda will be sent out for the newly formed committees. He reminded the Board that the annual training will be on May 12, 2017 and the March Board meeting will be March 15th.

Presentation and Approval of the Actuarial Valuation as of June 30, 2016 by GRS for Teacher Survivor Benefits Trust (TSB), State Police (SPRBT) and Judges (JRBT)Valuations

Messrs. Joseph Newton and Paul Wood provided their presentation report to the Board of the actuarial valuations as of June 30, 2016 for the SPRBT, JRBT, and TSB. Mr. Wood discussed and provided the following actuarial results for the SPRBT:



Actuarial Results –State Police (SPRBT)

	June 30, 2015 (1)	June 30, 2016 (2)
1. Actuarial accrued liability		
a. Actives & Inactives	$ 76,717,212	$ 75,975,466
b. Annuitants	40,339,515	59,529,686
2. Total actuarial accrued liability (1a +1b)	$ 117,056,727	$ 135,505,152
3. Actuarial value of assets	115,585,013	123,788,498
4. UAAL (2 - 3)	$ 1,471,714	$ 11,716,654
5. Funded ratio (3 / 2)	98.7%	91.4%
6. UAAL/Payroll	7.4%	51.9%
Weighted Average Contribution Rate for Applicable Fiscal Year		
7. Full retirement rate		
a. Normal cost	11.82%	11.04%
b. Prior service	0.40%	3.70%
c. Full retirement rate	12.22%	14.74%

He then discussed and provided the following actuarial results for the JRBT:

Actuarial Results – Judges (JRBT)

	June 30, 2015 (1)	June 30, 2016 (2)
1. Actuarial accrued liability		
a. Actives & Inactives	$ 43,134,122	$ 40,881,810
b. Annuitants	18,829,550	24,405,717
2. Total actuarial accrued liability (1a +1b)	$ 61,963,672	$ 65,287,527
3. Actuarial value of assets	60,004,470	64,401,616
4. UAAL (2 - 3)	$ 1,959,202	$ 885,911
5. Funded ratio (3 / 2)	96.8%	98.6%
6. UAAL/Payroll	21.1%	9.8%
Weighted Average Contribution Rate for Applicable Fiscal Year		
7. Full retirement rate		
a. Normal cost	19.83%	19.48%
b. Prior service	1.30%	0.80%
c. Full retirement rate	21.13%	20.28%

Mr. Wood finally discussed the TSB fund. He explained the fund is 153% funded and provided the following actuarial results noting that consistent with RIGL, a contribution increase is not required.

Actuarial Results – TSB

	June 30, 2014 (1)	June 30, 2016 (2)
1. Actuarial accrued liability		
a. Actives & Inactives	$ 29,644,162	$ 29,860,631
b. Annuitants	162,479,964	157,052,544
2. Total actuarial accrued liability (1a +1b)	$ 192,124,126	$ 186,913,175
3. Market value of assets	293,921,803	286,485,057
4. UAAL (2 - 3)	$ (101,797,677)	$ (99,571,882)
5. Funded ratio (3 / 2)	153.0%	153.3%
6. UAAL/Payroll	-18.8%	-19.0%
Weighted Average Contribution Rate for Applicable Fiscal Year		
7. Full retirement rate		
a. Normal cost	$ 2,156,104	$ 2,071,048
b. Amortization of UAAL	(8,336,509)	(8,154,232)
c. Total (7a plus 7b, not less than zero)	$ -	$ -

Mr. Newton then lastly discussed the Pay-As-You-Go State Police and Judges noting that two trusts were established. He said the Judges are a group of non-contributing Judges (originally 7 but 2 retired) and as required by GASB, are using a 2.85% discount rate (based on the municipal bond rate) since there is not a funding mechanism. He provided the following actuarial results:

Paygo Judges (RIJRFT) (Hired before January 1, 1990)

- Total of seven judges, two of which are now retired
- Valuation results as of July 1, 2016 (2.85% Discount Rate)
  - UAL: $20,037,653
  - Funded Ratio: 2.59%
- Potential Pre-Funding Policy
  - Benefits currently funded on a pay-as-you-go basis
  - Possible amortization strategy
    - Assume rate of return of 7.50%
    - Level dollar payments (due to closed nature of plan)
    - 20 year amortization period
    - Results in 20 annual payments of $1.24 million
    - Expected to be full funded in 2036
  - Valuation results as of July 1, 2016 (7.5% Discount Rate)
    - UAL: $12,955,354
    - Funded Ratio: 4.30%

Mr. Newton then discussed the non-contributing State Police. He said the State Police are able to use the 7.5% discount rate as there are contributions being made as a result of Google settlement money. He then provided the following actuarial results:

Paygo State Police (Hired before July 1, 1987)

- Valuation results as of July 1, 2016 (7.5% Discount Rate)
  - UAL: $176,546,337
  - Funded Ratio: 0.00%
- Article 12
  - Trust was recently established with ERSRI
    - Used to advance fund the benefits
    - Initial deposit assumed to be $15 million in July 2017
  - Amortization strategy
    - Level dollar payments (due to closed nature of plan)
    - 18 year amortization period from July 1, 2015
    - FY 2017 and FY 2018 contribution amount of $16.4 million
    - FY 2019 through FY 2033 contribution amount of $16.5 million
    - Expected to be fully funded by 2033

The Board asked questions and discussed the trusts with Mr. Newton. Then on a motion by Marcia B. Reback and seconded by John P. Maguire, it was unanimously

VOTED: To approve the results of Actuarial Valuations as of June 30, 2016 by Gabriel, Roeder Smith & Company for the Teacher Survivor Benefits Trust (TSB), State Police (SRBT), Judges (JRBT), and the Non-Contributing State Police and Judges Valuations.

Michael DiBiase left the meeting at 10:50 a.m.

V. Administrative Decisions

Administrative Appeal – Linda S. Resnick vs. ERSRI

Included in Board Members' Books was the Hearing Officer's written decision, along with exhibits and supporting information in the matter of *Linda S. Resnick vs. ERSRI EAJA Hearing*. Attorney John McCann represented the Board as Attorney Michael P. Robinson recused himself.

There being a stenographer present, Attorney McCann then provided a synopsis of the matter. Attorney Vicki J. Bejma appeared representing Ms. Resnick, who was not present at this hearing. The parties thereafter presented their respective positions.

At the conclusion of the presentation, a motion was made by Marcia B. Reback to overturn the Hearing Officer's decision and grant the appellant's petition for reimbursement of reasonable litigation expenses under the Equal Access to Justice Act for Small Businesses and Individuals RIGL 45-92-1 *et seq*. (EAJA). There not being a second, the motion failed.

A motion was then made by Mark A. Carruolo and seconded by Brian M. Daniels to uphold the decision and recommendation of the Hearing Officer to deny Ms. Resnick's request for an award of reasonable litigation expenses pursuant to the Equal Access to Justice Act for Small Businesses and Individuals RIGL 45-92-1 *et seq*. A roll call was taken, and the following members voted Yea: General Treasurer Seth Magaziner; William B. Finelli; Mark A. Carruolo; Brian M. Daniels; Paul L. Dion, Ph.D.; Thomas M. Lambert; John P. Maguire; Marianne F. Monte; Thomas A. Mullaney; Claire M. Newell and Dr. Laura Shawhughes. The following voted Nay: Marcia B. Reback.

There being 12 votes cast, 11 voted in the affirmative, and 1 voted in the negative, consistent with Rhode Island General Laws §36-8-6, *Votes of the Board -- Record of Proceedings*, and there being a quorum present, it was then

VOTED: To uphold the decision and recommendation of the Hearing Officer to deny Ms. Resnick's request for an award of reasonable litigation expenses pursuant to the EAJC in the matter of *Linda S. Resnick vs. ERSRI (EAJA)*.

Mark A. Carruolo left the meeting at 11:54 a.m.

VI. Approval of the January Pensions as Presented by ERSRI

On a motion by William B. Finelli and seconded by Paul L. Dion, Ph.D., it was unanimously

VOTED: To approve the January pensions as presented.

VII. Committee Reports

Disability Subcommittee:

The Disability Subcommittee recommended the following actions on disability applications for approval by the full Board as a result of its meeting on Friday, February 3, 2017:

	Name	Membership Group	Type	Action
1.	Holly Cole	Municipal	Accidental Denied	Ordinary Approved
2.	Laura Barzykowski	State	Accidental	Deny
3.	Nellie Richardson	State	Accidental Denied	Ordinary Approved
4.	Julie Furgasso	Municipal	Accidental	Deny
5.	David Cerullo	State	Accidental	Approved at 66 2/3%
6.	Cheryl Conklin	Teacher	Ordinary	Approve
7.	Kelly Burns	State	Ordinary	Approve
8.	Gayle Cameron	Teacher	Ordinary	Approve
9.	Rosa Morales	State	Ordinary	Approve
10.	Angela Iannotti	State	Ordinary	Approve
11.	Marie Merrill	State	Ordinary	Approve
12.	Valerie Demarco	Teacher	Ordinary	Approve
13.	Diane Bruno	State	Ordinary	The Board's 1/13/16 decision to deny Ms. Bruno an ordinary disability pension was reaffirmed

On a motion by William B. Finelli and seconded by Thomas A. Mullaney, it was unanimously

VOTED: To approve the recommendation of the Disability Subcommittee meeting of Friday, February 3, 2017 on item 8.

John P. Maguire recused himself from the vote on number 8.

On a motion by William B. Finelli and seconded by Thomas A. Mullaney, it was unanimously

VOTED: To approve the recommendation of the Disability Subcommittee meeting of Friday, February 3, 2017 on items 2, 3, 9 and 13.

Claire M. Newell recused herself from the vote on numbers 2, 3, 9 and 13.

On a motion by William B. Finelli and seconded by Thomas A. Mullaney, it was unanimously

VOTED: To approve the recommendation of the Disability Subcommittee meeting of Friday, February 3, 2017 on items 1, 4, 5, 6, 7, 10, 11 and 12.

Legislative Subcommittee:

Executive Director Karpinski provided an overview to the Board of the Legislative Subcommittee meeting. He said the legislative subcommittee met on January 18th to discuss potential legislation for 2017 general assembly session. Members present were, Roger Boudreau, Mark Dingley, Paul Dion, Patrick Marr and Jean Rondeau. Bea Lanzi, the Deputy Treasurer for Legislation and Outreach, briefed the Board on the proposed legislative agenda of Treasury as well as the status of other pension-related legislation pending in the General Assembly.

Individual committee members raised some of their own ideas for potential legislation, but the subcommittee did not support taking any action at that time. The subcommittee members discussed that the role of the legislative subcommittee would be incorporated into the new Governance committee where legislation would be considered in the future. The subcommittee noted that retirement-related bill tracking should be provided to the Board through the Governance committee on a regular basis so it could be monitored during the session.

VIII. Legal Counsel Report

Attorney Robinson updated the Board regarding the status of the Kevin Lang appeal pending in the Workers' Compensation Court. He suggested that a motion would be in order for the Board to convene in Executive Session to discuss the pending litigation matters identified on the agenda pursuant to Rhode Island General Laws section §42-46-5 (a)(2).

Consistent with Rhode Island General Laws section §42-46-5 (a)(2) regarding pending or potential litigation involving the Retirement System, a motion was made by Marcia B. Reback and seconded by John P. Maguire to convene the Board in Executive Session to discuss *The Retirement Board of the Municipal Employees' Retirement System of Rhode Island v. Kevin Lang PC 2015-3380* litigation matter identified on the agenda.

A roll call vote was taken to enter into Executive Session, and the following members were present and voted Yea: General Treasurer Seth Magaziner; Vice Chair William B. Finelli; Brian M. Daniels; Paul L. Dion, Ph.D.; Thomas M. Lambert; John P. Maguire; Marianne F. Monte; Thomas A. Mullaney; Claire M. Newell; Marcia B. Reback and Dr. Laura Shawhughes. It was unanimously

VOTED: To convene the Board into Executive Session pursuant to Rhode Island General Laws section §42-46-5 (a)(2) to discuss the matter of *The Retirement Board of the Municipal Employees' Retirement System of Rhode Island v. Kevin Lang PC 2015-3380* which involves pending litigation involving the Board.

[Executive Session]

The Board thereafter convened in executive session.

[Return to Open Session]

Upon returning to open session, Board Counsel Michael P. Robinson noted for the record that two unanimous votes had been taken in Executive Session. A motion was made by Marcia B. Reback and seconded by Claire B. Newell to seal the executive session minutes pursuant to R.I.G.L. §§42-46-4(b) and 42-46-5 (a)(2), as the discussion involved confidential communications and discussion related to litigation strategy. A roll call was taken and it was then unanimously

VOTED: To seal the executive session minutes.

A second motion was made by Marcia B. Reback and seconded by John P. Maguire and it was unanimously

VOTED: To exit executive session and return to open session.

IX. Adjournment

There being no other business to come before the Board, on a motion by Claire M. Newell and seconded by Marcia B. Reback, the meeting adjourned at 12:20 p.m.

Respectfully submitted,

Frank J. Karpinski
Executive Director

Municipal Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/08/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/08/17
1095 Coventry Fire Dist.	BIWK	2/17/2017	$1,730.21	$3,645.59	$17,302.26	$ 5,375.80	1/20/2017	$ 6,005.87		$ 58,006.32
1242 Hope Valley-Wyoming Fire Dist.	BIWK	11/23/2016	$113.69	$70.49	$5,684.73	$ 184.18	11/23/2016	$ 184.18	4	$ 736.72
1566 Warren Housing Auth.	WKLY	1/21/2017	$68.65	$107.08	$3,431.98	$ 175.73	12/10/2016	$ 175.33	9	$ 1,581.57
1356 Newport Housing Auth.	WKLY	12/21/2016	$903.71	$6,454.59	$33,565.25	$ 7,358.30	12/14/2016	$ 7,266.41	6	$ 44,149.80
1515 Union Fire Dist. (Nc)	BIWK	2/19/2017	$294.98	$988.78	$12,976.17	$ 1,283.76	12/25/2016	$ 1,283.76	2	$ 2,567.52
1122 Town Of Cumberland	BIWK	2/25/2017	$4,500.71	$23,981.57	$186,337.23	$ 28,482.28	12/31/2016	$ 30,222.07	2	$ 56,964.56
1019 Town Of Bristol EE Highway	BIWK	1/27/2017	$3,878.62	$14,383.83	$97,187.76	$ 18,262.45	1/13/2017	$ 19,534.92	1	$ 18,262.45
1014 Bristol Police	BIWK	1/27/2017	$8,872.10	$4,498.04	$88,720.36	$ 13,370.14	1/13/2017	$ 14,205.99	1	$ 13,370.14
1303 Lincoln School Dept. (Nc)	BIWK	2/16/2017	$54.81	$657.76	$5,481.31	$ 712.57	1/19/2017	$ 712.57	0	$ -
1098 Coventry Lighting Dist.	BIWK	2/17/2017	$34.69	$0.00	$1,734.62	$ 34.69	1/20/2017	$ 34.69	0	$ -
1353 Newport School Dept. (Nc)	BIWK	2/17/2017	$4,328.27	$35,599.44	$154,176.42	$ 39,927.71	1/20/2017	$ 40,325.42	0	$ -
1493 South Kingstown School Dept. (Nc)	BIWK	2/17/2017	$6,496.79	$25,042.30	$215,696.61	$ 31,539.09	1/20/2017	$ 32,586.88	0	$ -
1283 Johnston School Dept. (Nc)	BIWK	2/17/2017	$4,262.04	$26,231.28	$163,028.17	$ 30,493.32	1/20/2017	$ 30,505.63	0	$ -
1373 North Kingstown School Dept. (Nc)	BIWK	2/17/2017	$6,427.13	$39,534.92	$217,463.32	$ 45,962.05	1/20/2017	$ 51,960.77	0	$ -
1382 Town Of North Providence	BIWK	2/17/2017	$3,878.92	$9,733.09	$167,811.99	$ 13,612.01	1/20/2017	$ 13,713.89	0	$ -
1116 Cranston Housing Auth.	BIWK	2/18/2017	$1,827.40	$2,880.76	$39,844.60	$ 4,708.16	1/21/2017	$ 5,006.06	0	$ -
1306 Lincoln Housing Auth.	BIWK	1/21/2017	$388.41	$1,291.39	$19,419.30	$ 1,679.80	1/21/2017	$ 1,679.80	0	$ -
1473 Smithfield School Dept. (Nc)	BIWK	2/18/2017	$3,015.72	$9,870.02	$128,350.37	$ 12,885.74	1/21/2017	$ 13,056.06	0	$ -
1344 New Shoreham Police Dept.	BIWK	2/18/2017	$1,379.96	$3,340.87	$13,799.57	$ 4,720.83	1/21/2017	$ 4,798.08	0	$ -
1342 Town Of New Shoreham	BIWK	2/18/2017	$1,743.78	$5,485.98	$70,243.20	$ 7,229.76	1/21/2017	$ 7,549.95	0	$ -
1393 North Smithfield School Dept. (Nc)	BIWK	2/18/2017	$2,060.38	$4,758.47	$77,499.76	$ 6,818.85	1/21/2017	$ 7,095.33	0	$ -
1492 Town Of South Kingstown	BIWK	2/18/2017	$4,408.89	$25,593.46	$220,442.66	$ 30,002.35	1/21/2017	$ 42,961.85	0	$ -
1494 South Kingstown Police	BIWK	2/18/2017	$12,201.16	$30,685.80	$122,011.27	$ 42,886.96	1/21/2017	$ 43,960.03	0	$ -
1505 South Kingstown Emt	BIWK	2/18/2017	$3,132.46	$1,544.31	$31,324.67	$ 4,676.77	1/21/2017	$ 4,558.96	0	$ -
1113 Cranston School Dept. (Nc)	BIWK	2/18/2017	$14,695.01	$49,225.96	$506,958.02	$ 63,920.97	1/21/2017	$ 64,430.86	0	$ -
1705 Albion Fire District	BIWK	1/22/2017	$867.54	$1,703.85	$8,675.40	$ 2,571.39	1/22/2017	$ 2,571.39	0	$ -
1403 Northern Rhode Island Collaborative (Nc)	BIWK	2/19/2017	$970.82	$4,265.42	$37,026.34	$ 5,236.24	1/22/2017	$ 5,325.59	0	$ -
1073 Chariho Regional School Dist. (Nc)	BIWK	2/22/2017	$3,163.01	$17,458.90	$158,143.41	$ 20,621.91	1/25/2017	$ 33,950.26	0	$ -
1633 Woonsocket School Dept. (Nc)	BIWK	2/22/2017	$4,617.81	$26,921.31	$230,887.28	$ 31,539.12	1/25/2017	$ 3,436.74	0	$ -
1193 Foster School Dist. (Nc)	BIWK	2/10/2017	$345.28	$1,911.61	$17,667.42	$ 2,256.89	1/27/2017	$ 2,256.29	0	$ -
1012 Town Of Bristol	BIWK	1/27/2017	$2,857.32	$14,263.79	$96,377.13	$ 17,121.11	1/27/2017	$ 17,364.83	0	$ -
1322 Town Of Middletown	BIWK	2/24/2017	$2,851.56	$10,395.08	$98,159.29	$ 13,246.64	1/27/2017	$ 12,442.38	0	$ -
1015 Bristol Fire Dept.	BIWK	2/10/2017	$369.83	$664.06	$4,109.28	$ 1,033.89	1/27/2017	$ 2,173.96	0	$ -
1324 Middletown Police & Fire	BIWK	2/24/2017	$16,451.76	$10,529.01	$164,517.06	$ 26,980.77	1/27/2017	$ 25,470.59	0	$ -
1462 Town Of Scituate	BIWK	2/24/2017	$1,699.55	$7,428.22	$50,429.13	$ 9,127.77	1/27/2017	$ 9,583.21	0	$ -
1203 Foster/Glocester Reg. School Dist. (Nc)	BIWK	2/24/2017	$1,352.44	$7,411.16	$67,620.07	$ 8,763.60	1/27/2017	$ 11,015.36	0	$ -
1183 Exeter/West Greenwich Reg. Schools (Nc)	BIWK	2/24/2017	$2,077.88	$13,059.54	$103,894.55	$ 15,137.42	1/27/2017	$ 17,988.46	0	$ -
1463 Scituate School Dept. (Nc)	BIWK	2/26/2017	$1,291.67	$6,720.80	$45,626.59	$ 8,012.47	1/27/2017	$ 9,845.19	0	$ -
1033 Burrillville School Dept. (Nc)	BIWK	2/24/2017	$3,409.69	$8,655.60	$106,726.44	$ 12,065.29	1/27/2017	$ 11,921.34	0	$ -
1282 Town Of Johnston	BIWK	2/10/2017	$2,470.07	$19,871.45	$123,501.69	$ 22,341.52	1/27/2017	$ 28,121.79	0	$ -
1602 Town Of West Greenwich	WKLY	2/17/2017	$532.30	$3,289.56	$21,627.56	$ 3,821.86	1/27/2017	$ 3,808.12	0	$ -
1604 West Greenwich Police/Rescue	WKLY	2/17/2017	$1,786.48	$3,719.45	$17,864.80	$ 5,505.93	1/27/2017	$ 5,505.93	0	$ -
1284 Johnston Police Dept.	SMON	2/10/2017	$2,469.04	$2,298.99	$27,433.62	$ 4,768.03	1/27/2017	$ 4,758.28	0	$ -
1285 Johnston Firefighters	BIWK	2/10/2017	$14,027.74	$11,580.78	$155,864.07	$ 25,608.52	1/27/2017	$ 24,109.52	0	$ -
1213 Glocester School Dist. (Nc)	BIWK	2/24/2017	$543.57	$2,894.47	$27,177.74	$ 3,438.04	1/27/2017	$ 4,435.05	0	$ -

Municipal Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/08/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/08/17
1004 Barrington Police Dept.	BIWK	2/24/2017	$6,586.92	$20,439.05	$65,868.91	$ 27,025.97	1/27/2017	$ 24,220.48	0	$ -
1005 Barrington Fire Dept. (20 Plan)	BIWK	2/24/2017	$256.95	$0.00	$2,569.54	$ 256.95	1/27/2017	$ 234.86	0	$ -
1008 Barrington Fire Dept. (25 Plan)	BIWK	2/24/2017	$6,025.79	$5,121.98	$60,258.55	$ 11,147.77	1/27/2017	$ 10,200.93	0	$ -
1009 Barrington Cola Group	BIWK	2/24/2017	$5,116.53	$12,388.14	$136,583.09	$ 17,504.67	1/27/2017	$ 17,065.89	0	$ -
1323 Middletown Public Schools (Nc)	BIWK	2/24/2017	$3,370.90	$10,164.01	$95,977.14	$ 13,534.91	1/27/2017	$ 15,732.07	0	$ -
1148 Cumberland Rescue	BIWK	2/25/2017	$3,699.98	$3,503.88	$36,999.65	$ 7,203.86	1/28/2017	$ 3,693.24	0	$ -
1126 Cumberland Housing Auth.	WKLY	2/18/2017	$191.67	$712.21	$9,586.19	$ 903.88	1/28/2017	$ 903.88	0	$ -
1272 Town Of Jamestown	BIWK	2/11/2017	$3,424.61	$10,840.41	$103,340.64	$ 14,265.02	1/28/2017	$ 14,061.40	0	$ -
1802 Pascoag Fire Dis. Admin.	WKLY	1/28/2017	$21.20	$140.34	$1,060.00	$ 161.54	1/28/2017	$ 161.54	0	$ -
1805 Pascoag Fire Dist	WKLY	1/28/2017	$592.75	$1,145.81	$5,927.68	$ 1,738.56	1/28/2017	$ 1,738.56	0	$ -
1273 Jamestown School Dept. (Nc)	BIWK	2/11/2017	$1,256.78	$5,260.02	$50,142.70	$ 6,516.80	1/28/2017	$ 7,059.69	0	$ -
1533 Tiverton School Dept. (Nc)	BIWK	2/11/2017	$2,463.11	$2,417.40	$85,718.19	$ 4,880.51	1/28/2017	$ 4,863.52	0	$ -
1416 Pawtucket Housing Auth.	WKLY	1/28/2017	$2,272.59	$0.00	$68,062.87	$ 2,272.59	1/28/2017	$ 2,272.59	0	$ -
1465 Smithfield Firefighters	WKLY	2/25/2017	$1,560.00	$1,332.21	$15,599.74	$ 2,892.21	1/28/2017	$ 2,892.21	0	$ -
1474 Smithfield Police Dept.	WKLY	2/25/2017	$6,719.88	$4,448.54	$67,198.19	$ 11,168.42	1/28/2017	$ 9,202.68	0	$ -
1478 Town Of Smithfield (Cola)	WKLY	2/25/2017	$2,560.51	$6,909.55	$72,503.27	$ 9,470.06	1/28/2017	$ 9,983.22	0	$ -
1632 City Of Woonsocket	WKLY	2/25/2017	$3,637.99	$14,617.97	$125,369.62	$ 18,255.96	1/28/2017	$ 18,177.44	0	$ -
1634 Woonsocket Police Dept.	WKLY	2/25/2017	$11,681.44	$33,771.24	$116,815.51	$ 45,452.68	1/28/2017	$ 36,978.74	0	$ -
1635 Woonsocket Fire Dept.	WKLY	2/25/2017	$13,673.45	$15,642.23	$136,734.30	$ 29,315.68	1/28/2017	$ 23,612.78	0	$ -
1712 Harrisville Fire District - Muni	WKLY	2/25/2017	$181.66	$183.24	$4,404.40	$ 364.90	1/28/2017	$ 364.90	0	$ -
1715 Harrisville Fire District	WKLY	2/25/2017	$647.46	$340.59	$6,474.20	$ 988.05	1/28/2017	$ 988.05	0	$ -
1036 Burrillville Housing Auth.	WKLY	2/25/2017	$79.62	$324.82	$3,980.41	$ 404.44	1/28/2017	$ 404.44	0	$ -
1166 East Providence Housing Authority	WKLY	2/25/2017	$482.75	$2,031.88	$14,112.59	$ 2,514.63	1/28/2017	$ 2,514.62	0	$ -
1343 New Shoreham School Dist. (Nc)	BIWK	2/11/2017	$537.81	$1,320.81	$16,912.03	$ 1,858.62	1/28/2017	$ 1,860.20	0	$ -
1212 Town Of Glocester	BIWK	2/25/2017	$2,267.34	$7,276.87	$68,327.34	$ 9,544.21	1/28/2017	$ 9,232.10	0	$ -
1214 Glocester Police Dept.	BIWK	2/25/2017	$4,514.57	$7,832.67	$45,145.28	$ 12,347.24	1/28/2017	$ 10,504.09	0	$ -
1386 North Providence Hsg. Auth.	BIWK	2/25/2017	$448.32	$2,883.65	$10,425.27	$ 3,331.97	1/28/2017	$ 3,331.96	0	$ -
1286 Johnston Housing Auth.	WKLY	2/26/2017	$79.95	$889.83	$7,994.89	$ 969.78	1/29/2017	$ 969.78	0	$ -
1562 Town Of Warren	BIWK	2/26/2017	$2,316.27	$9,066.92	$79,744.42	$ 11,383.19	1/29/2017	$ 11,411.78	0	$ -
1564 Warren Police Dept.	BIWK	2/26/2017	$6,191.21	$16,320.01	$61,912.03	$ 22,511.22	1/29/2017	$ 22,547.17	0	$ -
1616 West Warwick Housing Auth.	BIWK	2/26/2017	$177.49	$744.55	$8,874.35	$ 922.04	1/29/2017	$ 1,177.79	0	$ -
1156 East Greenwich Hsg. Auth.	BIWK	2/13/2017	$380.97	$1,718.08	$19,047.40	$ 2,099.05	1/30/2017	$ 2,099.05	0	$ -
1336 Narragansett Housing Auth.	MNLY	2/28/2017	$308.15	$751.88	$15,407.51	$ 1,060.03	1/31/2017	$ 1,060.03	0	$ -
1354 City Of Newport - Monthly	MNLY	2/28/2017	$9.99	$115.44	$500.01	$ 125.43	1/31/2017	$ 125.43	0	$ -
1063 Central Falls School Dist. (Nc)	BIWK	2/15/2017	$2,957.65	$11,564.76	$147,886.25	$ 14,522.41	2/1/2017	$ 1,945.44	0	$ -
1532 Town Of Tiverton	BIWK	2/16/2017	$1,435.63	$1,452.77	$51,516.85	$ 2,888.40	2/2/2017	$ 2,606.71	0	$ -
1534 Tiverton Fire Dept.	BIWK	2/16/2017	$6,474.81	$10,722.42	$64,748.84	$ 17,197.23	2/2/2017	$ 17,055.99	0	$ -
1538 Tiverton Local 2670A	BIWK	2/16/2017	$1,155.21	$4,108.81	$40,086.50	$ 5,264.02	2/2/2017	$ 5,264.02	0	$ -
1052 City Of Central Falls	BIWK	2/16/2017	$1,468.19	$11,186.01	$82,982.36	$ 12,654.20	2/2/2017	$ 12,269.61	0	$ -
1163 East Providence Schools (Nc)	BIWK	3/3/2017	$7,237.73	$68,288.43	$279,526.88	$ 75,526.16	2/3/2017	$ 89,929.55	0	$ -
1158 East Greenwich-Cola-Nc	BIWK	3/3/2017	$3,187.86	$6,329.73	$123,147.86	$ 9,517.59	2/3/2017	$ 9,527.57	0	$ -
1153 East Greenwich School Dist. (Nc)	BIWK	3/3/2017	$346.35	$458.24	$8,915.24	$ 804.59	2/3/2017	$ 804.59	0	$ -
1262 Town Of Hopkinton	BIWK	2/17/2017	$1,613.90	$2,364.09	$66,407.68	$ 3,977.99	2/3/2017	$ 3,911.15	0	$ -
1264 Hopkinton Police Dept.	BIWK	2/17/2017	$3,391.08	$10,542.83	$33,910.63	$ 13,933.91	2/3/2017	$ 14,820.53	0	$ -
1383 North Providence School Dept. (Nc)	BIWK	2/17/2017	$1,075.04	$6,236.31	$107,520.92	$ 7,311.35	2/3/2017	$ 8,834.37	0	$ -

Municipal Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/08/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/08/17
1392 Town Of North Smithfield	BIWK	2/17/2017	$1,665.36	$3,932.13	$64,041.42	$ 5,597.49	2/3/2017	$ 5,944.55	0	$ -
1394 North Smithfield Police Dept.	BIWK	2/17/2017	$5,690.32	$11,790.25	$56,902.71	$ 17,480.57	2/3/2017	$ 17,710.94	0	$ -
1112 City Of Cranston	BIWK	2/17/2017	$17,840.69	$44,609.67	$459,419.07	$ 62,450.36	2/3/2017	$ 62,381.59	0	$ -
1114 Cranston Police	BIWK	2/17/2017	$36,444.59	$34,877.06	$364,445.37	$ 71,321.65	2/3/2017	$ 71,859.18	0	$ -
1115 Cranston Fire	BIWK	2/17/2017	$42,371.41	$31,777.98	$423,711.42	$ 74,149.39	2/3/2017	$ 73,218.67	0	$ -
1045 Central Coventry Fire Dist.	BIWK	2/4/2017	$2,791.00	$4,820.08	$27,910.32	$ 7,611.08	2/4/2017	$ 7,611.08	0	$ -
1192 Town Of Foster	WKLY	2/11/2017	$470.39	$2,088.02	$19,298.12	$ 2,558.41	2/4/2017	$ 2,645.30	0	$ -
1194 Foster Police Dept.	WKLY	2/4/2017	$965.42	$2,611.47	$9,654.17	$ 3,576.89	2/4/2017	$ 3,701.42	0	$ -
1255 Hopkins Hill Fire Dept.	BIWK	2/4/2017	$2,610.59	$3,344.14	$26,105.66	$ 5,954.73	2/4/2017	$ 5,954.73	0	$ -
1056 Central Falls Housing Auth.	WKLY	2/25/2017	$454.55	$2,063.98	$19,075.51	$ 2,518.53	2/4/2017	$ 2,518.54	0	$ -
1162 City Of East Providence	BIWK	2/4/2017	$13,351.67	$100,334.26	$410,701.07	$ 113,685.93	2/4/2017	$ 113,685.93	0	$ -
1496 South Kingstown Housing Auth.	WKLY	2/18/2017	$81.48	$142.98	$4,074.00	$ 224.46	2/4/2017	$ 231.96	0	$ -
1123 Cumberland School Dept. (Nc)	SMON	2/18/2017	$3,016.09	$24,381.91	$189,448.41	$ 27,398.00	2/4/2017	$ 27,132.67	0	$ -
1125 Cumberland Fire Dist.	WKLY	2/25/2017	$2,267.13	$5,073.79	$22,671.21	$ 7,340.92	2/4/2017	$ 5,901.57	0	$ -
1135 Cumberland Hill Fire Dist.	WKLY	2/25/2017	$1,634.68	$4,688.22	$16,346.79	$ 6,322.90	2/4/2017	$ 5,089.99	0	$ -
1365 North Cumberland Fire District	WKLY	2/25/2017	$1,489.85	$3,237.42	$14,898.37	$ 4,727.27	2/4/2017	$ 3,803.60	0	$ -
1555 Valley Falls Fire Dist.	WKLY	2/25/2017	$1,359.59	$2,409.49	$15,106.39	$ 3,769.08	2/4/2017	$ 3,751.22	0	$ -
1157 East Greenwich-Cola	WKLY	2/25/2017	$1,823.08	$2,546.15	$49,535.37	$ 4,369.23	2/4/2017	$ 4,523.73	0	$ -
1096 Coventry Housing Auth.	BIWK	2/18/2017	$247.50	$1,745.01	$24,751.72	$ 1,992.51	2/4/2017	$ 1,992.51	0	$ -
1152 Town Of East Greenwich	WKLY	2/25/2017	$629.47	$996.89	$19,394.59	$ 1,626.36	2/4/2017	$ 1,626.36	0	$ -
1154 East Greenwich Police Dept.	WKLY	2/25/2017	$4,779.61	$13,765.22	$47,795.82	$ 18,544.83	2/4/2017	$ 15,831.78	0	$ -
1155 East Greenwich Fire Dist.	WKLY	2/25/2017	$6,064.26	$17,446.71	$60,641.99	$ 23,510.97	2/4/2017	$ 17,616.96	0	$ -
1364 Newport Police Dept.	BIWK	2/18/2017	$1,603.94	$1,484.55	$17,821.87	$ 3,088.49	2/4/2017	$ 3,389.00	0	$ -
1476 Smithfield Housing Auth.	BIWK	2/18/2017	$210.68	$0.00	$5,569.12	$ 210.68	2/4/2017	$ 205.04	0	$ -
1016 Bristol Housing Authority	WKLY	3/4/2017	$329.26	$0.00	$8,266.15	$ 329.26	2/4/2017	$ 329.26	0	$ -
1352 City Of Newport	BIWK	2/18/2017	$5,256.98	$60,691.85	$262,849.18	$ 65,948.83	2/4/2017	$ 95,164.10	0	$ -
1023 Bristol Warren Reg. School Dist. (Nc)	BIWK	2/19/2017	$5,048.15	$29,116.74	$185,931.01	$ 34,164.89	2/5/2017	$ 34,249.57	0	$ -
1032 Town Of Burrillville	BIWK	2/19/2017	$4,043.05	$10,107.33	$124,628.31	$ 14,150.38	2/5/2017	$ 14,225.00	0	$ -
1034 Burrillville Police Dept.	BIWK	2/19/2017	$5,839.23	$12,717.75	$58,391.92	$ 18,556.98	2/5/2017	$ 18,580.90	0	$ -
1452 Town Of Richmond	BIWK	2/19/2017	$922.08	$4,021.76	$44,488.36	$ 4,943.84	2/5/2017	$ 4,954.45	0	$ -
1454 Richmond Police Dept.	BIWK	2/19/2017	$2,675.52	$3,255.21	$29,728.11	$ 5,930.73	2/5/2017	$ 5,921.88	0	$ -
1007 Barrington Cola Noncertifieds	BIWK	2/24/2017	$3,875.63	$14,349.56	$158,208.70	$ 18,225.19	2/10/2017	$ 18,325.73	0	$ -
1412 City Of Pawtucket	WKLY	2/25/2017	$8,502.71	$38,807.76	$238,230.98	$ 47,310.47	2/11/2017	$ 48,956.45	0	$ -
1413 Pawtucket School Dept. (Nc)	WKLY	2/25/2017	$3,820.10	$22,409.44	$137,565.01	$ 26,229.54	2/11/2017	$ 28,775.76	0	$ -
1293 Limerock Adm. Services	WKLY	2/25/2017	$88.42	$252.57	$1,850.36	$ 340.99	2/11/2017	$ 340.99	0	$ -
1372 Town Of North Kingstown	BIWK	2/11/2017	$7,124.44	$40,548.02	$223,036.56	$ 47,672.46	2/11/2017	$ 47,672.46	0	$ -
1374 North Kingstown Police Dept.	BIWK	2/11/2017	$13,036.13	$34,519.84	$130,361.88	$ 47,555.97	2/11/2017	$ 47,555.97	0	$ -
1375 North Kingstown Fire Dept.	BIWK	2/11/2017	$17,247.17	$51,724.12	$172,471.27	$ 68,971.29	2/11/2017	$ 68,971.29	0	$ -
1305 Lincoln Rescue	BIWK	2/26/2017	$3,060.04	$5,685.52	$30,600.26	$ 8,745.56	2/12/2017	$ 8,597.03	0	$ -
1395 North Smithfield Fire & Rescue Services	WKLY	2/24/2017	$3,026.34	$5,171.96	$30,262.76	$ 8,198.30	2/17/2017	$ 6,614.50	0	$ -
1227 Greenville Water Dist.	WKLY	2/22/2017	$130.05	$117.03	$6,502.69	$ 247.08	2/22/2017	$ 205.42	0	$ -
1302 Town Of Lincoln	BIWK	2/26/2017	$325.04	$3,900.32	$32,502.60	$ 4,225.36	2/26/2017	$ 4,225.36	0	$ -
1082 Town Of Charlestown	BIWK	2/28/2017	$3,257.40	$7,803.49	$90,843.95	$ 11,060.89	2/28/2017	$ 11,060.89	0	$ -
1084 Charlestown Police Dept.	BIWK	2/28/2017	$5,356.50	$13,037.71	$53,564.85	$ 18,394.21	2/28/2017	$ 18,394.21	0	$ -

Municipal Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/08/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/08/17
			$521,761.50	$1,512,964.82	$11,179,653.79	$2,034,726.32		$2,059,965.82		$195,639.08

Column Definitions:

Frequency = BIWK = Bi-Weekly; WKLY = Weekly; SMON - Semi-Monthly

Last Posted Pay Period End Date = represents last pay period that has been posted into the ERSRI system.

Payment for Pay Period Ending = represents that last pay period that the employer has satisfied.

Check Amount = represents the dollar amount of the last payment that the employer has remitted to ERSRI.

Periods Past Due = represents the number of payrolls that have not been posted to ERSRI or have been posted but balance due is still outstanding.

Estimated Amount Past Due = represents an estimate for payrolls that are delinquent, but have not been posted to the ERSRI system.

Employees' Retirement System of Rhode Island

Report of Received Contributions
Period Ending: 1/31/2017

Organization		Frequency	Received Employer/Employee Contributions	Delinquent Contributions	Delinquent Loss/Earnings Calculation
1114	Cranston Police Department	BIWK	$51,497.48 *		
1115	Cranston Fire Department	BIWK	$62,985.06 *		
1001	Barrington Public Schools	BIWK	$168,045.79		
1007	Barrington COLA Non-Certified	BIWK	$18,271.25		
1009	Barrington COLA Group	BIWK	$12,272.83		
1012	Town of Bristol	BIWK	$10,248.37		
1014	Bristol Police Department	BIWK	$10,943.64		
1016	Bristol Housing Authority	WKLY	$1,179.16		
1019	Town of Bristol EE Highway	BIWK	$9,475.16		
1021	Bristol Warren Reg. School District	BIWK	$152,468.40		
1023	Bristol Warren Reg. School District (NC)	BIWK	$20,418.83		
1031	Burrillville School Department	BIWK	$92,195.37		
1032	Town of Burrillville	BIWK	$12,761.72		
1033	Burrillville School Department (NC)	BIWK	$10,477.91		
1036	Burrillville Housing Authority	WKLY	$1,422.88		
1052	City of Central Falls	BIWK	$8,405.24		
1056	Central Falls Housing Authority	WKLY	$9,606.61		
1061	Central Falls Collaborative	BIWK	$130,507.43 ^		$7,046.38
1063	Central Falls School District (NC)	BIWK	$19,477.28 ^		$3,592.61
1071	Chariho Regional School District	BIWK	$96,200.34		
1073	Chariho Regional School District (NC)	BIWK	$22,912.66		
1082	Town of Charlestown	BIWK	$8,482.91		
1091	Coventry Public Schools	BIWK	$230,177.27		
1095	Coventry Fire District	BIWK	$3,448.56		
1096	Coventry Housing Authority	BIWK	$3,037.58		
1098	Coventry Lighting District	BIWK	$312.24		
1111	Cranston School Department	BIWK	$619,315.64		
1112	City of Cranston	BIWK	$41,922.62		
1113	Cranston School Department (NC)	BIWK	$56,194.21		
1116	Cranston Housing Authority	BIWK	$3,558.68		
1121	Cumberland School Department	SMON	$213,225.28		
1122	Town of Cumberland	BIWK	$18,898.18		
1123	Cumberland School Department (NC)	SMON	$21,034.08		
1126	Cumberland Housing Authority	WKLY	$2,462.56		
1151	East Greenwich School Department	BIWK	$134,112.92		
1152	Town of East Greenwich	WKLY	$3,940.93		
1153	East Greenwich School District (NC)	BIWK	$791.68		
1156	East Greenwich Housing Authority	BIWK	$3,600.04		
1157	East Greenwich - COLA	WKLY	$10,043.78		
1158	East Greenwich - COLA - NC	BIWK	$14,142.65		
1161	East Providence School Department	BIWK	$240,472.45		

Employees' Retirement System of Rhode Island

Report of Received Contributions
Period Ending: 1/31/2017

	Organization	Frequency	Received Employer/Employee Contributions	Delinquent Contributions	Delinquent Loss/Earnings Calculation
1162	City of East Providence	BIWK	$41,784.68		
1163	East Providence School Department (NC)	BIWK	$31,948.66		
1166	East Providence Housing Authority	WKLY	$3,177.43		
1181	Exeter/West Greenwich Reg. School Department	BIWK	$51,433.48		
1183	Exeter/West Greenwich Reg. School Department (NC)	BIWK	$12,571.23		
1191	Foster School District	BIWK	$17,079.40		
1192	Town of Foster	WKLY	$3,260.18		
1193	Foster School District (NC)	BIWK	$2,956.29		
1201	Foster/Glocester Reg. School District	BIWK	$83,664.73		
1203	Foster/Glocester Reg. School District (NC)	BIWK	$13,243.24		
1211	Glocester School District	BIWK	$26,482.65		
1212	Town of Glocester	BIWK	$9,626.14		
1213	Glocester School District (NC)	BIWK	$5,810.82		
1227	Greenville Water District	WKLY	$1,298.08		
1242	Hope Valley-Wyoming Fire District	BIWK	$682.16		
1255	Hopkins Hill Fire Department	BIWK	$3,648.34		
1262	Town of Hopkinton	BIWK	$7,702.07		
1271	Jamestown School Department	BIWK	$17,488.73		
1272	Town of Jamestown	BIWK	$10,329.99		
1273	Jamestown School Department (NC)	BIWK	$5,450.19		
1281	Johnston School Department	BIWK	$160,977.56		
1282	Town of Johnston	BIWK	$22,453.38		
1283	Johnston School Department (NC)	BIWK	$18,187.25		
1286	Johnston Housing Authority	WKLY	$2,391.84		
1293	Limerock Adm. Services	WKLY	$212.64		
1301	Lincoln School Department	BIWK	$162,441.12		
1302	Town of Lincoln	BIWK	$3,898.59		
1303	Lincoln School Department (NC)	BIWK	$1,033.78		
1306	Lincoln Housing Authority	BIWK	$1,176.18		
1311	Little Compton School Department	BIWK	$27,244.47		
1321	Middletown Public Schools	BIWK	$103,119.29		
1322	Town of Middletown	BIWK	$9,944.42		
1323	Middletown Public School Department (NC)	BIWK	$10,102.88		
1331	Narragansett School Department	BIWK	$47,287.06		
1336	Narragansett Housing Authority	MNLY	$980.85		
1341	New Shoreham School District	BIWK	$12,023.22		
1342	Town of New Shoreham	BIWK	$8,276.63		
1343	New Shoreham School District (NC)	BIWK	$2,666.96		
1351	Newport School Department	BIWK	$129,879.09		
1352	City of Newport	BIWK	$32,192.97		
1353	Newport School Department (NC)	BIWK	$16,992.17		

Employees' Retirement System of Rhode Island

Report of Received Contributions
Period Ending: 1/31/2017

	Organization	Frequency	Received Employer/Employee Contributions	Delinquent Contributions	Delinquent Loss/Earnings Calculation
1354	City of Newport - Monthly	MNLY	$30.83		
1356	Newport Housing Authority	WKLY	$9,165.36		
1364	Newport Police Department	BIWK	$2,288.84		
1371	North Kingstown School Department	BIWK	$121,967.53		
1372	Town of North Kingstown	BIWK	$22,896.74		
1373	North Kingstown School Department (NC)	BIWK	$23,853.88		
1381	North Providence School Department	BIWK	$94,348.51		
1382	Town of North Providence	BIWK	$17,349.17		
1383	North Providence School Department (NC)	BIWK	$16,255.20		
1386	North Providence Housing Authority	BIWK	$922.04		
1391	North Smithfield School Department	BIWK	$84,339.09		
1392	Town of North Smithfield	BIWK	$7,370.19		
1393	North Smithfield School Department (NC)	BIWK	$8,232.64		
1401	Northern Rhode Island Collaborative	BIWK	$14,496.64		
1403	Northern Rhode Island Collaborative (NC)	BIWK	$6,997.33		
1411	Pawtucket School Department	BIWK	$294,303.86		
1412	City of Pawtucket	WKLY	$47,570.99		
1413	Pawtucket School Department (NC)	WKLY	$33,215.60		
1416	Pawtucket Housing Authority	WKLY	$10,343.01		
1421	Portsmouth School Department	BIWK	$125,954.97		
1441	Providence School Department	BIWK	$918,495.84		
1447	Providence School Department Long Term Subs	WKLY	$12,622.00		
1448	Providence School Department - 12 Month Bi-Weekly	BIWK	$67,603.23		
1452	Town of Richmond	BIWK	$4,548.98		
1461	Scituate School Department	BIWK	$72,903.14		
1462	Town of Scituate	BIWK	$5,765.19		
1463	Scituate School Department (NC)	BIWK	$5,409.86		
1471	Smithfield School Department	BIWK	$122,536.50		
1473	Smithfield School Department (NC)	BIWK	$14,773.30		
1476	Smithfield Housing Authority	BIWK	$393.66		
1478	Town of Smithfield (COLA)	WKLY	$14,326.75		
1491	South Kingstown School Department	BIWK	$107,190.81		
1492	Town of South Kingstown	BIWK	$30,134.41		
1493	South Kingstown School Department (NC)	BIWK	$23,235.47		
1496	South Kingstown Housing Authority	WKLY	$969.60		
1515	Union Fire District	BIWK	$1,969.14		
1531	Tiverton School Department	BIWK	$134,899.77		
1532	Town of Tiverton	BIWK	$5,080.44		
1533	Tiverton School Department (NC)	BIWK	$13,108.55		
1538	Tiverton Local 2670A	BIWK	$4,203.67		
1541	Urban Collaborative Schools	BIWK	$8,177.48		

Employees' Retirement System of Rhode Island

Report of Received Contributions
Period Ending: 1/31/2017

	Organization	Frequency	Received Employer/Employee Contributions	Delinquent Contributions	Delinquent Loss/Earnings Calculation
1562	Town of Warren	BIWK	$8,908.22		
1566	Warren Housing Authority	BIWK	$833.56		
1571	Warwick School Department	BIWK	$290,499.37		
1591	West Bay Collaborative	BIWK	$5,374.91		
1602	Town of West Greenwich	WKLY	$4,773.59		
1611	West Warwick School Department	BIWK	$98,488.80		
1616	West Warwick Housing Authority	BIWK	$1,447.98		
1621	Westerly School Department	BIWK	$162,563.17		
1631	Woonsocket School Department	BIWK	$155,027.04		
1632	City of Woonsocket	WKLY	$26,194.72		
1633	Woonsocket School Department (NC)	BIWK	$28,346.43		
1634	Woonsocket Police Department	WKLY	$27,282.12		
1635	Woonsocket Fire Department	WKLY	$30,985.66		
1641	Highlander Charter School	SMON	$20,006.53		
1651	Paul Cuffee School	BIWK	$23,108.47		
1661	Kingston Hill Academy School	BIWK	$4,068.36		
1671	International Charter School	BIWK	$9,715.21		
1681	The Compass School	SMON	$5,084.04		
1691	Blackstone Academy Charter School, Inc.	SMON	$7,405.22		
1701	Beacon Charter School of Woonsocket	SMON	$14,717.79		
1711	The Learning Community Charter School	BIWK	$21,056.53		
1712	Harrisville Fire District - Municipal	WKLY	$778.52		
1721	Segue Institute of Learning	BIWK	$5,640.08		
1731	The Greene School	SMON	$5,423.64		
1741	Trinity Academy	SMON	$6,403.40		
1751	RI Nurses Institute	SMON	$7,526.36		
1761	The Village Green Virtual Charter School	SMON	$4,801.46		
1771	Nowell Leadership Academy	BIWK	$8,968.32		
1781	South Side Elementary Charter School	BIWK	$1,981.00		
1802	Pascoag Fire District - Administration	BIWK	$265.00		
2000	State	BIWK	$2,131,813.76		
2100	R.I. Airport Corporation	BIWK	$407.68		
2300	Narragansett Bay Commission	BIWK	$23,221.84		
			$9,327,437.50		

Employees' Retirement System of Rhode Island

Report of Received Contributions
Period Ending: 1/31/2017

Organization	Frequency	Received Employer/Employee Contributions	Delinquent Contributions	Delinquent Loss/Earnings Calculation

Column Definitions:

Frequency = BIWK = Bi-Weekly; WKLY = Weekly; SMON = Semi-Monthly

Received Employer/Employee contributions = Contributions received during the reporting period

* Cranston Police and Fire have not withheld DC plan contributions on holiday and longevity payments for its MERS police officers and holiday payments for its firefighters. The City may be liable for loss earnings to employees for delayed contributions. Amounts due are currently under analysis.

^ Central Falls School Department has determined that the three employees (previously in question) are eligible to participate in the defined contribution plan. The CFSD is working with TIAA-CREF to calculate and post the required contributions for the prior periods. Once the contributions are posted TIAA-CREF will prepare a lost earnings calculation.

Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/8/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/8/17
1301 Lincoln School Dept.	BIWK	2/16/2017	$49,243.68	$123,728.43	$938,758.27	$ 172,972.11	1/19/2017	$ 180,918.29	0	$ -
1571 Warwick School Dept.	BIWK	2/17/2017	$87,130.32	$293,346.23	$2,225,696.65	$ 380,476.55	1/20/2017	$ 551,893.63	0	$ -
1281 Johnston School Dept.	BIWK	2/17/2017	$47,521.52	$116,093.04	$880,819.99	$ 163,614.56	1/20/2017	$ 170,350.49	0	$ -
1351 Newport School Dept.	BIWK	2/17/2017	$39,833.49	$97,797.43	$742,015.95	$ 137,630.92	1/20/2017	$ 147,615.37	0	$ -
1491 South Kingstown School Dept.	BIWK	2/17/2017	$55,054.53	$137,907.34	$1,046,337.80	$ 192,961.87	1/20/2017	$ 198,444.19	0	$ -
1671 International Charter School	BIWK	1/20/2017	$2,998.94	$10,056.87	$76,304.21	$ 13,055.81	1/20/2017	$ 13,904.15	0	$ -
1721 Segue Institute Of Learning	BIWK	1/20/2017	$1,762.54	$6,194.63	$47,000.48	$ 7,957.17	1/20/2017	$ 7,957.17	0	$ -
1471 Smithfield School Dept.	BIWK	2/24/2017	$35,667.04	$92,183.49	$699,416.76	$ 127,850.53	1/21/2017	$ 132,796.55	0	$ -
1591 West Bay Collaborative	BIWK	2/18/2017	$2,065.15	$6,188.53	$46,954.11	$ 8,253.68	1/21/2017	$ 8,575.96	0	$ -
2100 R.I. Airport Corporation	BIWK	2/18/2017	$2,423.73	$6,107.11	$24,100.69	$ 8,530.84	1/21/2017	$ 8,530.84	0	$ -
2300 Narragansett Bay Commission	BIWK	2/18/2017	$6,954.61	$46,994.23	$185,454.92	$ 53,948.84	1/21/2017	$ 72,033.58	0	$ -
1401 Northern Rhode Island Collaborative	BIWK	2/19/2017	$5,315.88	$12,550.27	$95,222.12	$ 17,866.15	1/22/2017	$ 17,903.91	0	$ -
1441 Providence School Dept.	BIWK	2/19/2017	$290,154.16	$729,304.78	$5,533,416.91	$ 1,019,458.94	1/22/2017	$ 1,106,742.06	0	$ -
1448 Providence 12 Month Bi-Weekly	BIWK	2/19/2017	$23,983.86	$55,918.92	$424,271.18	$ 79,902.78	1/22/2017	$ 85,457.61	0	$ -
1661 Kingston Hill Academy School	BIWK	2/19/2017	$1,272.49	$4,472.39	$33,933.13	$ 5,744.88	1/22/2017	$ 5,652.60	0	$ -
1071 Chariho Regional School Dist.	BIWK	2/22/2017	$29,071.42	$98,718.29	$748,999.55	$ 127,789.71	1/25/2017	$ 175,979.73	0	$ -
1631 Woonsocket School Dept.	BIWK	2/22/2017	$46,771.31	$152,467.77	$1,156,811.33	$ 199,239.08	1/25/2017	$ 266,614.02	0	$ -
1331 Narragansett School Dept.	BIWK	2/15/2017	$25,124.14	$62,302.07	$472,702.13	$ 87,426.21	1/26/2017	$ 90,178.77	0	$ -
1191 Foster School Dist.	BIWK	2/10/2017	$3,306.45	$8,265.02	$62,708.94	$ 11,571.47	1/27/2017	$ 12,772.81	0	$ -
1181 Exeter/West Greenwich Reg. Schools	BIWK	2/24/2017	$15,432.67	$52,746.70	$400,204.11	$ 68,179.37	1/27/2017	$ 102,166.38	0	$ -
1201 Foster/Glocester Reg. School Dist.	BIWK	2/24/2017	$10,171.79	$35,390.85	$268,519.66	$ 45,562.64	1/27/2017	$ 63,338.69	0	$ -
1311 Little Compton School Dept.	BIWK	2/10/2017	$3,705.95	$11,613.76	$93,134.12	$ 15,319.71	1/27/2017	$ 15,177.53	0	$ -
1031 Burrillville School Dept.	BIWK	2/24/2017	$30,780.21	$69,151.47	$554,542.06	$ 99,931.68	1/27/2017	$ 105,056.96	0	$ -
1211 Glocester School Dist.	BIWK	2/24/2017	$11,085.03	$20,442.90	$155,105.56	$ 31,527.93	1/27/2017	$ 32,188.13	0	$ -
1321 Middletown Public Schools	BIWK	2/24/2017	$39,576.12	$88,501.52	$671,485.33	$ 128,077.64	1/27/2017	$ 132,906.64	0	$ -
1531 Tiverton School Dept.	BIWK	2/11/2017	$22,535.14	$64,365.82	$488,358.92	$ 86,900.96	1/28/2017	$ 88,992.27	0	$ -
1271 Jamestown School Dept.	BIWK	2/11/2017	$6,835.37	$19,704.39	$149,501.84	$ 26,539.76	1/28/2017	$ 28,193.58	0	$ -
1341 New Shoreham School Dist.	BIWK	2/11/2017	$3,816.63	$9,705.72	$77,832.55	$ 13,522.35	1/28/2017	$ 13,522.35	0	$ -
1411 Pawtucket School Dept.	BIWK	2/25/2017	$128,173.14	$333,053.21	$2,526,961.52	$ 461,226.35	1/28/2017	$ 510,152.24	0	$ -
1651 Paul Cuffee School	BIWK	2/25/2017	$7,568.85	$23,412.63	$177,637.67	$ 30,981.48	1/28/2017	$ 35,163.47	0	$ -
1711 The Learning Community Charter School	BIWK	2/25/2017	$4,229.03	$13,414.52	$101,779.71	$ 17,643.55	1/28/2017	$ 20,722.75	0	$ -
1447 Providence Long Term Subs	WKLY	2/26/2017	$1,366.95	$4,744.80	$36,000.00	$ 6,111.75	1/29/2017	$ 9,106.87	0	$ -
1461 Scituate School Dept.	BIWK	2/26/2017	$21,006.59	$55,159.40	$418,507.84	$ 76,165.99	1/29/2017	$ 78,165.77	0	$ -
1761 The Village Green Virtual Charter School	SMON	2/28/2017	$2,195.58	$5,550.91	$42,116.21	$ 7,746.49	1/30/2017	$ 8,696.85	0	$ -
1741 Trinity Academy	SMON	1/31/2017	$2,001.05	$6,626.83	$50,279.65	$ 8,627.88	1/31/2017	$ 9,340.64	0	$ -
1701 Beacon Charter School Of Woonsocket	SMON	2/28/2017	$3,081.55	$10,830.71	$82,175.08	$ 13,912.26	1/31/2017	$ 13,912.26	0	$ -
1731 The Greene School	SMON	2/28/2017	$1,584.67	$5,569.55	$42,257.47	$ 7,154.22	1/31/2017	$ 7,668.24	0	$ -
1641 Highlander Charter School	SMON	2/28/2017	$4,147.63	$14,130.59	$107,212.30	$ 18,278.22	1/31/2017	$ 18,930.76	0	$ -
1681 The Compass School	SMON	2/28/2017	$1,588.76	$5,583.98	$42,366.99	$ 7,172.74	1/31/2017	$ 7,172.74	0	$ -
1691 Blackstone Academy Charter School, Inc.	SMON	2/28/2017	$2,296.51	$8,071.30	$61,238.87	$ 10,367.81	1/31/2017	$ 10,367.81	0	$ -
1751 Ri Nurses Institute	SMON	2/28/2017	$2,348.72	$7,717.62	$58,555.39	$ 10,066.34	1/31/2017	$ 11,009.26	0	$ -
1061 Central Falls Collaborative	BIWK	2/15/2017	$23,947.99	$80,718.01	$612,427.38	$ 104,666.00	2/1/2017	$ 137,869.35	0	$ -
1151 East Greenwich School Dept.	BIWK	3/3/2017	$31,451.92	$89,832.75	$720,390.50	$ 121,284.67	2/3/2017	$ 121,789.13	0	$ -
1161 East Providence Schools	BIWK	3/3/2017	$76,971.98	$182,003.03	$1,385,207.91	$ 258,975.01	2/3/2017	$ 284,442.06	0	$ -
1371 North Kingstown School Dept.	BIWK	2/17/2017	$54,251.00	$146,030.88	$1,107,972.88	$ 200,281.88	2/3/2017	$ 207,299.06	0	$ -
1381 North Providence School Dept.	BIWK	2/17/2017	$28,657.50	$95,044.67	$721,126.93	$ 123,702.17	2/3/2017	$ 183,641.28	0	$ -
1421 Portsmouth School Dept.	BIWK	3/3/2017	$23,042.07	$79,604.26	$603,977.59	$ 102,646.33	2/3/2017	$ 127,766.83	0	$ -
1111 Cranston School Dept.	BIWK	2/18/2017	$172,571.64	$451,075.18	$3,422,421.11	$ 623,646.82	2/4/2017	$ 658,873.66	0	$ -
1121 Cumberland School Dept.	SMON	2/18/2017	$54,652.61	$152,394.94	$1,156,256.84	$ 207,047.55	2/4/2017	$ 213,862.21	0	$ -

Employees' Retirement System of Rhode Island

Report of Contributions
Period Ending: 3/8/17

Organization	Frequency	Last Posted Pay Period End Date	Employee Contributions	Employer Contributions	Wages	Total	Payment for Period Ending	Check Amount	Periods Past Due	Estimated Amount Past Due As Of 3/8/17
1391 North Smithfield School Dept.	BIWK	2/18/2017	$21,232.29	$57,182.38	$458,558.96	$ 78,414.67	2/4/2017	$ 79,424.90	0	$ -
1781 South Side Elementary Charter School	BIWK	2/18/2017	$385.77	$1,355.85	$10,287.17	$ 1,741.62	2/4/2017	$ 1,741.62	0	$ -
2000 State	BIWK	2/18/2017	$655,643.75	$4,430,405.16	$17,483,842.92	$ 5,086,048.91	2/4/2017	$ 20,694.76	0	$ -
2010 Correctional Officers	BIWK	2/18/2017	$233,711.61	$676,829.87	$2,670,994.43	$ 910,541.48	2/4/2017	$ 1,013.52	0	$ -
2200 Ri Economic Dev. Corp.	BIWK	2/18/2017	$397.11	$914.80	$3,610.11	$ 1,311.91	2/4/2017	$ 1,311.91	0	$ -
1541 Urban Collaborative Schools	BIWK	2/5/2017	$2,358.88	$5,235.01	$39,719.34	$ 7,593.89	2/5/2017	$ 7,593.89	0	$ -
1021 Bristol Warren Reg. School Dist.	BIWK	2/19/2017	$44,101.29	$113,777.81	$863,259.94	$ 157,879.10	2/5/2017	$ 165,687.93	0	$ -
1091 Coventry Public Schools	BIWK	2/19/2017	$74,797.08	$182,808.99	$1,387,017.14	$ 257,606.07	2/5/2017	$ 264,893.38	0	$ -
1001 Barrington Public Schools	BIWK	2/24/2017	$45,706.40	$124,936.68	$947,928.42	$ 170,643.08	2/10/2017	$ 173,156.80	0	$ -
1621 Westerly School Dept.	BIWK	2/24/2017	$45,587.75	$121,849.89	$924,505.56	$ 167,437.64	2/10/2017	$ 170,445.48	0	$ -
1611 West Warwick School Dept.	BIWK	2/11/2017	$49,708.41	$123,051.85	$933,627.95	$ 172,760.26	2/11/2017	$ 183,935.78	0	$ -
1771 Sheila C Nowell Leadership Academy	BIWK	2/19/2017	$1,121.04	$3,762.64	$28,548.00	$ 4,883.68	2/19/2017	$ 5,195.10	0	$ -
			$2,721,481.29	**$10,044,900.67**	**$57,528,379.05**	**$12,766,381.96**		**$7,586,912.57**		**$0.00**

Column Definitions:

Frequency = BIWK = Bi-Weekly; WKLY = Weekly; SMON - Semi-Monthly

Last Posted Pay Period End Date = represents last pay period that has been posted into the ERSRI system.

Payment for Pay Period Ending = represents that last pay period that the employer has satisfied.

Check Amount = represents the dollar amount of the last payment that the employer has remitted to ERSRI.

Periods Past Due = represents the number of payrolls that have not been posted to ERSRI or have been posted but balance due is still outstanding.

Estimated Amount Past Due = represents an estimate for payrolls that are delinquent, but have not been posted to the ERSRI system.

Roxanne Donoyan

From: Roxanne Donoyan
Sent: Friday, March 03, 2017 8:51 AM
To: 'Bill Tocco'
Subject: RE: Robert Perfetto Hearing March 2, 2017 at 10:30 A.M.

You're very welcome, Attorney Tocco. A copy will go in the mail today as well to you and Mr. Perfetto of the time change.
Regards,
Roxanne

Roxanne Donoyan
Assistant to Executive Director
Employees' Retirement System of Rhode Island
50 Service Avenue
2nd Floor
Warwick, RI 02886-1021
Tel:(401) 462-7608
Fax: (401) 462-7691
roxanne.donoyan@ersri.org

From: Bill Tocco [mailto:billt2590@gmail.com]
Sent: Thursday, March 02, 2017 4:39 PM
To: Roxanne Donoyan <Roxanne.Donoyan@ersri.org>
Subject: Re: Robert Perfetto Hearing March 2, 2017 at 10:30 A.M.

Thank you, Ms. Donovan.

William P. Tocco III
Attorney At Law
Office: (401) 273-8200
Cell: (401) 864-8101
Email: billt2590@gmail.com

Office Street Address:
23 Acorn Street Floor 1
Providence, RI 02903-1066

On Thu, Mar 2, 2017 at 4:13 PM, Roxanne Donoyan <Roxanne.Donoyan@ersri.org> wrote:

Attorney Tocco,

This is a clearer attachment of the time change for Robert Perfetto's hearing date and time.

Thank you.

Roxanne

Roxanne Donoyan

Assistant to Executive Director

Employees' Retirement System of Rhode Island

50 Service Avenue

2nd Floor

Warwick, RI 02886-1021

Tel:(401) 462-7608

Fax: (401) 462-7691

roxanne.donoyan@ersri.org

Employees' Retirement System of Rhode Island

February 6, 2017 UPDATE – MARCH 2, 2017

William P. Tocco III
Attorney at Law
23 Acorn Street, Floor 1
Providence, RI 02903-1066

RE: *Notice of Full Board Meeting*
Robert Perfetto v. Employees' Retirement System of Rhode Island

Dear Attorney Tocco:

Please be advised that the decision of the Employees' Retirement System of Rhode Island to deny Mr. Perfetto's request to have his lump sum retroactive payment included in the calculation of his final average compensation *has* been upheld by the Hearing Officer. In accordance with Regulation 4 of the Rules of Practice and Procedure of the Employees' Retirement System, this matter will be presented to the full Retirement Board for approval or denial at the March 15, 2017 Retirement Board Meeting. You have the right to appear before the Retirement Board and make oral argument in support of or in opposition to the Hearing Officer's decision.

The March meeting of the Retirement Board is scheduled for:

DATE:	**Wednesday, March 15, 2017**
TIME:	~~**9:30 am**~~ TIME CHANGE TO 10:30 A.M.
LOCATION:	**2nd Floor Conference Room**
	50 Service Avenue
	Warwick, Rhode Island 02886

A party wishing to file a brief or make exceptions must submit 15 copies to the Retirement System, Attention: Roxanne Donoyan no later than 10 days prior to the date of the Retirement Board meeting.

If you are unable to attend this meeting, please notify me at 462.7608 as soon as possible. Should the meeting be rescheduled, we will notify you of the new date and time of the meeting.

Sincerely,

Roxanne Donoyan

cc: Robert Perfetto
Michael P. Robinson, Esq.

Enclosure: Employees' Retirement System of Rhode Island Rules & Regulations, Regulation 4.

Gayle Mambro-Martin

From: Bill Tocco <billt2590@gmail.com>
Sent: Monday, February 27, 2017 2:27 PM
To: Frank Karpinski; Gayle Mambro-Martin; mrobinson@shslawfirm.com; John McCann
Subject: REVISED Brief of Appellant Robert Perfecto
Attachments: REVISED Brief Appellant Perfecto - Hearing 03.15.17.pdf

Via email only

February 27, 2017

Frank J. Karpinski

Executive Director, ERSRI

fkarpinski@ersri.org

Gayle C. Mambro-Martin

Deputy General Counsel, ERSRI

gmambro@ersri.org

Michael P. Robinson, Esquire

Legal Counsel, ERSRI

mrobinson@shslawfirm.com

John H. McCann, Esquire

jmccann@shslawfirm.com

I attach the REVISED brief of Appellant Perfetto. It is the same as the brief initially submitted, except that corrections have been made in the last paragraph of the brief.

I apologize for the inconvenience.

William P. Tocco III

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Office: (401) 273-8200
Cell: (401) 864-8101
Email: billt2590@gmail.com

Office Street Address:
23 Acorn Street Floor 1
Providence, RI 02903-1066

IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

REVISED BRIEF

THIS REVISED BRIEF MAKES CORRECTIONS TO THE LAST PARAGRPH OF APPELLANT'S INITIALLY SUBMITTED BRIED

APPELLANT ROBERT PERFETTO'S BRIEF IN ANTICIPATION OF MARCH 15, 2017 HEARING BEFORE THE RETIREMENT BOARD

This brief is submitted on behalf of Appellant, Robert Perfetto, pursuant to Section 10(1) of Regulation Four, of the ERSRI Rules of Practice for Hearings in Contested Cases.

Mr. Perfetto appeals from a January 6, 2017 Hearing Officer Decision.

The facts giving rise to this contested case are virtually undisputed. In the spring of 2013, Mr. Perfetto decided to explore the feasibility of retiring. As part of his due diligence during that exploration, in April 2013, Mr. Perfetto met with an ERSRI counselor, who

eventually provided Mr. Perfetto with an estimated Retiree's Benefit Amount of $79,404.60 annually, which equates to a monthly amount of $6,617.05. Following both his receipt of this ERSRI computation of his benefit amount and his determination that this benefit amount would sufficiently provide for his anticipated expenses and desired lifestyle during his retirement years, Mr. Perfetto proceeded forward with his Application for Retirement. He signed his Application for Retirement on July 9, 2013, indicating a Retirement Date of August 1, 2013. This Application for Retirement incorporated—and, as such, was predicated upon—the above-noted estimated Retiree's Benefit Amount of $79,404.60 annually.

Thereafter, without any intervening notice from ERSRI and wholly unbeknownst to Mr. Perfetto, ERSRI reviewed the determination of Mr. Perfetto's retirement benefit and unilaterally reduced it to $66,966.24 annually, which equates to a monthly amount of $5,580.52. The reduced retirement benefit, of which Mr. Perfetto first became aware upon receipt of his first retirement

payment dated September 30, 2013, represented a reduction of more than fifteen percent (15%) from the initial benefit computation provided to him as part of his due diligence and deliberation on the question of whether to retire.

In the proceedings leading to this hearing before the full Retirement Board, Mr. Perfetto has advanced, in the alternative, three principal claims for relief: (1) reinstatement of the initial benefit amount by validating the computations on which it was based; (2) reinstatement of the initial benefit amount based upon the theory of equitable estoppel; or (3) rescission of his separation from employment via retirement and his reinstatement of his employment as of August 1, 2013.

As to Mr. Perfetto's first claim, seeking reinstatement of the initial benefit amount by validating the computations on which it was based, in the proceedings heretofore, ERSRI counsel argued that, "The applicable statutes do not permit the interpretation proposed by Mr. Perfetto." In the Decision now presented

for review by the full Retirement Board, the Hearing Officer sided with the argument advanced by ERSRI counsel on this issue. In the instant proceeding before the full Retirement Board, Mr. Perfetto stands by the argument advanced in his own Post-Hearing Memorandum of Law directed to the Hearing Officer, a copy of which is appended to this brief as Exhibit 1.

As to Mr. Perfetto's second claim, seeking reinstatement of the initial benefit amount based upon the theory of equitable estoppel, in the proceedings heretofore, ERSRI counsel argued that, "Equitable estoppel does not apply where an official's representations were *ultra vires*." In the Decision now presented for review by the full Retirement Board, the Hearing Officer again sided with the argument advanced by ERSRI counsel on this issue. In the instant proceeding before the full Retirement Board, Mr. Perfetto urges that both ERSRI counsel and the Hearing Officer erred as a matter of law in simplifying the equitable estoppel doctrine to make the issue of *ultra vires* action wholly

determinative. Instead, Mr. Perfetto urges that the better rule of law advances a two-part test:

> When a party seeks to assert equitable estoppel against the State, that party must also show (1) that equitable estoppel is necessary to prevent a manifest injustice and (2) that the exercise of government powers will not thereby be impaired.

Kramarevcky v. Dep't of Soc. & Health Services, 822 P.2d 1227, 1230 (Wash.App. 1992). (A copy of the Kramarevcky decision is attached hereto as Exhibit 2.) In Kramarevcky, the court applied the doctrine of equitable estoppel to prevent the respondent state department from seeking recoupment of public assistance overpayments. While the Kramarevcky court's whole body of reasoning offers guidance on the equitable estoppel issue before this Board, several quotes from the opinion are worth highlighting immediately:

> The review judge looked to the cumulative effect of allowing the application of equitable estoppel in all cases like these as a basis for precluding assertion of the doctrine here. She concluded that DSHS would be 'excessively impaired in the administration of public assistance programs' due to the expense to the State of being prevented from assessing

overpayments in other similar situations.

Id. at 1233 (footnote omitted).

> Rather, we must look to public policy considerations to determine whether application of any equitable defense interferes with the proper exercise of governmental duties. Housing Auth. v. Northeast Lk. Wash. Sewer & Water Dist., 56 Wn. App. 589, 593, 784 P.2d 1284, 789 P.2d 103 *review denied*, 115 Wn.2d 1004 (1990). We consider relevant to this inquiry which party could best have prevented the mistakes that occurred and who is in the better position to assure that future errors of this kind do not occur. Here, that party is DSHS. The regulatory scheme does not place the burden of determining eligibility on the recipient. Thus, when all information is accurately and timely provided by the recipient, it is appropriate to put the burden on the government to assess eligibility accurately in light of the information provided.

Id. at 1234 (footnotes omitted).

> Finally, we hope that application of equitable estoppel in these cases will improve the accurate and orderly administration of the entitlements system by providing an impetus to more adequately monitor and control it. The overpayments here stemmed from DSHS' error alone. Because only DSHS is in a position to review and revise its procedures so as to assure that fewer such mistakes are made in the future, government functioning will not be impaired.

Id. at 1234. Should this Board adopt the rule followed by the Kramarevcky court, Appellant respectfully requests a remand of his case to the Hearing Officer for hearing *de novo* on his claim of equitable estoppel.

In the proceedings before the Hearing Officer, Mr. Perfetto introduced as his first exhibit, labeled Appellant's Exhibit 1 (Full), a copy of a complaint filed by him in Providence County Superior Court, challenging the reduction in his benefit amount. (A copy of this complaint is attached hereto as Exhibit 3.) Because he had not first exhausted his administrative remedies, this complaint was dismissed as premature. The complaint, *inter alia*, provided a concise statement of both Mr. Perfetto's grounds for challenging the reduction in his benefit amount and his claims for relief, including his third claim, seeking rescission of his separation from employment via retirement and reinstatement of his employment as of August 1, 2013.

In the context of federal law, namely, the Employee Retirement Income Security Act ("ERISA"), codified in part at 29 U.S.C. Chapter 18, it has been held that

> reinstatement of employment is an appropriate equitable remedy when an employee had been induced to accept early retirement based on incomplete or inaccurate information for which the plan administrator could be held responsible.

Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 385 (4th Cir. 2001). (A copy of the Griggs (2001) decision is attached hereto as Exhibit 4.) Of particular note, in Griggs, the Fourth Circuit Court of Appeals focused on the failure of the plan administrator to notify the retirement applicant upon learning that information furnished to the retirement applicant had been determined to be false:

> Griggs's claim focuses primarily on a fiduciary's duty to communicate complete and accurate information to a beneficiary and to refrain from misleading the beneficiary with respect to material facts. Griggs contends that DuPont provided him with information that it knew was material to his decision to accept a TPS distribution, and that upon learning later that this important information was false with respect to Griggs individually, DuPont breached

its fiduciary duty by failing to notify him of the inaccuracy. Specifically, the assertion is that DuPont provided employees with an explanation of TPS distribution options that clearly implied to them, as it did to Griggs, that a rollover of TPS benefits could be accomplished tax free, that DuPont later learned these rollovers could not be accomplished without the imposition of an immediate tax, and that DuPont did nothing to warn affected employees like Griggs.

We agree with Griggs and the district court that these facts establish a breach of fiduciary duty by DuPont. * * * an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent—especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions. In other words, a fiduciary is obligated to advise the beneficiary 'of circumstances that threaten interests relevant to the [fiduciary] relationship.'

Id. at 381. (Citation omitted.)

… we conclude that the return or reinstatement of the parties to their preelection positions is not necessarily an inappropriate remedy under these circumstances, and we remand for the district court to further develop this issue.

Id. at 386. *See also* Adams v. Brink's Co., 261 Fed. Appx. 583, 595 (4th Cir. 2008)(intent to deceive is not a

requisite element of right to rescission). (A copy of the Adams decision is attached hereto as Exhibit 5.)

Finally, it is beyond dispute that Mr. Perfetto had a constitutionally-protected property right in his state employment. Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)(copy attached hereto as Exhibit 6); Wilkinson v. The State Crime Laboratory Commission et al. 788 A.2d 1129 (R.I. 2002) (copy attached hereto as Exhibit 7). It is an egregious violation of due process of law to compel Mr. Perfetto to relinquish his property right and force him to accept, in exchange, a retirement benefit amount that was substantially reduced without notice to him and without opportunity for him to reconsider his retirement application in light of the changed circumstances due to the mistaken representation made by ERSRI, which had sole control over the timing and calculation of the final retirement benefit amount. Id. Counsel for Mr. Perfetto respectfully suggests that, under the circumstances presented, the State of Rhode Island, through ERSRI,

argument that the label "estimated Retiree Benefit Amount" allows the trampling of Mr. Perfetto's right to due process of law is both contrived and baseless. For ERSRI to do something of this gravity behind Mr. Perfetto's back and then argue that he is out of luck flies in the face of the principles of fairness and reasonableness which are enshrined in both federal and state constitutions under the rubric of due process of law.

DATED: February 27, 2017

Respectfully submitted,
Robert Perfetto,
Appellant,
By his attorney,

William P. Tocco III (#2275)
P. O. Box 41060
Providence, RI 02940-1060
Tel. (401) 864-8101
Email: billt2590@gmail.com

Certification of Service

I hereby certify that, on this 27th day of February, 2017, a copy of the within document (with all exhibits stated as attached hereto) was delivered by email to the following:

Frank J. Karpinski
Executive Director, ERSRI

fkarpinski@ersri.org

Gayle C. Mambro-Martin
Deputy General Counsel, ERSRI
gmambro@ersri.org

Michael P. Robinson, Esquire
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John H. McCann, Esquire
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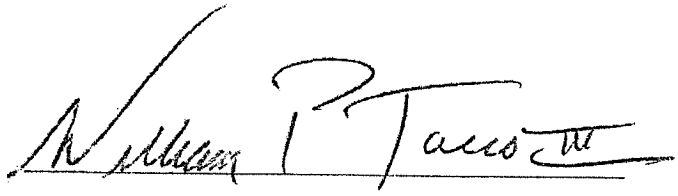

IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 1

Post-Hearing Memorandum of Law of Appellant, Robert Perfetto, Directed to the Hearing Officer

COPY

ATTORNEYS AT LAW
23 Acorn Street, Providence R.I. 02903
Tel: 401-273-8200 Fax: 401-521-5820
E-Mail-sakenned@gmail.com
aubeeesq@gmail.com

Samuel Kennedy-Smith*
Carleen N.T. Aubee*
*Also Admitted in MA**

April 29, 2015

Teresa M. Rusbino, Esq.
Employees Retirement System of Rhode Island 50
Service Avenue, 2nd Floor
Warwick, RI, 02886

Re: Robert Perfetto v. ERSRI

Dear Attorney Rusbino:

Please find A Memorandum of Law on behalf of Robert Perfetto regarding the above referenced matter. Please contact the office with any questions or concerns.

Thank you.

Very truly yours,

Samuel Kennedy-Smith, Esq.

SKS/peg

Enclosure

CC: John McCann, Esquire
Michael Robinson, Esquire

Re: Robert Perfetto v. ERSRI

CA No.: 2013-5811

MEMORANDUM OF LAW

Robert Perfetto was employed as a teacher at the William M. Davies, Jr. Career-Technical High School during the 2007-08 school year. He then began working at the Rhode Island Training School for the Department of Children, Youth, and Families and eventually ascended to the position of Assistant Principal, Youth Career Education Center. Due to a wrongful termination, Perfetto sought recourse in the Superior Court and was awarded fifty five thousand seven hundred and seventy five dollars ($55,775.00) on or about June 23, 2010 in a Consent Order entered in Case Number PC-2009-2428. During the 2013 school year, Perfetto began considering the prospect of retirement and reached out to the Employees' Retirement System of Rhode Island. Perfetto was given an estimation of his retirement benefits which factored the $55,775.00 payment as counting towards the date and year of receipt. This made - and still makes - good, common sense as Perfetto actually paid taxes on the back wages for the year that they were received. The last three years of employment - from 2010 -2013 - were the three highest years of salary used in calculating his retirement benefits as set forth in R.I.G.L. § 36-8-1(5). Based upon the figures provided him by Retirement Benefit Analyst John P. Midgely, Perfetto elected to retire in August 2013.

In the months after retirement, Employees' Retirement System of Rhode Island informed Perfetto that it had miscalculated his benefits and that the $55,775.00 in back pay actually counted towards the 2009 school year (the year over which Perfetto had previously brought suit). Consequently, Perfetto would receive a significantly lower benefit. See Letter attached herein as Exhibit A. Perfetto subsequently brought suit seeking Declaratory and substantive relief - namely a ruling that the original (higher) calculation of benefits be ratified and enforced on the basis of the statute at issue and equitable estoppel, and - in the alternative - that Perfetto be rehired based on a

theory that he entered into his retirement contract due to the Retirement System's misrepresentation of a material fact. Perfetto now finds himself in an administrative appeal of the calculation.

Under R.I.G.L. § 36-8-1(5) " (5) ""Average compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest." R.I.G.L. § 36-8-1(8) defines 'Compensation' as "salary or wages earned and paid for the performance of duties for covered employment." R.I.G.L. § 36-8-1(8) then goes on to specify several types of payment which are not to count for the purposes of compensation such as cashing out sick leave, vacation leave, or compensatory time and salary adjustments granted in anticipation of retirement, among others. See R.I.G.L. § 36-8-1(8).

The Retirement System takes the position that the lump sum paid to Perfetto does not count as compensation for the purposes of R.I.G.L. § 36-8-1(5) as it was not both **paid** and **earned** in the year of receipt. This is a red herring. This argument cannot apply as the lump sum payment was **neither paid nor earned** in the year in question. That was the whole point of PC-2009-2428 - that Perfetto was in fact **not** working due to the wrongful termination. The lump sum was characterized as wages or 'compensation' by operation of the consent order.

Admittedly, the 2010 payment was based upon the sum that Perfetto **would** have earned and other financial considerations. However, the order simply recites (attached herein as **Exhibit B**) the basis for the calculation and characterizes it as 'back pay.' Thus, we are not dealing with a situation where Perfetto is seeking to have cashed-out sick time or salary adjustments or overtime. Nor are we dealing with a situation where Perfetto is receiving a deferred salary or some type of correction of a past compensation order. We are dealing with a situation where the Retirement System is seeking to find further shelter behind its previous malfeasance.

In regards to the cases cited by the Retirement System, R.I. Federation of Teachers v. The Employees Retirement System of Rhode Island, et al., 1994 R.I. Super. LEXIS 63 (Bourcier, J.) is distinguishable on any of several grounds. Notably, the case dealt with a systemic issue - i.e. the unintended consequences or fall out of requiring teachers to defer certain portions of their salary. Unless the State is systematically and frequently violating/ignoring State Law by improperly terminating veterans, concerns of 'retirement bloat' discussed in this case would be entirely inapplicable. Furthermore, this is not a situation of statutorily/legislatively mandated salary deferment. This is a situation where Perfetto was improperly denied a position and was compensated and when compensated had that compensation classified as wages. He never actually worked to earn those wages because he was not allowed to work to earn those wages.

In regards to Asselin v. ERSRI, 1998 (Hearing Officer E. Giannini) Asselin received lump sum payments due to a calculation error in her start date and an incorrect hourly rate. Once again, this is distinguishable from the current circumstances - as noted by the Asselin hearing officer on page five (5) "... the salary or wages earned are paid for the performance of duties." No such duties were ever performed by Perfetto due to the malfeasance of his employers. The same is true of Defelice et al. v. ERSRI, 1998 (Hearing Officer C. Koutsogiane). The lump sum payments in all of the cited cases were lump sum payments predicated on work actually done by the recipients and paid at a later date. That is clearly and irrefutably not the situation that has befallen Mr. Perfetto.

Perfetto is not seeking some sort of windfall payment. He was improperly terminated and later compensated. He paid taxes upon the lump sum payment at the time of receipt to the very same State which is now attempting to slash his retirement benefits. Perfetto is ready willing and able to explore the possibility of being reinstated to his previous position.

In sum, the respondent cannot avoid a necessary consequence of its malfeasance. The cases cited by the Retirement System are distinguishable, and the lump sum payment was characterized as

wages by consent order. The wages count towards the year they were received and the initial calculation of wages was correct.

Robert Perfetto
By HIS Attorneys

SAMUEL KENNEDY-SMITH, Esq.
RI Bar Reg No. 8867
23 Acorn Street
Providence, RI, 02903
401-273-8200
sakenned@gmail.com

CERTIFICATION

TO: Michael P. Robinson, Esq.
John H. McCann, Esq.
Shechtman Halperin Savage LLP
1080 Main Street
Pawtucket, RI, 02860

I hereby certify that I mailed a true copy of the within to the above-named attorney of record.

DATE: April 29, 2015 Patricia Germain

EXHIBIT A

Employees' Retirement System of Rhode Island

June 20, 2014

Keven A. McKenna
23 Acorn Street
Providence, RI 02903

RE: Robert Perfetto

Dear Attorney McKenna:

We write regarding the above retiree and his request to have a lump sum retroactive payment he received from his employer which represented "back pay in the amount of $55,775.00" for the years 2007-2009 be used in the calculation of his pension benefit. This request cannot be granted.

Mr. Perfetto retired on August 1, 2013. Given his eligibility under Rhode Island General Law (RIGL), the calculation of his Final Average Compensation was based on three (3) consecutive years where compensation was the highest. Specifically, the 78 consecutive pay periods during 2010-2013 where compensation was **earned** and **paid** as provided in RIGL.

The Employees' Retirement System of Rhode Island (ERSRI) received a copy of the Consent Order from the Superior Court which sets forth the amount of back pay to be made to Mr. Perfetto, the period covered and the reasons for the payment. The sum paid in the amount of $55,775.00 reflects moneys received and earned for the school years from 2007 through 2009.

Rhode Island General Laws define average compensation and provides the following:

> RIGL §36-8-1 (5)(a) "Average compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest. For members eligible to retire on or after October 1, 2009, "Average compensation" shall mean the average of the highest five (5) consecutive years of compensation within the total service when the average compensation was the highest.

The term "compensation" is defined as the following :

> RIGL §36-8-1(8) "Compensation" as used in chapters 8 -- 10 of this title, chapters 16 and 17 of title 16, and chapter 21 of title 45 shall mean salary or base wages earned and paid for the performance of duties for covered employment, including regular longevity or incentive plans approved by the board, but shall not include payments made for overtime or any other reason other than performance of duties, including but not limited to the types of payments listed below:
>
> (i) Payments contingent on the employee having terminated or died;
>
> (ii) Payments made at termination for unused sick leave, vacation leave, or compensatory time;
>
> (iii) Payments contingent on the employee terminating employment at a specified time in the future to secure voluntary retirement or to secure release of an unexpired contract of employment;
>
> (iv) Individual salary adjustments which are granted primarily in anticipation of the employee's retirement;
>
> (v) Additional payments for performing temporary or extra duties beyond the normal or regular work day or work year.

As you can see the statutory definition of compensation provides for salary "*earned* and paid".

Since the documents produced show that the earnings were for the performance of duties outside of the calculation period, even though they were received within the calculation period, consistent with RIGL, these payments were not used to calculate Mr. Perfetto's pension benefit.

This letter constitutes official notification of an administrative denial. Pursuant to Regulation No. 4, Rules of Practice and Procedure for Hearings of the Employees' Retirement System of Rhode Island, Section 3.00, any member aggrieved by an administrative action may request a hearing before the Retirement Board. Upon such request, the matter will be deemed a contested case. Such request shall be in writing and shall be sent to the Retirement Board, 50 Service Avenue, 2nd Floor, Warwick, RI 02886,Attention: Frank J. Karpinski, Executive Director, within 60 days of date of the letter from the Executive Director or Assistant Executive Director constituting a formal administrative denial. A request for hearing shall be signed by the member and shall contain the name of the member; date and nature of decision to be contested; a clear statement of the objection to the decision which

must include the reasons the member feels he or she is entitled to relief; and a concise statement of the relief sought. Failure to strictly comply with the procedures outlined above shall be grounds to deny a request for a hearing.

Sincerely,

Frank J. Karpinski
Executive Director

Enclosure: Employees' Retirement System of Rhode Island and Municipal Employees' Retirement System Rule and Regulations No. 4

Cc: Robert Perfetto

50 Service Avenue, Warwick, RI 02886-1021 (401)462-7600 Fax: (401)462-7691
E-Mail: ersri@ersri.org Web Site: www.ersri.org

WA[6] [6]

Estoppel > Governments > Elements > Injury > Change in Position > Government's Breach of Duty To Inform

For purposes of applying the doctrine of equitable estoppel against a government, the injury element is satisfied if there was a change of position by a person with limited resources in reasonable reliance on an agency's silence when that agency had a duty to provide accurate information to the person.

WA[7] [7]

Estoppel > Governments > Elements > Manifest Injustice > Identity of Parties > Factors

The manifest injustice element of applying the doctrine of equitable estoppel against a government focuses on the impact on the particular parties before the court. Among the factors that may be considered are: the extent of the financial burden imposed in light of the parties' income and resources; which party was at fault; whether circumstances might have alerted the party seeking to assert equitable estoppel to the error; and whether any reasonable inference can be drawn that the party seeking to assert equitable estoppel attempted to abuse a governmental program.

WA[8] [8]

Estoppel > Governments > Elements > Impairment of Governmental Functions > Loss of Revenue

For purposes of applying the doctrine of equitable estoppel against a government, governmental powers are not necessarily impaired by a loss of public revenue.

WA[9] [9]

Estoppel > Governments

Elements -- Impairment of Governmental Functions -- Public Policy Factors. In determining whether applying the doctrine of equitable estoppel against a government will impair governmental powers, a court will apply public policy factors, including identifying the party which could have prevented the error that occurred; identifying the party which is in the better position to ensure that errors of the same kind do not occur in the future; preventing windfall benefits unrelated to present needs; and safeguarding the accurate and orderly administration of governmental programs.

Counsel: *William Rutzick* and *Schroeter, Goldmark & Bender, P.S.; Yvette Hall War Bonnet* and *Elizabeth A. Schott* of *Evergreen Legal Services;* and *Barbara Baker* of *Puget Sound Legal Assistance Foundation,* for appellants.

Kenneth O. Eikenberry, Attorney General, [***2] and *Robert L. Schroeter, Assistant,* for respondents.

Judges: Agid, J. Baker and Kennedy, JJ., concur.

Opinion by: AGID

Opinion

[*16] [**1229] Petitioners Mikhail Kramarevcky and Olivia S. Jinneman, both former recipients of public assistance benefits, challenge the reversal by a Department of Social and Health Services (DSHS) review judge of the initial decisions made by the administrative law judges (ALJ) in each of their cases. The ALJ's found that equitable estoppel applied to prevent DSHS from seeking recoupment of public assistance overpayments made by DSHS to each of the petitioners. We agree with the ALJ's and reverse the decision of the review judge.

I

Facts of the Cases

Kramarevcky

Petitioner Mikhail Kramarevcky and his wife are refugees from the Soviet Union who arrived in the United States on April 26, 1989, with their minor son, Andre. Between September 1989 and October 1990, the Kramarevckys received both income and food assistance benefits through the Family Independence Program administered by DSHS. Kramarevcky obtained employment in December 1989 and provided DSHS with a copy of his first pay stub. DSHS failed to send Kramarevcky monthly income reporting [***3] forms as required by established procedure. Kramarevcky therefore did not understand that he had any further obligation to report his wages. As a result, his earned income was not considered in DSHS' calculation of benefits awarded to his family for the 4-month period of February through May 1990. DSHS subsequently determined that Kramarevcky had received an overpayment of $ 1,375 in financial assistance and $ 262 in food assistance [*17] during

that 4-month period and issued an overpayment letter to that effect.

After the administrative hearing at which Kramarevcky contested the assessed overpayments, the ALJ found that Kramarevcky had followed all proper procedures and had no reason to believe his eligibility had ceased, that he could have been eligible for job training reimbursement had he not received the overpaid benefits, and that both he and his wife are now partially disabled and have no income or resources with which to repay DSHS. The ALJ therefore concluded that each of the elements of the defense of equitable estoppel had been met, and DSHS was estopped from recouping the overpaid amounts.

Jinneman

Olivia Jinneman was the recipient of categorically needy medical **[***4]** assistance under the Aid to Families with Dependent Children (AFDC) Program, also administered by DSHS. Jinneman had provided DSHS with accurate information concerning the date of birth of her son, whose 18th birthday occurred on April 29, 1988. Because her son was not attending school at the time of his 18th birthday, the family unit became ineligible for the AFDC program. As a result, Jinneman was no longer eligible for the medical coupons she continued to receive from May 1, 1988, through June 30, 1989. Upon discovering its error, DSHS terminated Jinneman's medical assistance and assessed a $ 1,759.94 overpayment against her for medical assistance received during that period.

At her hearing to contest the overpayment assessment, a different ALJ found that the overpayment stemmed solely from DSHS' error, and that Jinneman would have obtained medical care through alternative sources such as women's clinics and the fire department if she had been correctly advised of her ineligibility for medical assistance. The ALJ also found that Jinneman's average disposable income for the 11 months preceding the hearing was $ 527 a month, an amount barely adequate to meet her current needs. **[***5]** The **[*18] [**1230]** judge concluded that the elements of equitable estoppel had been met, and DSHS was therefore estopped from recouping the assessed overpayment from Jinneman.

DSHS appealed each of the initial decisions made by the ALJ's to a DSHS review judge. The review judge adopted all the findings of fact made by the ALJ's in each case, but reversed on the basis that all of the elements required to assert equitable estoppel against the government were not met. Each of the recipients subsequently filed a petition for review in Snohomish County Superior Court pursuant to *RCW 34.05.510 et seq.* and *RCW 74.08.080*. The petitions were consolidated through an agreed order, and certified to this court, which accepted review by order of May 23, 1991.

II

Standard of Review

[1][↑] [1] *[2]*[↑] [2] *HN1*[↑] An agency's determination that the elements of equitable estoppel have not been met presents a mixed question of law and fact. ***Coble v. Hollister, 57 Wn. App. 304, 308-09, 788 P.2d 3 (1990)***. *HN2*[↑] In reviewing administrative decisions, we apply a clearly erroneous standard to factual findings and review legal conclusions de novo. *Franklin Cy. Sheriff's Office v. Sellers, 97 Wn.2d 317, 324-25, 646 P.2d 113 (1982)*, **[***6]** *cert. denied, 459 U.S. 1106 (1983)*. When conclusions of law are not supported by or are inconsistent with the findings, the findings control. *Mell v. Winslow, 49 Wn.2d 738, 747, 306 P.2d 751 (1957)*; *Riley v. Sturdevant, 12 Wn. App. 808, 812, 532 P.2d 640 (1975)*. In both of these cases, the review judge adopted all of the findings of fact made by the ALJ's, which findings are not contested. The issues raised on certification concern the application of law to those facts and are thus conclusions of law subject to de novo review.

III

Equitable Estoppel Doctrine

[3][↑] [3] *[4]*[↑] [4] *[5]*[↑] [5] *HN3*[↑] The elements of equitable estoppel are:

> (1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) [an] action by the other party on the faith of such admission, statement, or act; and (3) [an] **[*19]** injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act.

Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). *HN4*[↑] When a party seeks to assert equitable estoppel against the State, that party must also show (1) that **[***7]** equitable estoppel is necessary to prevent a manifest injustice and (2) that the exercise of governmental powers will not thereby be impaired. *Finch v. Matthews, 74 Wn.2d 161, 175, 443 P.2d 833*

(1968). Because equitable estoppel against the government is disfavored, each of the elements must be established by clear, cogent and convincing evidence. Chemical Bank v. WPPSS, 102 Wn.2d 874, 901 n.7, 691 P.2d 524 (1984), cert. denied, 471 U.S. 1065, 1075 (1985); Mercer v. State, 48 Wn. App. 496, 500, 739 P.2d 703, review denied, 108 Wn.2d 1037 (1987). The burden of proving each of the elements is on the party seeking to invoke the doctrine of equitable estoppel. Pioneer Nat'l Title Ins. Co. v. State, 39 Wn. App. 758, 760-61, 695 P.2d 996 (1985); Mercer, 48 Wn. App. at 500.

HN5[↑] Where public revenues are involved, a general rule has been articulated that, at least in tax cases, courts should be "most reluctant" to find the State equitably estopped. Harbor Air Serv., Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 367, 560 P.2d 1145 (1977) (applying equitable [***8] estoppel to the State); Wasem's, Inc. v. State, 63 Wn.2d 67, 70, 385 P.2d 530 (1963) (finding the elements of estoppel not met). Further, current federal and state legislation both impose on DSHS the duty to take all possible steps to recoup overpaid amounts. 42 U.S.C. § 602(a)(22); RCW 43.20B.630; WAC 388-44-140. However, neither federal nor state legislation and case law prohibit the application of equitable estoppel in appropriate cases. E.g., Harbor Air; Lentz v. McMahon, 49 Cal. 3d 393, 777 P.2d 83, 261 Cal. Rptr. 310 (1989).

[**1231] IV

Application of the Doctrine

The parties agree that the first two elements of equitable estoppel were met in each of these cases. At issue here is [*20] the determination by the review judge that the remaining elements -- "injury", "manifest injustice", and "nonimpairment of government powers" -- were not met in either case.

A. The Injury Element.

The review judge concluded that, in order to establish an injury, a recipient must demonstrate either that he or she was substantively eligible for the assistance paid, or that the recipient was eligible for some other [***9] form of benefits that he or she would have received but for the overpaid assistance. [1] In characterizing the injury requirement in this manner, the review judge declined to consider as binding or instructive two Washington cases concerning the application of equitable estoppel, West v. Department of Social & Health Servs., 21 Wn. App. 577, 586 P.2d 516 (1978), review denied, 92 Wn.2d 1032 (1979) and Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 530 P.2d 298 (1975), relying instead on two out-of-state cases, Lentz v. McMahon, supra, and Thrift v. Adult & Family Servs. Div., 58 Or. App. 13, 646 P.2d 1358 (1982). The review judge's reliance on these out-of-state cases is misplaced.

[***10] In *Lentz*, the court held that a recipient may assert equitable estoppel as a defense when a government agent causes a claimant to fail to comply with a procedural precondition to eligibility. The court did not reach the question presented here; *i.e.*, can the nature of the official misconduct and the resulting hardship on an ineligible recipient outweigh the damage to the government caused by prohibiting the repayment assessment, thus supporting a claim of estoppel. 49 Cal. 3d at 401-02. *Lentz* simply does not provide support for the conclusion that an ineligible recipient of overpaid benefits is precluded from asserting the defense of equitable estoppel.

Thrift is not persuasive for a different reason. In *Thrift*, the Oregon court declined to apply equitable estoppel on the [*21] ground that the recipient did not "lose a benefit to which she was otherwise entitled." 58 Or. App. at 17. There, the applicant, through agency error, had received an amount of public assistance greater than that to which she was substantively entitled. However, that same court has subsequently ruled that equitable estoppel in Oregon is not limited [***11] to cases in which the individual asserting estoppel was deprived of a benefit that would have been received but for the government's misleading or erroneous actions. In In re Tax Rate Assessments of Western Graphics Corp., 76 Or. App. 608, 613-14, 710 P.2d 788, 791 (1985), the Oregon court held that a party asserting estoppel must establish that he relied on misleading information to his detriment, which may, but need not, have involved a lost benefit to which he was entitled. Thus, *Thrift* is no longer the law in Oregon.

In contrast, *West* and *Wilson* are both instructive with respect to the manner in which equitable estoppel has been applied in Washington. While *Wilson* involved the assertion of equitable estoppel against a private, rather

[1] The review judge also announced that any such injury is limited to the amount of other benefits forgone as a direct consequence of receiving the overpayment, which amount must be proved by clear, cogent and convincing evidence. We note that there is currently no such requirement under Washington law, and decline to engraft such a requirement onto it.

than a governmental, entity, it speaks to the first three elements of equitable estoppel, the third of which is, of course, the injury element. [2] Both *Wilson* and *West* strongly suggest that substantive eligibility for an overpaid benefit is not a necessary prerequisite to a finding that injury results from the repayment of an overissued amount.

[*12]** **[**1232]** In *Wilson*, the parties agreed that Mr. Wilson was not substantively eligible for excess pension payments he had received. *Wilson, 85 Wn.2d at 80*. However, the court held that Westinghouse was estopped from recouping excess pension benefits already paid to Wilson because of an error by Westinghouse in computing those benefits. It was clear that the recipient had properly assumed that payments tendered to him were accurate and had structured his life accordingly. [3] **[*22]** *Wilson, 85 Wn.2d at 79, 82*. *West* also involved a benefit, in the form of forbearance of an obligation, to which the plaintiff was not substantively entitled. *West, 21 Wn. App. at 579*. There, the court held that DSHS was estopped from collecting foster care payment contributions from a parent. The court found that the parent had changed her position to her detriment, *i.e.*, unknowingly acquired the support obligation, as a result of DSHS' silence in the face of its duty to inform West of that accruing obligation.

[*13]** *[6]*[↑] [6] Thus, in analyzing the injury requirement, we look to see if there was a change in position by a party reasonably relying on an agency's silence in the face of a duty to accurately inform the party invoking equitable estoppel. Despite DSHS' failure to perform its duty to inform Kramarevcky and Jinneman, [4] it seeks to require them to repay debts which they had no reasonable basis to anticipate and for which they made no provision. These cases are indistinguishable from *West* and *Wilson*. Given the unchallenged findings here with respect to the limited resources of each of the petitioners, we hold that the imposition of the debt and the burden imposed by requiring its repayment is a sufficient injury to satisfy that requirement of equitable estoppel.

[*14]** B. The Manifest Injustice Requirement.

The review judge also concluded that requiring the petitioners to repay amounts for which they were not categorically eligible would not result in a manifest injustice. She reasoned that this requirement was not met because the State would not achieve any gain by recovering amounts wrongfully paid and because there was no "'solemn written **[*23]** commitment'" accompanying the issuance of the overpaid assistance. Both factors are bases on which equitable estoppel has been invoked against the government in earlier Washington cases. [5] Washington case law does not suggest, however, that these are either necessary or exclusive factors in determining whether a manifest injustice will result. **[***15]** [6]

Petitioners and DSHS evaluate any potential injustice in allowing recoupment of the overpaid benefits from contrasting perspectives. DSHS argues that applying estoppel would be unjust to other needy recipients who would be limited only to the correctly calculated amount and would not receive a similar "windfall". Petitioners emphasize the effect of the review judge's decision on the individual parties before the court. They argue that, as the ALJ in each case concluded after considering the petitioners' resources and earning capacities, a manifest injustice would result from requiring **[**1233]** the

---

[2] *HN6*[↑] Washington case law applies the same three basic elements of estoppel to private or governmental entities. The elements specifically required to establish equitable estoppel against the government are in addition to these first three elements. *E.g., Beggs v. Pasco, 93 Wn.2d 682, 689, 611 P.2d 1252 (1980); Shafer, 83 Wn.2d at 622-23*.

[3] In contrast, the court found no injury with respect to readjusting the prospective payments: "A deprivation of a mere possibility, without a showing that it *likely* would have become a reality, is an insufficient showing of prejudice upon which to predicate an estoppel." *65 Wn.2d at 83*.

[4] WAC 388-44-020(4) (DSHS "must inform all applicants and recipients of their rights and responsibilities concerning eligibility for and receipt of assistance"); WAC 388-38-030(3) ("Each applicant shall be fully informed of his or her legal rights and responsibilities in connection with public assistance").

[5] *Finch v. Matthews, 74 Wn.2d 161, 176, 443 P.2d 833 (1968)* (equitable estoppel deemed necessary to prevent the State's obtaining unjust enrichment or dishonest gains at the expense of a citizen); *State ex rel. Shannon v. Sponburgh, 66 Wn.2d 135, 143, 401 P.2d 635 (1965)* (equitable estoppel applied to prevent an administrative body from revoking its approval of a variance where the applicant, who acted in good faith on a "solemn written commitment", would be bankrupt as a result).

[6] *Mercer Island v. Steinmann, 9 Wn. App. 479, 482, 513 P.2d 80 (1973)* characterized this requirement as an "obvious injustice" and suggested that this means that the evidence must present an unmistakable justification for imposition of the doctrine.

repayments in these circumstances.

[7][↑] [7] Washington case law supports petitioners' position. Our *HN7*[↑] courts have consistently evaluated the potential for manifest injustice in terms of the impact on the parties before them, **[***16]** not of unfairness to third persons who are not parties to the case. [7] The focus of these cases on the manifest injustice to the parties before the court is the correct one. We conclude that it would be manifestly unjust to require persons with extremely limited resources and income to **[*24]** take on the added burden of repaying a debt incurred entirely without their knowledge and acquiescence, solely through the fault of the party against whom estoppel is sought.

The record below supports our conclusion that failure to apply equitable estoppel here will result in a manifest injustice. As the ALJ's found, petitioners provided timely and accurate information to DSHS, the overpayment stemmed from DSHS' error and **[***17]** its error alone, the overpayment involved a simple continuation of benefits for which petitioners had been eligible and which were already being received at the time of the error, and there were no circumstances which might have alerted the recipients to the fact of overpayment. [8] As noted above, the ALJ's also found that the petitioners do not have the resources to repay the debt without drawing on funds currently needed to meet their most basic needs. In addition, there is no evidence from which any reasonable inference can be drawn that petitioners in any way abused the public assistance system. The combination of these facts, which are not disputed, is persuasive evidence that the manifest injustice requirement is met here.

[*18]** C. Impairment of Governmental Functions.

The review judge looked to the cumulative effect of allowing the application of equitable estoppel in all cases like these as a basis for precluding assertion of the doctrine **[*25]** here. She concluded that DSHS would be "excessively impaired in the administration of public assistance programs" due to the expense to the State of being prevented from assessing overpayments in other similar situations. [9]

[8][↑] [8] The review judge erroneously relied on *Litz v. Pierce Cy., 44 Wn. App. 674, 684, 723 P.2d 475 (1986)* to justify considering the potential cumulative effect of similar decisions as a basis for refusing to estop the State. In *Litz*, the court did conclude that applying equitable **[***19]** estoppel would excessively impair Pierce County's exercise of its governmental powers. However, this was because the local government would be required to undertake repairs costing approximately $ 1 million to maintain a specified level of ferry service to a private island under circumstances in which Pierce County had made no assurances that the existing level of service would continue indefinitely. *Litz, 44 Wn. App. at 683-84*. **[**1234]** Thus, *Litz* does not stand for the proposition that a court may speculate about the potential cumulative impact of many similar outcomes in other cases to justify a conclusion that equitable estoppel cannot be applied in the case before it. Moreover, loss of state revenue alone does not necessarily impair governmental powers. *Harbor Air, 88 Wn.2d at 367*.

[9][↑] [9] Rather, *HN9*[↑] we must look to public policy considerations to determine whether application of any equitable defense interferes with the proper exercise of governmental duties. *Housing Auth. v. Northeast Lk. Wash. Sewer & Water Dist., 56 Wn. App. 589, 593, 784 P.2d 1284, 789 P.2d 103, review denied, 115 Wn.2d 1004 (1990)*. **[***20]** We consider relevant to

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[7] *E.g., Beggs, 93 Wn.2d at 689; Harbor Air, Finch, 74 Wn.2d at 176; Playhouse Corp. v. Liquor Control Bd., 35 Wn. App. 539, 540, 667 P.2d 1136 (1983); Hasan v. Eastern Wash. Univ., 24 Wn. App. 829, 834, 604 P.2d 191 (1979)*.

[8] In contrast, *see Cudal v. Sunn, 69 Hawaii 336, 346, 742 P.2d 352, 358 (1987)*, where the Hawaii Supreme Court declined to apply the doctrine of equitable estoppel in part because the recipient was aware that there might be a reduction in the assistance to which she was entitled when she and her daughter became part of another household.

Here, petitioners' reliance on DSHS' acts was reasonable and, by not contesting the second element of equitable estoppel in these cases, DSHS appears to so concede. *Schoneman v. Wilson, 56 Wn. App. 776, 784, 785 P.2d 845 (1990)* *HN8*[↑] ("Implicit in the [three] factors is that the assertion on which estoppel is based must induce detrimental reliance by the other party. Such reliance, in turn, must be reasonable.") (Citation omitted.) While we recognize that the reasonableness of a party's reliance is properly analyzed under the second element of equitable estoppel, it is difficult to conceive of a case in which a manifest injustice could be found in the absence of reasonable reliance.

[9] We express some dismay at the assumption that similar errors will continue to be made in quantities large enough to significantly affect state revenues and question whether such an assumption is, in any event, a proper basis for a judicial decision.

this inquiry which party could best have prevented the mistakes that occurred [10] and who is in the better position to assure [*26] that future errors of this kind do not occur. [11] Here, that party is DSHS. The regulatory scheme does not place the burden of determining eligibility on the recipient. [12] Thus, when all information is accurately and timely provided by the recipient, it is appropriate to put the burden on the government to assess eligibility accurately in light of the information provided.

We recognize that policies such as [***21] preventing windfall benefits unrelated to present needs and safeguarding the accurate and orderly administration of the welfare system are also important. [13] However, as noted above, these petitioners are impoverished and lack any resources with which to repay DSHS, thus minimizing the persuasiveness of the windfall rationale. In addition, as the ALJ's found, both families would have been eligible for other benefits and services had they been informed that they were no longer eligible for assistance from DSHS. Finally, we hope that application of equitable estoppel in these cases will improve the accurate and orderly administration of the entitlements system by providing an impetus to more adequately monitor and control it. The overpayments here stemmed from DSHS' error alone. Because only DSHS is in a position to review and revise its procedures so as to assure that fewer such mistakes are made in the future, government functioning will not be impaired.

[***22] In so holding, we emphasize that it is the particular combination of factors present here that is dispositive of this case. Other cases might yield different results based on the presence or absence of factors such as those enumerated above.

[*27] Because we have already ruled in favor of petitioners on their equitable estoppel claim, we need not reach the question of whether, based on the unappealed decision of the Thurston County Superior Court in Chaplin v. Sugarman, Thurston Cy. cause 87-2-01239-2 (June 12, 1990), reaching a similar result, collateral estoppel also applies in this case.

V

Attorney Fees

HN10[↑] RCW 74.08.080(3)(a) provides that an appellant is entitled to reasonable attorney fees and costs in the event that a decision is rendered in the appellant's favor by a court reviewing an adjudicative proceeding involving public assistance benefits. The attorney fees requested by petitioners are awarded subject to the requirements of RAP 18.1.

Reversed.

End of Document

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[10] The ease with which a misunderstanding could have been avoided is a factor in allowing the assertion of equitable estoppel. Harbor Air, 88 Wn.2d at 368.

[11] It has been suggested that when a court refuses to apply estoppel in an appropriate situation, the court encourages inefficient bureaucracy. See Comment, *Estoppel and Government*, 14 Gonz. L. Rev. 597, 606 (1978-1979).

[12] RCW 74.08.060.

[13] These are policy considerations noted by the court in Lentz, 49 Cal. 3d at 400-01.

IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 3

Copy of Complaint Filed by Appellant, Robert Perfetto,

in Providence County Superior Court

#1 Appellant's 1 Full

Providence County

State of Rhode Island and Providence Plantations

Superior Court

Robert Perfetto
Plaintiff

VS

Employees' Retirement System
Of Rhode Island and
Gina Raimondo, in her capacity as
General Treasurer of the State of Rhode
Island and
Rhode Island Retirement Board
Defendant

13-

EXHIBIT
1-Perfetto
9-26-14 PC

Complaint

Parties

1. The Plaintiff is Robert J. Perfetto of 15 Harbour Island Road, Narragansett, R.I. 02882.

2. The Defendants are (a) the Employees' Retirement System of Rhode Island, (b) Rhode Island Retirement Board located each located at 50 Service Avenue, 2nd Floor of Warwick, Rhode Island 02886 and (c) Gina Raimondo in her official capacity as the General Treasurer of the State of Rhode Island (hereinafter referred to as the "Treasurer"), located at the State House on Smith Street in Providence, Rhode Island 02903. Pursuant to R.I.G.L. §42-10-11 et seq., the Treasurer has responsibility for and control of state funds and the payment of state retirement benefits administered through the Employees' Retirement System of Rhode Island. Pursuant to R.I. G.L. §36-8-9, the Treasurer shall serve as ex-officio chairperson of the Rhode Island Retirement Board and custodian and treasurer of the funds of the Employees' Retirement System of Rhode Island.

3. Defendant, Employees' Retirement System of Rhode Island, is established and placed under the management of the Rhode Island Retirement Board pursuant to R.I.G.L. §§36-8-2 and 36-8-3. The Retirement Board, pursuant to R.I.G.L. §36-8-9, by statute is in

charge of administration of the retirement system and serves as Secretary to the Retirement Board. The Employees' Retirement System of the State of Rhode Island and the Retirement Board are hereinafter collectively referred to as the "Retirement System".

Jurisdiction

4. This Honorable Court has jurisdiction over this controversy pursuant to section 1 and 2 of Article X of the R.I. State Constitution and R.I.G.L. §§8-6-13 (equity) and 8-6-14 (law), and R.I.G.L. §9-30-1, et seq (Uniform Declaratory Judgment Act).

Facts:

5. The Plaintiff was born on July 1, 1947.
6. The Plaintiff's base entry and hire date was restored to September 8, 1987 pursuant to a Superior Court Judgment, C.A. No. 09-2428 and his back pay of $55,775 was awarded on June 23, 2010.
7. Plaintiff is entitled to certain benefits of retirement upon reaching the standards for retirement as they existed on September 30, 2009 ("Group A"), including "average compensation" being ...the average of the highest three (3) consecutive years of compensation.." as per R.I.G.L. §36-8-1.
8. On August 1, 2013 the Plaintiff retired from the Employment System based upon calculations as a Group A member and as set forth in that certain "Benefits Estimate" prepared by John P. Midgley of the Retirement System, in his clerical capacity pursuant to R.I.G.L. §§36-8-1 and 36-8-10, during a meeting initiated by the Plaintiff to determine his retirement income should he desire to retire at this time.

9. Plaintiff relied on the calculation of the monthly retirement benefit which he was informed he would receive and based upon said information, Plaintiff concluded that retirement was an option at this time.

10. Thereinafter the Treasurer's office mailed the incorrect statutory sum due for the monthly retirement check of the Plaintiff from the Treasury account of the Defendant, the Retirement System.

11. The retirement check received by Plaintiff was incorrect in that it was approximately $1,000 less than the calculations set forth in the Benefits Estimate presented to Plaintiff at the time he entered into the retirement contract. When Plaintiff questioned the discrepancy, he was informed that "an error was made" in the calculation of benefits.

12. But for the incorrect calculation of his retirement benefits, the Plaintiff would not have retired and the Defendants are equitably estopped from not paying the amount of monthly retirement sums promised and relied upon by the Retirement System.

13. Had the Retirement System not promised the incorrect monthly benefit, Plaintiff would not have retired and would have continued working.

14. The false fact presented by the Employee Retirement System induced the Plaintiff to enter into a retirement contract; thus, the Plaintiff's retirement contract is void based on such misrepresentation of a material fact for which the Plaintiff relied upon.

Wherefore, Plaintiff demands the following alternative forms of relief:

(i) Order the Treasurer and the Retirement System to abide by the Benefits Estimate and pay the Plaintiff the correct monthly sum in accordance with statute, plus interest;

(ii) In the alternative, declare the retirement contract void and order that the Plaintiff be rehired as of August 1, 2013 as if he had not been falsely induced to retire and that he be awarded a retroactive credit for income he would have earned, plus interest.

(iii) Plaintiff be awarded counsel fees and costs.

(iv) Provide such other relief which is just and equitable.

Plaintiff
By His Attorney

Keven A. McKenna, #662
23 Acorn Street
Providence, Rhode Island 02903
401 273-8200 Tel.

IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 4

Griggs v. E.I. DuPont de Nemours & Co.

237 F.3d 371 (4th Cir. 2001).

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237 F.3d 371 (4th Cir. 2001)

JOSEPH D. GRIGGS, Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY, Defendant-Appellee.

JOSEPH D. GRIGGS, Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY, Defendant-Appellee.

No. 99-2508 No. 99-2607.

United States Court of Appeals, Fourth Circuit

January 9, 2001

Argued: September 28, 2000.

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington.

James C. Fox, District Judge. (CA-98-17-7-F)

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[Copyrighted Material Omitted]

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COUNSEL ARGUED: Michael Murchison, MURCHISON, TAYLOR & GIB-SON, L.L.P., Wilmington, North Carolina, for Appellant.

Raymond Michael Ripple, E.I. DUPONT DE NEMOURS & COMPANY, Wil-mington, Delaware, for Appellee.

ON BRIEF: Donna L. Goodman, E.I. DUPONT DE NEMOURS & COMPANY, Wilmington, Dela-ware; Gardner G. Courson, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Atlanta, Georgia, for Appellee.

Before WILKINS, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Traxler wrote the opinion, in which Judge Wilkins and Judge Williams joined.

OPINION

TRAXLER, Circuit Judge:

Joseph Griggs brought an action against his former employer E.I. DuPont de Nemours & Company ("DuPont") under section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), see 29 U.S.C.A. § 1132(a)(3) (West 1999). Griggs claimed that DuPont breached its fiduciary duty by leading Griggs to believe that he was eligible for a tax-deferred lump sum distribution

of early retirement benefits under DuPont's Temporary Pension System and then failing to notify Griggs when DuPont learned that Griggs's election to receive such a distribution was not permitted by federal tax laws. Instead, DuPont made the distribution directly to Griggs which resulted in an immediate tax and defeated the reason that Griggs elected to retire early. The district court concluded that DuPont breached its fiduciary duty but held that ERISA does not provide the

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relief that Griggs seeks. We agree that, under these circumstances, DuPont breached its duty as an ERISA fiduciary. However, we conclude that Griggs is not necessarily without a remedy under ERISA, and we remand for the district court to explore the issue further.

I.

DuPont serves as the administrator for its Pension and Retirement Plan ("the pension plan"), a tax-qualified defined benefit pension plan under the Internal Revenue Code ("tax code"), see 26 U.S.C.A. § 401(a) (West Supp. 2000), and ERISA, see 29 U.S.C.A. § 1002(2), (35) (West 1999). DuPont also administers a qualified contribution plan known as the Savings and Investment Plan ("SIP"). The SIP is a retirement savings vehicle akin to a 401(k) plan through which an employee's benefits accumulate on a tax-deferred basis.

In 1993, DuPont amended the pension plan to create a program called the Temporary Pension System ("TPS"). According to DuPont, TPS was designed to assist DuPont employees who were leaving their jobs at DuPont, but not necessarily retiring. A participant in TPS was entitled to one month of pay for every two years of service, not to exceed one year's salary, in addition to any other benefits from the pension plan to which the participant might be entitled. The TPS benefit could be received as either a lump sum payment or as an additional amount added to the employee's regular monthly pension payment. Benefits under TPS, however, were not universally available to DuPont employees at all times. Instead, TPS benefits were offered to employees for a limited "window" period, and the decision to make TPS benefits available occurred on the regional level.

Griggs was a long-time employee of DuPont. He began his employment in 1962 and eventually became operations manager for DuPont's nylon fibers division. Griggs was serving in this capacity when he elected early retirement in 1994. During the year or so preceding Griggs's retirement, DuPont was closing one of its nylon plants and, as a result, decided that a workforce reduction was necessary. It was Griggs's understanding that because of the decreased need for employees, DuPont decided to make TPS benefits available to employees in the nylon division as an incentive to retire early. DuPont, however, disputes that the purpose of TPS was to encourage early retirement; rather, the essential aim of TPS was "to provide transition assistance as employees move from a career with DuPont to a career elsewhere." J.A. 175.

Whatever the primary aim of TPS, everyone agrees that TPS benefits were made available in 1994 to a group of DuPont employees that included Griggs. And, given his long-term service, Griggs was among those employees who would be entitled, in addition to his regular pension, to a TPS benefit equivalent to a full year's salary.

Initially, Griggs was reluctant to consider leaving his position with DuPont and retiring early. Griggs was not being forced out of DuPont, and there is nothing before us that suggests Griggs was being pressured to accept the TPS offer. In May 1994, however, Griggs received a written communication from DuPont providing details about TPS that caused him to reevaluate whether he should retire early. For Griggs, what really made the TPS offer attractive was the option to receive his full TPS benefit in a lump sum that could be "rolled over" from the pension plan into his SIP account with DuPont or another qualified vehicle where it would grow on a tax-deferred basis. In its description of the TPS program, DuPont explained that

TPS provides a benefit from the Pension and Retirement Plan [ ] in addition [to the] other pension benefit[s] that you are currently eligible to receive. The additional benefit is as follows:

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One month of pay for every two years of service. Pay to include base pay, Shift Differential pay, Sunday Premium, scheduled overtime pay and any incentive compensation award made in the previous twelve months. The minimum benefit is equal to two months' pay, the maximum is twelve months' pay.

This additional TPS benefit may be taken as a lump sum, or may be added to the monthly payments under an immedi ate or deferred pension. If taken as a lump sum, all or part of the lump sum can be rolled into the DuPont Savings and Investment Plan (SIP), or

any qualified IRA, within 60 days.

Because this benefit is paid from the Pension Trust, in some cases taking the lump sum without rolling it over will cause you to incur an early payment excise tax. If that applies to you, a tax gross up allowance will be paid to off set any overall addition to your taxes.

J.A. 186. This was general, form language that was provided to all potential participants in TPS. Other than this May 1994 communication, DuPont did not make any representations to Griggs concerning the tax implications of his decision to take a lump sum distribution, nor did Griggs request any information from DuPont regarding the potential tax impact on him individually.

After receiving DuPont's written description of TPS benefits, Griggs opted for early retirement and elected to receive his TPS benefit in a lump sum, believing that he could roll it over into the DuPont SIP without incurring immediate tax liability. In July 1994, Griggs received a written statement indicating that, if he were to apply for TPS benefits, the amount of his lump sum distribution would be $132,900, which is about what he expected.

On August 1, 1994, Griggs applied for TPS benefits and filled out an application form for a lump sum payment of his TPS benefit. On the form, Griggs elected to receive "a lump sum payment of the additional pension benefit amount payable under Section XII of the Pension and Retirement Plan." Griggs was presented with various options for the form his lump sum payment would take; he selected the "ROLLOVER SETTLEMENT" which indicated Griggs's desire to "rollover [his] total lump sum benefit in accordance with the deposit information in Section 5." In turn, Griggs indicated in Section 5 of the application that the "[d]eposit is to be made to: SIP (fixed income)."

The reverse side of the application form contained instructions for completing the lump sum payment application. With respect to the lump sum election, the form instructed that "[y]ou have elected a lump sum payment pursuant to Section XII of the Pension and Retirement Plan. In making this election, you understand that it is YOUR responsibility to obtain independent financial and tax advice." Griggs concedes that he sought no such independent tax advice.

Griggs officially retired in late September 1994, and in October DuPont sent Griggs a notice indicating that DuPont was preparing to process his pension payments "in accordance with[his] election." J.A. 207. DuPont, however, did not honor Griggs's election to roll over his lump sum payment into the SIP plan, even though DuPont had said in its description of the TPS program that this could be done. In fact, as early as July 1994 -before Griggs even submitted his TPS lump sum payment application -calculations performed by DuPont showed that section 415 of the tax code would not permit Griggs to roll over his entire TPS benefit into the tax-deferred SIP account. These calculations were apparently performed during the process of providing Griggs with an estimate of the lump sum amount he could expect to receive if he participated in TPS. No one informed Griggs, however, that there was a possibility that the tax code would not permit the entire lump sum to be paid from a qualified plan (like DuPont's pension plan) and that any portion not paid from a qualified plan could not be

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rolled over and would be taxed immediately.[1]

After Griggs submitted his lump sum payment application in August 1994, DuPont performed additional calculations required by section 415 of the tax code and determined that various limits imposed by section 415 barred Griggs from electing to roll over his entire TPS distribution into the SIP or an Individual Retirement Account. During this process, DuPont generated internal reports warning that Griggs was not eligible for the TPS election he made. By mid-September 1994, approximately two weeks before Griggs officially retired, DuPont had been put on notice by its internal calculations that most, if not all, of Griggs's lump sum distribution could not be rolled over into the SIP. Griggs was never advised of this critical fact. Griggs remained unaware of any problem with his election until he received a check in mid-November 1994 for approximately $133,000, his full TPS benefit. Because of the limits imposed by section 415 of the tax code, DuPont paid Griggs's lump sum payment not from the pension plan but from its Pension Restoration Plan, a nonqualified plan. As a result, Griggs was not able to roll the payment into the SIP and was forced to pay a tax of approximately $50,000.

Griggs sued DuPont in North Carolina Superior Court for negligent misrepresentation. Griggs alleged that DuPont made an offer of early retirement to him, using "an incentive lump sum payment in the amount of one year's salary" as an inducement. J.A. 11. The complaint further alleged that DuPont falsely represented that Griggs's "lump sum benefit could be `rolled over into the DuPont Savings and Investment Plan (SIP), or any qualified IRA, within 60 days' thereby avoiding significant tax liability." J.A. 11. Griggs asserted that he suffered tax liability because "DuPont negligently failed to exercise reasonable care and competence in obtaining

or communicating . . . information" relating to "Griggs' ability to roll the lump sum benefit into a qualified plan and thereby avoid taxes." J.A. 12.

DuPont removed the action to federal court and moved to dismiss on the grounds that Griggs's negligent misrepresentation claim under state law was preempted by ERISA. The district court denied the motion, relying on the Ninth Circuit's decision in Farr v. US West, Inc., 58 F.3d 1361 (9th Cir. 1995) (Farr I), which held that ERISA did not preempt the plaintiffs' claim that their employer either fraudulently or negligently misled them regarding the tax consequences of a lump sum distribution under an early retirement program included in the employer's pension plan. See id. at 1365-67. The Ninth Circuit, however, revisited the issue after the Supreme Court subsequently handed down its decision in Varity Corp. v. Howe , 516 U.S. 489 (1996), and held that, under the reasoning in Varity, ERISA preempted the state law fraud and negligent misrepresentation claims. See Farr v. U.S. West Communications, Inc., 151 F.3d 908, 913 (9th Cir. 1998) (Farr II), cert. denied, 120 S.Ct. 935 (2000).

Not long after Farr II was issued, DuPont moved for summary judgment, again contending that ERISA preempted

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Griggs's state law negligent misrepresentation claim.[2] The district court reexamined the preemption issue in light of Farr II and concluded that ERISA preempted Griggs's claim; however, the district court properly permitted Griggs to amend his complaint to include a claim, based on the same facts, for breach of fiduciary duty under ERISA§ 502(a)(3). See 29 U.S.C.A. § 1132(a)(3).

In his amended complaint, Griggs alleged that DuPont was a fiduciary in relation to the pension plan and had breached its fiduciary duty to Griggs by: (1) "falsely representing to .. . Griggs that his lump sum benefit could be rolled over into a qualified IRA or savings investment plan"; (2) "failing to disclose to Griggs, prior to his retirement, that he would not be able to roll over his lump sum payment into a qualified plan because of the limits imposed by Section 415 of the Internal Revenue Code, notwithstanding DuPont's knowledge that this was the case"; and (3) "generally failing to disclose to . . . Griggs the potential impact of Section 415 limits on his ability to roll over his lump sum distribution." J.A. 52. Griggs sought "appropriate equitable and restitutionary relief, including back pay and loss of benefits which [Griggs] lost by virtue of being induced to elect early retirement, [and] reinstatement to his former position with DuPont." J.A. 52.

The parties agreed there were no issues of material fact requiring a trial and made cross-motions for summary judgment on the issue of DuPont's liability under ERISA. Additionally, DuPont sought summary judgment on the basis that ERISA did not provide the remedies that Griggs was pursuing. The district court agreed with Griggs that DuPont had breached its fiduciary duty; however, the court concluded that ERISA did not provide for any of the remedies sought by Griggs and therefore left him the victim of "a wrong without a remedy." J.A. 291.

Griggs appeals the district court's determination that he is without a remedy for DuPont's breach of fiduciary duty. Alternatively, Griggs contends that if the district court correctly held that ERISA affords him no remedy, then the district court mistakenly concluded that ERISA preempted Griggs's state law claim because preemption is not appropriate when Congress fails to provide relief. DuPont crossappeals the district court's conclusion that it breached a fiduciary duty under ERISA.

II.

Although Griggs advances his preemption argument in the alternative, asking us to reach it only if we agree with the district court that Griggs has a viable claim but no remedy, we will address first things first. Thus, we turn to the issue of whether ERISA preempts Griggs's state law negligent misrepresentation claim, keeping in mind the "`presumption that Congress does not intend to supplant state law.'" Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1467 (4th Cir. 1996) (quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995)).

ERISA's broadly-phrased preemption clause provides that ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a) (West 1999). A state law"`relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). In fact, "ERISA pre-empts any state law that refers to or has a connection with covered benefit plans . . . `

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even if the law is not specifically designed to affect such plans, or the effect is only indirect.'" District of Columbia v. Greater

Washington Bd. of Trade, 506 U.S. 125, 129 30 (1992) (quoting IngersollRand Co. v. McClendon, 498 U.S. 133, 139 (1990)). Of course, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n.21. But, as long as the nexus between the state law and the employee benefit plan is not too tangential, "a state law of general application, with only an indirect effect on a pension plan, may nevertheless be considered to 'relate to' that plan for preemption purposes." Smith v. Dunham-Bush, Inc., 959 F.2d 6, 9 (2nd Cir. 1992).

A "state law" includes "all . . . decisions. . . of any State." 29 U.S.C.A. § 1144(c)(1) (West 1999). Thus, in appropriate circumstances, state common law claims fall within the category of state laws subject to ERISA preemption. See Ingersoll-Rand, 498 U.S. at 140; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987). When a cause of action under state law is "premised on" the existence of an employee benefit plan so that "in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists," IngersollRand, 498 U.S. at 140, ERISA preemption will apply. Alternatively, a state law claim is preempted when "it conflicts directly with an ERISA cause of action." Id. at 142; see Powell v. Chesapeake & Potomac Tel. Co. of Va., 780 F.2d 419, 422 (4th Cir. 1985) ("To the extent that ERISA redresses the mishandling of benefits claims or other maladministration of employee benefit plans, it preempts analogous causes of action, whatever their form or label under state law.").

Generally speaking, ERISA preempts state common law claims of fraudulent or negligent misrepresentation when the false representations concern the existence or extent of benefits under an employee benefit plan. See, e.g., Hall v. Blue Cross/Blue Shield of Alabama, 134 F.3d 1063, 1064-66 (11th Cir. 1998) (ERISA preempted claim that fraudulent misrepresentations regarding the scope of coverage induced plaintiff to enroll in her employer-provided health benefits plan); Shea v. Esensten, 107 F.3d 625, 627-28 (8th Cir. 1997) (preemption applied to a state law claim for "fraudulent nondisclosure and misrepresentation about [the plan's] doctor incentive programs" that "limited [the participant's] ability to make an informed choice about his life-saving health care"); Smith, 959 F.2d at 8-10 (ERISA superseded claim that plaintiff was induced to relocate based on his employer's false, oral representations regarding pension benefits). In fact, ERISA preemption is commonly understood to apply to state common law claims that an ERISA fiduciary misrepresented the nature or availability of retirement benefits, or failed to provide enough information to permit the retiring beneficiary to make an intelligent retirement decision. See, e.g., Muse v. International Bus. Machs. Corp., 103 F.3d 490, 493 (6th Cir. 1996) (concluding that ERISA preempts claim that plaintiffs "would have chosen to participate in the superior benefit plan had IBM not negligently or intentionally misrepresented to [them] that no further early retirement plans would be offered"); Vartanian v. Monsanto Co. , 14 F.3d 697, 700 (1st Cir. 1994) (same); Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 756-57 (5th Cir. 1990) (same); see also Carlo v. Reed Rolled Thread Die Co., 49 F.3d 790, 791 (1st Cir. 1995) (concluding that "ERISA preempts a state law claim of negligent misrepresentation against an employer based upon the employer's representations regarding the employee's prospective benefits under an early retirement program").

Originally, Griggs sought relief from DuPont in state court based on a

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theory of negligent misrepresentation. In considering whether ERISA preemption applies to Griggs's claim, however, we look more closely at the factual nature of his claim than any state law label he applies to that claim. See Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 439-40 (1st Cir. 1996) (explaining that a court cannot make a preemption determination solely "based on the form or label of the law . . . . [T]he inquiry into whether a state law 'relates to' an ERISA plan or is merely 'tenuous, remote, or peripheral' requires a court to look at the facts of [a] particular case."). The factual essence of Griggs's claim is that DuPont did not provide any information about the general eligibility limitations on a lump sum rollover of the TPS benefit and then compounded the problem by failing to inform Griggs that federal tax law precluded him from rolling it over into DuPont's SIP, despite DuPont's knowledge of this fact prior to making the TPS distribution. According to Griggs, had he been aware of this limitation, he would not have elected to participate in the TPS program and would have continued working.

This claim has a sufficient "connection with or reference to" DuPont's pension plan to warrant preemption. Shaw, 463 U.S. at 97. Griggs contends that the terms of DuPont's written description of TPS benefits misled him about his eligibility to elect various options under the TPS program, and, when DuPont's internal computations revealed that, in fact, Griggs was not eligible for his preferred TPS payment option (and therefore would not be able to defer the taxes on his early retirement benefit), DuPont failed to pass along this information. The assertion concerns a core function performed by an ERISA fiduciary -the provision of information about plan benefits to "permit[ ] beneficiaries to make an informed choice about continued participation." Varity, 516 U.S. at 502.

The Ninth Circuit Court of Appeals addressed a remarkably similar set of facts in Farr II. There, a group of retired employees brought a claim against their former employer for failing to provide complete information about an early retirement incentive program administered under the company's pension plan. Like DuPont's TPS offer, the program involved in Farr II permitted participants to elect a lump sum benefit and explained that "`[a]ll or part of [lump sum] distribution may be rolled over to another

qualified plan or an IRA . . . without any current tax liability.'" Farr II, 151 F.3d at 911 (second alteration in original). The retirees brought various claims, including fraud and misrepresentation claims, based on the employer's failure to explain that only qualified portions of a lump sum payment would escape immediate taxation. The court explained that the claims were preempted because "the tax consequences of the [early retirement] plan clearly 'relate to' plan administration because they are part of the overall mix of information relied upon by Plaintiffs in making their decisions to participate in the plan." Id. at 913.

We conclude that Griggs's negligent misrepresentation claim, which arises under circumstances nearly identical to those in Farr II, likewise falls within the expansive scope of ERISA's preemption clause.

III.

DuPont does not dispute that, as the administrator of its pension plan, DuPont is a fiduciary for purposes of ERISA when it is engaged in the administration or management of its pension plan. See Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir. 1991) (fiduciary duty attaches where employer "wear[s] two hats" by acting as both employer and plan administrator); Great Lakes Steel v. Deggendorf, 716 F.2d 1101, 1104-05 (6th Cir. 1983) (explaining that ERISA permits an employer to serve as a fiduciary for its employee benefit plan). Neither does DuPont suggest that in conveying

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information about TPS benefits under its pension plan it was not acting in a fiduciary capacity. See Varity, 516 U.S. at 502-03. Rather, DuPont disputes that it violated any obligations imposed upon ERISA fiduciaries.

Congress intended ERISA's fiduciary responsibility provisions to codify the common law of trusts. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989); see also Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1299 (3d Cir. 1993) ("Although the statute articulates a number of fiduciary duties, . . . Congress relied upon the common law of trusts to define the general scope of [trustees' and other fiduciaries'] authority and responsibility.'" (alteration in original) (quoting Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985)). Under common law trust principles, a fiduciary has an unyielding duty of loyalty to the beneficiary. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 152-53 (1985) (Brennan, J., concurring) ("Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA, and it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits."). Naturally, such a duty of loyalty precludes a fiduciary from making material misrepresentations to the beneficiary. See Varity, 516 U.S. at 506; Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. § 1104]."). However, a fiduciary's responsibility when communicating with the beneficiary encompasses more than merely a duty to refrain from intentionally misleading a beneficiary. ERISA administrators have a fiduciary obligation "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000) (internal quotation marks omitted), cert. denied, -- U.S. --, 121 S.Ct. 626, -- L.Ed.2d --,(2000).

Moreover, a fiduciary is at times obligated to affirmatively provide information to the beneficiary. Indeed, "[t]he duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA." Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990). The common law of trusts identifies two instances where a trustee is under a "duty to inform." First, a fiduciary has "a duty to give beneficiaries upon request 'complete and accurate information as to the nature and amount of the trust property.'" Faircloth v. Lundy Packing Co., 91 F.3d 648, 656 (4th Cir. 1996) (quoting Restatement (Second) of Trusts § 173 (1959)). Second, in limited circumstances, a trustee is required to provide information to the beneficiary even when there has been no specific request:

Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information . . . . [However,] he is under a duty to com municate to the beneficiary material facts affecting the inter est of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection . . . .

Restatement (Second) of Trusts § 173 cmt. d. In sum, the duty to inform "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." Bixler, 12 F.3d at 1300; accord Jordan v. Federal Express Corp., 116 F.3d 1005, 1016 (3d Cir. 1997) (recognizing that "it is clear that circumstances known to the fiduciary can give rise to this affirmative obligation [to inform] even absent a

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request by the beneficiary" (alteration in original) (internal quotation marks omitted)).

Griggs's claim focuses primarily on a fiduciary's duty to communicate complete and accurate information to a beneficiary and to refrain from misleading the beneficiary with respect to material facts. Griggs contends that DuPont provided him with information that it knew was material to his decision to accept a TPS distribution, and that upon learning later that this important information was false with respect to Griggs individually, DuPont breached its fiduciary duty by failing to notify him of the inaccuracy. Specifically, the assertion is that DuPont provided employees with an explanation of TPS distribution options that clearly implied to them, as it did to Griggs, that a rollover of TPS benefits could be accomplished tax free, that DuPont later learned these rollovers could not be accomplished without the imposition of an immediate tax, and that DuPont did nothing to warn affected employees like Griggs.

We agree with Griggs and the district court that these facts establish a breach of fiduciary duty by DuPont. In so doing, we acknowledge our agreement with DuPont that it did not have"a duty to provide [Griggs] with individualized notice of all the ways the tax laws would impact his lump sum distribution." Brief of Appellee Cross-Appellant at 14. ERISA does not impose a general duty requiring ERISA fiduciaries to ascertain on an individual basis whether each beneficiary understands the collateral consequences of his or her particular election. See, e.g., Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 452 (6th Cir. 1993) (explaining that "a fiduciary is not obligated to seek out employees to ensure that they understand the plan's provisions"). However, an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent -especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions. In other words, a fiduciary is obligated to advise the beneficiary "of circumstances that threaten interests relevant to the [fiduciary] relationship." Eddy, 919 F.2d at 750. Thus, for example, "when an ineligible person contributes to a fund, a fiduciary has a duty to inform him of his ineligibility within a reasonable time after the [fiduciary] acquired knowledge of that ineligibility." Id. at 751 (alteration in original) (internal quotation marks omitted). In the ERISA context, the recognition of a limited fiduciary duty to inform a beneficiary of material facts in the absence of a specific request for information from the beneficiary is not a ground-breaking proposition. See Jordan, 116 F.3d at 1015 (explaining that fiduciary has an affirmative duty to inform a beneficiary of material facts known by the fiduciary but not the beneficiary and that the irrevocability of a retirement benefits election may be a material omission); Shea, 107 F.3d at 628-29 (holding that fiduciary breached its duty under ERISA by failing to disclose to the beneficiary financial incentives discouraging preferred doctors from making referrals to specialists - information that was necessary for beneficiary to make an informed decision); Bixler, 12 F.3d at 1302-03 (reversing grant of summary judgment to employer on beneficiary's claim that employer breached its fiduciary duty to affirmatively inform beneficiary of COBRA benefits where there was evidence that employer knew beneficiary had unpaid medical expenses that would be reimbursed by an election under COBRA).

Once DuPont learned that Griggs's lump sum rollover election would not be possible and, therefore, that Griggs was no doubt under the mistaken belief that he was eligible to roll"all or part of the lump sum . . . into the DuPont [SIP]" as provided in DuPont's written description, DuPont had a duty to inform him of this development prior to making a fully taxable lump sum distribution. As early as July 1994, before

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Griggs even applied for TPS benefits, DuPont's employees in the pensions and benefits section learned that at least some portion of Griggs's TPS distribution would not qualify for a rollover. By September 1994, it knew that Griggs would not likely be able to exercise his election to receive a tax-deferred lump sum payment at all. And, DuPont should have known that Griggs was under the impression that he could roll the entire lump sum distribution into a taxdeferred vehicle. Thus, before DuPont distributed the TPS benefit and tax consequences attached, it knew -or should have known -that Griggs expected to receive the benefits of having his TPS benefit paid into a tax-deferred account but that, in fact, he was very much mis taken. DuPont should have informed Griggs about this before he retired and before a fully-taxable benefit check was issued to him.

As we earlier alluded, it is critical that Griggs's misunderstanding was fostered by DuPont's TPS explanation. Had DuPont's general, written description of the TPS payment options included a more thorough explanation that federal tax law permits only qualified portions to be rolled over, or that not every employee was eligible for this option, we might view DuPont's duty to inform in a different light. In this case, however, DuPont's pamphlet on TPS benefits included no such explanation and, instead, merely indicated that the beneficiaries could choose whether to roll all or part of their lump sum benefit into DuPont's SIP. We are not impressed by the admonishment appearing on the reverse side of the TPS application form (warning applicants to seek tax advice) since it does not explain that an applicant needs to consult a tax expert to determine if he or she is even eligible to make this election.[3] Also, such a warning might have more force if DuPont, during the course of processing Griggs's application, had not learned that Griggs's

TPS distribution would not qualify for the tax-deferred SIP. But, once DuPont actually learned that there was a problem that threatened to cut substantially into the benefits Griggs thought he would receive, the particular language on the back of the application form did nothing to correct Griggs's obvious misunderstanding. Cf. Eddy, 919 F.2d at 751 ("'A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.'" (quoting Globe Woolen Co. v. Utica Gas & Electric Co., 121 N.E. 378, 380 (N.Y. 1918) (Cardozo, J.)).

DuPont complains that it would be impractical for it to notify beneficiaries like Griggs, given the vast number of pension plan participants who would potentially elect to participate in TPS or a similar program. We do not perceive any tremendous hardship. DuPont need not have rendered any tax advice; rather, it needed only to notify Griggs that, during the processing of Griggs's TPS application, DuPont learned that the tax code may prevent him from taking the rollover option that he selected.[4] Armed with that information, Griggs could have made a more informed choice about the form of payment that he wished his TPS benefit to take or about whether he would even participate in the TPS program. One wonders how inconvenient carrying out such a duty to inform could be since DuPont had already performed all of the necessary calculations.

In Farr II the Ninth Circuit rejected an employer's claim that it satisfied its fiduciary duty to inform when it provided a substantially similar -but even more thorough -written explanation of its early retirement

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benefit options. In Farr II, U.S. West sent a written overview of its early retirement incentives program to employees who were eligible to participate. The overview contained a section entitled "'Tax Considerations Affecting Choice of Distribution'" that identified tax provisions "relevant to the choice between taking the pension benefits in a lump sum or in a series of monthly installments." Farr II, 151 F.3d at 911. The overview warned eligible employees that the tax implications of the distribution of benefits were complicated and admonished potential participants to consult with a tax advisor. Finally, the overview explained that part or all of the lump sum payment "'may be rolled over to another qualified plan or an IRA within 60 days without any current tax liability;'" but"[t]he booklet did not say that only qualified portions of the lump sum distributions could be rolled over, and that everything else would be taxed." Id.[5] The plaintiffs, long-time employees of U.S. West, decided to participate in the early retirement program, and opted to receive their early retirement benefits in a lump sum. They attempted to roll the lump sum distribution into their individual accounts, only to discover that just qualified portions of their distributions could be rolled over. Thus, the plaintiffs incurred a significant and immediate tax.

The plaintiffs contended that U.S. West breached its fiduciary duty pursuant to ERISA § 404 "by providing them with incomplete, false, and misleading information regarding the tax consequences of their lump sum distributions." Id. at 912. The Farr II panel agreed that U.S. West had breached its fiduciary duty by failing"to provide sufficiently detailed information" to put the plaintiffs on notice of the potentially adverse tax consequences and, generally speaking, who might be affected. See id. at 915. The court concluded that U.S. West

should have explained to employees the difference between excess lump sum benefits that cannot be "rolled over" into IRAs and are therefore subject to immediate taxation and qualified benefits which can be "rolled over" without imme diate taxation. [U.S. West's] fiduciary duties also required [it] to explain more specifically what categories of employ ees would be likely to be affected by the § 415 limitations, such as employees expecting larger amounts of financial benefits. With this information, individual employees would be alerted that they themselves might face adverse tax con sequences and could make informed decisions about whether they needed to seek professional tax advice.

Id.[6] The Farr II court made clear, however, that U.S. West's duty to inform did not extend to "individualized notice of all the ways the tax laws would impact each of [the plaintiffs'] individual distributions."

Id.

DuPont has tried to frame the issue as whether it had a duty to give, on its own initiative, individualized notice to Griggs of all of the potential tax consequences of his election-an idea that Farr II rejected. As previously stated, we view the issue differently. Griggs decided to retire early because he believed he could receive a substantial lump-sum benefit that, according to DuPont's written description, could be rolled over into his SIP account on a tax-deferred basis, and Griggs so opted. However, DuPont determined that, because of the limitations imposed by section 415, Griggs was not eligible for the option he selected. Thus, the question is whether DuPont had a fiduciary obligation to pass this information along to Griggs before it

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simply distributed the money and Griggs incurred tax liability that he had opted to avoid. We answer that question affirmatively, and conclude that DuPont failed to discharge that duty.

IV.

Finally, we address the district court's conclusion that, despite DuPont's breach of duty, Congress provided no remedy under ERISA. Originally, Griggs sought a number of various remedies; however, Griggs has now whittled down his claim to a single remedy. He wishes to be returned -to be "reinstated" -to the pre-election position he occupied prior to September 1994. Observing that reinstatement "would require Griggs to return the TPS payment he received, as well as any profit thereon which would have enured to the Plan had Griggs not accepted the early retirement package," the district court concluded that "'reinstatement' and return of the parties to the pre-September, 1994, status quo is not feasible." J.A. 293.

Griggs seeks relief under ERISA § 502(a)(3) which provides: "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C.A. § 1132(a)(3) (emphasis added). By this provision, Congress provided individual beneficiaries with an avenue to seek equitable relief for a breach of fiduciary duty under ERISA. See Varity, 516 U.S. at 507-15. The trick comes in determining what qualifies as "appropriate equitable relief."

The phrase "appropriate equitable relief" encompasses "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993). In considering what kind of remedies would typically be categorized as equitable in nature, the Supreme Court looked to "virtually identical language in Title VII of the Civil Rights Act of 1964 . . . where the phrase 'any other equitable relief as the court deems appropriate' was held to limit recovery to back pay, injunctions and other equitable remedies and not to allow 'awards for compensatory or punitive damages.'" Hemelt v. United States, 122 F.3d 204, 207 (4th Cir. 1997); see Mertens, 508 U.S. at 255. The question, then, is whether the remedy Griggs seeks -reinstatement to the status quo -is a kind typically available in equity. We believe it is.

Contrary to DuPont's suggestion, Varity provides guidance -albeit general -on this issue. In Varity, a group of individual plaintiffs sought relief under section 502(a)(3) after they were defrauded by the parent company of their employer into leaving their employment, relinquishing their medical and nonpension benefits, and transferring to another subsidiary that turned up insolvent and unable to make good on its benefit plan. The plaintiffs argued that if not for the breach of fiduciary duty, they would not have left their original employer and would have been receiving benefits under its plan. See Howe v. Varity Corp., 36 F.3d 746, 754-55 (8th Cir. 1994). The Eighth Circuit Court of Appeals determined that section 502(a)(3) entitled the plaintiffs "to an injunction reinstating them as members of [their original employer's] Welfare Benefits Plan under the terms of that plan as it existed at the time of retirement," id. at 756, a conclusion that the Supreme Court affirmed, see Varity, 516 U.S. at 515.

Moreover, reinstatement is clearly among the forms of "other equitable relief" permitted under Title VII, see 42 U.S.C.A. § 2000e-5(g) (providing that a court that determines that an employer has violated Title VII may "order such affirmative action as may be appropriate" including "reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate").

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We are aware of the significant problems that would result from drawing analogies between ERISA and Title VII; however, for the limited purpose of deciding what constitutes "appropriate equitable relief" under ERISA, we are satisfied that the use of nearly identical language in Title VII sheds light on the subject. See Mertens, 508 U.S. at 255; Hemelt, 122 F.3d at 207-08. We believe that reinstatement, as a general equitable concept, is within the range of redress permitted by the phrase "other appropriate equitable relief."

However, even if the redress sought by a beneficiary under ERISA § 502(a)(3) is a classic form of equitable relief, it must be appropriate under the circumstances. For example, such relief is not "appropriate" equitable relief "where Congress elsewhere provided adequate relief for a beneficiary's injury" and there is "no need for further equitable relief." Varity, 516 U.S. at 515.[7] Or, for instance, reinstatement might not be appropriate equitable relief within the Title VII context where circumstances have changed substantially such that reinstatement would require removing an current employee. Cf. Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 121 (4th Cir. 1983) (explaining that district court's authority to fashion equitable relief under the ADEA "does not . . . extend to ordering the displacement or bumping of incumbent employees.").

The district court held that ERISA provided no equitable relief for Griggs based on the conclusion that the "return" and "reinstatement" of the parties to their pre-election positions was"not a viable alternative." J.A. 293. The court, however, did not specifically explain why the reinstatement or return of the parties was not a viable option and why reinstatement would not be "appropriate" equitable relief under ERISA § 502(a)(3), other than to point out that if Griggs were reinstated he would be required to return his TPS benefit. Moreover, it is not apparent from the record whether the district court was addressing reinstatement to Griggs's position of employment, reinstatement under the plan such that Griggs could make another TPS distribution option, or both. We understand Griggs's claim to encompass both possibilities.

We are not convinced that Griggs is simply without an equitable remedy under ERISA. Although we agree that there may well be facts that make the return of the parties to their pre-election positions inappropriate, we are not able to determine why the district court found such relief to be inappropriate, and, on this record, we are not able to make the determination in the first instance.

Thus, we remand for further factual development with respect to whether the reinstatement of the parties to the pre-election status quo is appropriate. In determining whether such relief is appropriate, the district court's consideration should be broader than the question of whether it would be appropriate, or even possible at this point, to reinstate Griggs to his job. The district court should also consider whether it would be appropriate, or even possible, to return Griggs to his preelection position so that he could make an alternate TPS distribution election. In either event, we note that because reinstatement is equitable in nature, Griggs is not entitled to a windfall; if he is reinstated, we agree with the district court that he must return his TPS benefit. Indeed, Griggs concedes that he would be required to return at least part of his TPS distribution. We will leave it to the sound discretion of the district

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court to consider the subtleties that will surely arise, including what portion of Griggs's benefit he must return if equitable relief is appropriate, i.e., on whom the loss occasioned by the tax liability should fall.

V.

In sum, we conclude that the district court properly determined that Griggs's negligent misrepresentation claim is preempted by ERISA. We likewise affirm the district court's determination that DuPont breached its fiduciary duty to Griggs under ERISA. However, we conclude that the return or reinstatement of the parties to their preelection positions is not necessarily an inappropriate remedy under these circumstances, and we remand for the district court to further develop this issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Notes:

[1]As DuPont later explained, section 415 of the tax code

limits the amount of pension benefits that can be paid to certain highly-compensated individuals by tax-qualified pension plans such as the DuPont Pension and Retirement Plan. When the final calculation of Mr. Griggs' pensions benefit was made, it was clear that Section 415(e) of the Internal Revenue Code applied, and, because only distributions from tax-qualified plans can be rolled-over, none of Mr. Griggs' pension distribution could be rolled over.

Compliance with Section 415 of the Code is not discretionary. Compliance is necessary to maintaining the tax-qualified status of both the DuPont Pension and Retirement Plan and the SIP.

J.A. 205. Therefore, DuPont paid Griggs his TPS benefit from DuPont's non-qualified Pension Restoration Plan, resulting in a fully taxable distribution.

[2]Griggs filed a cross-motion for partial summary judgment on the issue of liability, which the district court denied.

[3]We note in passing that even if Griggs somehow knew that his eligibility for a rollover election was an issue and decided that expert advice was necessary, Griggs's own expert could not perform the necessary calculations unless DuPont first supplied the relevant data.

[4]Or, DuPont could have explained that the TPS rollover option was not automatically available to all employees and that the tax

code limited the ability of some highly-compensated employees to enjoy this option.

[5]However, U.S. West provided a telecast to employees addressing the early retirement program. The program indicated that only "a `qualified portion of the lump-sum distribution' could be rolled over into an IRA," but did not elaborate further. Farr II, 151 F.3d at 912.

[6]Ultimately, the court determined that ERISA did not provide a remedy for the wrong suffered by the plaintiffs; however, the court declined to expressly address whether reinstatement -the remedy that Griggs seeks -is an available remedy under ERISA. See Farr II, 151 F.3d at 916.

7Of course, in this case Griggs's breach of fiduciary duty claim is remedied under section 502(a)(3), or it is not remedied at all. Griggs cannot recover "benefits due" under section 502(a)(1), see 29 U.S.C.A. § 1132(a)(1), because when he received his lump sum payment, he received all that he was entitled to receive from DuPont -there are no outstanding benefits. And, Griggs cannot recover under subsection (a)(2), see 29 U.S.C.A. § 1132(a)(2), because that provision does not provide remedies for individual ERISA beneficiaries. See Russell, 473 U.S. at 144.

IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 5

Adams v. Brink's Co.

261 Fed. Appx. 583 (4th Cir. 2008)

Adams v. Brink's Co.

United States Court of Appeals for the Fourth Circuit

September 27, 2007, Argued; January 11, 2008, Decided

No. 06-1744, No. 06-1770

Reporter

261 Fed. Appx. 583 *; 2008 U.S. App. LEXIS 536 **; 42 Employee Benefits Cas. (BNA) 2337

JIMMY ADAMS; CHRISTOPHER BROOKS ADDINGTON; MICHAEL ADKINS; JERRY BAIRD; MICHAEL A. BLEDSOE; ROBERT BLEDSOE; KIM BOGGS; HARRY BOONE; GLENDA BRADY; WILLIAM BREEDING; JOHN BROWNING, JR.; JOHN BROWNING, SR.; BILLY BULLION; BENNETT S. CANTRELL; BILLY CANTRELL; FLOYD CANTRELL; FREDDIE CANTRELL; ISAAC W. CANTRELL; JOHN W. CANTRELL; THELMER CANTRELL; DONALD CHILDRESS; DONALD R. CLARK; GREG CLARK; MICHAEL CLARK; RANDALL A. CLARK; JAMES E. COOKE; CLAUDE COX; VERNUS A. CULBERTSON; TEDDY DEAN; CARL T. DOTSON; DAVID ELAM; WILLIE M. FALIN; FRANK FARMER; JOHNNY W. FARMER; HEZEKIAH FRANKLIN; DAVID M. FREEMAN; LARRY GILLIAM; ROY R. GILLIAM; EDWARD GRAHAM; DONALD GREEAR; DENVER HALL; DANE HAMILTON; SCOTTY HAMILTON; DANNY HAYES; CLEGG HESS; HOMER HILL; THOMAS HILLMAN; RICHARD HUGHES; JERRY HYLTON; GREG IRESON; ARTHUR W. JENKINS; ROGER J. JONES; ROY JONES; DON KENNEDY; DAVID KING; CHARLES LANE; RONALD LARGE; ATLON LAWSON; RONNIE L. LAWSON; TIM LAWSON; JOHN LIVINGSTON; ROBIN LOVELL; WOODROW LOVELL; DAVID G. MCCONNELL; DWAYNE MCCONNELL; HENRY MCFADDEN; GEORGE L. MEADE; HOLLY P. MEADE; IVAL MEADE; RICKY MEADE; DANNY S. MOORE; ROGER D. MORGAN; DONALD E. MULLINS; DONALD M. MULLINS; FRANKLIN D. MULLINS; GARY MULLINS; JOHNNY R. MULLINS; OTTIS MULLINS; RANDY MULLINS; RONNIE MULLINS; GERALD NEWTON; CHARLES OSBORNE; JEFFREY PETRO; HOMER PHIPPS; FREDDY POWERS; DENNIS RASNIC; BOBBY REDMAN; LAWRENCE REEVES; CHARLES RICHARDSON, JR.; DUSTY ROBINSON; JIMMY ROSE; MITCHELL SALYERS; DENVER SANDERS; RICKY SHELTON; RONNIE SLEMP; KENNETH SLUSS; DONALD STAIR; ROBERT STAPLETON; JEFF SUMMERS; WILLIS SURRETT, JR.; GARY SWINEY; DANNY TAYLOR; JUDY THACKER; PHIL THACKER; WILLIE THACKER; JERRY TIGNOR; RAY WATSON; BOBBY WHEELER; CLARENCE WHISENHUNT; MIKE WHITAKER; JERRY WHITE; GARY WILLIAMS; ARTHUR WILSON; RALPH WILSON, JR.; DENVER WINEBARGER; ROBERT SMALLWOOD; WINSTON RICHARDSON; MICHAEL HOPKINS; KENNETH MEADE; TERRY MITCHELL; MICHAEL BOGGS; RAY TAYLOR; JACK BLANTON; DONALD RATLIFF, Plaintiffs - Appellants, and MARTIN JESSEE; JAMES W. RAY; SAM ADKINS; DENNIS A. CANTRELL; JEFF FRANKLIN; TRENTON MULLINS; DAVID MCCARTY, Plaintiffs, versus THE BRINK'S COMPANY; PARAMONT COAL CORPORATION; THE BRINK'S COMPANY PENSION-RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE BRINK'S COMPANY PENSION-RETIREMENT PLAN, Defendants - Appellees. JIMMY ADAMS; CHRISTOPHER BROOKS ADDINGTON; MICHAEL ADKINS; JERRY BAIRD; MICHAEL A. BLEDSOE; ROBERT BLEDSOE; KIM BOGGS; HARRY BOONE; GLENDA BRADY; WILLIAM BREEDING; JOHN BROWNING, JR.; JOHN BROWNING, SR.; BILLY BULLION; BENNETT S. CANTRELL; BILLY CANTRELL; FLOYD CANTRELL; FREDDIE CANTRELL; ISAAC W. CANTRELL; JOHN W. CANTRELL; THELMER CANTRELL; DONALD CHILDRESS; DONALD R. CLARK; GREG CLARK; MICHAEL CLARK; RANDALL A. CLARK; JAMES E. COOKE; CLAUDE COX; VERNUS A. CULBERTSON; TEDDY DEAN; CARL T. DOTSON; DAVID ELAM; WILLIE M. FALIN; FRANK FARMER; JOHNNY W. FARMER; HEZEKIAH FRANKLIN; DAVID M. FREEMAN; LARRY GILLIAM; ROY R. GILLIAM; EDWARD GRAHAM; DONALD GREEAR; DENVER HALL; DANE HAMILTON; SCOTTY HAMILTON; DANNY HAYES; CLEGG HESS; HOMER HILL; THOMAS HILLMAN; RICHARD HUGHES; JERRY

HYLTON; GREG IRESON; ARTHUR W. JENKINS; ROGER J. JONES; ROY JONES; DON KENNEDY; DAVID KING; CHARLES LANE; RONALD LARGE; ATLON LAWSON; RONNIE L. LAWSON; TIM LAWSON; JOHN LIVINGSTON; ROBIN LOVELL; WOODROW LOVELL; DAVID G. MCCONNELL; DWAYNE MCCONNELL; HENRY MCFADDEN; GEORGE L. MEADE; HOLLY P. MEADE; IVAL MEADE; RICKY MEADE; DANNY S. MOORE; ROGER D. MORGAN; DONALD E. MULLINS; DONALD M. MULLINS; FRANKLIN D. MULLINS; GARY MULLINS; JOHNNY R. MULLINS; OTTIS MULLINS; RANDY MULLINS; RONNIE MULLINS; GERALD NEWTON; CHARLES OSBORNE; JEFFREY PETRO; HOMER PHIPPS; FREDDY POWERS; DENNIS RASNIC; BOBBY REDMAN; LAWRENCE REEVES; CHARLES RICHARDSON, JR.; DUSTY ROBINSON; JIMMY ROSE; MITCHELL SALYERS; DENVER SANDERS; RICKY SHELTON; RONNIE SLEMP; KENNETH SLUSS; DONALD STAIR; ROBERT STAPLETON; JEFF SUMMERS; WILLIS SURRETT, JR.; GARY SWINEY; DANNY TAYLOR; JUDY THACKER; PHIL THACKER; WILLIE THACKER; JERRY TIGNOR; RAY WATSON; BOBBY WHEELER; CLARENCE WHISENHUNT; MIKE WHITAKER; JERRY WHITE; GARY WILLIAMS; ARTHUR WILSON; RALPH WILSON, JR.; DENVER WINEBARGER; ROBERT SMALLWOOD; WINSTON RICHARDSON; MICHAEL HOPKINS; KENNETH MEADE; TERRY MITCHELL; MICHAEL BOGGS; RAY TAYLOR; JACK BLANTON; DONALD RATLIFF, Plaintiffs - Appellees, and MARTIN JESSEE; JAMES W. RAY; SAM ADKINS; DENNIS A. CANTRELL; JEFF FRANKLIN; TRENTON MULLINS; DAVID MCCARTY, Plaintiffs, versus THE BRINK'S COMPANY; PARAMONT COAL CORPORATION; THE BRINK'S COMPANY PENSION-RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE BRINK'S COMPANY PENSION-RETIREMENT PLAN, Defendants - Appellants.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Costs and fees proceeding at, Motion denied by *Adams v. Brink's Co., 2008 U.S. Dist. LEXIS 18706 (W.D. Va., Mar. 11, 2008)*
US Supreme Court certiorari denied by *Adams v. Brink's Co., 128 S. Ct. 2936, 171 L. Ed. 2d 865, 2008 U.S. LEXIS 4929 (U.S., June 16, 2008)*

Prior History: [**1] Appeals from the United States District Court for the Western District of Virginia, at Big Stone Gap. Pamela Meade Sargent, Magistrate Judge. (2:02-cv-00044-PMS).

Adams v. Brink's Co., 420 F. Supp. 2d 523, 2006 U.S. Dist. LEXIS 11020 (W.D. Va., 2006)

Disposition: AFFIRMED.

Core Terms

fiduciary, district court, benefits, employees, calculation, Plans, pension benefits, misrepresentations, early retirement, fiduciary duty, equitable, pension, Coal, years of service, communicate, discretionary authority, retirement benefits, plan benefits, merger, rescission, accrual, monthly, pension plan, participants, retirement, documents, annual, plan administrator, summary judgment, breached

Case Summary

Procedural Posture

Appellants, current or former employees of an employer, brought an action against defendants, the employer and its employee pension plan, alleging that the employer misrepresented the employees' benefit accrual service credit. The employees appealed the order of the United States District Court for the Western District of Virginia which granted summary judgment to defendants.

Overview

The employees participated in prior plans which were consolidated into a single plan, and the employees contended that human resources officials of the employer misrepresented that the employees would receive service credit accrued prior to the consolidation. The employees argued that such conduct constituted breaches of fiduciary duty in violation of the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.* The appellate court held, however, that the employees failed to show that the officials were plan fiduciaries or that the employees' benefit accrual service credit was misrepresented. The officials had no discretionary authority with regard to plan terms or benefit eligibility, and the officials' performance of administrative duties in explaining plan benefits did not constitute an exercise of power appropriate to carrying out a plan purpose. Further, plan administrators clearly and accurately communicated plan benefits to the employees in writing, there was no concerted corporate-wide effort to purposefully deceive the employees with

regard to their plan coverage for pension benefits, and the plan language itself was clear and unambiguous.

Outcome

The order granting summary judgment to defendants was affirmed.

LexisNexis® Headnotes

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

HN1[] The United States Supreme Court has recognized the rights of an individual participant to sue a person acting as a fiduciary under a plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C.S. § 1001 et seq.*, for breach of fiduciary duty, and to seek relief pursuant to *29 U.S.C.S. § 1132(a)(3)*. In order to establish a claim for breach of fiduciary duty based on alleged misrepresentations, a plaintiff must show: (1) that a defendant was a fiduciary of the ERISA plan, (2) that a defendant breached its fiduciary responsibilities under the plan, and (3) that the participant is in need of injunctive or other appropriate equitable relief to remedy the violation or enforce the plan.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

HN2[] A person is a fiduciary with respect to a plan, and therefore subject to fiduciary duties the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*, to the extent that he or she exercises any discretionary authority or discretionary control respecting management of the plan, or has any discretionary authority or discretionary responsibility in the administration of the plan. Fiduciary status is not an all-or-nothing concept. The inclusion of the phrase "to the extent" in *29 U.S.C.S. § 1002(21)(A)* means a party is a fiduciary only as to the activities which bring the person within the definition. When determining whether a party is a fiduciary, a court must ask whether a person is a fiduciary with respect to the particular activity at issue. A court is required to examine the relevant documents to determine whether the conduct at issue was within the formal allocation of responsibilities under the plan documents and, if not, ascertain whether, in fact, a party voluntarily assumed such responsibility for the conduct at issue.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[] An appellate court gives deference to the factual findings of a district court, recognizing its comparative advantage in understanding the specific context in which the events of a case arose.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

HN4[] Ministerial administrative acts are not fiduciary acts under the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

HN5[] Under the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001 et seq.*, an employer/plan administrator does not exercise discretionary authority or control over the administration of the plan merely when employees tell each other about plan benefits. The discretionary authority or responsibility which is pivotal to the statutory definition of "fiduciary" is allocated by the plan documents themselves.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN6[] Findings of fact by a trial court are not set aside unless clearly erroneous. *Fed. R. Civ. P. 52(a)*. A finding is clearly erroneous when, although there is evidence to support it, a reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Pensions & Benefits Law > ERISA > Civil Litigation > Statute of Limitations

HN7[] See 29 U.S.C.S. § 1113.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

HN8[] See 29 U.S.C.S. § 1132(a)(1)(B).

Business & Corporate Compliance > ... > Fiduciaries > Fiduciary Responsibilities > Duty of Loyalty

HN9[] A fiduciary under the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 et seq., has an unyielding duty of loyalty to a beneficiary. The fiduciary duty encompasses more than merely a duty to refrain from intentionally misleading the beneficiary, but also includes a duty not to misinform the beneficiary through material misrepresentations.

Business & Corporate Compliance > ... > Fiduciaries > Fiduciary Responsibilities > Duty of Loyalty

HN10[] A lack of intent to deceive does not insulate a fiduciary from liability based on a misrepresentation to a beneficiary. Under the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 et seq., the fiduciary has a duty to provide beneficiaries with accurate information. Moreover, a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally.

Pensions & Benefits Law > ... > Remedies > Equitable Relief > Rescission

HN11[] Reinstatement of employment is an appropriate equitable remedy under the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 et seq., when an employee has been induced to accept early retirement based on incomplete or inaccurate information for which a plan administrator could be held responsible.

Civil Procedure > Preliminary Considerations > Equity > Relief

HN12[] Normally, equitable rescission involves a restoration of the parties to the status quo as it existed before the rescinded transaction. However, the complete-restoration requirement is a general one that is subject to certain exceptions and courts of equity may order rescission where the equities of the situation so demanded.

Counsel: ARGUED: James A. Holifield, Jr., HOLIFIELD & ASSOCIATES, P.C. Knoxville, Tennessee, for Appellants/Cross-Appellees.

Robert Martin Rolfe, HUNTON & WILLIAMS, Richmond, Virginia, for Appellees/Cross-Appellants.

ON BRIEF: William S. Lockett, Jr., KENNERLY, MONTGOMERY & FINLEY P.C., Knoxville, Tennessee, for Appellants/Cross-Appellees.

Elena E. Ellison, HUNTON & WILLIAMS, Richmond, Virginia, for Appellees/Cross-Appellants.

Judges: Before WILLIAMS, Chief Judge, DUNCAN, Circuit Judge, and Raymond A. JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Jackson wrote the opinion, in which Chief Judge Williams and Judge Duncan joined.

Opinion by: JACKSON

Opinion

[*586] JACKSON, District Judge:

Appellants petition for review of the final order of the district court which disposed of most of Appellants' claims, denying additional pension benefits under the Pittston Plan. Appellees cross-appeal the district court judgment with respect to Christopher Brooks Addington, who succeeded on his breach of fiduciary duty claim. **[**2]** For the reasons that follow, we affirm.

[*587] I.

Appellants are former employees of Paramont Coal

Corporation and current and/or former employees of the Pittston Company, a subsidiary of the Brink's Company. J.A. 101. In this action, Appellants seek benefit accrual service credit under the Pittston Plan for service with Paramont before Paramont's pension plans were merged into the Pittston Plan. (Appellees' Br., 4.)

In July 1986, Pyxis Resources, then a subsidiary of The Pittston Company ("Pittston"), acquired Paramont Coal Company ("Paramont"). JA 2962. In 2003, Pittston changed its name to the Brink's Company and the Pension-Retirement Plan of the Pittston Company and Its Subsidiaries changed its name to the Brink's Company Pension-Retirement Plan. JA 1798.

At the time of Paramont's acquisition by Pyxis, Paramont employees were participants in one of two identical defined-benefit pension plans: (1) the Salaried Employees' Pension Plan of Paramont Coal Corporation or (2) the Hourly Employees' Pension Plan of Paramont Coal Corporation (collectively hereinafter referred to as the "Paramont Plans"). JA 1394, 1398. The Paramont Plans provided a maximum monthly retirement benefit of $ 350 for 20 **[**3]** years of service with Paramont. JA 2962-2963. All Paramont employees, regardless of their salary, earned the same retirement benefit for the same years of service. JA 2963.

The Paramont Plans remained in effect until January 1, 1989, when the Paramont Plans merged into the Pittston Plan. JA 2963. The Pittston Plan established a more generous benefit formula than the Paramont Plans. The Pittston Plan calculated benefits by multiplying a percentage of an average salary by the number of years of "Benefit Accrual Service." JA 176, 2964-65. Moreover, the Pittston Plan imposed no cap on these benefits. JA 176, 2964-65.

Exhibit G to the Pittston Plan, entitled "Special Provisions Applicable to Former Participants in the Pension Plans of Paramont Coal Corporation," states that the Paramont Plans shall be merged into the Pittston Plan and that "in connection with such mergers, the provisions of this Exhibit G shall apply, effective January 1, 1989, notwithstanding any provisions elsewhere in the Plan to the contrary." [1] JA 315, 2963.

Exhibit G further provides that vesting service under the Paramont Plans would count as vesting service under the Pittston Plan. JA 315. The district court found the language of Exhibit G to be clear and unambiguous and concluded that it does not provide for the inclusion of Appellants' years of service with Paramont prior to January 1, 1989, in the calculation of their retirement benefits under the Pittston Plan. JA 2964. There is no dispute that Appellants are receiving or are entitled to receive these retirement benefits as calculated.

Appellants argue that Pittston intentionally deceived them by saying, on numerous occasions beginning with Paramont's acquisition by Pyxis, that Paramont employees would receive benefit accrual service credit for their years of service with Paramont **[*588]** prior to January 1, 1989. (Appellants **[**5]** Br., 35.) However, based on the evidence presented at trial, the district court found that Pittston had not made misrepresentations. [2] JA 3049.

Two years after the acquisition of Paramont, all Paramont employees received a 1988 Employee Handbook that accurately stated that each was covered for pension benefits by only the Paramont Plans. JA 1296, 1308-20, 3047. Prior to the merger of the plans, every Paramont employee received two notices that they would not receive credit under the more lucrative Pittston Plan formula for their years of service with Paramont prior to January 1, 1989. JA 3047. These notices came in a November 10, 1988 letter from Randy Robinette, and a December 1988 article in the Paramont Pride, the company newspaper. JA 1334-34.1, 1350, 3047.

More than a year after Paramont **[**6]** employees received these accurate descriptions in 1988, Gerald Spindler, a Pittston Vice President who performed no routine functions with regard to the Pittston Plan, spoke at a meeting held at Clinch Valley College in 1990. JA 739, 769, 3009, 3065. The purpose of the meeting was to explain to the union-free side of Pittston's operation,

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[1] Exhibit G states in part: "The accrued pension benefit of each Paramont Participant under the Plan in respect of periods of service prior to January 1, 1989, shall **[**4]** be determined solely in accordance with the provisions of the Paramont Plan in which he was a participant, as in effect immediately prior to January 1, 1989, based solely on his 'Benefit Service' (as defined in such Paramont Plan) on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation..." JA 277-278,315.

[2] The district court concluded that the evidence does not in any way establish any concerted corporatewide effort to deceive current and former Paramont employees and that Michael Quillen, Kathy Fox, and Gerald Spindler did not tell plaintiffs that their years of service with Paramont prior to January 1, 1989 would be included in the calculation of their benefits under the Pittston Plan. JA 3049.

which included more than just Paramont employees, how they could be affected by the new union contract. JA 739. A contract that settled a Pittston-UMWA coal strike had been settled the day before the commencement of the meeting. For the first time in the history of Paramont, the union-free work force was affected by the language of the contract. JA 739. At the meeting, Gerald Spindler, Scott Perkins, and Donnie Ratliff discussed the value of the Pittston/Paramont marriage, the management structure and growth potential. JA 740. Spindler spoke about contracts, the commitment to remain union-free, and the importance of the Pyxis group. JA 740. Spindler also answered questions on a variety of subjects, one of them concerning the Pittston pension funds and Paramont years counting in the benefit calculation. JA 741. Although the purpose of the meeting did **[**7]** not specifically include discussing pension benefits, Spindler made his planned remarks, and when an employee subsequently inquired about their time of pension service, Spindler answered, "nothing will change." JA 741, 872, 3018. Spindler did not explain or elaborate and the district court found that Spindler made no misrepresentations. JA 872, 3018.

Additional accurate communications were distributed to all Paramont employees after the Clinch Valley College meeting. JA 1340, 3047-3048. Also, numerous witnesses at trial testified that they understood the relevant terms of the Pittston Plan. JA 3048.

However, over the years, a minority of employees received annual benefit statements that occasionally incorrectly estimated the amount of their projected pension benefits by including too many years of benefit accrual service under the Pittston calculation formula. JA 3049. Of the 836 annual benefit statements sent to Plaintiffs, 8% incorrectly estimated future retirement benefits. JA 2951, 3049. The annual benefit statements did not indicate how the estimate had been calculated and did not state that the employee's years of service with Paramont prior to January 1, 1989 were included in **[**8]** the calculation of **[*589]** their benefits under the Pittston Plan formula. JA 3057. Also, the annual benefit statements cautioned that the figures were estimates. JA 3057.

Appellants instituted this action on December 19, 2001, in the United States District court for the Eastern District of Tennessee seeking legal, declaratory and equitable relief for various claims against (1) Pittston, (2) Paramont, (3) the Pittston Plan, and (4) the Administrative Committee for the Pittston Plan ("Administrative Committee"). JA 99-107. Appellants asserted federal question jurisdiction in the district court pursuant to the general jurisdictional grant of *28 U.S.C. § 1331* and the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 1001 et seq.* JA 102.

On September 6, 2002, Pittston filed a Motion for Summary Judgment, which the district court granted in part and denied in part by Memorandum Opinion and Order entered November 18, 2003. JA 497-504. On October 7, 2004, an Agreed Order was entered severing the claims of five of the then 123 plaintiffs to be tried to the court first. JA 505-507. The court entered its Findings of Fact and Conclusions of Law and Judgment in the trial of these five **[**9]** plaintiffs ("Initial Plaintiffs") on June 3, 2005. JA 2960-3079. On October 24, 2005, Pittston filed a Second Motion for Summary Judgment, seeking entry of summary judgment on the claims of the remaining 119 plaintiffs. The district court granted Pittston's Second Motion for Summary Judgment by Memorandum Opinion and Order entered on March 17, 2006. JA 4667-4730. A Final Judgment was entered on June 2, 2006, disposing of all claims before the district court with the exception of the parties' cross motions for attorney's fees. JA 4737-4740.

Appellants are appealing the final order of the district court entered on June 2, 2006. Appellants timely filed a Notice of Appeal with the district court on June 26, 2006, pursuant to *Rules 3* and *4 of the Federal Rules of Appellate Procedure*. JA 4741-4750. Appellants filed an amended Notice of Appeal on July 7, 2006. JA 4753-4758. Accordingly, this Court has jurisdiction pursuant to *28 U.S.C. § 1291*.

II.

On **[**10]** appeal, Appellants argue that the district court erred and challenge its judgment on four grounds. On cross-appeal, Appellees challenge the district courts judgment with respect to Christopher Brooks Addington. We address each argument in turn below.

A.

Appellants first assert that certain Pittston employees were fiduciaries of the Pittston Plan in accordance with the Supreme Court's decision in *Varity Corporation v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)*. Specifically, Appellants aver that Gerald Spindler, President of Pittston, acted as a fiduciary of the Pittston Plan when he spoke to a group of employees at a company-wide meeting regarding Plan benefits. Appellants also assert that Michael Quillen was

delegated fiduciary responsibilities by the Administrative Committee and had apparent authority to speak on behalf of the Plan. In addition, Appellants assert that Donald Ratliff, Kathy Fox, Rhonda Miller and Eddie Needy were fiduciaries of the Pittston Plan. The Court disagrees.

HN1[↑] The United States Supreme Court has recognized the rights of an individual participant to sue a person acting as a fiduciary under an ERISA plan for breach of fiduciary duty, and to seek relief pursuant to 29 U.S.C. § 1132(a)(3). [**11] Varity Corp., 516 U.S. at 489. In order to establish a claim for breach of fiduciary [*590] duty based on alleged misrepresentations, a plaintiff must show: 1) that a defendant was a fiduciary of the ERISA plan, 2) that a defendant breached its fiduciary responsibilities under the plan, and 3) that the participant is in need of injunctive or other appropriate equitable relief to remedy the violation or enforce the plan. Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371, 379-380 (4th Cir. 2001)("Griggs I"); Blair v. Young Phillips Corp., 235 F. Supp. 2d 465, 470 (M.D.N.C. 2002).

HN2[↑] A "person is a fiduciary with respect to a plan," and therefore subject to ERISA fiduciary duties, "to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. Varity, 516 U.S. at 489 (quoting ERISA § 3(21)(A)). Fiduciary status is not an all-or-nothing concept. The inclusion of the phrase "to the extent" in 29 U.S.C. § 1002(21)(A) means a party is a fiduciary only as to the activities which bring the person within the definition. Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 60-61 (4th Cir. 1992). [**12] When determining whether a party is a fiduciary, "a court must ask whether a person is a fiduciary with respect to the particular activity at issue." Id. A court is required to examine the relevant documents to determine whether the conduct at issue was within the formal allocation of responsibilities under the plan documents and, if not, ascertain whether, in fact, a party voluntarily assumed such responsibility for the conduct at issue. Coleman, 969 F.2d at 61; Phelps v. C.T. Enters., Inc., 394 F.3d 213, 219 (4th Cir. 2005).

In Varity, the Supreme Court concluded that based on the factual context in which the statements were made as well as the plan-related nature of the activity engaged in by those who had plan-related authority to do so, there was sufficient support for the legal conclusion that Varity was acting as a fiduciary. Varity, 516 U.S. at 503. The Court emphasized that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out a plan purpose." Id. at 502. Moreover, the court noted that "other documents came [**13] from those within the firm who had authority to communicate as fiduciaries with plan beneficiaries." Id. at 503. Contrary to Appellants' assertions, the specific context for the Pittston Employees' statements in this case significantly differ from that which the Supreme Court recognized in Varity.

Pittston was both employer and administrator for the benefit plan. However, not all of Pittston's business activities involved plan management or administration. See id. The district court held that when the statements were made regarding employee benefits, Pittston employees were not acting as "fiduciaries" as well as "employers." In reviewing this legal conclusion, HN3[↑] we give deference to the factual findings of the district court, recognizing its comparative advantage in understanding the specific context in which the events of this case arose. See id. The Court will examine the specific factual context of the alleged misrepresentations to determine whether each individual was a fiduciary.

Appellants assert that Gerald Spindler was a fiduciary. However, the evidence reveals that Spindler had no responsibilities with respect to the Pittston plan. Spindler, in addition to Quillen, Fox, Robinette, [**14] Miller and Needy possessed no discretionary authority to alter the terms of the Pittston Plan or to determine eligibility for benefits or the amount of benefits a [*591] participant was entitled to under the Pittston plan. JA 3065. Despite this, Appellants assert that when Spindler reassured Paramont employees that their Paramont time would be used for calculating benefit accrual service under the Pittston Plan he was acting as a fiduciary. (Appellant's Br., 38.) The Court disagrees.

In Varity, the Supreme Court focused on the purpose of the meeting and the actions of the parties. Specifically, the Court emphasized that offering beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially an exercise of a power "appropriate" to carrying out an important plan purpose. Moreover, in Varity the materials used at the meeting came from those at the firm with authority to communicate as fiduciaries with

beneficiaries. Varity, 516 U.S. at 502. Here, the circumstances of the Clinch Valley College meeting were different.

Unlike the meeting in Varity, the purpose of the Clinch Valley College Meeting was not to offer beneficiaries detailed plan information [**15] in order to help them decide whether to remain with the plan. In fact, testimony in the district court reveals that Spindler's only communication regarding benefits was an answer to a question at the end of a meeting. JA 741. In addition, the evidence does not suggest that there were any benefit-related materials used at the meeting that came from those at the firm with authority to communicate as fiduciaries with beneficiaries. See Varity, 516 U.S. at 502. The situation here can also be distinguished from Griggs I because Griggs suffered a very specific harm by relying on written documents from the Plan Administrator. See Griggs I, 237 F.3d at 374. It is evident that Spindler possessed no discretionary authority with respect to the Pittston Plan; moreover, he never offered detailed plan information with the intention of inducing a particular choice of plans. See Varity, 516 U.S. at 502.

Appellants also assert that Michael Quillen was delegated fiduciary responsibilities by the Administrative Committee and that he had apparent authority to speak on behalf of the Plan. (Appellants' Br., 39.) Appellants cite various documents and oral statements in support of this assertion. (Appellants' [**16] Br., 39-41.) However, the district court found that Quillen possessed no discretionary authority to alter the terms of the Pittston Plan or determine eligibility for benefits. Based on the evidence presented, this Court finds that this statement of fact is not clearly erroneous. Quillen testified that he never had any administrative responsibility, any control over, or any discretion regarding the Pittston Plan. JA 2991. Also, the documents and oral statements that Appellants cite to in order to establish that Quillen had authority were contained when Quillen was President of Paramont and trustee of the Paramont Plans before their merger into the Pittston Plan. JA 2991.

Appellants additionally assert that Robinette, Ratliff, Fox, Miller, and Needy were all fiduciaries of the Plan because ERISA defines fiduciary status "functionally," where virtually any employee who communicates on benefits issues may be considered a fiduciary. (Appellants' Br., 41-42.) Appellants argue that the local human resource managers were delegated actual authority to answer questions regarding plan benefits. (Appellants' Br., 42.) Further, Appellants support their argument with the following assertions: (1) [**17] Kathy Fox trained Paramont's administrative personnel on the Pittston Plan so they could explain benefits to Paramont employees; (2) Donald Ratliff traveled to mine sites explaining Pittston plan benefits; (3) Randy [*592] Robinette was Paramont's Director of Human Resources and, in this capacity, sent various letters and memos to Paramont employees explaining the effects of the Pittston-Paramont merger. (Appellants' Br., 44.) Appellants aver that the aforementioned facts reveal that these persons were involved in the administration of the Plan and subject to fiduciary obligations. (Appellants' Br., 44.)

However, the district court found that Needy performed no functions with regard to the Pittston Plan and based on the evidence presented, the Court does not find this decision to be clearly erroneous. The district court also found that Fox, Robinette, and Miller performed certain administrative duties for the Pittston Plan but lacked any discretionary authority to determine the eligibility for benefits or the amount of benefits to which a participant was entitled. JA 3065. Based on the evidence presented, the Court finds that these individuals were not fiduciaries.

HN4[↑] Ministerial administrative [**18] acts are not fiduciary acts. Healthsouth Rehab. Hosp. v. Am. Natl' Red Cross, 101 F.3d 1005, 1009 (4th Cir. 1996) (stating that the limited role in processing claims and reading a computer screen to determine who is covered by a plan is not a fiduciary act). Even if Fox trained other employees to explain Pittston Plan benefits and Ratliff and Robinette explained plan benefits at mine sites and in writing, these actions fail to constitute the exercise of "discretionary authority or discretionary control respecting management" or administration of the Pittston Plan. 29 U.S.C. § 1002(21)(A)(2007).

The Court agrees that HN5[↑] an employer/plan administrator does not exercise discretionary authority or control over the administration of the plan merely when employees tell each other about plan benefits. As in Coleman, the discretionary authority or responsibility which is pivotal to the statutory definition of "fiduciary" is allocated by the plan documents themselves. Coleman, 969 F.2d at 61. In examining the specific context of the alleged misrepresentations, the Court finds it significant that the Pittston Plan administrators clearly and accurately communicated the plan benefits to the Paramont [**19] employees in writing. JA 307-3048. Based on the record, none of the alleged statements of

the speakers deprived Appellants of any benefits to which they were entitled under the terms of the plan. All of the Appellants will receive the "contractually defined" benefits that their Plan provided.

In an effort to interpret ERISA's fiduciary duties, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity, 516 U.S. at 497*. In resolving this issue, the Court is sensitive to these competing purposes.

B.

Appellants contend that Pittston and other fiduciaries breached their fiduciary duty to Appellants by misrepresenting that their years of service under the Paramount retirement plans would be included in the calculation of benefit accrual service under the Pittston Pension Plan. (Appellants' Br., 45.) Appellants cite to the Varity holding to support the proposition that misleading **[**20]** plan beneficiaries violates a fiduciary duty imposed upon plan administrators by ERISA. Id. However, the district court found that no misrepresentations were made to any Appellant, with the exception of Christopher Brooks Addington. **[*593]** The Court concurs with this factual conclusion.

HN6[↑] Findings of fact by a trial court shall not be set aside unless clearly erroneous. *Fed. R. Civ. P. 52(a). Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)*. "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*.

With the exception of Addington, the district court found that the Pittston Plan administrators clearly and accurately communicated the plan benefits to the Paramount employees in writing. [3] JA 3047-3048. Based on the evidence presented at trial, the Court agrees that there was no concerted corporate wide effort to purposefully deceive Paramount employees with regard to their plan coverage for pension benefits. Likewise, there was no concerted effort to deceive employees about how **[**21]** their pension benefits would be calculated under the Pittston Plan after the merger of the Paramount Plans into it. Because the facts here distinguish this case from *Varity*, in order for Appellants to succeed with their breach of fiduciary duty claim based on alleged misrepresentations, they must prove that specific misrepresentations were made to them individually. However, because the Court determines

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[3] Specifically, the district court made the following findings: "...the uncontradicted evidence shows that, in the fall of 1988, prior to the merger of the Paramount Plans into the Pittston Plan, every then-current employee of Paramount received notice on at least two occasions that they would receive credit for their years of service with Paramount prior to January 1, 1989, **[**22]** in the calculation of their retirement benefits under the Pittston Plan. These notices came in the form of Robinette's 11-10-88 Letter, (Exhibit 3), and the Paramount Pride Article, (Exhibit 26). Further, a number of other accurate communications were distributed to Paramount employees after the merger of the Paramount Plans into the Pittston Plan on January 1, 1989. Miller's 4-10-90 Letter was distributed to all Paramount employees. Miller's 4-10-90 Letter states that Paramount employees' pension benefits consisted of two parts, "your pension benefits from the Paramount Plan through December 31, 1988, and your pension benefit from the Pittston Plan from January 1, 1989." Perkins's 5-15-90 Letter also was distributed to all Paramount employees. Attached to Perkins's 5-15-90 Letter was a sample pension benefits calculation. This sample calculation used a hypothetical individual who had 14 years prior service with Paramount and eight years service under the Pittston Plan. The sample did not include the employee's time with Paramount in the calculation of benefits under the Pittston Plan, but instead used only the eight years of service under the Pittston Plan. JA 3048. With the exception of the **[**23]** five plaintiffs, Quillen and Rennie, every other witness who testified in this case stated that they understood at the time of the merger of the Paramount Plans into the Pittston Plan that Paramount employees' service from only January 1, 1989, forward would be used to calculate their retirement benefits under the Pittston Plan. These witnesses included upper level management with Pittston and Pittston Coal, management personnel with Paramount and Pyxis, Pittston and Pittston Coal human resources personnel, and individuals in the local human resources departments responsible for answering Paramount employee inquiries. JA 3048. Also, while there was evidence that there were errors in the calculation of retirement benefits provided to Paramount employees through Pittston's Annual Benefit Statements beginning as early as 1991, this evidence also reveals that of the 836 Annual Benefit Statements sent to the plaintiffs in this case, only eight percent contained an incorrect calculation of their retirement benefits. Also, of the 132 original plaintiffs in this case, the evidence shows that only 16 received one or more incorrect Annual Benefit Statements.

that the named individuals were not fiduciaries of the Pittston Plan, the Court will not further address the merits of Appellants' [*594] misrepresentation claims. Therefore, the Court affirms the district court's holding that there were not misrepresentations by fiduciaries. Because this Court finds that there has been no breach or violation of fiduciary duty the statute of limitations issue is moot and will not be addressed. [4]

C.

Appellants aver that the district court erred in dismissing Appellants' claims for benefits under *ERISA § 502(a)(1)(B)*. [5] Appellants urge the Court to [**25] consider the Pittston Plan as a whole when determining whether or not the Plan is ambiguous. (Appellants' Br., 65.) Furthermore, Appellants argue that Exhibit G is ambiguous because there is nothing in Exhibit G that excludes benefit service with Paramont in the calculation of benefits under the Pittston Plan. (Appellants' Br., 65.) Again, the Court disagrees.

The Paramont Plans were merged into the Pittston Plan effective January 1, 1989. However, before it was effective, there was an amendment of the Pittston Plan to add Exhibit G. Exhibit G states in part that the accrued pension benefit in respect of periods of service prior to January 1, 1989, "shall be determined solely in accordance with the provisions of the Paramont Plan in which he was a Participant, as in effect immediately prior to January 1, 1989, based solely on his 'Benefit Service' (as defined in such Paramont Plan) [**26] on December 31, 1988 or any earlier date on which the Paramont Participant ceases to be an employee of Paramont Coal Corporation..." JA 315, 2964. Exhibit G also states that vesting service under the Paramont Plans would count as vesting service under the Pittston Plan. JA 315.

The Court finds that the language of Exhibit G is clear and unambiguous. Paramont employee retirement benefits for periods of service prior to January 1, 1989, the date of the plan merger, are to be determined by the Paramont Plan. Also, Article IV of the Plan provides further guidance by stating that "the commencement dates for the benefit accrual computation periods for Employees of specified employers is included in Exhibit M." JA 170. Exhibit M presents a chart that displays the benefit accrual period start date based on an employee's company. Based on an examination of the Pittston Plan as a whole, the district court correctly awarded summary judgment to Pittston on Plaintiffs' § 502(a)(1)(B) claims. The language of the plan is not ambiguous.

[*595] III.

A.

On cross-appeal, Appellees assert that the district court wrongly held that the Administrative Committee's mistaken overcalculation of pension benefits breached [**27] a fiduciary duty to Addington. (Appellees' Br., 69.) Appellees do not contest that the Administrative Committee is a Pittston Plan fiduciary. However, they assert that there is no evidence that it breached any fiduciary duty to Addington when it sent him a letter overstating the amount of his pension benefits and overpaying him for five years. (Appellees' Br., 69.) The Court disagrees and holds that *HN9*[↑] Pittston did violate its fiduciary duty to Addington because Pittston had an "unyielding duty of loyalty to the beneficiary." *Griggs I, 237 F.3d at 380*. The Court finds that Pittston's fiduciary duty "encompass[es] more than merely a duty to refrain from intentionally misleading a beneficiary," but also includes a duty "not to misinform employees through material misrepresentations." Id.

HN10[↑] The lack of intent to deceive does not insulate the Administrative Committee from liability based on the misrepresentation to Addington. Under ERISA, a fiduciary has a duty to provide beneficiaries with

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[4] Although the Court determines that Appellees [**24] did not breach their fiduciary duty with respect to Addington, the Court will still discuss the statute of limitations issue because Appellees seek to recover the mistaken overpayment issued to him. According to *29 U.S.C. § 1113*, *HN7*[↑] "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of - (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." Because the evidence reveals that Addington did not know that the letter contained any misrepresentation until the Fall of 1999 and the case was filed in December of 2001, Addington's claim was filed less than three years after he learned of the misrepresentation.

[5] *ERISA § 502(a)* states: *HN8*[↑] "A civil action may be brought -(1) by a participant or beneficiary -(B)to recover benefits due to him under the terms of his plan to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. *29 U.S.C. § 1132(a)(1)(B)*."

accurate information. See id.; *Faircloth, 91 F.3d 648, 656 (4th Cir. 1996)*. Moreover, in Krohn v. Huron Mem'l Hosp., the Sixth Circuit stated that "a fiduciary breaches its duties by materially misleading [**28] plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *173 F.3d 542, 547 (6th Cir. 1999)*.

The Court finds that the Administrative Committee breached its duty of loyalty and care by sending inaccurate communications to Addington. Parsley was a ministerial employee who calculated pensions according to the terms of the Pittston Plan. JA 3039. The Administrative Committee's 1-27-95 Letter to Addington did not contain accurate information concerning Addington's monthly pension benefits under the Pittston Plan. By relying on Parsley's incorrect calculation, the Administrative Committee's subsequent misrepresentation clearly violated its fiduciary duty to communicate accurately with a plan beneficiary.

B.

Appellees argue that the district court clearly erred when it found that Addington relied on the mistaken calculation in deciding to retire early. The district court found that had Addington "been given accurate information concerning the amount of his monthly pension benefits, he would not have taken early retirement." JA 3191-3192. The Court does not find this determination to be clearly erroneous.

Appellees argue that no [**29] equitable relief is appropriate in this case. They state that Addington could not have relied on the information contained in the Administrative Committee's 1-27-95 letter because it was received after he took early retirement. (Appellants' Br., 74.) Contrary to this assertion, the district court found that Addington's benefits were not approved until the Administrative Committee sent out the 1-27-95 letter which states, "The Administrative Committee has approved your application for early retirement benefits..." JA 3191. Addington testified that, if he had been given accurate information concerning the amount of his monthly pension benefits, he would not have taken early retirement. JA 3192. Although Appellees dismiss this claim as inaccurate and self-serving, the district court did not doubt Addington's credibility and it is quite possible that Addington was waiting on the approval letter to finalize [*596] his decision. Based on the facts, the Court is not left with a definite and firm conviction that a mistake has been committed in determining that Addington relied on the mistaken calculation. See *United States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*.

C.

Because the Court [**30] determines that Addington relied and continues to rely on the mistaken calculation and subsequent payment by the Administrative Committee, it is necessary to determine the appropriate remedy in this situation. Appellees do not ask that Addington return the overpayment before receiving any future plan payments. (Appellee's Br., 76.) However, Appellees contend that any rescission remedy should require Addington to repay the overpaid pension benefits by offsetting any overpayment against any past payment due Addington. The Court disagrees.

The district court ordered that the Pittston Plan rescind Addington's election to retire early and raise his benefit to the $ 1256.00 monthly benefit he would have earned had he worked until his normal retirement date of November 1, 1997. JA 3196. Appellees contend that Addington has received an overpayment because he received $ 2,140.43 monthly from January 1995 until January 2000. JA 3059. However, the district court stated that it would be "unreasonable and inequitable" to order Addington to return "any of the early retirement he received." JA 3193, 3205. The Court agrees that partial rescission was proper in this case.

Although Appellees argue that [**31] the facts in this case do not justify partial rescission as necessary or equitable, this Court finds that the district court properly weighed the equities in its decision not to order Addington to repay incorrectly calculated pension payments. The evidence does not suggest that the mistaken pension distribution was caused by Addington but rather was the result of the Administrative Committee's miscalculations. See *Phillips v. Maritime Association - I.L.A. Local Pension Plan, 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001)*(stating that while fault does not necessarily preclude restitution, a party's culpability is an appropriate equitable consideration). To punish Addington by forcing him to repay pension benefits that he received as the result of a mistake made by the Administrative Committee is contrary to the primary purpose of ERISA, which is to protect plan participants. The Court intends to restore Addington, as much as possible, to the position he would have been in had the mistake never been made without inflicting unnecessary injury on an innocent beneficiary.

The Supreme Court and this Court have expressly

authorized federal courts to develop a federal common law of rights and obligations [**32] under ERISA-regulated plans. *Provident Life & Acc. Ins. Co. v. Waller, 906 F.2d 985, 990 (4th Cir. 1990)*. In Varity, the Supreme Court recognized that courts will keep in mind the special nature and purpose of employee benefit plans in fashioning 'appropriate' equitable relief. *Varity, 516 U.S. at 515*. Federal common-law restitution is to be used to further the purposes of ERISA and is governed by general equitable principles. *Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176 (3rd Cir. 1991)*.

In Griggs I, this Court determined that ***HN11***[↑] reinstatement of employment is an appropriate equitable remedy when an employee had been induced to accept early retirement based on incomplete or inaccurate information for which the plan administrator could be held responsible. *237 F.3d at 385*. However, based on Addington's situation, rescission of Addington's election to [*597] take early retirement and reinstatement to his former position is not appropriate or possible. Here, Addington took early retirement effectI've January 1, 1995 and has been out of the work force for approximately 12 years. Addington is currently 72 years old and Pittston has sold all of its coal mining operations. [**33] JA 3192. However, it does appear equitable and appropriate for the court to order that Addington be allowed to rescind his election for early retirement benefits and to reinstate him to the benefits he would be entitled to under the Pittston Plan if he had continued to work until his normal retirement date of November 1, 1997, which would be $ 1,256.00.

HN12[↑] Normally, equitable rescission involves a restoration of the parties to the status quo as it existed before the rescinded transaction. *See Pinter v. Dahl, 486 U.S. 622, 642 n.18, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988)*(noting that equitable rescission provides for restoration of the status quo). However, this Court in Griggs II stated that "the complete-restoration requirement is a general one that is subject to certain exceptions" and also stated that courts of equity may order rescission "where the equities of the situation so demanded." ***Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 448-49 (4th Cir. 2004)***("Griggs II"). Further, the Court stated that the formulation of the exception is somewhat broad to give federal courts the flexibility to appropriately balance the interests of participants and beneficiaries of ERISA plans against the interests and obligations [**34] of employers and fiduciaries. ***Id. at 449***. Additionally, the Court stated that "a rule generally requiring full restoration of benefits to accompany a grant of rescission protects the financial integrity of ERISA plans, while permitting an exception to this rule when the equities of the situation demand[,] provides a necessary incentive for ERISA fiduciaries to take seriously their obligations to protect the interests of the participants and beneficiaries." Id. The Court finds that when applying this rule and the potential exception to the facts, it would be unreasonable and inequitable to order Addington to return any of the early retirement benefits he received or to offset the overpayment against any future payment in order to rescind his early retirement election.

The responsibility for the miscalculation of Addington's early retirement benefits lies with the Pittston Plan and with the Pittston employees who were entrusted with the task of computing his benefits. Because of Appellees' mistakes, Addington and his wife detrimentally relied on a stated monthly early retirement payment and have lived according to this fixed monthly standard for many years. *See Kaliszewski v. Sheet Metal Workers' Nat'l Pension Fund, No. 03-216E, 2005 U.S. Dist. LEXIS 23059, 2005 WL 2297309, at *8 (W.D. Pa., July 19, 2005)* [**35] (highlighting the significant equitable concerns regarding the nine-year duration and extent of Plaintiff's reliance on the Fund's erroneous pension information and benefit payments, as to, e.g., lifestyle and financial planning in denying Defendant's motion for summary judgment). Thus, the equities of the situation demand an exception to the full restoration rule in order to protect Addington and provide a necessary incentive for Pittston to ensure that they are protecting the interests of future participants and beneficiaries. The Court affirms the district court finding that Addington does not have to repay the overpaid pension benefits.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

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IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 6

Cleveland Bd. of Educ. V. Loudermill

470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Johnston v. Manitowoc County Health Care Center, E.D.Wis., May 24, 1996

105 S.Ct. 1487
Supreme Court of the United States

CLEVELAND BOARD OF EDUCATION, Petitioner,
v.
James LOUDERMILL et al.
PARMA BOARD OF EDUCATION, Petitioner,
v.
Richard DONNELLY et al.
James LOUDERMILL, Petitioner,
v.
CLEVELAND BOARD OF EDUCATION et al.

Nos. 83–1362, 83–1363 and 83–6392.
|
Argued Dec. 3, 1984.
|
Decided March 19, 1985.

Terminated school district employees brought action against boards of education challenging propriety of their discharges. The District Court for the Northern District of Ohio, John M. Manos, J., dismissed the actions for failure to **state** claims on which relief could be granted, and the Court of Appeals affirmed in part and vacated and remanded in part. 721 F.2d 550. On certiorari, the Supreme Court, Justice White, held that process due to the terminated employees was pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by Ohio statute and, because the employees alleged that they had no chance to respond, their complaints against boards of education sufficiently **stated** a claim.

Judgment of Court of Appeals affirmed; case remanded.

Justice Marshall filed opinion concurring in part and concurring in judgment.

Justice Brennan filed opinion concurring in part and dissenting in part.

Justice Rehnquist filed dissenting opinion.

Order on remand, 763 F.2d 202.

West Headnotes (8)

[1] **Constitutional Law**
⚭Public **Employment** Relationships

Public employees having **property right** in continued **employment** cannot be deprived of that **property right** by the **state** without due process. U.S.C.A. Const.Amends. 5, 14.

858 Cases that cite this headnote

[2] **Constitutional Law**
⚭Source of right or interest

Property interests protected by due process are not created by the Constitution but, rather, are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as **state** law. U.S.C.A. Const.Amends. 5, 14.

788 Cases that cite this headnote

[3] **Constitutional Law**
⚭**Procedural due process** in general
Constitutional Law
⚭Substantive Due Process in General

As relating to due process clause provision that substantive rights of life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures, categories of substance and procedure are distinct; once it is determined that the due process clause applies, question remains what process is due. U.S.C.A. Const.Amends. 5, 14.

634 Cases that cite this headnote

[4] **Constitutional Law**
⇦Duration and timing of deprivation; pre- or post-deprivation remedies

An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S.C.A. Const.Amends. 5, 14.

1230 Cases that cite this headnote

[5] **Constitutional Law**
⇦Notice, hearing, proceedings, and review in general

Due process clause requires some kind of a hearing prior to discharge of employee who has a constitutionally protected property interest in his **employment**. U.S.C.A. Const.Amends. 5, 14.

2290 Cases that cite this headnote

[6] **Constitutional Law**
⇦Notice and Hearing

Right to a hearing under the due process clause does not depend on a demonstration of certain success. U.S.C.A. Const.Amends. 5, 14.

241 Cases that cite this headnote

[7] **Constitutional Law**
⇦Notice and hearing; proceedings and review
Education
⇦Pleadings

Process due to terminated school district employees was pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by Ohio statute and, because the employees alleged that they had no chance to respond, their complaints against boards of education sufficiently **stated** a claim. Ohio R.C. § 124.34; U.S.C.A. Const.Amends. 5, 14.

2278 Cases that cite this headnote

[8] **Education**
⇦Pleadings
Public Employment
⇦Pleading

Former school district employee's complaint reciting course of proceedings regarding his termination but which did not indicate that his wait for conclusion of the proceedings was unreasonably prolonged other than the fact that it took nine months failed to **state** a claim of a constitutional deprivation. U.S.C.A. Const.Amends. 5, 14.

72 Cases that cite this headnote

1488 *532 *Syllabus

In No. 83–1362, petitioner Board of Education hired respondent Loudermill as a security guard. On his job application Loudermill **stated** that he had never been convicted of a felony. Subsequently, upon discovering that he had in fact been convicted of grand larceny, the Board dismissed him for dishonesty in filling out the job application. He was not afforded an opportunity to respond to the dishonesty charge or to challenge the dismissal. Under Ohio law, Loudermill was a "classified civil servant," and by statute, as such an employee, could be terminated only for cause and was entitled to administrative review of the dismissal. He filed an appeal with the Civil Service Commission, which, after hearings before a referee and the Commission, upheld the dismissal some nine months after the appeal had been filed. Although the Commission's decision was subject to review in the **state** courts, Loudermill instead filed suit in Federal District Court, alleging that the Ohio statute providing for administrative review was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal, thus depriving him of liberty and

property without due process. It was also alleged that the statute was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings. The District Court dismissed the suit for failure to **state** a claim on which relief could be granted, holding that because the very statute that created the **property right** in continued **employment** also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due; that the post-termination hearings also adequately protected Loudermill's property interest; and that in light of the Commission's crowded docket the delay in processing his appeal was constitutionally acceptable. In No. 83–1363, petitioner Board of Education fired respondent Donnelly from his job as a bus mechanic because he had *533 failed an eye examination. He appealed to the Civil Service Commission, which ordered him reinstated, but without backpay. He then filed a complaint in Federal District Court essentially identical to Loudermill's, and the court dismissed for failure to **state** a claim. On a **1489 consolidated appeal, the Court of Appeals reversed in part and remanded, holding that both respondents had been deprived of due process and that the compelling private interest in retaining **employment**, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. But with regard to the alleged deprivation of liberty and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation.

Held: All the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by the Ohio statute; since respondents alleged that they had no chance to respond, the District Court erred in dismissing their complaints for failure to **state** a claim. Pp. 1491–1496.

(a) The Ohio statute plainly supports the conclusion that respondents possess **property rights** in continued **employment**. The Due Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. "Property" cannot be defined by the procedures provided for its deprivation. Pp. 1491–1493.

(b) The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his **employment**. The need for some form of pretermination hearing is evident from a balancing of the competing interests at stake: the private interest in retaining **employment**, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. Pp. 1493–1495.

(c) The pretermination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process are notice and an opportunity to respond. Pp. 1495–1496.

(d) The delay in Loudermill's administrative proceedings did not constitute a separate constitutional violation. The Due Process Clause *534 requires provision of a hearing "at a meaningful time," and here the delay stemmed in part from the thoroughness of the procedures. P. 1496.

721 F.2d 550 (6 Cir.1983), affirmed and remanded.

Attorneys and Law Firms

James G. Wyman argued the cause for petitioners in Nos. 83-1362 and 83-1363 and respondents in No. 83-6392. With him on the brief for petitioner in No. 83-1362 was *Thomas C. Simiele. John F. Lewis* and *John T. Meredith* filed a brief for petitioner in No. 83-1363. *John D. Maddox* and *Stuart A. Freidman* filed a brief for respondents Cleveland Civil Service Commission et al. in No. 83-6392.

Robert M. Fertel, by appointment of the Court, 468 U.S. 1203, argued the cause and filed briefs for respondents in Nos. 83-1362 and 83-1363 and petitioner in No. 83-6392.†

† Briefs of *amici curiae* urging reversal in Nos. 83-1362 and 83-1363 were filed for the **State** of Ohio et al. by *Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *Gene W. Holliker* and *Christine Manuelian,* Assistant Attorneys General, *Charles A. Graddick,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *Tany S. Hong,* Attorney General of Hawaii, *Lindley E. Pearson,* Attorney General of Indiana, *Robert T. Stephen,* Attorney General of Kansas, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *Michael T. Greely,* Attorney General of Montana, *Brian McKay,* Attorney

General of Nevada, *Gregory H. Smith,* Attorney General of New Hampshire, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Robert WeFald,* Attorney General of North Dakota, *Michael Turpen,* Attorney General of Oklahoma, *David Frohnmayer,* Attorney General of Oregon, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Mark V. Meierhenry,* Attorney General of South Dakota, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Archie G. McClintock,* Attorney General of Wyoming; and for the National School Boards Association by *Gwendolyn H. Gregory* and *August W. Steinhilber.*

Briefs of *amici curiae* urging affirmance in Nos. 83-1362 and 83-1363 were filed for the American Civil Liberties Union of Cleveland Foundation by *Gordon J. Beggs, Edward R. Stege, Jr.,* and *Charles S. Sims;* for the American Federation of **State**, County, and Municipal Employees, AFL-CIO, by *Richard Kirschner;* and for the National Educational Association by *Robert H. Chanin* and *Michael H. Gottesman.*

Opinion

*535 Justice WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill **stated** that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his **employment** records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the **employment** application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to **1490 challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Ohio Rev.Code Ann. § 124.11 (1984). Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the *536 full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the **state** courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to **state** a claim on which relief could be granted. See Fed.Rule Civ.Proc. 12(b)(6). It held that because the very statute that created the **property right** in continued **employment** also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due. The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that, in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard *537 the case. It ordered Donnelly reinstated, though without backpay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim,

relying on its opinion in *Loudermill.*

The District Court denied a joint motion to alter or amend its judgment,[2] and the **1491 cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit reversed in part and remanded. 721 F.2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original rationale. Instead, it concluded that the compelling private interest in retaining **employment**, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.*, at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.*, at 563–564.

*538 The dissenting Judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.*, at 566.

Both employers petitioned for certiorari. Nos. 83–1362 and 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, 467 U.S. 1204, 104 S.Ct. 2384, 81 L.Ed.2d 343 (1984), and now affirm in all respects.

II

[1] Respondents' federal constitutional claim depends on their having had a **property right** in continued **employment.**[3] *Board of Regents v. Roth,* 408 U.S. 564, 576–578, 92 S.Ct. 2701, 2708–2709, 33 L.Ed.2d 548 (1972); *Reagan v. United States,* 182 U.S. 419, 425, 21 S.Ct. 842, 845, 45 L.Ed. 1162 (1901). If they did, the **State** could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11–12, 98 S.Ct. 1554, 1561–1562, 56 L.Ed.2d 30 (1978); *Goss v. Lopez,* 419 U.S. 565, 573–574, 95 S.Ct. 729, 735–736, 42 L.Ed.2d 725 (1975).

[2] Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as **state** law...." *Board of Regents v. Roth, supra,* 408 U.S., at 577, 92 S.Ct., at 2709. See also *Paul v. Davis,* 424 U.S. 693, 709, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev.Code Ann. § 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except ... for ... misfeasance, *539 malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed **property rights** in continued **employment.** Indeed, this question does not seem to have been disputed below.[5]

1492 The Parma Board argues, however, that the **property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The *540 procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.*, at 27. See also Brief for **State** of Ohio et al. as *Amici Curiae* 5–10.

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

"[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be **employed** in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.*, at 152–154, 94 S.Ct., at 1643–1644.

This view garnered three votes in *Arnett,* but was specifically rejected by the other six Justices. See *id.,* at 166–167, 94 S.Ct., at 1650–1651 (POWELL, J., joined by BLACKMUN, J.,); *id.,* at 177–178, 185, 94 S.Ct., at 1655–1656 (WHITE, J.,); *id.,* at 211, 94 S.Ct., at 1672 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop v. Wood,* 426 U.S. 341, 355–361, 96 S.Ct. 2074, 2082–2085, 48 L.Ed.2d 684 (1976) (WHITE, J., dissenting); *Goss v. Lopez,* 419 U.S., at 586–587, 95 S.Ct., at 742–743 (POWELL, J., joined *541 by BURGER, C.J., and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the Court has clearly rejected it. In *Vitek v. Jones,* 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the **State** may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had **1493 the prerogative to define the procedures to be followed to protect that entitlement.

[3] In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] **employment**, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy, supra,* 416 U.S., at 167, 94 S.Ct., at 1650 (POWELL, J., concurring in part and concurring in result in part); see *id.,* at 185, 94 S.Ct., at 1659 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The answer to that question is not to be found in the Ohio statute.

*542 III

[4] [5] An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original); see *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his **employment**. *Board of Regents v. Roth,* 408 U.S., at 569–570, 92 S.Ct., at 2705; *Perry v. Sindermann,* 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis v. Scherer,* 468 U.S. 183, 192, n. 10, 104 S.Ct. 3012, 3018, n. 10, 82 L.Ed.2d 139 (1984); *id.,* at 200–203, 104 S.Ct., at 3022–3024 (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry v. Barchi,* 443 U.S. 55, 65, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in *543 retaining **employment**, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. **1494 See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

First, the significance of the private interest in retaining **employment** cannot be gainsaid. We have frequently

recognized the severity of depriving a person of the means of livelihood. See *Fusari v. Steinberg,* 419 U.S. 379, 389, 95 S.Ct. 533, 539, 42 L.Ed.2d 521 (1975); *Bell v. Burson, supra,* 402 U.S., at 539, 91 S.Ct., at 1589; *Goldberg v. Kelly,* 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969). While a fired worker may find **employment** elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See *Lefkowitz v. Turley,* 414 U.S. 70, 83–84, 94 S.Ct. 316, 325–326, 38 L.Ed.2d 274 (1973).

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano v. Yamasaki,* 442 U.S. 682, 686, 99 S.Ct. 2545, 2550, 61 L.Ed.2d 176 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss v. Lopez,* 419 U.S., at 583–584, 95 S.Ct., at 740–741; *Gagnon v. Scarpelli,* 411 U.S. 778, 784–786, 93 S.Ct. 1756, 1760–1761, 36 L.Ed.2d 656 (1973).[8]

[6] ***544** The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[9] and the right to a hearing does not depend on a demonstration of certain success. *Carey v. Piphus,* 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep ****1495** a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully **employed** rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in ***545** keeping the employee on the job,[10] it can avoid the problem by suspending with pay.

IV

[7] The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut,* 401 U.S., at 378, 91 S.Ct., at 786. See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894–895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge,* 424 U.S., at 343, 96 S.Ct., at 907. Under **state** law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.,* at 264, 90 S.Ct., at 1018, that case presented significantly different considerations than are present in the context of public **employment**. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether ***546** there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540, 91 S.Ct., at 1590.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the

employer's evidence, and an opportunity to present his side of the story. See *Arnett v. Kennedy,* 416 U.S., at 170–171, 94 S.Ct., at 1652–1653 (opinion of POWELL, J.); *id.,* at 195–196, 94 S.Ct., at 1664–1665 (opinion of WHITE, J.); see also *Goss v. Lopez,* 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

[8] Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long.[11] The Court of *547 **1496 Appeals held otherwise, and we agree.[12] The Due Process Clause requires provision of a hearing "at a meaningful time." *E.g., Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry v. Barchi,* 443 U.S., at 66, 99 S.Ct., at 2650. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. App. 10. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se.* Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.[13]

VI

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination *548 administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice MARSHALL, concurring in part and concurring in the judgment.

I agree wholeheartedly with the Court's express rejection of the theory of due process, urged upon us by the petitioner Boards of Education, that a public employee who may be discharged only for cause may be discharged by whatever procedures the legislature chooses. I therefore join Part II of the opinion for the Court. I also agree that, before discharge, the respondent employees were entitled to the opportunity to respond to the charges against them (which is all they requested), and that the failure to accord them that opportunity was a violation of their constitutional rights. Because the Court holds that the respondents were due all the process they requested, I concur in the judgment of the Court.

I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents **1497 sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages,* the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett v. Kennedy,* 416 U.S. 134, 214, 94 S.Ct. 1633, 1674, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting). Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety.

*549 To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional pre-deprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pretermination proceeding. After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant

and often traumatic disruptions to his personal and economic life.

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing—indeed, in this case nine months passed before Loudermill received a decision from his postdeprivation hearing. During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public **employment** if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many **States** deny unemployment compensation to workers discharged for cause.' Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to *550 cash before becoming eligible for public assistance. Even in that instance

> "[t]he substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government **employment** cannot be so easily discounted," *id.*, at 221, 94 S.Ct., at 1677.

Moreover, it is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury. Even if reinstatement is forthcoming, the same might not be true of back-pay—as it was not to respondent Donnelly in this case—and the delay in receipt of wages would thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

**1498 That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable. Yet in requiring only that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial.

Were there any guarantee that the post-deprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this minimal pre-deprivation *551 process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood. Nor has this Court grounded any guarantee of this kind in the Constitution. Indeed, this Court has in the past approved, at least implicitly, an average 10 or 11-month delay in the receipt of a decision on Social Security benefits, *Mathews v. Eldridge*, 424 U.S. 319, 341–342, 96 S.Ct. 893, 905–906, 47 L.Ed.2d 18 (1976), and, in the case of respondent Loudermill, the Court gives a stamp of approval to a process that took nine months. The hardship inevitably increases as the days go by, but nevertheless the Court countenances such delay. The adequacy of the predeprivation and postdeprivation procedures are inevitably intertwined, and only a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possibility of a wrongful termination of wages.

The opinion for the Court does not confront this reality. I cannot and will not close my eyes today—as I could not 10 years ago—to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

Justice BRENNAN, concurring in part and dissenting in part.

Today the Court puts to rest any remaining debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for *552 cause. As the Court convincingly demonstrates, the employee's right to fair notice and an opportunity to "present his side of the story" before discharge is not a matter of legislative grace, but of "constitutional

guarantee." *Ante,* at 1493, 1495. This principle, reaffirmed by the Court today, has been clearly discernible in our "repeated pronouncements" for many years. See *Davis v. Scherer,* 468 U.S. 183, 203, 104 S.Ct. 3012, 3023, 82 L.Ed.2d 139 (1984) (BRENNAN, J., concurring in part and dissenting in part).

Accordingly, I concur in Parts I–IV of the Court's opinion. I write separately to comment on two issues the Court does not resolve today, and to explain my dissent from the result in Part V of the Court's opinion.

I

First, the Court today does not prescribe the precise form of required pretermination procedures in cases where an employee disputes the *facts* proffered to support his discharge. The cases at hand involve, as the Court recognizes, employees who did not dispute the facts but had "plausible arguments to make that might have prevented their discharge." *Ante,* at 1494. In such cases, notice and an "opportunity to present reasons," *ante,* at 1495, are sufficient to protect the important interests at stake.

**1499 As the Court also correctly notes, other cases "will often involve factual disputes," *ante,* at 1494, such as allegedly erroneous records or false accusations. As Justice MARSHALL has previously noted and stresses again today, *ante* at 1497, where there exist not just plausible arguments to be made, but also "substantial disputes in testimonial evidence," due process may well require more than a simple opportunity to argue or deny. *Arnett v. Kennedy,* 416 U.S. 134, 214, 94 S.Ct. 1633, 1674, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting). The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe *553 that the charges against the employee are *true* and support the proposed action." *Ante,* at 1495 (emphasis added). When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker. Such an opportunity might not necessitate "elaborate" procedures, see *ante,* at 1495, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true."

Factual disputes are not involved in these cases, however, and the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). I do not understand Part IV to foreclose the views expressed above or by Justice MARSHALL, *ante,* p. 1497, with respect to discharges based on disputed evidence or testimony. I therefore join Parts I–IV of the Court's opinion.

II

The second issue not resolved today is that of administrative delay. In holding that Loudermill's administrative proceedings did not take too long, the Court plainly does *not* state a flat rule that 9-month delays in deciding discharge appeals will pass constitutional scrutiny as a matter of course. To the contrary, the Court notes that a full post-termination hearing and decision must be provided at "a meaningful time" and that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Ante,* at 1496. For example, in *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), we disapproved as "constitutionally infirm" the shorter administrative delays that resulted under a statute that required "prompt" postsuspension hearings for suspended racehorse trainers with decision to follow within 30 days of the hearing. *Id.,* at 61, 66, 99 S.Ct., at 2647, 2650. As Justice MARSHALL demonstrates, when an employee's wages are terminated pending *554 administrative decision, "hardship inevitably increases as the days go by." *Ante,* at 1498; see also *Arnett v. Kennedy, supra,* 416 U.S., at 194, 94 S.Ct., at 1664 (WHITE, J., concurring in part and dissenting in part) ("The impact on the employee of being without a job pending a full hearing is likely to be considerable because '[m]ore than 75 percent of actions contested within employing agencies require longer to decide than the 60 days required by ... regulations' ") (citation omitted). In such cases the Constitution itself draws a line, as the Court declares, "at some point" beyond which the State may not continue a deprivation absent decision.[1] The holding in Part V is merely that, in this particular case, Loudermill failed to allege facts sufficient **1500 to state a cause of action, and not that nine months can never exceed constitutional limits.

III

Recognizing the limited scope of the holding in Part V, I must still dissent from its result, because the record in this case is insufficiently developed to permit an informed judgment on the issue of overlong delay. Loudermill's complaint was dismissed without answer from the respondent Cleveland Civil Service Commission. Allegations at this early stage are to be liberally construed, and "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (citation omitted). Loudermill alleged that it took the Commission over two and one-half months simply to hold ***555** a hearing in his case, over two months *more* to issue a non-binding interim decision, and more than three and one-half months after *that* to deliver a final decision. Complaint ¶¶ 20, 21, App. 10.[2] The Commission provided no explanation for these significant gaps in the administrative process; we do not know if they were due to an overabundance of appeals, Loudermill's own foot-dragging, bad faith on the part of the Commission, or any other of a variety of reasons that might affect our analysis. We do know, however, that under Ohio law the Commission is obligated to hear appeals like Loudermill's "within thirty days." Ohio Rev.Code Ann. § 124.34 (1984).[3] Although this ****1501** statutory limit has been ***556** viewed only as "directory" by Ohio courts, those courts have also made it clear that when the limit is exceeded, "[t]he burden of proof [is] placed on the [Commission] to illustrate to the court that the failure to comply with the 30-day requirement ... was reasonable." *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (Com.Pl.1977). I cannot conclude on this record that Loudermill could prove "no set of facts" that might have entitled him to relief after nine months of waiting.

***557** The Court previously has recognized that constitutional restraints on the timing, no less than the form, of a hearing and decision "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738–739, 42 L.Ed.2d 725 (1975). The relevant interests have generally been recognized as threefold: "the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982) (citations omitted); accord, *Mathews v. Eldridge*, 424 U.S. 319, 334–335, 96 S.Ct. 893, 902–903, 47 L.Ed.2d 18 (1976); cf. *United States v. $8,850*, 461 U.S. 555, 564, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983) (four-factor test for evaluating constitutionality of delay between time of property seizure and initiation of forfeiture action). "Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." *Id.*, at 565, 103 S.Ct., at 2012.

Thus the constitutional analysis of delay requires some development of the relevant factual context when a plaintiff alleges, as Loudermill has, that the administrative process has taken longer than some minimal amount of time. Indeed, all of our precedents that have considered administrative delays under the Due Process Clause, either explicitly or *sub silentio*, have been decided only after more complete proceedings in the District Courts. See, *e.g.*, *$8,850, supra; Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Mathews v. Eldridge, supra.*[4] Yet in Part V, the Court summarily holds Loudermill's allegations ***558** insufficient, without adverting to any considered balancing of interests. Disposal of Loudermill's complaint without examining the competing interests involved marks an unexplained departure from the careful multifaceted analysis of the facts we consistently have employed in the past.

I previously have stated my view that

> "[t]o be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—*i.e.*, either before or immediately after suspension." *Barry v. Barchi, supra*, 443 U.S., at 74, 99 S.Ct., at 2654 (BRENNAN, J., concurring in part).

****1502** Loudermill's allegations of months-long administrative delay, taken together with the facially divergent results regarding length of administrative delay found in *Barchi* as compared to *Arnett*, see n. 4, *supra*, are sufficient in my mind to require further factual development. In no other way can the third *Mathews* factor—"the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement [in this case, a speedier hearing and decision] would entail," 424 U.S., at 335, 96 S.Ct., at 903—sensibly be evaluated in this case.[5] I therefore would remand the delay issue to the District Court for further evidentiary proceedings consistent with the *Mathews* approach. I respectfully dissent from the Court's contrary decision in Part V.

*559 Justice REHNQUIST, dissenting.

In *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), six Members of this Court agreed that a public employee could be dismissed for misconduct without a full hearing prior to termination. A plurality of Justices agreed that the employee was entitled to exactly what Congress gave him, and no more. The Chief Justice, Justice Stewart, and I said:

> "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service.' But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers v. McElroy,* 367 U.S. 886, 896–897, 81 S.Ct. 1743, 1749–1750, 6 L.Ed.2d 1230 (1961), we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive *560 right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." *Id.,* at 151–152, 94 S.Ct., at 1643.

In these cases, the relevant Ohio statute provides in its first paragraph that

> "[t]he tenure of every officer or employee in the classified service of the state **1503 and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except ... for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." Ohio Rev.Code Ann. § 124.34 (1984).

The very next paragraph of this section of the Ohio Revised Code provides that in the event of suspension of more than three days or removal the appointing authority shall furnish the employee with the stated reasons for his removal. The next paragraph provides that within 10 days following the receipt of such a statement, the employee may appeal in writing to the State Personnel Board of Review or the Commission, such appeal shall be heard within 30 days from the time of its filing, and the Board may affirm, disaffirm, or modify the judgment of the appointing authority.

*561 Thus in one legislative breath Ohio has conferred upon civil service employees such as respondents in these cases a limited form of tenure during good behavior, and prescribed the procedures by which that tenure may be terminated. Here, as in *Arnett,* "[t]he employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the Ohio Legislature] has designated for the determination of cause." 416 U.S., at 152, 94 S.Ct., at 1643 (opinion of REHNQUIST, J.). We stated in *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

We ought to recognize the totality of the **State's** definition of the **property right** in question, and not merely seize upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the **State** has inexorably conferred upon a civil service employee something which it is powerless under the United **States** Constitution to qualify in the next paragraph of the statute. This practice ignores our duty under *Roth* to rely on **state** law as the source of property interests for purposes of applying the Due Process Clause of the Fourteenth Amendment. While it does not impose a federal definition of property, the Court departs from the full breadth of the holding in *Roth* by its selective choice from among the sentences the Ohio Legislature chooses to use in establishing and qualifying a right.

Having concluded by this somewhat tortured reasoning that Ohio has created a **property right** in the respondents in these cases, the Court naturally proceeds to inquire what process is "due" before the respondents may be divested of ***562** that right. This customary "balancing" inquiry conducted by the Court in these cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake. The results in previous cases and in these cases have been quite unpredictable. To paraphrase Justice Black, today's balancing act requires a "pretermination opportunity to respond" ****1504** but there is nothing that indicates what tomorrow's will be. *Goldberg v. Kelly,* 397 U.S. 254, 276, 90 S.Ct. 1011, 1024, 25 L.Ed.2d 287 (1970) (Black, J., dissenting). The results from today's balance certainly do not jibe with the result in *Goldberg* or *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[4] The lack of ***563** any principled standards in this area means that these **procedural due process** cases will recur time and again. Every different set of facts will present a new issue on what process was due and when. One way to avoid this subjective and varying interpretation of the Due Process Clause in cases such as these is to hold that one who avails himself of government entitlements accepts the grant of tenure along with its inherent limitations.

Because I believe that the Fourteenth Amendment of the United **States** Constitution does not support the conclusion that Ohio's effort to confer a limited form of tenure upon respondents resulted in the creation of a "**property right**" in their **employment,** I dissent.

All Citations

470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494, 118 L.R.R.M. (BNA) 3041, 53 USLW 4306, 23 Ed. Law Rep. 473, 1 IER Cases 424

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev.Code Ann. § 124.34 (1984). Petitioner Parma Board of Education interprets this as authority to reinstate with or without backpay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, **stated** that the Commission lacked the power to award backpay. 721 F.2d 550, 554, n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

2 In denying the motion, the District Court no longer relied on the principle that the **state** legislature could define the necessary procedures in the course of creating the **property right.** Instead, it reached the same result under a balancing test based on Justice POWELL's concurring opinion in *Arnett v. Kennedy,* 416 U.S. 134, 168–169, 94 S.Ct. 1633, 1651–1652, 40 L.Ed.2d 15 (1974), and the Court's opinion in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

3 Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 13, *infra.*

4 The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect

of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

5 The Cleveland Board of Education now asserts that Loudermill had no **property right** under **state** law because he obtained his **employment** by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions—that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage. Finally, the argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

6 After providing for dismissal only for cause, see n. 4, *supra,* § 124.34 **states** that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within 10 days of the filing of the order with the Director of Administrative Services, the employee may file a written appeal with the **State** Personnel Board of Review or the Commission. "In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the Commission's decision in the **State** Court of Common Pleas.

7 There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements. See *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908).

8 This is not to say that where **state** conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum v. Fano,* 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon v. Love,* 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect.... [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss v. Lopez,* 419 U.S., at 583–584, 95 S.Ct., at 740–741.

9 Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction. Tr. of Oral Arg. 35.

10 In the cases before us, no such danger seems to have existed. The examination Donnelly failed was related to driving school buses, not repairing them. *Id.,* at 39–40. As the Court of Appeals **stated**, "[n]o emergency was even conceivable with respect to Donnelly." 721 F.2d, at 562. As for Loudermill, petitioner **states** that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the **employment** form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occurring more than two years previously. See Ohio Admin.Code § 124–3–04 (1979). Petitioner concedes that Loudermill's job performance was fully satisfactory.

11 Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have ruled that the time limit is not mandatory. *E.g., In re Bronkar,* 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (Com.Pl.1977). The statute does not provide a time limit for the actual decision.

12 It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry v. Barchi,* 443 U.S. 55, 72–74,

99 S.Ct. 2642, 2653–2654, 61 L.Ed.2d 365 (1979) (BRENNAN, J., concurring in part). We conclude that it is appropriate to consider this issue, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in the cross-petition. Finally, the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.

13 The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals found, 721 F.2d, at 563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976).

* See U.S. Dept. of Labor, Comparison of **State** Unemployment Insurance Laws §§ 425, 435 (1984); see also *id.*, at 4–33 to 4–36 (table of **state** rules governing disqualification from benefits for discharge for misconduct).

1 Post-termination administrative procedures designed to determine fully and accurately the correctness of discharge actions are to be encouraged. Multiple layers of administrative procedure, however, may not be created merely to smother a discharged employee with "thoroughness," effectively destroying his constitutionally protected interests by over-extension. Cf. *ante*, at 1496 ("thoroughness" of procedures partially explains delay in this case).

2 The interim decision, issued by a hearing examiner, was in Loudermill's favor and recommended his reinstatement. But Loudermill was not reinstated nor were his wages even temporarily restored; in fact, there apparently exists no provision for such interim relief or restoration of backpay under Ohio's statutory scheme. See *ante*, at 1490, n. 1; cf. *Arnett v. Kennedy*, 416 U.S. 134, 196, 94 S.Ct. 1633, 1665, 40 L.Ed.2d 15 (1974) (WHITE, J., concurring in part and dissenting in part) (under federal civil service law, discharged employee's wages are only "provisionally cut off" pending appeal); *id.*, at 146 (opinion of REHNQUIST, J.) (under federal system, backpay is automatically refunded "if the [discharged] employee is reinstated on appeal"). See also N.Y.Civ.Serv.Law § 75(3) (McKinney 1983) (suspension without pay pending determination of removal charges may not exceed 30 days). Moreover, the final decision of the Commission to reverse the hearing examiner apparently was arrived at without any additional evidentiary development; only further argument was had before the Commission. 721 F.2d 550, 553 (CA6 1983). These undisputed facts lead me at least to question the administrative value of, and justification for, the 9-month period it took to decide Loudermill's case.

3 A number of other **States** similarly have specified time limits for hearings and decisions on discharge appeals taken by tenured public employees, indicating legislative consensus that a month or two normally is sufficient time to resolve such actions. No **state** statutes permit administrative delays of the length alleged by Loudermill. See, *e.g.*, Ariz.Rev.Stat.Ann. § 41–785(A), (C) (Supp.1984–1985) (hearing within 30 days, decision within 30 days of hearing); Colo.Rev.Stat. § 24–50–125(4) (Supp.1984) (hearing within 45 days, decision within 45 days of hearing); Conn.Gen.Stat.Ann. § 5–202(b) (Supp.1984) (decision within 60 days of hearing); Ill.Rev.Stat., ch. 24½, ¶ 38b14 (1983) (hearing within 45 days); Ind.Code § 4–15–2–35 (1982) (decision within 30 days of hearing); Iowa Code § 19A.14 (1983) (hearing within 30 days); Kan.Stat.Ann. § 75–2949(f) (Supp.1983) (hearing within 45 days); Ky.Rev.Stat. § 18A.095(3) (1984) (hearing within 60 days of filing, decision within 90 days of filing); Maine Rev.Stat.Ann., Tit. 5, § 753(5) (1979) (decision within 30 days of hearing); Md.Ann.Code, Art. 64A, §§ 33(b)(2), (e) (Supp.1984) (salary suspension hearing within 5 days and decision within 5 more days; discharge hearing within 90 days and decision within 45 days of hearing); Mass.Gen.Laws Ann., ch. 31, § 43 (Supp.1984–1985) (hearing within 10 days, findings "forthwith," decision within 30 days of findings); Minn.Stat. § 44.08 (1970) (hearing within 10 days, decision within 3 days of hearing); Nev.Rev.Stat. § 284.390(2) (1983) (hearing within 20 days); N.J.Stat.Ann. §§ 11:15–4, 11:15–6 (West 1976) (hearing within 30 days, decision within 15 days of hearing); Okla.Stat., Tit. 74, §§ 841.13, 841.13A (Supp.1984) (hearing within 35 days, decision within 15 days of hearing); R.I.Gen.Laws §§ 36–4–40, 36–4–40.2, 36–4–41 (1984) (initial hearing within 14 days, interim decision within 20 days of hearing, appeal decision within 30 more days, final decision of Governor within 15 more days); S.C.Code §§ 8–17–330, 8–17–340 (Supp.1984) (interim decision within 45 days of filing, final decision within 20 days of hearing); Utah Code Ann. § 67–19–25 (Supp.1983) (interim decision within 5–20 days, final hearing within 30 days of filing final appeal, final decision within 40 days of hearing); Wash.Rev.Code § 41.64.100 (1983) (final decision within 90 days of filing); Wis.Stat. § 230.44(4)(f) (Supp.1984–1985) (decision within 90 days of hearing); see also Ala.Code § 36–26–27(b) (Supp.1984) (hearings on citizen removal petitions within 20 days of service); D.C.Code § 1–617.3(a)(1)(D) (1981) ("Career and Educational Services" employees "entitled" to decision within 45 days); Ga.Code Ann. § 45–20–9(e)(1) (1982) (hearing officer's decision required within 30 days of hearing); Miss.Code Ann. § 21–31–23 (Supp.1984) (hearing required within 20 days of termination for "extraordinary circumstances").

4 After giving careful consideration to well-developed factual contexts, the Court has reached results that might be viewed as inconsistent in the abstract. Compare *Barchi*, 443 U.S., at 66, 99 S.Ct., at 2650 (disapproving statute

requiring decision within 30 days of hearing), with *Arnett*, 416 U.S., at 194, 94 S.Ct., at 1664 (WHITE, J., concurring in part and dissenting in part) (approving statutory scheme under which over 50 percent of discharge appeals "take more than three months"). Rather than inconsistency, however, these differing results demonstrate the impossibility of drawing firm lines and the importance of factual development in such cases.

5 In light of the complete absence of record evidence, it is perhaps unsurprising that the Court of Appeals below was forced to speculate that "[t]he delays in the instant cases in all likelihood were inadvertent." 721 F.2d at 564, n. 19. Similarly, the Cleveland Board of Education and Civil Service Commission assert only that "[n]o authority is necessary to support the proposition" that administrative resolution of a case like Loudermill's in less than nine months is "almost impossible." Brief for Respondents in No. 83–6392, p. 8, n. 4. To the contrary, however, I believe our precedents clearly require demonstration of some "authority" in these circumstances.

* Today the balancing test requires a pretermination opportunity to respond. In *Goldberg* we required a full-fledged trial-type hearing, and in *Mathews* we declined to require any pretermination process other than those required by the statute. At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired. For example, in *Mathews* we minimized the importance of the benefit to the recipient, **stating** that after termination he could always go on welfare to survive. 424 U.S., at 340–343, 96 S.Ct., at 905–907; see also *id.*, at 350, 96 S.Ct., at 910 (BRENNAN, J., dissenting). Today, however, the Court exalts the recipient's interest in retaining **employment**; not a word is said about going on welfare. Conversely, in *Mathews* we stressed the interests of the **State**, while today, in a footnote, the Court goes so far as to denigrate the **State's** interest in firing a school security guard who had lied about a prior felony conviction. *Ante*, at 1495, n. 10.

Today the Court purports to describe the **State's** interest, *ante*, at 1495, but does so in a way that is contrary to what petitioner Boards of Education have asserted in their briefs. The description of the **State's** interests looks more like a make-weight to support the Court's result. The decision whom to train and **employ** is strictly a decision for the **State**. The Court attempts to ameliorate its ruling by **stating** that a **State** may always suspend an employee with pay, in lieu of a predischarge hearing, if it determines that he poses a threat. *Ante*, at 1495. This does less than justice to the **State's** interest in its financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure, and ignores Ohio's current practice of paying back wages to wrongfully-discharged employees.

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IN THE MATTER OF:

ROBERT PERFETTO,
Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND,
Respondent

Exhibit 7

Wilkinson v. The State Crime Laboratory Comm'n et al.

788 A.2d 1129 (R.I. 2002)

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788 A.2d 1129 (R.I. 2002)

Richard C. WILKINSON

v.

The STATE CRIME LABORATORY COMMISSION et al.

No. 2000-410-Appeal.

Supreme Court of Rhode Island

January 31, 2002.

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Sean M. McAteer, for Plaintiff.

Page 1131

Louis J. Saccoccior James R. Lee, Providence, for Defendant.

Present LEDERBERG, FLANDERS, and GOLDBERG, JJ.

OPINION

FLANDERS, Justice.

This is a government-employment dispute involving a whole passel of claims and counterclaims between a classified "full status" state employee and the state governmental entities and individuals that either employed him or supervised his work at the state's crime laboratory. Both sides have appealed from the Superior Court judgments that disposed of the parties' respective claims.

To resolve the legal issues presented, we must construe provisions of the Merit System Act (merit system)--specifically G.L.1956 § 36-4-59 (tenure in state service) and § 36-4-38 (dismissal)--as well as the State Crime Laboratory Commission Act (crime lab act), G.L.1956 § 12-1.2-6. In addition, we must decide whether certain 1994 amendments to the crime lab act (the 1994 amendments) stripped the plaintiff, Richard C. Wilkinson (plaintiff or Wilkinson), of a property interest in his "full status" as a classified employee under the merit system. Finally, we also must consider whether the individual defendants--Louis Luzzi (Luzzi), who was dean of the Pharmacy Department of the defendant University of Rhode Island (URI) and also served as executive secretary to the Commission, and Dennis Hilliard (Hilliard), who was the director of the crime laboratory, defamed Wilkinson and whether Hilliard committed contempt of court. [1] With respect to defendants' counterclaims, we address whether, as part of his employment at the crime laboratory, Wilkinson was entitled to receive certain benefits and compensation from either or both defendants, URI, and the defendant State of Rhode Island (state). For the reasons classified below, we reverse in part the

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rulings on summary judgment, affirm the final judgment embodying the trial justice's rulings, and remand this case to the Superior Court for further proceedings consistent with this opinion. The pertinent facts and travel of this case are as follows.

Facts and Travel

In 1971, Wilkinson began working as a criminalist for the state in what was then known as the Laboratories for Scientific

Criminal Investigation (laboratory), located at URI's Kingston campus. In June 1973, he became the laboratory's assistant director. In 1978, however, the General Assembly enacted G.L.1956 chapter 1.2 of title 12, via P.L.1978, ch. 206, § 2, which established the State Crime Laboratory Commission (commission), a named defendant herein. It also enacted G.L.1956 chapter 1.1 of title 12, via P.L.1978, ch. 205, art. VIII, § 1, which established the State Central Crime Laboratory (lab or crime lab) at URI. [2] Section 12-1.1-8 authorized the commission, among other things, to pay the salaries of lab employees and to monitor the crime lab's general operation. Although the General Assembly did not authorize URI in 1978 to supervise the commission's employees or to manage the lab's activities, nevertheless, URI did so by exercising a close oversight of the lab and its personnel. [3]

In July 1988, after obtaining twenty years of state-service credit, plaintiff achieved "full status" under the state's merit system as a classified commission employee for which he received his twenty-year certificate. [4] In 1990, as part of a salary negotiation, the state offered plaintiff the nonclassified position of associate professor of toxicology at URI, in addition to his preexisting position as assistant director of the crime lab. The state also allowed plaintiff to work fewer hours, for the same salary. Wilkinson accepted the offer, and in March 1991, the state appointed him acting director of the crime lab.

The present dispute arose with respect to a disagreement over what entity or

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entities actually employed Wilkinson and to whom he was required to report. By letter dated January 8, 1992, Luzzi notified Wilkinson in writing that he was being fired for his alleged insubordination to Luzzi and to URI. On or about February 24, 1992, the commission ratified the action taken by Luzzi and terminated Wilkinson from state employment. On June 30, 1992, however, the commission decided that it should provide Wilkinson with a post-termination hearing. The commission held that hearing on July 22 and 23, 1993, after which it referred the matter to the Attorney General's office (AG) for findings of fact and conclusions of law (a designee of the AG chaired the commission). The AG determined that Wilkinson and all other employees of the crime lab were not URI employees; rather, such employees were statutorily responsible to the commission alone. Thus, the AG concluded, Luzzi lacked authority to act as Wilkinson's superior. The AG also concluded that Wilkinson could not have been insubordinate to Luzzi because Wilkinson was responsible only to the commission (rather than to Luzzi and URI), and that his termination for alleged insubordination had been improper.

After his termination, Wilkinson filed a claim for unemployment compensation benefits. Initially, the director of the Department of Employment Security (DES) denied Wilkinson's claim, stating that he had been discharged for "proved misconduct," and was thereby barred from receiving unemployment benefits by G.L.1956 § 28-44-18. The defendants URI and the commission were parties to the administrative proceedings and to the administrative appeal to the District Court under G.L.1956 § 42-35-15 of the Administrative Procedures Act that followed the agency's denial of benefits to Wilkinson.

The District Court referred the matter to a master, who ultimately issued written findings of fact and law. Thereafter, the District Court duly adopted the master's findings and recommendations as the decision of the court and entered judgment thereon in favor of Wilkinson. The District Court ruled that:

"[I]t is clear that the University's view of its authority over the Crime Laboratory was contrary to law. No rational person may suggest that state employees by their administrative action may overrule duly promulgated laws. From the record before the [DES] Board it cannot be determined when in recent history this illegal encroachment first occurred. It matters not. It is also irrelevant whether the administrative authority asserted by [URI] was the result of a simple misunderstanding, mere presumptuousness, an abdication of responsibility by others, or an intentional usurpation. * * * Therefore at all times relevant [Wilkinson] was answerable only to the [c]ommission."

In effect, the District Court's decision declared that from 1978 to the time of the court's decision, Wilkinson had been a classified employee of the commission--and not of URI. Because defendants did not seek this Court's review of that ruling, the District Court's judgment became final and binding on defendants.

Later, in 1994, the commission requested an advisory opinion from the Attorney General (AG) to determine whether Wilkinson's acceptance in 1990 of the position of associate professor at URI had altered his full status under the merit system as a classified state employee. The AG opined that Wilkinson's acceptance of the URI associate professorship position had no effect on his classified full-status employment with the state. As a commission employee, Wilkinson, the AG concluded,

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could be fired only for cause; that he had never been informed that accepting the associate professorship position at URI would affect his rights under the merit system; and that, in any event, state employees like Wilkinson could not validly waive rights that they were unaware they were surrendering. As a result, the AG recommended that the commission reinstate Wilkinson to his commission job with back pay.

Pursuant to the AG's recommendation, the commission reinstated Wilkinson to his job at the lab. But the commission reinstated Wilkinson as a criminalist, a lower-ranking position than his former job as assistant lab director. In response to this unsatisfactory reinstatement, and to resolve other disputes over the restoration of his employment benefits, Wilkinson instituted this Superior Court lawsuit in 1994--well before his final discharge occurred, in 1996. [5]

Thereafter, in 1994, the General Assembly amended the crime lab act to convert all commission jobs at the lab into "limited appointment positions of the board of governors for higher education and [they] shall be subject to all employment policies, practices, and procedures of the board of governors for higher education and the University of Rhode Island." Section 12-1.2-6, as amended by P.L.1994, ch. 50, § 2. Then, in 1996, apparently at the urging of Luzzi and Hilliard, the commission terminated Wilkinson from his employment with the state by refusing to reappoint him to his criminalist job at the lab, asserting that his limited-term position there had expired. The commission's refusal to reappoint Wilkinson occurred without any assertion of cause to discharge him from state employment.

Wilkinson then amended his complaint to challenge his termination. In due course, the case proceeded to summary judgment in the Superior Court, after Wilkinson and defendants had filed cross-motions seeking this relief. Wilkinson contended that, as a matter of law, he was a classified full-status employee who could not be terminated from state employment without just cause. The defendants argued, however, that, because of the 1994 amendments, Wilkinson had become a statutorily appointed limited-term employee of URI. Consequently, they urged that he had lost the benefits previously afforded to him when he was a classified, full-status employee of the commission under the merit system. [6]

In response, Wilkinson argued points too numerous to be recited here, [7] but the motion justice ruled that the 1994 amendments constituted a later-enacted and more specific statute that took precedence over the earlier-enacted, general provisions of the merit system. Consequently, the motion justice dismissed most of Wilkinson's claims, including one for wrongful discharge, because the court determined that he was, as a matter of law, a limited-term appointee subject to termination without cause at the end of his term. The motion justice, however, allowed Wilkinson's

contempt claims against Hilliard and defendants' counterclaims against Wilkinson to proceed to a nonjury trial on an agreed statements of facts.

At the conclusion of the nonjury trial, the trial justice found that Wilkinson had failed to prove his contempt case against Hilliard because he could not show that Hilliard was aware of the restraining order when he had informed the commission about Wilkinson's allegedly insubordinate refusal to clean up a contaminated safe at the lab. Furthermore, the trial justice ruled that defendants' counterclaims against Wilkinson--seeking reimbursement of the employment benefits he had received when he worked at the lab--were baseless because whatever benefits Wilkinson had received when he worked there, he received them in connection with his crime-lab employment and not because he was considered a URI employee. In essence, the trial justice ruled that the benefits Wilkinson had received while working at the lab were legitimate consideration for his work there, regardless of what governmental entity or entities actually employed him during the years in question.

On appeal, Wilkinson argues that the 1994 amendments did not--and, indeed, could not--have any effect on his classified full-status employment with the state. Even though the amendments subjected him to the oversight and employment practices of URI, he contends, they did not and could not have divested him of his tenure as a classified full-status state employee, one who could not be dismissed or terminated from state employment without just cause. He therefore requests that this Court order his reinstatement to state-government employment and award him damages and benefits commensurate with his claims. The defendants' respond that, as a result of the 1994 amendments, Wilkinson lost his classified full-status employment and became a nonclassified, limited-term URI employee who could be terminated or not reappointed with or without cause.

The defendants' counterclaims also questioned Wilkinson's employment status at the crime lab. They contended that, because Wilkinson was a commission employee from 1978-1994 when he worked at the lab, but not a URI employee, he was not entitled to the salary he received, to the tuition waivers he obtained for his children, or to a shortened work week--all of which, they contend, were available only to URI employees. Wilkinson argues that the trial justice correctly decided that he was in fact

entitled to these benefits as a result of his commission employment at the crime lab, even though URI was not his statutory employer during this period.

Analysis

I. Claims Disposed of by Summary Judgment

A. Did Wilkinson's classified full-status employment under the merit system vest him with a protected property right entitling him to due process and to just-compensation protections?

In granting summary judgment in favor of defendants, the motion justice ruled that Wilkinson had achieved full status in his classified position at the crime lab in 1988, but that "the plaintiff's classified status terminated when the legislature [in the 1994 amendments] made all positions of the lab limited appointment positions subject to the approval of the Commission." The motion justice further ruled that, after the 1994 amendments, "as a matter of law, plaintiff had no constitutionally protected interest [as a limited-appointment, crime-lab employee] * * * to which due-process

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protections attached." [8] She based this conclusion on her belief that the 1994 amendments had stripped Wilkinson of his classified full-status employment at the crime lab because the 1994 crime-lab amendments were a specific-effect statute that superseded the general, earlier-enacted provisions of the merit system. *SeeCasey v. Sundlun,* 615 A.2d 481, 483 (R.I.1992) (holding that G.L.1956 § 43-3-26 embodies a policy of statutory construction that requires courts to give precedence to a specific statute over a general statute when the two are in conflict).

This Court "reviews the granting of a summary judgment motion on a *de novo* basis." *M & B Realty, Inc. v. Duval,* 767 A.2d 60, 63 (R.I.2001) (citing *Marr Scaffolding Co. v. Fairground Forms, Inc.,* 682 A.2d 455, 457 (R.I.1996)). "In conducting such a review, we are bound by the same rules and standards as those employed by the trial justice." *Id. SeeRotelli v. Catanzaro,* 686 A.2d 91, 93 (R.I.1996). "[A] party who opposes a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Accent Store Design, Inc. v. Marathon House, Inc.,* 674 A.2d 1223, 1225 (R.I.1996). "Rather, by affidavits or otherwise [the opposing party has] an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." *Providence Journal Co. v. Convention Center Authority,* 774 A.2d 40, 46 (R.I.2001) (quoting *Bourg v. Bristol Boat Co.,* 705 A.2d 969, 971 (R.I.1998)).

We will affirm the granting of a summary judgment if, after reviewing the evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact existed and that the moving party was entitled to judgment as a matter of law. *Woodland Manor III Associates v. Keeney,* 713 A.2d 806, 810 (R.I.1998). For the reasons stated below, we hold that, as a matter of law, the motion justice erred when she granted summary judgment in favor of defendants; on the contrary, Wilkinson was entitled to a grant of summary judgment on his constitutional claims because, as a matter of law, the 1994 amendments did not divest him of his classified full-status employment with the state.

Under § 36-4-2 the classified service "shall comprise all positions in the state service now existing or hereinafter established, except the following specific positions * * * or hereinafter specifically exempted * * *." Because neither commission employees nor lab employees were listed in § 36-4-2 when Wilkinson was appointed to his crime-lab job, employees holding these positions served within the state's classified service. Moreover, § 36-4-38 provides in relevant part that "[a] classified employee with permanent status may be dismissed by an appointing authority whenever he or she considers the good of the service to be served thereby, stated in writing,

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with full and sufficient reason, and filed with the personnel administrator. * * * In every case of dismissal, the appointing authority shall, *on or before the effective date thereof give written notice of this action and the reason thereof to the employee* and shall file a copy of the notice with the personnel administrator * * *." (Emphasis added.) *SeeAniello v. Marcello,* 91 R.I. 198, 206, 207, 162 A.2d 270, 274 (1960) (holding that an appointing authority cannot summarily dismiss a classified employee, and that the language " *'the good of the service to be served thereby'* " in § 36-4-38 has the " 'effect of limiting the valid exercise of that power to dismiss for cause' ") (modified by subsequent statutory amendments). Nonclassified employees of URI, however, are under the exclusive control of the commissioner of higher education. *SeeRhode Island Board of Governors for Higher Education v.*

Newman, 688 A.2d 1300, 1303 (R.I.1997).

The merit system also provides that "[e]very person who shall have twenty (20) years, not necessarily consecutive, of service credit, the credits having been earned in either the classified, nonclassified, or unclassified service of the state or a combination of both, shall be deemed to have acquired full status in the position he or she holds at the time of obtaining twenty (20) years of service credit." Section 36-4-59(a)(1). Nevertheless, "this section shall not apply to employees of the state government whose method of appointment and salary and term of office is specified by statute." Section 36-4-59(a)(2)(iii). The defendants argue that, whatever Wilkinson's status was before 1994, the 1994 amendments altered his status because they provided that his method of appointment was henceforth to be one specified by statute, thereby removing him from the rolls of the merit system.

It is undisputed, however, that as of 1988 Wilkinson had accumulated twenty years of service credit and that, when he was hired in 1971 and working at the crime lab in 1988, his position there was not statutorily specified. Thus, in 1988 he achieved full status under the merit system in his classified position as a commission employee working at the crime lab. Although the 1994 amendments specified that, effective on the date of passage, employees of the crime lab would be limited-term appointees subject to URI employment rules and practices, the amendments did not alter Wilkinson's preexisting protected status by rendering his previous crime-lab appointment one that was statutorily specified. [9]

We first consider whether, as of 1994, Wilkinson possessed a legitimate claim of entitlement to continued employment under the merit system. A "state employee who, under state law or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge, may demand the procedural protection of due process." *Lynch v. Gontarz*, 120 R.I. 149, 157, 386 A.2d 184, 188 (1978); *see alsoBarber v. Exeter-West Greenwich School Committee*, 418 A.2d 13, 19-20 (R.I.1980) (holding that a tenured teacher who can be dismissed only for

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good cause has a legitimate claim of entitlement to his or her position, and may not be deprived of it without due process of law). The United States Supreme Court has had several opportunities to discuss what constitutes a property right that will entitle its holder to the due-process protections of the Fourteenth Amendment to the United States Constitution. Frequently, these issues have arisen in the context of educational institutions that grant tenure to teachers or professors. [10] In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Supreme Court defined what constituted a protected property interest in an employment benefit. Specifically, the high Court stated that:

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined * * * [and that property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561. [11]

Applying these standards to the statutes before us, we note that the state's merit system contains a two-tiered system of state employment. The first tier is the classification of state employment positions. The second tier is the tenure in state employment that an employee achieves after a specified number of years in state service. *But see* footnote 4, *supra*. We turn first to the classified service.

In applying these constitutional principles to the classified service, it is evident that achieving permanent classified status under the merit system grants to the state employee in question a legitimate claim of entitlement to continued employment with the state. As a result, an employee who has achieved permanent classified status in his or her employment with the state has a property right in continued government employment and is entitled to due-process protections before he or she can be deprived of that property right. On the other hand, a classified employee is not totally insulated from termination. For example, if the state determines that cause exists to terminate the employee or that it is necessary to lay off, reorganize, or otherwise abolish a classified employee's position, it is entirely possible, and even probable, that such a decision would be upheld "for the good of the service"--unless the decision was arbitrary, pretextual, or irrational. But a rational, non-pretextual, and non-arbitrary employment decision would provide cause for termination--provided, of course, that procedural due-process rights were duly afforded to the terminated employee.

We next examine the effect of achieving full status under § 36-4-59. Once an employee, in any category of state service, has accumulated twenty years of service

credit, he or she is provided with even greater protections than those afforded to mere classified employees. A classified full-status employee still may not be fired except for cause. The definition of what constitutes cause, however, is altered by the statute after the employee achieves "full status" protection. For example, a full-status employee may not be separated from state service because of layoffs or reorganizations. The full-status employee whose position is lost through layoffs or reorganization still "shall be retained within the state services in a position of similar grade." Section 36-4-59(a)(2)(ii). Moreover, and more importantly for the case at bar, an employee who achieves full status (classified or otherwise) acquires full status in "the position he or she holds at the time of obtaining twenty (20) years of service credit." Section 36-4-59(a)(1).

Although this Court has not had the opportunity to comment directly on whether a government employee's achievement of classified or full status under the merit system creates a property right subject to constitutional protections, we have suggested as much in the past. In the case of *Blanchette v. Stone*, 591 A.2d 785, 787 (R.I.1991), the Court was called upon to construe § 36-5-7, another provision of the merit system. The plaintiff in *Blanchette* was a Rhode Island State Police officer, who involuntarily was "retired" from the state police force. In challenging his "retirement," Blanchette argued that he had achieved full-status protection under the merit system, and therefore could be "retired" only for cause. The Court ultimately held that the Legislature never intended the merit system's full-status protections to apply to state police officers. [12] In so holding, however, the Court stated that "§ 36-5-7 was never intended to apply to members of the Rhode Island State Police, and without the protections afforded under § 36-5-7, Blanchette acquired no *property interest* in continued employment that would assure him of due-process protections." *Blanchette*, 591 A.2d at 787. (Emphasis added.) Thus, in *Blanchette*, we alluded by negative inference to the fact that a state employee would, in fact, obtain a property interest in continued state employment by achieving full status under the merit system.

In addition, the United States Supreme Court's definition of a property right indicates that a state statute can confer a property interest on government employees, thereby entitling those employees to the due-process and just-compensation protections that are found in both the state and federal constitutions. And unlike the seniority rights and other statutory veterans' benefits that were at issue in *Brennan v. Kirby*, 529 A.2d 633, 641 (R.I.1987), Wilkinson actually had received the classified full-status benefits conferred on him by the state when the legislation in question was enacted. Thus, as of 1988, when Wilkinson completed his twenty years of state service credit and received his full-status certificate, this statutory benefit had matured from a mere gratuity or floating expectancy into a full-blown vested property right. [13] We therefore explicitly

hold that achieving full status under the merit system provides state-government employees with a property right in the position and classification that they hold at the time they achieve full status, entitling such employees to due-process and just-compensation protections against any attempted elimination or alteration of their property rights.

Since 1988 Wilkinson has possessed a property interest in his classified full-status employment with the state. Thus, he could not have been deprived of that interest without due process of law. Nor can the state take that interest away from him without cause to do so, or, lacking such cause, without paying him just compensation. [14] Consequently, the hearing justice was incorrect when she held that Wilkinson possessed no "protected interest" in his full-status employment with the state when the Legislature enacted the 1994 amendments.

B. What effect, if any, did the 1994 amendments have on Wilkinson's classified full-status employment?

The defendants argue that the 1994 amendments stripped Wilkinson of his classified full-status employment and that the General Assembly possessed the inherent authority to alter its prior policy by enacting such amendments. Moreover, defendants argue, the specific provisions of the 1994 amendments take precedence over the general provisions of the merit system. It is true that when statutes conflict, a later-enacted specific statute will be given effect over the earlier-passed general statute. *See* § 43-3-26 (requiring the harmonization of statutes, but if that is not possible, then the specific statute trumps the general statute).

This Court, however, long has held that "statutes *and their amendments* are applied prospectively." *Lawrence v. Anheuser--Busch, Inc.*, 523 A.2d 864, 869 (R.I.1987). (Emphasis added.) From and after the effective date of the 1994 amendments, all crime lab jobs were converted into so-called limited-appointment positions subject to URI's employment rules and practices. But government employees like Wilkinson who already had achieved classified full status under the merit system did not lose that classified full status merely because a position they held after achieving full status became a limited-term appointment on the effective date of the statutory amendment. The terms of particular crime-lab jobs may well have come to an

end as of the result of the 1994

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amendments, but Wilkinson's classified full-status protection under the merit system survived those changes. "Only when 'it appears by clear, strong language or by necessary implication that the Legislature intended' a statute to have retroactive application will the courts apply it retrospectively." *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 954-55 (R.I.1994) (quoting *VanMarter v. Royal Indemnity Co.*, 556 A.2d 41, 44 (R.I.1989)).

Here, no specific language in the 1994 amendments supports defendants' position that these enactments retroactively stripped Wilkinson of his full-status employment. In the absence of such language, or indeed any evidence to the contrary, this Court will apply the general rule that "statutes operate prospectively from and after the effective date of the statute. It is only in the event that a statute contains clear and explicit language requiring retroactive application that a statute will be interpreted to operate retrospectively." *Avanzo v. Rhode Island Department of Human Services*, 625 A.2d 208, 211 (R.I.1993) (holding that attempt by governmental entity to apply a statute changing welfare eligibility requirements by establishing a limit on the length of time a totally incapacitated adult might receive benefits should not have been applied to existing recipients by counting benefit months prior to the effective date of the statute). Thus, the 1994 amendments affecting the status of crime lab employees are valid only for those employees who had not obtained a protected property interest in their full-status employment before the 1994 amendments. There is, therefore, no conflict between the 1994 amendments and the merit system necessitating the application of the "trumping" provision of § 43-3-26.

The defendants also argue that, since 1971, Wilkinson always has been a nonclassified limited-term appointee under URI's employment policies and practices. This contention, however, completely ignores the District Court's ruling to the contrary in Wilkinson's 1993 appeal that reversed DES's refusal to award him unemployment compensation. This Court has held that the doctrine of collateral estoppel prevents the re-litigation of an issue actually litigated and determined between the same parties or their privies. *Casco Indemnity Co. v. O'Connor*, 755 A.2d 779, 782 (R.I.2000). "[F]or collateral estoppel to apply, three factors must be present: 'there must be an identity of issues; the prior proceeding must have resulted in a final judgment on the merits; and the party against whom the collateral estoppel is sought must be the same as or in privity with the party in the prior proceeding.' " *Id.* (quoting *Commercial Union Insurance Co. v. Pelchat*, 727 A.2d 676, 680 (R.I.1999)). All three of these elements are satisfied in this case. The defendants were parties to Wilkinson's action seeking unemployment compensation; at issue was what government entity actually employed Wilkinson, and what was his actual government-employment status. Finally, defendants, as they acknowledged at oral argument, never sought further review of the District Court's final judgment holding that Wilkinson was a commission employee who had achieved "full-status" protection in his job. Therefore, this Court will not entertain arguments concerning what entity employed Wilkinson or what type of state employment he held. As determined in the earlier District Court action, Wilkinson was never a URI employee, but was at all times a classified commission employee who had achieved full status or tenure in his job.

Moreover, defendants' counterclaims for reimbursement of tuition benefits and compensation were based on Wilkinson's

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status as a classified employee of the commission, at least from 1978-1994. Because of the preclusive effect of the District Court's final judgment, and the tacit waiver of this issue in defendants' briefs, the Court will not, at this late date, entertain reargument on an issue that already has been decided and that defendants apparently have conceded. Moreover, we are in complete agreement with the District Court's interpretation of the applicable statute. Under the original crime lab act, Wilkinson was a classified employee of the commission, but not URI.

In sum, we hold that Wilkinson's classified full-status employment was not affected by the 1994 amendments. When he achieved this status in 1988, Wilkinson obtained a property interest in his continued employment with the commission such that he could not be terminated from state service except for cause, nor could he be "reorganized" into a different limited-term classification without paying him just compensation for taking his protected property interest in his full-status employment. Thus, when defendants declined to "reappoint" Wilkinson to a limited-term position in 1996 and refused to retain him as a classified full-status state employee, they violated the merit system, which prohibited them from dismissing Wilkinson from state service without cause to do so. Thus, as a matter of law, Wilkinson was entitled to a grant of summary judgment on this claim, and we vacate so much of the motion justice's summary judgment that is inconsistent with this determination.

C. Wilkinson's Defamation Claims

Wilkinson also leveled defamation claims against the individual defendants, Luzzi and Hilliard. Luzzi's allegedly defamatory statements were contained in certain memoranda that he had sent to Wilkinson in 1991 and 1992. [15] The statements Hilliard allegedly uttered were similar to those of Luzzi, though he directed his remarks to the commission. The motion justice held that, in reviewing the allegedly defamatory statements, "the court can discern no defamatory meaning here" and that "at worst, [these] assertion[s] would seem to be privileged." The hearing justice granted summary judgment in favor of Luzzi and Hilliard.

We have held that it is for the court to decide whether a statement contains a defamatory meaning. *Swerdlick v. Koch*, 721 A.2d 849, 859 (R.I.1998) (citing *Healey v. New England Newspapers Inc.*, 520 A.2d 147, 150 (R.I.1987)). A defamatory statement consists of "[a]ny words, if false and malicious, imputing conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred and contempt * * *." *Swerdlick*, 721 A.2d at 860 (quoting *Elias v. Youngken*, 493 A.2d 158, 161 (R.I.1985)). After reviewing the record, we agree with the motion justice that all concerned had believed in good faith that Luzzi properly had been supervising Wilkinson--until the District Court held in 1993 that neither URI nor the Board of Governors were

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Wilkinson's employer. Moreover, the statements were, from both Luzzi's and Hilliard's point of view, substantially true.

In any event, regardless of whether it legally qualified as Wilkinson's employer in 1991 and 1992, URI had been intimately involved with the crime lab and its oversight from its inception. Although he was not statutorily authorized to serve as Wilkinson's supervisor, Luzzi acted in that capacity pursuant to URI's joint--albeit unauthorized--de facto control over crime-lab employees. And Hilliard was the director of the lab, and thus was Wilkinson's supervisor when he allegedly uttered his defamatory statements. Thus, even if their statements might have been defamatory in some other context, both Luzzi and Hilliard were entitled to the legal protection afforded to them as Wilkinson's de facto supervisors by the qualified privilege accorded to those who comment upon the job performance of individuals they supervise. *SeeSwanson v. Speidel Corp.*, 110 R.I. 335, 338, 293 A.2d 307, 309 (1972) (holding that statements in personnel files that would otherwise be defamatory are privileged). The allegedly defamatory statements related to Wilkinson's job performance, and Luzzi and Hilliard communicated them to Wilkinson himself, or to persons in a supervisory position over Wilkinson. Therefore, we hold, Luzzi's and Hilliard's statements were privileged. Discerning no material issues of disputed fact and no errors of law, we conclude that the motion justice properly granted summary judgment in favor of Luzzi and Hilliard on these claims.

II

Claims Disposed of at Trial

The trial in this case proceeded on an agreed statement of facts and addressed two narrow claims. The first concerned Wilkinson's charge that Hilliard had violated the restraining order preventing him from taking any negative employment action against Wilkinson for refusing to clean a contaminated safe at the crime lab. The second involved defendants' alleged entitlement to reimbursement from Wilkinson for the benefits and compensation that Wilkinson had received between July 1978 and July 1994. The trial justice found no evidence that Hilliard had knowledge of the restraining order when he made certain statements to the commission (in the context of discussing whether to "reappoint" Wilkinson) that allegedly violated the restraining order. For conduct to constitute civil contempt, it must be "proved by clear and convincing evidence that a lawful decree was violated." *Durfee v. Ocean State Steel, Inc.*, 636 A.2d 698, 704 (R.I.1994) (quoting *Trahan v. Trahan*, 455 A.2d 1307, 1311 (R.I.1983)). The hallmark of civil contempt is the disobedience of a lawful decree. *Nelson v. Progressive Realty Corp.*, 81 R.I. 445, 448, 104 A.2d 241, 243 (1954). The trial justice found that Wilkinson had failed to prove by clear and convincing evidence that Hilliard was aware of the restraining order when he made the statements in question. Upon our review of the record, we cannot say that the trial justice erred in this determination. There is no evidence in the record to demonstrate that Hilliard knew about the restraining order, or that he had disobeyed it intentionally. Therefore, we affirm the trial justice's finding on this issue.

Furthermore, the trial justice found that there was no basis for defendants' counterclaims to recover the value of any benefits or other compensation bestowed on Wilkinson during the years he worked at the crime lab. As the trial justice observed "[t]he basis for the plaintiff's compensation and benefits during the time the defendants mention had little or nothing to do with the status of his employment or the

Page 1144

title of his employer. The defendants simply offered him salary and benefits based upon his position [at the crime lab] which the

plaintiff accepted as part of his agreement to work."

In reviewing a trial justice's decision in a nonjury civil case, we will not disturb his or her factual findings "unless such findings are clearly erroneous or unless the trial justice misconceived or overlooked material evidence or unless the decision fails to do substantial justice between the parties." *Harris v. Town of Lincoln,* 668 A.2d 321, 326 (R.I.1995) (citing *Gross v. Glazier,* 495 A.2d 672, 673 (R.I.1985) and *Lisi v. Marra,* 424 A.2d 1052, 1055 (R.I.1981)). *SeeParadis v. Heritage Loan and Investment Co.,* 701 A.2d 812, 813 (R.I.1997) (mem.). After examining the record, we conclude that the trial justice did not misconceive or overlook any material evidence in this regard. As a commission employee working at the crime lab that was supervised by URI personnel, Wilkinson received those benefits (including tuition assistance, salary, and a shortened work week) that also were offered to URI employees who did not work at the lab. No evidence suggested that this consideration was illegal or unwarranted--especially given the unauthorized but joint supervision of the lab by both URI and the commission. As the trial justice noted, these benefits were part and parcel of Wilkinson's employment package at the crime lab and Wilkinson's entitlement to them did not depend on whether URI was his employer. The trial justice properly refused to allow defendants to deny their joint control over the lab, or to recover the value of employment benefits that they freely had offered and provided to him, and that Wilkinson freely had accepted as part of his crime-lab employment. We do not believe that the trial justice erred as a matter of law, or that he misconceived or overlooked material evidence, and we therefore affirm that portion of the judgment that rejected defendants' counterclaims.

Conclusion

For these reasons, we reverse the motion justice's ruling concerning Wilkinson's classified full-status employment rights, vacate the summary judgment, and remand this case to the Superior Court for the entry of a summary judgment on liability in favor of Wilkinson and for further proceedings consistent with this opinion to determine Wilkinson's damages, including the back pay that defendants owe to him. Thereafter, an amended final judgment shall enter in favor of the plaintiff. Moreover, we hereby order that Wilkinson be reinstated to his position at the crime lab commensurate with his status as a classified full-status state employee, and that he receive all benefits that he was and remains entitled to receive in that capacity, as if he had not been terminated, less any compensation that he may have received from other sources that he would not otherwise have earned but for his wrongful termination. Moreover, in the future, although he shall be subject to URI's supervision and employment practices to the extent they are not inconsistent with his tenured status as a classified state employee, Wilkinson shall be entitled to receive the full panoply of due-process rights associated with his classified full-status employment. This part of our holding will become relevant if URI, the commission, or the state again attempt to terminate Wilkinson's employment. In addition, any grievance Wilkinson may have with the procedures implemented by URI after his reinstatement should be directed to the PAB, which has jurisdiction over Wilkinson as a classified employee. Nothing in this opinion, however, should be construed

to prohibit Wilkinson's employer from seeking to discipline or to remove him from state service for cause in accordance with the merit system. We also deny and dismiss (1) Wilkinson's appeal of the judgment denying his contempt claim and (2) the defendants' counterclaims for reimbursement. And we reiterate that all of Wilkinson's claims not explicitly addressed in this opinion have been deemed waived and are therefore denied.

Chief Justice WILLIAMS and Justice BOURCIER did not participate.

Notes:

[1] Wilkinson raises numerous arguments on appeal that he has failed to brief properly for this Court's review. Although he lists twelve different specifications of error on appeal, the majority of them are not discussed in the body of his brief. Simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue. *SeeO'Rourke v. Industrial National Bank of R.I.,* 478 A.2d 195, 198 n. 4 (R.I.1984) (citing *Mercurio v. Fascitelli,* 116 R.I. 237, 354 A.2d 736 (1976), and holding that the plaintiff's failure to present legal authorities and to argue an asserted error of the trial court in their legal brief constituted a waiver of that alleged error). *See also* Article I, Rule 16 of the Supreme Court Rules of Appellate Procedure, "Briefs." Accordingly, of Wilkinson's twelve issues raised on appeal, we deem the following to be waived by reason of improper briefing: (1) whether Wilkinson's 1992 termination violated his federal and state due-process rights; (2) whether defendants violated Wilkinson's due-process rights when they failed to reinstate him in 1994 to the position of acting director of the crime lab and denied him

longevity benefits; (3) whether defendants refused in bad faith to accede to Wilkinson's demand of employment and money, thereby violating his due-process rights; (4) whether defendants terminated Wilkinson in violation of state law in retaliation for his insistence that the crime lab should be managed in accordance with state law; (5) whether the "leadership of URI" and Hilliard tortiously interfered with Wilkinson's employment relationship with the Commission; (6) whether defendants retaliated against Wilkinson for his reporting to the proper authorities about the crime lab's management, in violation of G.L.1956 chapter 50 of title 28; (7) whether defendants' alleged violations of chapter 50 of title 28 and the "other cited statutes and provisions" damaged Wilkinson. Because we hold that the 1994 amendments did not reclassify Wilkinson into a "limited term" appointee, we do not reach his alternative arguments concerning reclassification.

[2] The 1981 reenactment of G.L.1956 chapters 1.1 and 1.2 of title 12 reorganized the 1978 enactment. All references herein to the 1978 enactments are to their original chapter and section numbers in the General Laws.

[3] The 1978 enactment of G.L.1956 § 12-1.2-3 provided that "[t]he dean of the college of pharmacy at the university of Rhode Island [where the crime lab is located] shall serve as the executive secretary of the commission." Section 12-1.2-12 also provided that "[t]he commission is hereby directed * * * to confer with the University of Rhode Island as to the continued utilization of facilities, scientific equipment and personnel available." Although the crime lab act did not authorize URI to manage the lab and its employees, the location of the lab on URI's campus, plus over twenty years of URI's de facto involvement in running the lab, resulted in both URI and the commission exercising some form of joint oversight of the lab.

[4] The record does not reveal exactly how Wilkinson obtained twenty years of service credit in 1988 after he began working for the state in 1971. Wilkinson's complaint alleged that he had achieved full status as a classified state employee under G.L.1956 § 36-4-59 (providing tenure to state employees who have achieved twenty years of service credit). In his brief, and at oral argument, however, Wilkinson suggested that he had achieved full status under both § 36-4-59 *and* G.L.1956 § 36-5-7, entitled "State employees-Veterans" (providing tenure after fifteen years of state service to state employees who are honorably discharged veterans of the United States armed forces). As noted below, the statutes are identical concerning the full-status benefits that they confer on such employees, differing only in the number of years of service credit needed to achieve full status. *See* note 13, *infra.* Both of these statutes are subject to a "sunset" provision making them inapplicable "to those employees whose base entry date is after August 7, 1996." *See* § 36-4-59(b) and § 36-5-7(b).

[5] Thus, this action already was pending in 1996 when the commission refused to reappoint Wilkinson to his job at the lab--or to any other job in state government. Also, in 1996, before the commission decided not to reappoint or retain Wilkinson in his lab job, a Superior Court justice had issued a restraining order against lab-director Hilliard, preventing him from taking any adverse action against Wilkinson in retaliation for his refusal to clean a contaminated safe at the lab. Nevertheless, the next day Hilliard informed the commission about Wilkinson's refusal to clean the safe.

[6] *See* note 9, *infra.*

[7] *See* note 1, *supra.*

[8] It should be noted that defendants' legal position is that "[a]s a limited term appointee [Wilkinson] has no due process or other right to re-appointment * * * " and that "[n]o cause is required to disapprove an appointment." Thus, defendants have argued on appeal that Wilkinson's appropriate remedy was an appeal to the Personnel Appeal Board (PAB). But if the 1994 amendments truly had converted Wilkinson to a limited-term, nonclassified employee, as defendants contend, then the PAB would have lacked jurisdiction to hear his appeal. *SeeRhode Island Board of Governors for Higher Education v. Newman,* 688 A.2d 1300, 1303 (R.I.1997) (holding that "the [PAB] has no jurisdiction over non-classified employees who are subject to the exclusive control of the commissioner of higher education * * * ").

[9] The 1978 version of G.L.1956 § 12-1.2-6 (12-1.2-9) provided that the commission would have final appointive authority over all crime lab positions, thereby rendering them "classified" positions. The 1994 amendments to § 12-1.2-6 provided that, effective on the date of its passage, all positions in the crime lab "shall be considered limited appointment positions" and that URI would have the authority to make such appointments, thereby converting lab employees into nonclassified appointments and removing them from the Personnel Appeals Board jurisdiction. *SeeNewman,* 688 A.2d at 1303.

[10] It should be noted that § 36-4-59 is titled "Tenure in state service."

[11] *See alsoPerry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (holding that property is not limited to technical forms, but encompasses a broader definition). "A person's interest in a benefit is a 'property' interest * * * if there are

such rules or mutually explicit understandings that support his claim of entitlement to the benefit * * *." *Id.* at 601, 92 S.Ct. at 2699, 33 L.Ed.2d at 580.

[12] As unclassified employees, the state police "serve[] at the pleasure of [their] appointing authority." *Blanchette v. Stone*, 591 A.2d 785, 787 (R.I.1991). Therefore, they do not receive the benefits of classified employees.

[13] The distinction between a claimant's potential eligibility for a statutory benefit and actually qualifying to receive it for purposes of establishing a vested property interest or contractual right in the benefit was also dispositive in *D. Corso Excavating, Inc. v. Poulin*, 747 A.2d 994 (R.I.2000) (holding that the claims to a statutory benefit had not yet vested when the Legislature eliminated the benefit) and *Retired Adjunct Professors v. Almond*, 690 A.2d 1342 (R.I.1997) (noting that the employees affected by a legislative repeal of statutory benefits were not required to forfeit any payments due them for work they already had performed; rather, they were suing to enforce their mere expectation at retirement of receiving future reemployment opportunities according to the statutory scheme as it then existed).

[14] Neither URI nor the commission raised the defense of sovereign immunity with respect to this aspect of Wilkinson's claims, nor could they have done so successfully. The defendant URI has long been held amenable to suit. *See University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200 (1st Cir. 1993) and *Vanlaarhoven v. Newman*, 564 F.Supp. 145 (D.R.I.1983) (both holding that URI is not an alter ego of the state, and thus it cannot invoke the defense of sovereign immunity). Moreover, even assuming arguendo that the commission would qualify as an arm or an alter ego of the state, it could not avoid a claim seeking to vindicate a protected property interest in statutory employment benefits by invoking the doctrine of sovereign immunity. *See, e.g.*, R.I. Const. art. 1, sec. 16; see also *Pellegrino v. The Rhode Island Ethics Commission*, 788 A.2d 1119 (R.I.202) (holding that sovereign immunity does not protect the state from claims for statutory employment benefits that constitute a protected property interest).

[15] The memoranda included (1) a memorandum dated October 4, 1991, requesting an accounting of vacation time; (2) a memorandum dated October 7, 1991, in which Luzzi expressed his belief that Wilkinson was employed by the Board of Governors; (3) a memorandum dated November 12, 1991, reprimanding Wilkinson for insubordination and requesting an accounting of time; (4) a memorandum dated December 5, 1991, demanding Wilkinson's schedule; and (5) a memorandum dated January 8, 1992, informing Wilkinson that he was being dismissed for his insubordinate and unacceptable attitude and actions. The claims against Hilliard were substantially similar, except that they included a charge of violating a restraining order.

Employees' Retirement System of Rhode Island

February 6, 2017

William P. Tocco III
Attorney at Law
23 Acorn Street, Floor 1
Providence, RI 02903-1066

RE: *Notice of Full Board Meeting*
Robert Perfetto v. Employees' Retirement System of Rhode Island

Dear Attorney Tocco:

Please be advised that the decision of the Employees' Retirement System of Rhode Island to deny Mr. Perfetto's request to have his lump sum retroactive payment included in the calculation of his final average compensation has been upheld by the Hearing Officer. In accordance with Regulation 4 of the Rules of Practice and Procedure of the Employees' Retirement System, this matter will be presented to the full Retirement Board for approval or denial at the March 15, 2017 Retirement Board Meeting. You have the right to appear before the Retirement Board and make oral argument in support of or in opposition to the Hearing Officer's decision.

The March meeting of the Retirement Board is scheduled for:

DATE:	**Wednesday, March 15, 2017**
TIME:	**9:30 am**
LOCATION:	**2nd Floor Conference Room**
	50 Service Avenue
	Warwick, Rhode Island 02886

A party wishing to file a brief or make exceptions must submit 15 copies to the Retirement System, Attention: Roxanne Donoyan no later than 10 days prior to the date of the Retirement Board meeting.

If you are unable to attend this meeting, please notify me at 462.7608 as soon as possible. Should the meeting be rescheduled, we will notify you of the new date and time of the meeting.

Sincerely,

Roxanne Donoyan

Roxanne Donoyan

cc: Robert Perfetto
Michael P. Robinson, Esq.

Enclosure: Employees' Retirement System of Rhode Island Rules & Regulations, Regulation 4.

Employees' Retirement System of the State of Rhode Island
And
Municipal Employees' Retirement System
Of The State of Rhode Island

Regulation No. 4

Rules of Practice and Procedure for Hearings in Contested Cases

Revised: May 12, 2010

Effective: August 26, 2010

TABLE OF CONTENTS

Section 1 Introduction

These Rules of Practice and Procedure are promulgated pursuant to R.I. General Laws Section 36-8-3. The Rules shall be in effect during any hearing on a contested case before the Retirement Board or its duly authorized representatives.

Section 2 Definitions

(1) The definitions set forth in R.I. General Laws Sections 36-8-1, 45-21-2, 45-21.2-2 and 16-16-1, and as further set forth in Regulations promulgated by the Retirement Board, are specifically incorporated by reference herein.

(2) "Contested case" means a matter for which a member requests a hearing because he or she is aggrieved by an administrative action other than a Disability decision. The term shall apply to hearings conducted before Hearing Officers, and thereafter in proceedings before the full Retirement Board.

(3) "Party" means any member, beneficiary, Retirement System, or such other person or organization deemed by the Hearing Officer to have standing.

(4) "Hearing Officer" means an individual appointed by the Retirement Board to hear and decide a contested case.

Section 3 Request for Hearing and Appearance

(1) Any member aggrieved by an administrative action other than a Disability decision, may request a hearing of such grievance. Upon such request, the matter will be deemed a contested case. The procedure for Disability decisions and appeals therefrom shall be governed by the procedures set forth in Regulation Number 9, Rules Pertaining to the Application to Receive an Ordinary or Accidental Disability Pension.

(2) Such request shall be in writing and shall be sent to the Retirement Board within sixty (60) days of the date of a letter from the Executive Director or Assistant Executive Director constituting a formal administrative denial.

(3) A request for hearing shall be signed by the member and shall contain the following information:

i. Name of member;
ii. Date and nature of decision being contested;
iii. A clear statement of the objection to the decision which must include the reasons the member feels he or she is entitled to relief; and
iv. A concise statement of the relief sought.

(4) Requests for hearing should be sent to the Retirement Board at 50 Service Avenue, 2nd Floor, Warwick, RI 02886-1021.

(5) Failure to strictly comply with the procedures outlined in this Section shall be grounds to deny any request for a hearing.

Section 4 Contested Cases – Notice of Hearing

(1) Upon receipt of a request for hearing in matters other than Disability decisions and appeals therefrom, the Retirement Board or its designee shall appoint a Hearing Officer. The appointed Hearing Officer shall hear the matter, find facts and offer conclusions of law to the Retirement Board. The decision of a Hearing Officer shall be subject to approval by the full Retirement Board. The Retirement System's action shall not be deemed final until such time as the Hearing Officer's recommendation has been voted upon by the Retirement Board.

(2) Within forty-five (45) days after receipt by the Retirement Board of a request for hearing, the Retirement Board shall give notice that the matter has been assigned to a Hearing Officer for consideration.

(3) In any contested case, all parties shall be afforded an opportunity to be heard after reasonable notice.

(4) The notice described in subsection (2), above, shall include:

i. A statement of the time, place, and nature of the hearing;

ii. A statement of the legal authority and jurisdiction under which the hearing is to be held;

iii. A reference to the particular sections of the statutes and rules involved;

iv. The name, official title and mailing address of the Hearing Officer, if any;

v. A statement of the issues involved and, to the extent known, of the matters asserted by the parties; and

vi. A statement that a party who fails to attend or participate in the hearing may be held to be in default and have his or her appeal dismissed.

(5) The notice may include any other matters the Hearing Officer or the Retirement Board considers desirable to expedite the proceedings.

Section 5 Contested Cases – Hearings in General

(1) All parties shall be afforded an opportunity to respond and present evidence and argument on all issues involved.

(2) Members must appear at hearings either personally, or by appearance of legal counsel. Members may represent themselves or be represented by legal counsel at their own expense. Consistent with RIGL §11-27-2 entitled, "Practice of law", any person accompanying the member who is not a lawyer (certified member of the bar of the State of Rhode Island) cannot represent the member in the hearing.

(3) Continuances and postponements may be granted by the Hearing Officer or the Retirement Board at their discretion.

(4) Disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

(5) Should the Hearing Officer or Retirement Board determine that written memoranda are required, the member will be notified by the Hearing Officer or the Retirement Board of the need to file a written document which discusses the issues of the case. Memoranda of law may always be offered in support of arguments offered by the member or the representative of the retirement systems.

(6) The Executive Director may, when he or she deems appropriate, retain independent legal counsel to prosecute any contested case.

(7) A recording of each hearing shall be made. Any party may request a transcript or copy of the tape at their own expense.

Section 6 Contested Cases - Conduct of Hearings before Hearing Officers

(1) Hearings shall be conducted by the Hearing Officer who shall have authority to examine witnesses, to rule on motions, and to rule upon the admissibility of evidence.

(2) The Hearing shall be convened by the Hearing Officer. Appearances shall be noted and any motions or preliminary matters shall be taken up. Each party shall have the opportunity to present its case generally on an issue by issue basis, by calling and examining witnesses and introducing written evidence.

(3) The Member shall first present his or her case followed by presentation of the Retirement System's case.

(4) The Hearing Officer shall have the authority to continue or recess any hearing and to keep the record open for the submission of additional evidence.

(5) If for any reason a Hearing Officer cannot continue on a case, another Hearing Officer will be appointed who will become familiar with the record and perform any function remaining to be performed without the necessity of repeating any previous proceedings in the case.

(6) Each party shall have the opportunity to examine witnesses and cross-examine opposing witnesses on any matter relevant to the issues in the case.

(7) Any objections to testimony or evidence and the basis for the objection shall be made at the time the testimony or evidence is offered.

(8) The Hearing Officer may question any party or any witness for the purpose of clarifying their understanding or to clarify the record.

(9) The scope of hearing shall be limited to those matters specifically outlined in the request for hearing.

(10) Written evidence will be marked for identification. If the original is not readily available, written evidence may be received in the form of copies or excerpts. Upon request, parties shall be given an opportunity to compare the copy with the original.

(11) Findings of fact shall be based solely on the evidence and matters officially noticed.

(12) If a member fails to attend or participate in the hearing as requested, the Hearing Officer may default such member and dismiss his or her appeal with prejudice.

Section 7 Contested Cases – Record of Proceedings before Hearing Officers

The record in a contested case shall include:

(1) All pleadings, motions, intermediate rulings;
(2) Evidence received or considered;
(3) A statement of matters officially noticed;
(4) Questions and offers of proof and rulings thereon;
(5) Proposed findings and exceptions;
(6) Any decision, opinion, or report by the Hearing Officer at the hearing; and
(7) All staff memoranda or data submitted to the Hearing Officer in connection with their consideration of the case.

Section 8 Ex Parte Communications (Communications by one party)

There shall be no communications between the Hearing Officer and either a member, the Retirement System or the Retirement Board, or any of their representatives regarding any issue of fact or law in a case, without notice and opportunity for all parties to participate. There shall be no written communications by any party that are not transmitted at the same time to all parties.

Section 9 Rules of Evidence in Contested Cases:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. Evidence not usually admitted under the rules of evidence for civil cases may be admitted where it is shown that such evidence is necessary to ascertain facts not capable of being proved otherwise. The Hearing Officer and the Retirement Board shall give effect to the rules of privilege (such as attorney/client privilege) recognized by law. Objections to evidence may be made and shall be noted in the record. Any part of the evidence may be received in written form when a hearing needs to be expedited and the interests of the parties will not be hurt substantially.

Section 10 Final Decision and Member Right of Appeal

(1) Within twenty-five (25) days after receipt of the Hearing Officer's recommendation, a copy thereof shall be served upon all parties to the proceeding and each party shall be notified of the time and place when the matter shall be considered by the Retirement Board. Each party to the proceeding shall be given the right to make exceptions, to file briefs and to make oral arguments before the Retirement Board. No additional evidence will be considered by the Retirement Board once the Hearing Officer has issued a recommendation. A party wishing to file a brief or make exceptions to the recommendation of the Hearing Officer shall be required to submit the same to the Executive Director not later than ten (10) days prior to the date when the Retirement Board is scheduled to hear and act upon the recommendation of the Hearing Officer. The aggrieved party and his or her representative shall have the right to appear before the Retirement Board and make oral argument at the time of such hearing. No new testimony will be taken, or evidence considered at this time. Consistent with RIGL §11-27-2 entitled, "Practice of law" any person accompanying the member who is not a lawyer (certified member of the bar of the State of Rhode Island), cannot represent the member before the Retirement Board. After consideration of the decision of the Hearing Officer and such other argument as shall be presented by any party to the proceeding, the Retirement Board shall vote on the recommendation of the Hearing Officer.

(2) In the event of a tie vote of a quorum present and voting on a contested matter, the matter will automatically be placed on the agenda of the next Retirement Board meeting.

In the event of a tie vote of a quorum present and voting on a contested matter rescheduled from a prior meeting, the Retirement Board may vote to postpone and re-consider the matter at a subsequent hearing, when a larger number of voting members may be present. If no such vote to postpone and re-consider is taken, or if a vote to postpone and re-consider the matter at a later date fails, the underlying action appealed from will be deemed affirmed

Section 11 Requests for Rehearing

(1) A request for rehearing which is submitted prior to the issuance of the Hearing Officer's recommendation should be made in writing. The request must detail the substance of any additional evidence to be offered, and the reason for the failure of the party to offer it at the prior proceedings.

(2) A rehearing will be denied if the evidence does not bear on any issue in contest in the original proceedings, will not likely affect the final recommendation, or if the request appears to be merely for purposes of delaying a final decision. A second request for rehearing after the granting or denial of a prior request for rehearing will not be permitted.

Gayle Mambro-Martin

From: Bill Tocco <billt2590@gmail.com>
Sent: Thursday, January 26, 2017 12:26 PM
To: Gayle Mambro-Martin
Subject: Re: Robert Perfetto v. ERSRI - Decision dated January 6, 2017

Good Afternoon Deputy General Counsel Mambro-Martin,

Yes, March 15 is an open day on my calendar.

Thank you for your prompt response to my request.

Professional regards,

Bill

William P. Tocco III
Attorney At Law
Office: (401) 273-8200
Cell: (401) 864-8101
Email: billt2590@gmail.com

Office Street Address:
23 Acorn Street Floor 1
Providence, RI 02903-1066

On Thu, Jan 26, 2017 at 11:10 AM, Gayle Mambro-Martin <Gayle.Mambro-Martin@ersri.org> wrote:

> Good Morning Attorney Tocco,
>
> I just left a message with your office. We would like to know if you are available for the March 15 retirement board meeting for a hearing in the Perfetto matter. I am unsure of the time but it may be 9:30 or 9:45.
>
> Once you confirm this date, Our office will follow up with a written notice.
>
> Thank you.
>
> Gayle

Gayle C. Mambro-Martin

Deputy General Counsel

Employees' Retirement System of Rhode Island

50 Service Avenue

Warwick, RI 02886

Phone: 401.462.7616

Fax: 401.462.7691

From: Bill Tocco [mailto:billt2590@gmail.com]
Sent: Thursday, January 26, 2017 7:49 AM
To: tmrri@aol.com; Frank Karpinski <Frank.Karpinski@ersri.org>; Gayle Mambro-Martin <Gayle.Mambro-Martin@ersri.org>; mrobinson@shslawfirm.com; jmccann@shslawfirm.com
Subject Robert Perfetto v. ERSRI - Decision dated January 6, 2017

A complete copy of this communication is attached hereto as a PDF document.

Via Fax: (401) 222-6140

January 26, 2017

The Honorable Seth Magaziner

Rhode Island General Treasurer

State House, Room 102

Providence, RI 02903

RE: Appeal of:

Robert Perfetto, Appellant vs. ERSRI

Hearing Officer: Teresa M. Rusbino, Esquire

Date of Decision: January 6, 2017

The Honorable Seth Magaziner:

This notice is directed to you in your capacity as the Chair of the ERSRI Retirement Board.

Pursuant to Section 10 of ERSRI Regulation Four, Rules of Practice and Procedure for Hearings, on behalf of the Appellant, Robert Perfetto, I request notice of the time and place when this matter shall be considered by the Retirement Board.

In the event that it is the position of the Retirement Board that the Appellant is not entitled as a matter of right to have this matter considered by the Retirement Board pursuant to said Section 10, then I request prompt notice to that effect, in order that the Appellant may pursue judicial review pursuant to the Administrative Procedures Act.

Thank you for your time and attention to this communication.

Respectfully submitted,

Robert Perfetto,

Appellant,

By his Attorney:

William P. Tocco III, Equire (#2275)

Attorney At Law

Office: (401) 273-8200

Cell: (401) 864-8101

Email: billt2590@gmail.com

Office Street Address:

23 Acorn Street Floor 1

Providence, RI 02903-1066

WPT/

cc: Teresa M. Rusbino, Esquire

Hearing Officer

Via email: tmrri@aol.com

Frank J. Karpinski

Executive Director, ERSRI

Via email: fkarpinski@ersri.org

Gayle C. Mambro-Martin

Deputy General Counsel, ERSRI

Via email: gmambro@ersri.org

Michael P. Robinson, Esquire

Legal Counsel, ERSRI

Via email: mrobinson@shslawfirm.com

John H. McCann, Esquire

Via email: jmccann@shslawfirm.comVia Fax: (401) 222-6140

Contact Information:

William P. Tocco III

Gayle Mambro-Martin

From: Bill Tocco <billt2590@gmail.com>
Sent: Thursday, January 26, 2017 7:49 AM
To: tmrri@aol.com; Frank Karpinski; Gayle Mambro-Martin; mrobinson@shslawfirm.com; jmccann@shslawfirm.com
Subject: Robert Perfetto v. ERSRI - Decision dated January 6, 2017
Attachments: 1.26.2017 Reg Four Section 10 Claim.pdf

A complete copy of this communication is attached hereto as a PDF document.

Via Fax: (401) 222-6140

January 26, 2017

The Honorable Seth Magaziner

Rhode Island General Treasurer

State House, Room 102

Providence, RI 02903

RE: Appeal of:

Robert Perfetto, Appellant vs. ERSRI

Hearing Officer: Teresa M. Rusbino, Esquire

Date of Decision: January 6, 2017

The Honorable Seth Magaziner:

This notice is directed to you in your capacity as the Chair of the ERSRI Retirement Board.

Pursuant to Section 10 of ERSRI Regulation Four, Rules of Practice and Procedure for Hearings, on behalf of the Appellant, Robert Perfetto, I request notice of the time and place when this matter shall be considered by the Retirement Board.

In the event that it is the position of the Retirement Board that the Appellant is not entitled as a matter of right to have this matter considered by the Retirement Board pursuant to said Section 10, then I request prompt notice to that effect, in order that the Appellant may pursue judicial review pursuant to the Administrative Procedures Act.

Thank you for your time and attention to this communication.

Respectfully submitted,

Robert Perfetto,

Appellant,

By his Attorney:

William P. Tocco III, Equire (#2275)

WPT/

cc: Teresa M. Rusbino, Esquire
Hearing Officer
Via email: tmrri@aol.com

Frank J. Karpinski
Executive Director, ERSRI
Via email: fkarpinski@ersri.org

Gayle C. Mambro-Martin

Deputy General Counsel, ERSRI

Via email: gmambro@ersri.org

Michael P. Robinson, Esquire

Legal Counsel, ERSRI

Via email: mrobinson@shslawfirm.com

John H. McCann, Esquire

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Via Fax: (401) 222-6140

January 26, 2017

The Honorable Seth Magaziner
Rhode Island General Treasurer
State House, Room 102
Providence, RI 02903

RE: Appeal of:
Robert Perfetto, Appellant vs. ERSRI
Hearing Officer: Teresa M. Rusbino, Esquire
Date of Decision: January 6, 2017

The Honorable Seth Magaziner:

This notice is directed to you in your capacity as the Chair of the ERSRI Retirement Board.

Pursuant to Section 10 of ERSRI Regulation Four, Rules of Practice and Procedure for Hearings, on behalf of the Appellant, Robert Perfetto, I request notice of the time and place when this matter shall be considered by the Retirement Board.

In the event that it is the position of the Retirement Board that the Appellant is not entitled as a matter of right to have this matter considered by the Retirement Board pursuant to said Section 10, then I request prompt notice to that effect, in order that the Appellant may pursue judicial review pursuant to the Administrative Procedures Act.

January 26, 2071

Thank you for your time and attention to this communication.

Respectfully submitted,

Robert Perfetto.
Appellant,
By his Attorney:

William P. Tocco III, Equire (#2275)

WPT/

cc: Teresa M. Rusbino, Esquire
Hearing Officer
Via email: tmrri@aol.com

Frank J. Karpinski
Executive Director, ERSRI
Via email: fkarpinski@ersri.org

Gayle C. Mambro-Martin
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Via email: gmambro@ersri.org

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Via email: mrobinson@shslawfirm.com

John H. McCann, Esquire
Via email: jmccann@shslawfirm.com

APPEAL OF:

ROBERT PERFETTO, Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM
OF RHODE ISLAND, Respondent

Appearance for Appellant:	KEVEN A. MCKENNA, ESQ. 23 Acorn Street Providence, RI 02903
Appearance for Respondent:	MICHAEL P. ROBINSON, ESQ. Legal Counsel Employees Retirement System of Rhode Island 50 Service Avenue Warwick, Rhode Island 02886
Hearing Officer:	TERESA M. RUSBINO, ESQ. Employees' Retirement System of Rhode Island 50 Service Avenue Warwick, Rhode Island 02886

DECISION

Pursuant to R.I.G.L. Section 36-8-3 and Regulation Four, Rules of Practice and Procedure for Hearings, the Appellant, Robert J. Perfetto (hereinafter "Appellant"), is appealing the June 20, 2014 Administrative Denial of the Employees' Retirement System of Rhode Island (hereinafter "Respondent"). The Respondent's Decision denied Appellant's request to have his lump sum retroactive payment of $55,755 included in the calculation of his final average compensation, pursuant to RIGL Section 36-8-1. Respondent based its denial on the position that the lump sum payment, though paid to the Appellant in 2010,

represented compensation earned for the performance of duties in the school years 2007-2009 and was therefore outside of the calculation period set forth in RIGL Section 36-8-1.

The June 20, 2014 administrative denial was appealed and referred to this Hearing Officer, pursuant to correspondence dated June 20, 2014. The appeal was perfected in accordance with the Rules of Practice. A hearing was held on September 26, 2014, at the offices of the Employees' Retirement System, 50 Service Avenue, Warwick, Rhode Island. Pre-hearing position statements and post-hearing memoranda of law were submitted by both Appellant's counsel and Respondent's counsel in support of their respective positions. The Appellant testified in his own behalf. Frank Karpinski, Executive Director of the Employees' Retirement System, also testified. Various documents were admitted into evidence.

FINDINGS OF FACT:

1. On or about June 23, 2010, the Rhode Island Superior Court entered a Consent Order providing, in part, that the Appellant would receive back pay in the amount of $55,755.00 (see Appellant's Exhibit 7).
2. The amount referred to in No. 1, above, represented the total annual salary that Appellant had received from the William M. Davies, Jr. Career-Technical High School for the 2007-2008 school year, as well as sums that would have been paid to him during the 2008-2009 school year, had he not been terminated in 2008 (see Appellant's Exhibit 7).

3. Prior to the retirement of the Appellant on August 1, 2013, he was provided with a benefits estimate from Respondent. The estimate included, as part of Appellant's final average compensation, the lump sum payment of $55,755.00 paid to him in 2010 (see Respondent's Exhibit D).

4. By correspondence dated October 2, 2013, the Respondent notified the Appellant that the lump sum payment of $55,755.00 had been erroneously included in his retirement estimates, because it had been incorrectly posted to Appellant's account for the year in which it was paid, namely, 2010, as opposed to the year in which it was earned (see Appellant's Exhibit 5).

5. In January of 2014, Appellant filed a complaint in the Rhode Island Superior Court against Respondent (see Appellant's Exhibit 1).

6. Appellant's Superior Court complaint was dismissed without prejudice on June 20, 2014, based upon the Appellant's failure to exhaust his administrative remedies.

7. On or about June 20, 2014, the Respondent issued an official notification of an administrative denial of Appellant's request to have his lump sum payment of $55,755.00 included in the calculation of his final average compensation under RIGL Section 36-8-1 (see Respondent's Exhibit F).

8. On or about June 20, 2014, the administrative denial was appealed and referred to this Hearing Officer (see Respondent's Exhibit G).

ISSUE ON APPEAL:

Did Respondent Employees' Retirement System of Rhode Island err in denying Appellant's request to have the lump sum payment of $55,755.00, paid to the Appellant in 2010, included in the calculation of his final average compensation under RIGL Section 36-8-1?

CONCLUSION AND ORDER:

R.I.G.L. Section 36-8-1(5)(a) reads in part as follows:

(a) "Average Compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest....

It is not disputed that the statute cited above determines average compensation as the average of the highest three consecutive years of compensation within the total service, when the average compensation was highest. The applicable years, as it relates to the Appellant, are 2010, 2011, and 2012. The Respondent's position, however, is that the lump sum payment of $55,755.00, paid to the Appellant in the year 2010, actually represented compensation earned for the performance of duties in the years 2007 through 2009 and, as such, was outside of the calculation period set forth in RIGL Section 36-8-1(5)(a). In support of its position, Respondent relies on the definition of compensation set forth in RIGL Section 36-8-1(8) as, "salary or wages *earned and paid* for the performance of duties for covered employment...." (emphasis added).

When a statute is clear and unambiguous, courts are required to ascribe the plain and ordinary meaning of the words of the statute. McCulloch v. McCulloch, 69 A.3d 810, 819 (R.I. 2013) quoting Town of Burrillville v. Pascoag Apartment Associates, LLC, 950 A.2d 435, 445 (R.I. 2008). Courts must presume that the General Assembly intended to attach significance to every word, sentence and provision of a statute. Ret. Bd. of the Employees' Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 279 (R.I. 2004).

Compensation, as that term is defined in RIGL Section 36-8-1(8), means "salary or wages earned *and* paid...." (emphasis added). The Rhode Island Supreme Court has recognized the difference in the use of the conjunctive "and" versus the disjunctive "or" and has determined that they should not be considered as equivalent in statutory interpretation. Members of the Jamestown School Committee v. Schmidt, 122 R.I. 185, 191, 405 A.2d 16 (R.I. 1979) citing Earle v. Zoning Board of Review, 96 R.I. 321, 324, 191 A.2d 161, 163 (1963).

The Respondent has interpreted the definition of compensation set forth in Section 36-8-1(8) as requiring salary or wages to be both earned and paid in a particular year, in order to be included for purposes of calculating final average compensation, in accordance with RIGL Section 36-8-1(5)(a). In this instance, the Respondent's interpretation is reasonable and wholly consistent with case law, as referenced above. When presented with a clear and unambiguous statute, Respondent applied the statute literally and ascribed the plain and ordinary meaning to its words. See Interstate Navigation Co. v. Division of Public Utilities and Carriers, 824 A.2d 1282, 1287 (R.I. 2003).

Even assuming, arguendo, that the statutory language of RIGL Section 36-8-1(8) is ambiguous and subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to great weight and deference, unless such interpretation is clearly erroneous or unauthorized. See Auto Body Ass'n v. State Dep't of Bus. Regulation, 996 A.2d 91, 97 (R.I. 2010). See also Lyman v. Employees' Ret. Sys. of R.I., 693 A.2d 1030, 1031 (R.I. 1997). The administrative agency's interpretation is accorded great deference, even when the agency's interpretation is not the only permissible one that could be applied. Id.

Pursuant to RIGL Section 36-8-9, the Respondent has been charged with the administration of the retirement system. The General Assembly has empowered the Respondent with a broad grant of authority over the state retirement system. See Iselin v. Ret. Bd. of the Employees' Ret. Sys., 943 A.2d 1045 (R.I. 2008) quoting Perotti v. Solomon, 657 A.2d 1045, 1047-48 (R.I. 1995). In exercising its responsibilities consistent with this legislative grant, Respondent routinely interprets the statutes it has been entrusted with administering, including RIGL Section 36-8-1(5)(a) and RIGL Section 36-8-1(8). In the instant matter, Respondent's interpretation of these statutes is not clearly erroneous or unauthorized, but rather, it is consistent with decisions rendered by the Superior Court of Rhode Island and other ERSRI administrative decisions. See e.g. RI Federation of Teachers v. The Employees' Ret. Sys. of R.I., 1994, R.I. Super. LEXIS 63 (Bourcier, J).

Additionally, the Appellant argues that Respondent is estopped from denying his request to have his lump sum payment of $55,755.00 included in the calculation of his final average compensation, because the initial benefits estimate provided to the Appellant included the lump sum payment in his final average compensation. The Rhode Island Supreme Court has held that the doctrine of equitable estoppel should not be applied against a governmental entity, when the alleged representations or conduct relied upon were *ultra vires* or in conflict with applicable law. Romano v. Ret. Bd. of the Employees' Ret. Sys. of R.I., 767 A.2d 35 (R.I. 2001). Estoppel claims will not be upheld against a governmental unit where an employee's actions are contrary to statute. Waterman v. Caprio, 983 A.2d 841, 846 (R.I. 2009).

In this instance, the initial benefits estimate provided to the Appellant by one of Respondent's retirement counselors was in conflict with and contrary to applicable law, because it included a lump sum payment in the calculation of Appellant's final average compensation that was earned outside of the calculation period set forth in RIGL Section 36-8-1(5)(a). Hence, the benefits estimate provided to the Appellant by the retirement counselor was unenforceable, because it was contrary to the applicable retirement statutes and, therefore, any representations or actions to the contrary were *ultra vires*.

For the reasons set forth herein, Respondent's Administrative Denial, dated June 20, 2014, denying Appellant's request to have his lump sum retroactive payment of $55,755.00 included in the calculation of his final average compensation pursuant to RIGL Section 36-8-1 is hereby affirmed.

It is so ordered.

DATED: January 6, 2017

Teresa M. Rusbino, Esq.

TERESA M. RUSBINO, ESQ.
Hearing Officer, Employees' Retirement System of Rhode Island

CERTIFICATION

I hereby certify that on the 6th day of January, 2017, I forwarded a true copy of the Within Decision, by electronic mail delivery, to FRANK J. KARPINSKI, Executive Director, Employees' Retirement System of Rhode Island, fkarpinski@ersri.org; GAYLE C. MAMBRO-MARTIN, Deputy General Counsel, Employees' Retirement System of Rhode Island, gmambro@ersri.org; MICHAEL P. ROBINSON, ESQ., Legal Counsel, Employees' Retirement System, mrobinson@shslawfirm.com; JOHN H. MCCANN, ESQ., jmccann@shslawfirm.com; and KEVEN A. MCKENNA, ESQ., KEVEN A. MCKENNA, ATTORNEY AT LAW, kevenm@kevenmckennapc.com .

Teresa M. Rusbino, Esq.

EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF RHODE ISLAND

ROBERT PERFETTO	:	**In re:**
	:	**Proceedings before Hearing**
v.	:	**Officer Teresa M. Rusbino, Esq.**
	:	
EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF RHODE ISLAND	:	

POST-HEARING MEMORANDUM OF LAW OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF RHODE ISLAND

INTRODUCTION

Now comes the Employees' Retirement System of the State of Rhode Island (the "Retirement System" or "ERSRI"), and hereby submits this post-hearing memorandum of law in support of the administrative determination of the Executive Director, Frank J. Karpinski, not to include a $55,755.00 retroactive payment (the "Retroactive Payment") relating to the 2008-2009 school year, but made in 2010, in the calculation of Robert Perfetto's ("Perfetto") Final Average Compensation. It is the position of the Retirement System that R.I.G.L. § 36-8-1(5)(a) and §36-8-1(8) are clear and unambiguous and do not permit the payment Perfetto received in 2010 as a result of a Consent Order,[1] to compensate him for service that he would have rendered in 2008-2009 if not prevented from doing so, to be included in his Final Average Compensation. Evidence adduced in the course of the September 24, 2014 hearing (the "Hearing") establishes that Perfetto did not work as a teacher during the 2008-2009 school year, and the Retroactive Payment made in 2010 was based on the amount he had received for the 2007 -2008 school year, and was adjusted to reflect the amounts he would have received if he had worked during the 2008-2009 school year. As such, the Retroactive Payment was not earned in 2010 and was not includable in Perfetto's Final Average Compensation.

---

[1] See, Appellant's Exhibit 7.

BACKGROUND

The underlying facts in this matter are not in dispute. On or about April 2, 2013 Perfetto met with John Midgley to discuss retirement and received an Application for Retirement which he subsequently signed on July 9, 2013 and returned to the Retirement System. Tr. 7:4 – 8:4;[2] Appellant's Exhibit 2. Consistent with his Application for Retirement, Perfetto retired as of August 1, 2013. Appellant's Exhibit 2. In the beginning of October 2013 Perfetto received his first pension check which was in an amount less than he had anticipated based upon the estimate he had previously received. Tr. 10:2 – 10:12. In a letter dated October 2, 2013 Mr. Midgley explained that the initial estimate he had given Perfetto had erroneously included the Retroactive Payment received as a result of the Consent Order. Appellant's Exhibit 5.

During the Hearing Perfetto testified that he was prevented from working during the 2008-2009 school year and that the Retroactive Payment made pursuant to the Consent Order was related to his having been prevented from working during that period. Tr. 34:20 – 36:22. The text of the Consent Order is of like import:

> Plaintiff shall receive back pay in the amount of $55,775. This sum is based on the total annual salary that Plaintiff had received at the William M. Davies, Jr. Career-Technical High School ("Davies") during the 2007-08 school year, plus additional sums that would have been paid to him during the 2008-09 school year, plus his out-of-pocket medical expenses for the 2008-09 school year, minus sums and benefits Plaintiff had received in payment during the 2008/09 school year; ....

See, Plaintiff's Exhibit 7. Accordingly, the chronological period to which the Retroactive Payment pertained is clear.

---

[2] The reference to Tr. 7:4 - 8:4 is to the Transcript of the Hearing of September 26, 2014, page 7, line 4 through page 8, line 4.

ARGUMENT

A. The applicable statutes do not permit the interpretation proposed by Mr. Perfetto.

The Retirement System through its Executive Director has determined that Mr. Perfetto may not include the $55,775.00 retroactive payment that he received in 2010 pursuant to the Consent Order as part of his average compensation for purposes of determining his pension payments because it was not earned and paid in 2010. Pursuant to statute:

> (5) (a) "Average compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest. For members eligible to retire on or after October 1, 2009, "Average compensation" shall mean the average of the highest five (5) consecutive years of compensation within the total service when the average compensation was the highest.

R.I.G.L. § 36-8-1(5)(a). It is not disputed that under this provision Mr. Perfetto's average compensation for purposes of determining his pension payments is the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was highest and that the applicable years in his case were 2010, 2011 and 2012.

The Retirement System, in making its determination, also considered the definition of compensation applicable to Mr. Perfetto's retirement:

> (8) "Compensation" as used in chapters 8 -- 10 of this title, chapters 16 and 17 of title 16, and chapter 21 of title 45 shall mean salary or wages **earned and paid** for the performance of duties for covered employment, including regular longevity or incentive plans approved by the board, but shall not include payments made for overtime or any other reason other than performance of duties, including but not limited to the types of payments listed below:
>
> (i) Payments contingent on the employee having terminated or died;
>
> (ii) Payments made at termination for unused sick leave, vacation leave, or compensatory time;

(iii) Payments contingent on the employee terminating employment at a specified time in the future to secure voluntary retirement or to secure release of an unexpired contract of employment;

(iv) Individual salary adjustments which are granted primarily in anticipation of the employee's retirement;

(v) Additional payments for performing temporary or extra duties beyond the normal or regular work day or work year.

R.I. Gen. Laws § 36-8-1 (emphasis added).

The Supreme Court of Rhode Island has stated that generally, the conjunctive "and" should not be considered as the equivalent of the disjunctive "or." *Members of Jamestown Sch. Comm. v. Schmidt*, 122 R.I. 185, 191 (R.I. 1979); *citing Earle v. Zoning Board of Review*, 96 R.I. 321, 324, 191 A.2d 161, 163 (1963). More recently, the Superior Court has noted:

> "'[T]he Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the [C]ourt will give effect to every word, clause, or sentence, whenever possible.'" Swain v. Estate of Tyre ex rel. Reilly, 57 A.3d 283, 288 (R.I. 2012) (quoting State v. Clark, 974 A.2d 558, 571 (R.I. 2009)). Moreover, courts generally "presume that 'or' is used in a statute disjunctively unless there is a clear legislative intent to the contrary."

Thatcher v. Dep't of Envtl. Mgmt., 2014 R.I. Super. LEXIS 110 (R.I. Super. Ct. 2014). The Retirement System has followed the guidance of the courts in interpreting the "and" in § 36-8-1(8) conjunctively to mean that to be considered in compensation in a particular year for purposes of the calculation of average compensation it must both be earned and paid in that year.

It is a:

> well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency * * * even when the agency's interpretation is not the only permissible interpretation that could be applied." Pawtucket Power Associates Limited Partnership v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993); see Unistrut Corp. v. State Department of Labor and Training, 922 A.2d 93,

> 99 (R.I. 2007) ("[W]hen the administration of a statute has been entrusted to a governmental agency, deference is due to that agency's interpretation of an ambiguous statute unless such interpretation is clearly erroneous or unauthorized."); Gallison v. Bristol School Committee, 493 A.2d 164, 166 (R.I. 1985) ("[W]here the provisions of a statute are unclear [**16] or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized."); see also Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 344-45 (R.I. 2004); In re Lallo, 768 A.2d 921, 926 (R.I. 2001).

Auto Body Ass'n v. State Dep't of Bus. Regulation, 996 A.2d 91, 97 (R.I. 2010). If the statutes are clear, they must be interpreted in accordance with their terms.

If the statutes are ambiguous, great deference is due to the agency's interpretation. The executive director testified that during his lengthy tenure at the Retirement System the staff had been trained to apply compensation to time periods in which the monies were actually earned, and that interpretation had been applied consistently during that time. Tr. 88:1 – 90:17.

This position is consistent with both decisional authority from the Superior Court and interpretations by other administrative hearing officers. *See, e.g., R.I. Federation of Teachers v. The Employees Retirement System of Rhode Island, et al.*, 1994 R.I. Super. LEXIS 63 (Bourcier, J.) (holding that the Retirement System was not required to include deferred teacher compensation as part of total compensation for the year in which it was paid, as opposed to the year in which it was earned). There, the Court stated that "[t]he effect of that action would of course serve to bloat and distort the retiring schoolteacher's annual salary and consequently result in an increase in the teachers' retirement benefit." *Id.* In 1998, Hearing Officer Elaine Giannini affirmed the Retirement System's decision to exclude monies from Final Average Compensation that were not earned within the statutory period. *Asselin v. ERSRI* (November 18,

1998).[3] "The statute in question mandates a two-prong requirement in order to include compensation in the calculation of 'average compensation. It is required that the salary or wages earned are paid for the performance of duties.") (emphasis in original). *Id.* In *Ralph Defelice, et al. v. ERSRI* (September 15, 1998)[4] Hearing Officer Charles Koutsogiane found that "to...allow Petitioners the right to apply lump sum amounts of retroactive pay for past services towards average compensation, simply because of an administrative delay in processing the receipt of that payment, is not equitable to all members of the pension system and does not seem to comport with the legislative intent."

Executive Director Karpinski's interpretations of R.I.G.L. §§ 36-8-1(5)(a) and 36-8-1(8) are entitled to substantial deference, even if his interpretations are not the only permissible interpretations that could be applied. *Lyman v. ERSRI*, 693 A.2d 1030, 1031 (R.I. 1997); *Town of Richmond v. R.I. Dep't of Envtl. Mgmt.*, 941 A.2d 151, 157 (R.I. 2008). The General Assembly has explicitly charged the Executive Director with the administration of the retirement system. R.I.G.L. § 36-8-9(a). Deference arises because most agencies are presumed to have knowledge and expertise in their respective fields. *Ludwig v. Coastal Res. Mgmt. Council,* 2013 R.I. Super. LEXIS 140 (R.I. Super. Ct. 2013). The Rhode Island Supreme Court has held that: "[t]he retirement system is a complex administrative agency that oversees, inter alia, a large number of claims; a statute of limitations governing those claims is likely to be absolute and devoid of exceptions." *Iselin v. Ret. Bd. of the Emples. Ret. Sys.*, 943 A.2d 1045 (RI 2008) (citation omitted).

In fulfilling the responsibilities of his legislative grant, the Executive Director has concluded that, consistent with the plain statutory language of R.I.G.L. §§ 36-8-1(5)(a) and 36-8-

[3] A copy of the Decision in *Asselin v. ERSRI* is attached as Exhibit A.

[4] A copy of the Decision in *DeFelice v. ERSRI* is attached as Exhibit B.

1(8), Mr. Perfetto is not entitled to include the Retroactive Payment in his average compensation. The Retirement System lacks the power to do other than as the General Assembly has required.

B. Equitable estoppel does not apply where an official's representations were *ultra vires*.

Because Mr. Midgley's initial estimate was both erroneous and *ultra vires*, Perfetto cannot prevail on a claim of equitable estoppel. *Waterman v. Caprio*, 983 A.2d 841, 846 (R.I. 2009); *see also Romano v. Retirement Board of the Employeees' Retirement System of Rhode Island*, 767 A.2d 35, 39-40 (R.I. 2001). In *Romano*, the plaintiff retired from the Department of Transportation based on an incentive package offered by the state. *Romano*, 767 A.2d at 36. However, before retiring plaintiff asked a retirement counselor if there would be any restrictions concerning his retirement if he began working for the Town of Bristol, who responded in the negative. *Id.* The then executive director of ERSRI told the town administrator that there were no restrictions. *Id.* The information given to Mr. Romano had been erroneous because it was contradictory to state law. *Id.* As such, the Supreme Court observed that estoppel in such a case "would allow every government official to act as his own mini-legislature, cashiering those laws he or she dislikes, is ignorant of, or misinterprets, and instead molding the law to be whatever the government official claims it to be." *Id.* at 43.

In *Waterman*, plaintiff, who had been injured in the course of his employment, claimed that he had settled his workers' compensation claim and relinquished his accidental disability retirement benefits in exchange for ordinary disability benefits based on a representation by ERSRI's then assistant executive director that amounts received in settlement of his workers' compensation claim would not be offset against his retirement benefits pursuant to R.I.G.L. § 28-33-25.1. *Waterman*, 983 A.2d 843. In June 2000, plaintiff settled the workers' compensation

claim based on § 28-33-25.1, and the state paid him $ 21,250. *Id.* In September 2000, plaintiff was notified that his retirement payments would not commence until the entire $ 21,250 was offset against the pension benefits. *Id.* The Supreme Court, in *Waterman*, relied upon its reasoning in *Romano*, stating: "We held then, as we do now, that plaintiff's estoppel claim must fail. The statements made by the retirement system employees were not within their authority to make because they contradicted state law." *Id.* at 847. In presenting the Estimate of Benefits,[5] Mr. Midgley lacked either actual or implied authority to waive, modify, or ignore applicable state law that conflicted with the estimate provided to Mr. Perfetto. *Id.* at 847.

The Supreme Court in Waterman continued, stating that an estoppel claim requires two elements; an affirmative representation on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon and second, that such representation or conduct did induce the other to act or fail to act to his injury. *Id.* (citations and quotations omitted). Here, the presentation of an estimate, by definition,[6] is not an affirmative representation intended to induce reliance. What was clearly marked as an estimate cannot be deemed to have induced reliance. Further, there is nothing in the record that indicates that Mr. Midgley provided the estimate for the purpose of inducing Mr. Perfetto to retire. *See, id.*

CONCLUSION

For all of the reasons set forth above, ERSRI requests that the determination of its Executive Director be affirmed, and that the Hearing Officer so recommend to the Retirement Board.

---

[5] See, Respondent's Exhibit C.

[6] Estimate. A valuing or rating by the mind, without actually measuring, weighing, or the like. A rough or approximate calculation only. Black's Law Dictionary 494 (5th ed. 1979).

THE EMPLOYEES' RETIREMENT
SYSTEM OF THE STATE OF
RHODE ISLAND

By its Attorneys,

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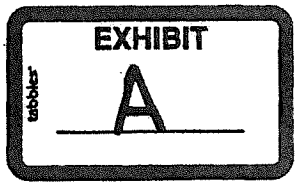
Dated: May 22, 2015

CERTIFICATION

I hereby certify that on this 22nd day of May 2015 I mailed a true and accurate copy of the within Post-Hearing Memorandum of Law of the Employees' Retirement System of the State of Rhode Island to Samuel Kennedy-Smith, Esq., 23 Acorn Street, Providence, RI 02903 by regular mail, postage prepaid.

November 18, 1998



ANN ASSELIN, Appellant

VS.

EMPLOYEES' RETIREMENT SYSTEM, Respondent

Appearance for the Appellant:	Timothy Chapman, Esq. 670 Willett Avenue Riverside, Rhode Island 02915
Appearance for the Respondent:	David Barricelli, Esq. Employees' Retirement System 40 Fountain Street Providence, RI 02903
Hearing Officer:	Elaine M. Giannini, Esq. Employees' Retirement System 40 Fountain Street Providence, RI 02903

Pursuant to Rhode Island General Laws §36-8-3 and Regulation Four, Rules of Practice and Procedure for Hearing, this matter was heard on an appeal by Ann Asselin from a determination of Joann Flaminio, Director of the Employees' Retirement System of Rhode Island.

A hearing was held on May 21, 1998 at the offices of the Employees' Retirement System, 40 Fountain Street, Providence, Rhode Island. The

testimony of the member, Ms. Asselin, and James Reilly, Assistant Director of the Retirement System, was presented. Both sides presented documentary evidence (attached). Closing arguments were made.

FINDINGS OF FACT:

1. The Member, Ann Asselin, was employed by the State of Rhode Island and was subject to Title 36, Chapter 8 of the RIGL governing retirements.
2. The Member accrued twenty-three years, four months and twenty nine days of service credit in the State Employees' Retirement System.
3. The Member terminated her employment on February 18, 1995.
4. The Member became eligible for her retirement benefits on June 6, 1997.
5. The Member received a retroactive salary payment on or about March 7, 1992 in the amount of $1,244.93 to correct an hourly rate error.
6. The Member received a retroactive salary payment on January 8, 1994 in the amount of $17,986.70 due to an error in her base entry date.
7. The three-year average salary used to calculate the Member's retirement benefit is $47,572.59.

ISSUE:

Did the Employees' Retirement System of Rhode Island err in interpreting RIGL §36-8-1(7) as it relates to the inclusion of retroactive payments in calculating the member's average compensation?

DECISION:

At hearing in this matter, the member, Ann Asselin, testified. According to her testimony, she terminated employment with the State of

Rhode Island in February of 1995, accruing 23 years, 4 months and 29 days of service credit in the Employees' Retirement System. She became eligible for retirement benefits on June 6, 1997.

Ms. Asselin testified that she received two retroactive payments. She received $17,986.70 in July of 1997 for a work period from July 2, 1978 to July 11, 1993. Further, she received $1,244.93 in March of 1992. This covered the employment period from 10/1/91 to 1/25/92.

Ms. Asselin contends that the Employees Retirement System did not include the retroactive payment in full, but added only a portion of the payment to the calculation of her average compensation for the purpose of determining monthly pension. The Member requested that the retroactive payments be included and considered "average compensation" pursuant to RIGL §36-8-1.

The Employees' Retirement System produced the testimony of James Reilly, the Assistant Director of he Employees' Retirement System. According to his testimony, and in corroboration of the contention of the Member, Mr. Reilly stated that only the portions of the retroactive payments received were applied in the average compensation calculation. Ms. Asselin's "average compensation" period was based on monies received and

earned from 2/92 to 2/95, the three highest years. None of the retroactive payment of March, 1992 in the amount of $1,244.93 was calculated. This payment was for an hourly salary rate adjustment for the employment period 10/1/91 to 1/25/92. (See System's Exhibit 3). Portions of the $17,986.70 were applied to the calculation. This retroactive payment was made to correct an error in the Member's base entry date. (See System's Exhibit 2). The employment period covered by this payment was from 7/2/78 to 7/11/93. Mr. Reilly testified that the portions of that payment which fell during the "average compensation" period were applied.

It is obvious that the facts are not in dispute. Resolution of this issue is based on an interpretation of the language contained in RIGL §36-8-1. That Statute in pertinent part states:

> (11) "Average Compensation" shall mean the average of the highest three (3) consecutive years of compensation, with the total service when the average compensation was the highest.
>
> The term "compensation" as used in Chapters 8 to 10, inclusive, of this title, Chapters 16 and 17 of Title 16 and Chapter 21 of Title 45, shall mean salary or wages earned and paid for the performance of duties for covered employment, including regular longevity or incentive plans approved by the board, but shall not include payments made for overtime or reasons other than performance of duties or activities, including, but not limited to the types of payments listed below:
>
> (A) Payments contingent on the employee having terminated or died;
>
> (B) Payments made at termination for unused sick leave, vacation leave, or compensatory time;
>
> (C) Payments contingent on the employee terminating employment, at a specified time in the future to secure voluntary retirement or to secure release of an unexpired contact of employment;

(D) Individual salary adjustments which are granted primarily in anticipation of the employee's retirement;
(E) Additional payments for performing temporary or extra duties beyond the normal or regular work day or work year.

Ms. Asselin received retroactive payments during the period used to determine her average compensation and ultimately, her retirement benefit. Documents produced show that some of those earnings were for the performance of duties out side of the calculation period. Any payments related to wages earned for the performance of duties during the calculation period was credited to the Member.

When the language of a Statute is ambiguous and expresses a clear and sensible meaning, there is no room for statutory construction or extension, and we must give the words of the statute their plain and obvious meaning. In RE Advisory Opinion to the Governor, 504 A.2d 456 at 459 (1986) citing Fruit Growers Express Co. vs. Norberg, 471 A.2d 628, 630 (1984). The statute in question mandates a two-prong requirement in order to include compensation in the calculation of "average compensation". It is required that the salary or wages earned are paid for the performance of duties.

In the instant case, some of the monies received were for the performance of duties outside the calculation period, although the money

was received within the period. This does not conform to the clear legislative mandate expressed in the statute.

Therefore, the determination of the Director is upheld.

Elaine M. Giannini

ELAINE M. GIANNINI, ESQ.
Employees' Retirement System
40 Fountain Street
Providence, RI 02903

Dated: August 26, 1998

LIST OF EXHIBITS

Member's Exhibits:

1. Correspondence (October 1, 1997) from the Employees' Retirement System to Ms. Asselin
2. Correspondence (October 29, 1997) from Attorney Chapman to the Employees' Retirement System
3. RIGL Chapter 8 §36-8-1
4. Direct deposit (payroll) receipts
5. Spread sheet prepared by Member

System's Exhibits:

1. Rhode Island Retirement System Ledger Card (Ann Asselin)
2. July 3, 1997 correspondence from Division of Veterans Affairs to Employees' Retirement System of Rhode Island
3. September 4, 1997 Memo to the Employees' Retirement System from Angela Larson regarding retroactive adjustment
4. Member Information Data Sheet
5. Termination Action Document

Ann Asselin v. ERSRI

Date of Decision: August 26, 1998

Matter: This case involves two retroactive payments that were *received* during the member's last three years of employment, but relate to employment outside of the last three years of employment. As a result, the portion of income not attributable to the member's last three years was not included in the member's final average salary. Did ERSRI err in interpreting RIGL 36-8-1(7) as it relates to the inclusion of retroactive payments in calculating the member's average compensation? No, only the portions of the retroactive payments received which applied to the employment period which fell during the average compensation period were applied in the average compensation calculation. The language of the statute expresses a clear and sensible meaning: it is required that the salary or wages earned are paid for the performance of duties

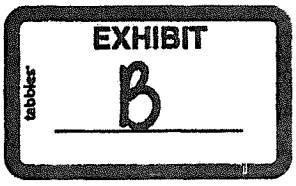
Decision of Hearing Officer: Denial affirmed

Decision of Board: Denial affirmed on 11/18/98

September 15, 1998
(Defelice & Lemery)

STATE OF RHODE ISLAND
PROVIDENCE, SC

EMPLOYEES RETIREMENT
SYSTEM OF RHODE ISLAND



Appeal of Ralph Defelice,
Alan Lemery, Joann Sawtelle
(Definition of Average Compensation
Pursuant to R.I.G.L. 36-8-1)

Appearances

For Petitioners: Angelica B. Gosz, Esq.
380 Broadway
Providence, RI 02909

For Respondent: David D. Barricelli, Esq.
Hinckley, Allen & Snyder
1500 Fleet Center
Providence, RI 02903

Hearing Officer: Charles M. Koutsogiane, Esq.

DECISION

TRAVEL OF THE CASE

This consolidated appeal is before the hearing officer pursuant to and in accordance with the statutory requirements of R.I.G.L. 36-8-3 and Regulation No. Four (4) of the Rules of Practice and Procedure for Hearing. Ralph Defelice, Alan Lemery and Joann Sawtelle ("Petitioner" and/or "Petitioners") are seeking relief from the decision of Joann E. Flaminio, Executive Director of the Employees Retirement System ("Respondent"), denying their request to have lump sum amounts of their retroactive pay included as average compensation in the Retirement System's calculation of their highest consecutive years of compensation as set forth in R.I.G.L. 36-8-1(4).

Petitioners' appeals were timely made and were filed in accordance with the above-stated Rules of Practice. A hearing was thereafter conducted on April 15, 1998 at the offices of the Employees' Retirement System, 40 Fountain Street, Providence, Rhode Island, in which sworn testimony was given by Petitioners and by Assistant Executive Director James Reilly on behalf of Respondent. Both parties also subsequently submitted post-hearing memoranda of law.

The record shows that Petitioners were employed by the Department of Human Services ("DHS") and were members of the Rhode Island Alliance of Social Service Employees, Local 580, of the Service Employees International Union ("Union"). Petitioners worked pursuant to a Collective Bargaining Agreement ("CBA") executed between DHS and the Union and as a result of the terms and conditions of said CBA, Petitioners each received on September 24, 1994, a lump sum retroactive payment covering employment between August 29, 1993 and June 11, 1994. Lemery received $2,855.36, Sawtelle received $2,109.02 and Defelice received $2,916.20.

Each of the Petitioners retired in July of 1997 and sought approval to include the lump sum retroactive payments as average compensation in the calculation of their three highest consecutive years of retirement benefits. (See, Petitioners' Exhibit #1)

Respondent denied each of Petitioners' requests on the basis that R.I.G.L. 36-8-1(4) requires that all monies included in the computation of the highest consecutive years of compensation must be earned and paid within 78 consecutive payroll periods. Respondent based this action on its interpretation and construction of the statute and on Retirement System policy which has been in effect since at least 1979. (See, Petitioners' Exhibit #2)

Petitioners maintain, inter alia, that Respondent's action is not grounded in statutory authority since the governing legislation does not expressly mandate that average compensation must be earned and paid within 78 consecutive payroll periods. In addition, Petitioners challenge Respondent's reliance on unpublicized regulation and/or unofficial office procedure and policy. Petitioners claim that since they had no official notice of the same, as provided for by the Administrative Procedures Act ("APA"), that the adverse decision must perforce be overturned.

FINDINGS OF FACT

1. Petitioners worked as employees for the Rhode Island Department of Human Services. ("DHS").

2. Petitioners were members of the Rhode Island Alliance of Social Service Employees, Local 580 of the Services Employees International during their employment with DHS.

3. Petitioners worked pursuant to a Collective Bargaining Agreement (as a result of an agreement to the CBA reached on September 7, 1994) and on September 24, 1994 each received a lump sum retroactive payment.

4. Lemery received $2,855.36; Sawtelle received $2,109.02; Defelice received $2,916.20. Pension contributions were deducted from said lump sum retroactive payments. (See, Respondent's Exhibit #1, 2, 3)

5. The lump sum retroactive payments received by Petitioners in September of 1994 covered the employment period of August 29, 1993 through June 11, 1994.

6. All taxes and contributions to the Employees Retirement System of Rhode Island with respective to the retroactive payments were made in the 1994 tax year.

7. Petitioners each retired from State service in July of 1997.

ISSUE(S)

Whether R.I.G.L. 36-8-1(4) mandates that only monies earned and paid within 78 consecutive payroll periods can be included in the computation of an employees' highest three years of compensation.

CONCLUSION AND ORDER

The statute applicable to the instant matter is R.I.G.L. 36-8-1(4) which defines the term "Average Compensation" in pertinent part as follows:

> "(4) 'Average Compensation' shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest. The term 'compensation' as used . . .shall mean salary or wages earned and paid for the performance of duties of covered employment, including regular longevity or incentive plans. . .but shall not include payments made for overtime or reasons other than performance of duties of activities. . ." (emphasis added)

In addition, an analogous statute, R.I.G.L. 36-8-1(7), defines the term "compensation" as ". . .salary or wages earned and paid for the performance of duties for covered employment." (emphasis added)

In construing a statute, one is required to ascertain the intent behind its enactment and to give effect to that intent. Dunne Leases Cars & Trucks Inc. v. Kenworth Truck Co., 466

A.2d 1153, 1156 (RI 1983). In ascertaining intent, one must rely on the rules of statutory construction and examine the language, nature and object of the statute. Lake v. State, 507 A.2d 1349, 1351 (RI 1986). It is a well established axiom that the meaning of a word or words in a statute can become clear by reference to other words in the statute, or also by in pari materia reference to other statutes. Howard Union of Teachers v. State, 478 A.2d 563, 566 (RI 1984).The statute(s) must be construed so as not to lead to an absurd result or defeat its obvious purpose. Cocchini v. City of Providence, 479 A.2d 108, 111 (RI 1984).

Administrative agencies are statutory creations possessing no inherent common law powers, Little v. Conflict of Interest Commission, 397 A.2d 884 (RI 1979), but they are generally clothed with the power to construe the law as a necessary precedent to administrative action. See, 2 Am Jur 2d, Administrative Law, 77. The power of an agency to construe and interpret the law is applied several ways: (1) Issuing rules and regulations such as pursuant to R.I.G.L. 36-8-3; (2) exercising its adjudicating powers; and (3) acting informally by interpretations, rulings or opinions upon the law that it administers. 2 Am Jur 2d, 80. Despite the guidance offered under R.I.G.L. 36-8-3, policy-making is not always effected by the promulgation of published rules. 2 Am Jur 2d,155.

It is certainly fundamental law that agency actions must be fair and reasonable. However, permissible constructions by agencies responsible for the administration of statutes are entitled to great weight. An interpretative regulation issued by an administrative agency charged with the administration of a statute will ordinarily be given great weight when the statute is ambiguous and in need of interpretation, provided that the agency's interpretation does not alter or amend the scope of the statute. See, Statewide Multiple Listing Service, Inc. v. Norberg, 392 A.2d

371, 373 (1978). Appropriate weight will, therefore, be given to a construction or interpretation which is long standing and uniform or contemporaneous with the first workings of the statute. 2 Am Jur 2d

Applying these established principles to the present matter, the Hearing Officer finds that Respondent's interpretation and construction of the applicable statutes, R.I.G.L. 36-8-1(4) and 36-8-1(7), is consistent with the legislative intent to provide a pension system which results in equality for all of its members. Petitioners, like all members of the State Retirement System, are mandated by law to make pension contributions. Here, they received pensions based upon their standard compensation that was highest during the last three years of service. In other words, they maximized their pension. However, to also allow Petitioners the right to apply lump sum amounts of retroactive pay for past services towards average compensation, simply because of an administrative delay in processing the receipt of that payment, is not equitable to all members of the pension system and does not seem to comport with the legislative intent.

The record shows that Respondent's policy requiring that only monies earned and paid within 78 consecutive payroll periods can be included in the computation of an employee's highest three years of compensation has been in effect at least since 1979. This policy as applied, while possibly susceptible to other contrary construction, nonetheless gives a fair and reasonable interpretation to the term "average compensation" as defined under R.I.G.L. 36-8-1(4) and to the term "compensation" as defined under R.I.G.L. 36-8-1(7).

Office policy constitutes administrative interpretation and effectuation of statutory legislation and its intent. The Hearing Officer finds that the agency's office policy in this particular case is not void ab initio simply because it has not been codified into regulation

pursuant to R.I.G.L. 36-8-3. The long-standing policy, as applied, gives an established uniform effect to the statutory requirement of qualified average compensation, and it is within the sound discretion and administrative authority of the Retirement System to implement the same.

Given the above, the determination of the Retirement System denying Petitioners' appeal is hereby affirmed.

It is so ordered.

Date: July 30, 1998

By: Charles M Koutsogiane

Charles M. Koutsogiane, Esq.
Hearing Officer
Employee's Retirement System
40 Fountain Street
Providence, RI

CERTIFICATION

I hereby certify that on the 30th day of July, 1998, a true copy of the within Decision was mailed to: Joann E. Flaminio, Executive Director, Employee's Retirement System, 40 Fountain Street, Providence, RI 02903; David Barricelli, Esq., Hinckley, Allen & Snyder, 1500 Fleet Center, Providence, RI 02903; Angelica B. Gosz, Esq., 380 Broadway, Providence, RI 02909.

Charles M Koutsogiane

Warwick, Rhode Island 02886

July 9, 1997

Ms. Joann Flamino
Executive Director
Employees Retirement System of the State of Rhode Island
40 Fountain Street
Providence, Rhode Island

Dear Ms. Flamino:

This letter is submitted on behalf of myself, Ms. Joann M. Sawtelle, Mr. Walter Sargeant, and Mr. Ralph DeFelice. The first three of us have retired as of early July, 1997 and the last person will retire as of the end of July, 1997. We have been verbally informed, by members of your staff, that a certain retroactive payment received by us in September, 1994 would not be used in calculating our pension benefit (the three highest years being July, 1994 through July, 1997).

This letter is also in reference to our telephone conversation of July 9, 1997. You informed me that the Employees Retirement System's position would stand. It was stipulated that I would submit a letter to you and that you would then give me a written response.

I am formally requesting that the Employees Retirement System (System) compute the retroactive compensation we received in September, 1994 when it determines the amount of our retirement pensions. I am further requesting that the written decision of the System be issued as soon as possible. If that decision denies our collective request, please include information relative to the appeals process of the Employees Retirement System.

Thank you for your prompt attention to this matter.

Respectfully submitted,

Alan A. Lemery

cc: Joann M. Sawtelle, Ralph G. DeFelice, Walter Sargeant

Petit. #1

Employees Retirement System of Rhode Island

Joann E. Flaminio, Executive Director

40 Fountain Street
Providence, RI
02903-1854

Tel: (401) 277-2203

TDD: (401) 521-8980

Fax: (401) 277-2430

E-mail:
ersri@treasury.state.ri.us

Web Site:
www.state.ri.us/
treas/ersri.htm

July 17, 1997

Alan A. Lemery

Warwick, Rhode Island 02886

Dear Mr. Lemery:

I am in receipt of your letter of July 9, 1997 regarding the calculation of your retirement allowance from the Employees Retirement System of Rhode Island and your receipt of a retroactive payment for the time period of August 29, 1993 through June 11, 1994 of your employment with the Department of Human Services.

R.I.G.L. 36-8-1 Definition of Terms provides the following (in relevant part):

> (11) "Average Compensation" shall mean the average of the highest (3) consecutive years of compensation, within total service when the average compensation was the highest. The term " compensation" as used in chapters 8 to 10 of this title, inclusive, chapters 16 and 17 of title 16 and chapter 21 of title 45, shall mean ***salary or wages earned and paid for the performance of duties of covered employment,*** including regular longevity or incentive plans approved by the Board, but shall not include payments made for overtime or reasons other than performance of duties or activities, including but not limited to the types of payments listed below: *(emphasis supplied)*
>
> (A) payments contingent on the employee having been terminated or died;
>
> (B) payments made at termination for unused sick leave, vacation leave or compensatory time;
>
> (C) payments contingent on the employee terminating employment, at a specified time in the future to secure voluntary employment or to secure release of unexpired contract of employment;
>
> (D) individual salary adjustments which are granted primarily in anticipation of the individual's retirement;
>
> (E) additional payments for performing temporary or extra duties beyond the normal or regular work day or work year.

Petit # 2

An examination of your covered employment reveals that compensation was the highest during your last three years of service which is typical for a majority of employees. Thus, your final average compensation is as follows:

July- Dec 1994 (6 mos.):	$23,108.28
Jan - Dec 1995:	$56,643.66
Jan - Dec 1996:	$57,583.14
Jan - July 1997 (6 mos.):	$31,101.98
TOTAL	$168,437.06
FAS	$56,145.69

The information received from your payroll supervisor at the Department of Human Services indicates that you received a retroactive payment of $2,855.36 for covered employment during the following time period: August 29, 1993 through June 11, 1994.

You will note that the statutory definition of average compensation contained in R.I.G.L. 36-8-1 states that average compensation shall mean average of the highest (3) consecutive years of compensation, within total service when the average compensation was the highest. The term compensation is then further defined to mean "salary or wages earned and paid for the performance of duties of covered employment."

Since the retroactive payment you received was not "earned and paid' during your last three years of service, it cannot be used to calculate your retirement benefit from this office.

Should you disagree with my opinion on this matter, you may seek a hearing before an independent hearing officer in accordance with the Rules of Practice and Procedure for Hearings of the Employees Retirement System of Rhode Island.

Your request for a hearing must be made within 30 days of the receipt of this letter. At that time, you will receive notification of the name of the hearing officer and details regarding setting of a hearing date.

With best wishes on your upcoming retirement.

Sincerely,

Joann E. Flaminio
Executive Director

/ejf

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

JO-ANN SAWTELLE

PERIOD ENDING 07/05/97

EMP. NO. 1000

TYP	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTIO TO DATE
100	12/26/92	88			7,866.66	16,876.71		
	YR TOTAL							
	01/09/93	01	1,237.11	95.88	7,866.66	16,972.59	.00	
	01/23/93	01	2,474.22	95.88	7,866.66	17,068.47	.00	
	02/06/93	01	3,711.33	95.88	7,866.66	17,164.35	.00	
	02/20/93	01	4,948.44	95.88	7,866.66	17,260.23	.00	
	03/06/93	01	6,185.55	95.88	7,866.66	17,356.11	.00	
	03/20/93	01	7,422.66	95.88	7,866.66	17,451.99	.00	
	04/03/93	01	8,659.77	95.88	7,866.66	17,547.87	.00	
	04/17/93	01	9,896.88	95.88	7,866.66	17,643.75	.00	
	05/01/93	01	11,133.99	95.88	7,866.66	17,739.63	.00	
	05/15/93	01	12,371.10	95.88	7,866.66	17,835.51	.00	
	05/29/93	01	13,608.21	95.88	7,866.66	17,931.39	.00	
	06/12/93	01	14,845.32	95.88	7,866.66	18,027.27	.00	
	06/26/93	01	16,082.43	95.88	7,866.66	18,123.15	.00	
	07/10/93	01	17,319.54	95.88	7,866.66	18,219.03	.00	
	07/24/93	01	18,556.65	95.88	7,866.66	18,314.91	.00	
	08/07/93	01	19,793.76	95.88	7,866.66	18,410.79	.00	
	08/21/93	01	21,030.87	95.88	7,866.66	18,506.67	.00	
	09/04/93	01	22,267.98	95.88	7,866.66	18,602.55	.00	
	09/18/93	01	23,505.09	95.88	7,866.66	18,698.43	.00	
	10/02/93	01	24,742.20	95.88	7,866.66	18,794.31	.00	
	10/16/93	01	26,034.42	100.15	7,866.66	18,894.46	.00	
	10/30/93	01	27,326.64	100.15	7,866.66	18,994.61	.00	
	11/13/93	01	28,949.53	125.77	7,866.66	19,120.38	.00	
	11/27/93	01	30,241.75	100.15	7,866.66	19,220.53	.00	
	12/11/93	01	31,533.97	100.15	7,866.66	19,320.68	.00	
	12/25/93	01	32,826.19	100.15	7,866.66	19,420.83	.00	
	YR TOTAL		32,826.19					
	01/08/94	01	1,292.22	100.15	7,866.66	19,520.98	.00	
	01/22/94	01	2,584.44	100.15	7,866.66	19,621.13	.00	
	02/05/94	01	3,876.66	100.15	7,866.66	19,721.28	.00	
	02/19/94	01	5,168.88	100.15	7,866.66	19,821.43	.00	
	03/05/94	01	6,461.10	100.15	7,866.66	19,921.58	.00	
	03/19/94	01	7,753.32	100.15	7,866.66	20,021.73	.00	
	04/02/94	01	9,045.54	100.15	7,866.66	20,121.88	.00	
	04/16/94	01	10,337.76	100.15	7,866.66	20,222.03	.00	
	04/30/94	01	11,629.98	100.15	7,866.66	20,322.18	.00	
	05/14/94	01	12,922.20	100.15	7,866.66	20,422.33	.00	
	05/28/94	01	14,214.42	100.15	7,866.66	20,522.48	.00	
	06/11/94	01	15,506.64	100.15	7,866.66	20,622.63	.00	
	06/25/94	01	16,901.73	108.12	7,866.66	20,730.75	.00	
	07/09/94	01	18,296.82	108.12	7,866.66	20,838.87	.00	

Respondt #1

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 07/05/97

NAME JO-ANN SAWTELLE

SOC.SEC.NO. 1000

EMPLOYER ACCOUNT NUMBER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIV BENEFI CONTRI TO DA
1255-100	07/23/94	01	19,691.91	108.12	7,866.66	20,946.99	.00	
	08/06/94	01	21,087.00	108.12	7,866.66	21,055.11	.00	
	08/20/94	01	22,482.09	108.12	7,866.66	21,163.23	.00	
	09/03/94	01	23,877.18	108.12	7,866.66	21,271.35	.00	
	09/17/94	01	27,381.29	271.57	7,866.66	21,542.92	.00	
	10/01/94	01	28,776.38	108.12	7,866.66	21,651.04	.00	
	10/15/94	01	31,671.47	224.37	7,866.66	21,875.41	.00	
	10/29/94	01	33,066.56	108.12	7,866.66	21,983.53	.00	
	11/12/94	01	34,461.65	108.12	7,866.66	22,091.65	.00	
	11/26/94	01	35,856.74	108.12	7,866.66	22,199.77	.00	
	12/10/94	01	37,251.83	108.12	7,866.66	22,307.89	.00	
	12/24/94	01	38,646.92	108.12	7,866.66	22,416.01	.00	
	YR TOTAL		38,646.92					
	01/07/95	01	1,395.09	108.12	7,866.66	22,524.13	.00	
	01/21/95	01	2,859.32	113.48	7,866.66	22,637.61	.00	
	02/04/95	01	4,323.55	113.48	7,866.66	22,751.09	.00	
	02/18/95	01	5,787.78	113.48	7,866.66	22,864.57	.00	
	03/04/95	01	7,252.01	113.48	7,866.66	22,978.05	.00	
	03/18/95	01	8,716.24	113.48	7,866.66	23,091.53	.00	
	04/01/95	01	10,180.47	113.48	7,866.66	23,205.01	.00	
	04/15/95	01	11,644.70	113.48	7,866.66	23,318.49	.00	
	04/29/95	01	13,108.93	113.48	7,866.66	23,431.97	.00	
	05/13/95	01	14,573.16	113.48	7,866.66	23,545.45	.00	
	05/27/95	01	16,037.39	113.48	7,866.66	23,658.93	.00	
	06/10/95	01	17,501.62	113.48	7,866.66	23,772.41	.00	
	06/24/95	01	18,965.85	113.48	7,866.66	23,885.89	.00	
	07/08/95	01	20,430.08	113.48	7,866.66	23,999.37	.00	
	07/22/95	01	21,894.31	113.48	7,866.66	24,112.85	.00	
	08/05/95	01	23,358.54	113.48	7,866.66	24,226.33	.00	
	08/19/95	01	24,822.77	128.12	7,866.66	24,354.45	.00	
	09/02/95	01	26,287.00	128.12	7,866.66	24,482.57	.00	
	09/16/95	01	27,751.23	128.12	7,866.66	24,610.69	.00	
	09/30/95	01	29,215.46	128.12	7,866.66	24,738.81	.00	
	10/14/95	01	30,679.69	128.12	7,866.66	24,866.93	.00	
	10/28/95	01	32,143.92	128.12	7,866.66	24,995.05	.00	
	11/11/95	01	33,608.15	128.12	7,866.66	25,123.17	.00	
	11/25/95	01	35,072.38	128.12	7,866.66	25,251.29	.00	
	12/09/95	01	36,536.61	128.12	7,866.66	25,379.41	.00	
	12/23/95	01	38,000.84	128.12	7,866.66	25,507.53	.00	
	YR TOTAL		38,000.84					
	01/06/96	01	1,464.23	128.12	7,866.66	25,635.65	.00	
	01/20/96	01	2,928.46	128.12	7,866.66	25,763.77	.00	
	02/03/96	01	4,392.69	128.12	7,866.66	25,891.89	.00	

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 07/05/97

ME JO-ANN SAWTELLE

C.SEC.NO. 1000

LOYER COUNT BER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTIO TO DATE
55-100	02/17/96	01	5,856.92	128.12	7,866.66	26,020.01	.00	.
	03/02/96	01	7,321.15	128.12	7,866.66	26,148.13	.00	.
	03/16/96	01	8,785.38	128.12	7,866.66	26,276.25	.00	.
	03/30/96	01	10,249.61	128.12	7,866.66	26,404.37	.00	.
	04/13/96	01	11,713.84	128.12	7,866.66	26,532.49	.00	.
	04/27/96	01	13,178.07	128.12	7,866.66	26,660.61	.00	.
	05/11/96	01	14,642.30	128.12	7,866.66	26,788.73	.00	.
	05/25/96	01	16,106.53	128.12	7,866.66	26,916.85	.00	.
	06/08/96	01	17,570.76	128.12	7,866.66	27,044.97	.00	.
	06/22/96	01	19,034.99	128.12	7,866.66	27,173.09	.00	.
	07/06/96	01	20,499.22	128.12	7,866.66	27,301.21	.00	.
	07/20/96	01	21,963.45	128.12	7,866.66	27,429.33	.00	.
	08/03/96	01	23,427.68	128.12	7,866.66	27,557.45	.00	.
	08/17/96	01	24,891.91	128.12	7,866.66	27,685.57	.00	.
	08/31/96	01	26,356.14	128.12	7,866.66	27,813.69	.00	.
	09/14/96	01	27,820.37	128.12	7,866.66	27,941.81	.00	.
	09/28/96	01	29,284.60	128.12	7,866.66	28,069.93	.00	.
	10/12/96	01	30,748.83	128.12	7,866.66	28,198.05	.00	.
	10/26/96	01	32,213.06	128.12	7,866.66	28,326.17	.00	.
	11/09/96	01	33,677.29	128.12	7,866.66	28,454.29	.00	.
	11/23/96	01	35,141.52	128.12	7,866.66	28,582.41	.00	.
	12/07/96	01	36,605.75	128.12	7,866.66	28,710.53	.00	.
	12/21/96	01	38,069.98	128.12	7,866.66	28,838.65	.00	.
	YR TOTAL		38,069.98					
	01/04/97	01	1,464.23	128.12	7,866.66	28,966.77	.00	
	01/18/97	01	2,928.46	128.12	7,866.66	29,094.89	.00	
	02/01/97	01	4,392.69	128.12	7,866.66	29,223.01	.00	
	02/15/97	01	5,856.92	128.12	7,866.66	29,351.13	.00	
	03/01/97	01	7,321.15	128.12	7,866.66	29,479.25	.00	
	03/15/97	01	8,785.38	128.12	7,866.66	29,607.37	.00	
	03/29/97	01	10,249.61	128.12	7,866.66	29,735.49	.00	
	04/12/97	01	11,713.84	128.12	7,866.66	29,863.61	.00	
	04/26/97	01	13,178.07	128.12	7,866.66	29,991.73	.00	
	05/10/97	01	14,642.30	128.12	7,866.66	30,119.85	.00	
	05/24/97	01	16,106.53	128.12	7,866.66	30,247.97	.00	
	06/07/97	01	17,570.76	128.12	7,866.66	30,376.09	.00	
	06/21/97	01	19,034.99	128.12	7,866.66	30,504.21	.00	
	07/05/97	01	20,499.22	128.12	7,866.66	30,632.33	.00	
	09/22/97	50		7,866.66-	.00	30,632.33	.00	
	09/22/97	50		30,632.33-	.00	.00	.00	
	YR TOTAL		20,499.22					
OTAL					.00	.00		
TAL FOR	TAXABLE AND NONTAXABLE					.00		

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 08/02/97

ME RALPH G DEFELICE

SEC.NO. 1000

OVER OUNT BER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTIO TO DATE
5-100	12/26/92	88			13,840.25	25,447.25		
	YR TOTAL							
	01/09/93	01	1,706.72	132.27	13,840.25	25,579.52	.00	
	01/23/93	01	3,413.44	132.27	13,840.25	25,711.79	.00	
	02/06/93	01	5,120.16	132.27	13,840.25	25,844.06	.00	
	02/20/93	01	6,826.88	132.27	13,840.25	25,976.33	.00	
	03/06/93	01	8,533.60	132.27	13,840.25	26,108.60	.00	
	03/20/93	01	10,240.32	132.27	13,840.25	26,240.87	.00	
	04/03/93	01	11,947.04	132.27	13,840.25	26,373.14	.00	
	04/17/93	01	13,653.76	132.27	13,840.25	26,505.41	.00	
	05/01/93	01	15,360.48	132.27	13,840.25	26,637.68	.00	
	05/15/93	01	17,067.20	132.27	13,840.25	26,769.95	.00	
	05/29/93	01	18,773.92	132.27	13,840.25	26,902.22	.00	
	06/12/93	01	20,480.64	132.27	13,840.25	27,034.49	.00	
	06/26/93	01	22,187.36	132.27	13,840.25	27,166.76	.00	
	07/10/93	01	23,894.08	132.27	13,840.25	27,299.03	.00	
	07/24/93	01	25,600.80	132.27	13,840.25	27,431.30	.00	
	08/07/93	01	27,307.52	132.27	13,840.25	27,563.57	.00	
	08/21/93	01	29,014.24	132.27	13,840.25	27,695.84	.00	
	09/04/93	01	30,720.96	132.27	13,840.25	27,828.11	.00	
	09/18/93	01	32,427.68	132.27	13,840.25	27,960.38	.00	
	10/02/93	01	34,134.40	132.27	13,840.25	28,092.65	.00	
	10/16/93	01	35,916.63	138.12	13,840.25	28,230.77	.00	
	10/30/93	01	37,698.86	138.12	13,840.25	28,368.89	.00	
	11/13/93	01	39,934.10	173.23	13,840.25	28,542.12	.00	
	11/27/93	01	41,716.33	138.12	13,840.25	28,680.24	.00	
	12/11/93	01	43,498.56	138.12	13,840.25	28,818.36	.00	
	12/25/93	01	45,280.79	138.12	13,840.25	28,956.48	.00	
	YR TOTAL		45,280.79					
	01/08/94	01	1,782.23	138.12	13,840.25	29,094.60	.00	
	01/22/94	01	3,564.46	138.12	13,840.25	29,232.72	.00	
	02/05/94	01	5,346.69	138.12	13,840.25	29,370.84	.00	
	02/19/94	01	7,128.92	138.12	13,840.25	29,508.96	.00	
	03/05/94	01	8,911.15	138.12	13,840.25	29,647.08	.00	
	03/19/94	01	10,693.38	138.12	13,840.25	29,785.20	.00	
	04/02/94	01	12,475.61	138.12	13,840.25	29,923.32	.00	
	04/16/94	01	14,257.84	138.12	13,840.25	30,061.44	.00	
	04/30/94	01	16,040.07	138.12	13,840.25	30,199.56	.00	
	05/14/94	01	17,822.30	138.12	13,840.25	30,337.68	.00	
	05/28/94	01	19,604.53	138.12	13,840.25	30,475.80	.00	
	06/11/94	01	21,386.76	138.12	13,840.25	30,613.92	.00	
	06/25/94	01	23,311.24	149.15	13,840.25	30,763.07	.00	
	07/09/94	01	25,235.72	149.15	13,840.25	30,912.22	.00	

Respond #2

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 08/02/97

: RALPH G DEFELICE

SEC.NO. 1000

YER INT R	DATE MO-DAY-YR	YR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTION TO DATE
-100	07/23/94	01	27,160.20	149.15	13,840.25	31,061.37	.00	.0
	08/06/94	01	29,084.68	149.15	13,840.25	31,210.52	.00	.0
	08/20/94	01	31,009.16	149.15	13,840.25	31,359.67	.00	.0
	09/03/94	01	32,933.64	149.15	13,840.25	31,508.82	.00	.0
	09/17/94	01	37,774.32	375.15	13,840.25	31,883.97	.00	.0
	10/01/94	01	39,698.80	149.15	13,840.25	32,033.12	.00	.0
	10/15/94	01	41,623.28	149.15	13,840.25	32,182.27	.00	.0
	10/29/94	01	43,547.76	149.15	13,840.25	32,331.42	.00	.0
	11/12/94	01	45,472.24	149.15	13,840.25	32,480.57	.00	.0
	11/26/94	01	47,396.72	149.15	13,840.25	32,629.72	.00	.0
	12/10/94	01	49,321.20	149.15	13,840.25	32,778.87	.00	.0
	12/24/94	01	51,245.68	149.15	13,840.25	32,928.02	.00	.0
	YR TOTAL		51,245.68					
	01/07/95	01	1,924.48	149.15	13,840.25	33,077.17	.00	.0
	01/21/95	01	3,943.76	156.49	13,840.25	33,233.66	.00	.0
	02/04/95	01	5,963.04	156.49	13,840.25	33,390.15	.00	.0
	02/18/95	01	7,982.32	156.49	13,840.25	33,546.64	.00	.0
	03/04/95	01	10,001.60	156.49	13,840.25	33,703.13	.00	.0
	03/18/95	01	12,020.88	156.49	13,840.25	33,859.62	.00	.0
	04/01/95	01	14,040.16	156.49	13,840.25	34,016.11	.00	.0
	04/15/95	01	16,059.44	156.49	13,840.25	34,172.60	.00	.0
	04/29/95	01	18,078.72	156.49	13,840.25	34,329.09	.00	.0
	05/13/95	01	20,098.00	156.49	13,840.25	34,485.58	.00	.0
	05/27/95	01	22,117.28	156.49	13,840.25	34,642.07	.00	.0
	06/10/95	01	24,136.56	156.49	13,840.25	34,798.56	.00	.0
	06/24/95	01	26,155.84	156.49	13,840.25	34,955.05	.00	.0
	07/08/95	01	28,175.12	156.49	13,840.25	35,111.54	.00	.0
	07/22/95	01	30,194.40	156.49	13,840.25	35,268.03	.00	.0
	08/05/95	01	32,213.68	156.49	13,840.25	35,424.52	.00	.0
	08/19/95	01	34,232.96	176.69	13,840.25	35,601.21	.00	.0
	09/02/95	01	36,252.24	176.69	13,840.25	35,777.90	.00	.0
	09/16/95	01	38,271.52	176.69	13,840.25	35,954.59	.00	.0
	09/30/95	01	40,290.80	176.69	13,840.25	36,131.28	.00	.0
	10/14/95	01	42,310.08	176.69	13,840.25	36,307.97	.00	.0
	10/28/95	01	44,329.36	176.69	13,840.25	36,484.66	.00	.0
	11/11/95	01	46,348.64	176.69	13,840.25	36,661.35	.00	.0
	11/25/95	01	48,367.92	176.69	13,840.25	36,838.04	.00	.0
	12/09/95	01	50,387.20	176.69	13,840.25	37,014.73	.00	.0
	12/23/95	01	52,406.48	176.69	13,840.25	37,191.42	.00	.0
	YR TOTAL		52,406.48					
	01/06/96	01	2,019.28	176.69	13,840.25	37,368.11	.00	.0
	01/20/96	01	4,038.56	176.69	13,840.25	37,544.80	.00	.0
	02/03/96	01	6,057.84	176.69	13,840.25	37,721.49	.00	.0

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 08/02/97

ME RALPH G DEFELICE

.SEC.NO. 1000

OYER OUNT BER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTIO TO DATE
5-100	02/17/96	01	8,077.12	176.69	13,840.25	37,898.18	.00	
	03/02/96	01	10,096.40	176.69	13,840.25	38,074.87	.00	
	03/16/96	01	12,115.68	176.69	13,840.25	38,251.56	.00	
	03/30/96	01	14,134.96	176.69	13,840.25	38,428.25	.00	
	04/13/96	01	16,154.24	176.69	13,840.25	38,604.94	.00	
	04/27/96	01	18,173.52	176.69	13,840.25	38,781.63	.00	
	05/11/96	01	20,192.80	176.69	13,840.25	38,958.32	.00	
	05/25/96	01	22,212.08	176.69	13,840.25	39,135.01	.00	
	06/08/96	01	24,231.36	176.69	13,840.25	39,311.70	.00	
	06/22/96	01	26,250.64	176.69	13,840.25	39,488.39	.00	
	07/06/96	01	28,269.92	176.69	13,840.25	39,665.08	.00	
	07/20/96	01	30,289.20	176.69	13,840.25	39,841.77	.00	
	08/03/96	01	32,308.48	176.69	13,840.25	40,018.46	.00	
	08/17/96	01	34,327.76	176.69	13,840.25	40,195.15	.00	
	08/31/96	01	36,347.04	176.69	13,840.25	40,371.84	.00	
	09/14/96	01	38,366.32	176.69	13,840.25	40,548.53	.00	
	09/28/96	01	40,385.60	176.69	13,840.25	40,725.22	.00	
	10/12/96	01	42,404.88	176.69	13,840.25	40,901.91	.00	
	10/26/96	01	44,424.16	176.69	13,840.25	41,078.60	.00	
	11/09/96	01	46,443.44	176.69	13,840.25	41,255.29	.00	
	11/23/96	01	48,462.72	176.69	13,840.25	41,431.98	.00	
	12/07/96	01	50,482.00	176.69	13,840.25	41,608.67	.00	
	12/21/96	01	52,501.28	176.69	13,840.25	41,785.36	.00	
	YR TOTAL		52,501.28					
	01/04/97	01	2,019.28	176.69	13,840.25	41,962.05	.00	
	01/18/97	01	4,038.56	176.69	13,840.25	42,138.74	.00	
	02/01/97	01	6,057.84	176.69	13,840.25	42,315.43	.00	
	02/15/97	01	8,077.12	176.69	13,840.25	42,492.12	.00	
	03/01/97	01	10,096.40	176.69	13,840.25	42,668.81	.00	
	03/15/97	01	12,115.68	176.69	13,840.25	42,845.50	.00	
	03/29/97	01	14,134.96	176.69	13,840.25	43,022.19	.00	
	04/12/97	01	16,154.24	176.69	13,840.25	43,198.88	.00	
	04/26/97	01	18,173.52	176.69	13,840.25	43,375.57	.00	
	05/10/97	01	20,192.80	176.69	13,840.25	43,552.26	.00	
	05/24/97	01	22,212.08	176.69	13,840.25	43,728.95	.00	
	06/07/97	01	24,231.36	176.69	13,840.25	43,905.64	.00	
	06/21/97	01	26,250.64	176.69	13,840.25	44,082.33	.00	
	07/05/97	01	28,269.92	176.69	13,840.25	44,259.02	.00	
	07/19/97	01	30,289.20	176.69	13,840.25	44,435.71	.00	
	08/02/97	01	32,308.48	176.69	13,840.25	44,612.40	.00	
	09/17/97	50		13,840.25-	.00	44,612.40	.00	
	09/17/97	50		44,612.40-	.00	.00	.00	
	YR TOTAL		32,308.48					

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

E ALAN LEMERY PERIOD ENDING 07/05/97

.SEC.NO. 1000

YER UNT ER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIVORS BENEFIT CONTRIBUTIO TO DATE
-104	12/26/92	88			8,968.19	23,643.35		
	YR TOTAL							
	01/09/93	01	1,712.47	132.72	8,968.19	23,776.07	.00	
	01/23/93	01	3,424.94	132.72	8,968.19	23,908.79	.00	
	02/06/93	01	5,137.41	132.72	8,968.19	24,041.51	.00	
	02/20/93	01	6,849.88	132.72	8,968.19	24,174.23	.00	
	03/06/93	01	8,562.35	132.72	8,968.19	24,306.95	.00	
	03/20/93	01	10,274.82	132.72	8,968.19	24,439.67	.00	
	04/03/93	01	11,987.29	132.72	8,968.19	24,572.39	.00	
	04/17/93	01	13,699.76	132.72	8,968.19	24,705.11	.00	
	05/01/93	01	15,412.23	132.72	8,968.19	24,837.83	.00	
	05/15/93	01	17,124.70	132.72	8,968.19	24,970.55	.00	
	05/29/93	01	18,837.17	132.72	8,968.19	25,103.27	.00	
	06/12/93	01	20,549.64	132.72	8,968.19	25,235.99	.00	
	06/26/93	01	22,262.11	132.72	8,968.19	25,368.71	.00	
	07/10/93	01	23,974.58	132.72	8,968.19	25,501.43	.00	
	07/24/93	01	25,687.05	132.72	8,968.19	25,634.15	.00	
	08/07/93	01	27,399.52	132.72	8,968.19	25,766.87	.00	
	08/21/93	01	29,111.99	132.72	8,968.19	25,899.59	.00	
	09/04/93	01	30,824.46	132.72	8,968.19	26,032.31	.00	
	09/18/93	01	32,536.93	132.72	8,968.19	26,165.03	.00	
	10/02/93	01	34,249.40	132.72	8,968.19	26,297.75	.00	
	10/16/93	01	36,035.81	138.45	8,968.19	26,436.20	.00	
	10/30/93	01	37,822.22	138.45	8,968.19	26,574.65	.00	
	11/13/93	01	40,052.23	172.83	8,968.19	26,747.48	.00	
	11/27/93	01	41,838.64	138.45	8,968.19	26,885.93	.00	
	12/11/93	01	43,625.05	138.45	8,968.19	27,024.38	.00	
	12/25/93	01	45,411.46	138.45	8,968.19	27,162.83	.00	
	YR TOTAL		45,411.46					
	01/08/94	01	1,786.41	138.45	8,968.19	27,301.28	.00	
	01/22/94	01	3,572.82	138.45	8,968.19	27,439.73	.00	
	02/05/94	01	5,359.23	138.45	8,968.19	27,578.18	.00	
	02/19/94	01	7,145.64	138.45	8,968.19	27,716.63	.00	
	03/05/94	01	8,932.05	138.45	8,968.19	27,855.08	.00	
	03/19/94	01	10,718.46	138.45	8,968.19	27,993.53	.00	
	04/02/94	01	12,504.87	138.45	8,968.19	28,131.98	.00	
	04/16/94	01	14,291.28	138.45	8,968.19	28,270.43	.00	
	04/30/94	01	16,077.69	138.45	8,968.19	28,408.88	.00	
	05/14/94	01	17,864.10	138.45	8,968.19	28,547.33	.00	
	05/28/94	01	19,650.51	138.45	8,968.19	28,685.78	.00	
	06/11/94	01	21,436.92	138.45	8,968.19	28,824.23	.00	
	06/25/94	01	23,362.61	149.24	8,968.19	28,973.47	.00	
	07/09/94	01	25,288.30	149.24	8,968.19	29,122.71	.00	

Respond # 3

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

PERIOD ENDING 07/05/97

NAME ALAN LEMERY

SOC.SEC.NO. 1000

EMPLOYER ACCOUNT NUMBER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVIV- BENEFI CONTRI TO DA
1211-104	07/23/94	01	27,213.99	149.24	8,968.19	29,271.95	.00	
	08/06/94	01	29,139.68	149.24	8,968.19	29,421.19	.00	
	08/20/94	01	31,065.37	149.24	8,968.19	29,570.43	.00	
	09/03/94	01	32,991.06	149.24	8,968.19	29,719.67	.00	
	09/17/94	01	37,772.11	370.53	8,968.19	30,090.20	.00	
	10/01/94	01	39,697.80	149.24	8,968.19	30,239.44	.00	
	10/15/94	01	41,623.49	149.24	8,968.19	30,388.68	.00	
	10/29/94	01	43,549.18	149.24	8,968.19	30,537.92	.00	
	11/12/94	01	45,474.87	149.24	8,968.19	30,687.16	.00	
	11/26/94	01	47,400.56	149.24	8,968.19	30,836.40	.00	
	12/10/94	01	49,326.25	149.24	8,968.19	30,985.64	.00	
	12/24/94	01	51,251.94			31,134.88		
	YR TOTAL		51,251.94					
	01/07/95	01	1,925.69	149.24	8,968.19	31,284.12	.00	
	01/21/95	01	3,944.20	156.43	8,968.19	31,440.55	.00	
	02/04/95	01	5,962.71	156.43	8,968.19	31,596.98	.00	
	02/18/95	01	7,981.22	156.43	8,968.19	31,753.41	.00	
	03/04/95	01	9,999.73	156.43	8,968.19	31,909.84	.00	
	03/18/95	01	12,018.24	156.43	8,968.19	32,066.27	.00	
	04/01/95	01	14,036.75	156.43	8,968.19	32,222.70	.00	
	04/15/95	01	16,055.26	156.43	8,968.19	32,379.13	.00	
	04/29/95	01	18,073.77	156.43	8,968.19	32,535.56	.00	
	05/13/95	01	22,231.10	322.19	8,968.19	32,857.75	.00	
	05/27/95	01	24,249.61	156.43	8,968.19	33,014.18	.00	
	06/10/95	01	26,268.12	156.43	8,968.19	33,170.61	.00	
	06/24/95	01	28,286.63	156.43	8,968.19	33,327.04	.00	
	05/26/95	34		1,455.14	10,423.33	33,327.04		
	07/08/95	01	30,305.14	156.43	10,423.33	33,483.47	.00	
	07/22/95	01	32,323.65	156.43	10,423.33	33,639.90	.00	
	08/05/95	01	35,204.40	223.26	10,423.33	33,863.16	.00	
	08/19/95	01	37,222.91	176.62	10,423.33	34,039.78	.00	
	09/02/95	01	39,241.42	176.62	10,423.33	34,216.40	.00	
	09/16/95	01	41,259.93	176.62	10,423.33	34,393.02	.00	
	09/30/95	01	43,905.52	231.49	10,423.33	34,624.51	.00	
	10/14/95	01	45,924.03	176.62	10,423.33	34,801.13	.00	
	10/28/95	01	47,942.54	176.62	10,423.33	34,977.75	.00	
	11/11/95	01	49,961.05	176.62	10,423.33	35,154.37	.00	
	11/25/95	01	51,979.56	176.62	10,423.33	35,330.99	.00	
	12/09/95	01	54,625.15	231.49	10,423.33	35,562.48	.00	
	12/23/95	01	56,643.66	176.62	10,423.33	35,739.10	.00	
	YR TOTAL		56,643.66					
	01/06/96	01	2,018.51	176.62	10,423.33	35,915.72	.00	
	01/20/96	01	4,037.02	176.62	10,423.33	36,092.34	.00	

R.I. RETIREMENT SYSTEM
EMPLOYEE LEDGER CARD

NAME ALAN LEMERY PERIOD ENDING 07/05/97

SOC.SEC.NO 1000

EMPLOYER ACCOUNT NUMBER	DATE MO-DAY-YR	TR CD	EARNINGS	RETIREMENT CONTRIBUTION	RETIREMENT CONTRIBUTION NON-TAXABLE TO DATE	RETIREMENT CONTRIBUTION TAX DEFERRED TO DATE	SURVIVORS BENEFIT CONTRI-BUTION	SURVI BENEI CONTR TO D
1211-104	02/03/96	01	6,839.38	245.21	10,423.33	36,337.55	.00	
	02/17/96	01	8,857.89	176.62	10,423.33	36,514.17	.00	
	03/02/96	01	10,876.40	176.62	10,423.33	36,690.79	.00	
	03/16/96	01	12,894.91	176.62	10,423.33	36,867.41	.00	
	03/30/96	01	15,697.27	245.21	10,423.33	37,112.62	.00	
	04/13/96	01	17,872.56	190.34	10,423.33	37,302.96	.00	
	04/27/96	01	20,047.85	190.34	10,423.33	37,493.30	.00	
	05/11/96	01	22,223.14	190.34	10,423.33	37,683.64	.00	
	05/25/96	01	24,398.43	190.34	10,423.33	37,873.98	.00	
	06/08/96	01	26,573.72	190.34	10,423.33	38,064.32	.00	
	06/22/96	01	28,749.01	190.34	10,423.33	38,254.66	.00	
	07/06/96	01	30,924.30	190.34	10,423.33	38,445.00	.00	
	07/20/96	01	33,145.87	194.39	10,423.33	38,639.39	.00	
	08/03/96	01	35,367.44	194.39	10,423.33	38,833.78	.00	
	08/17/96	01	37,589.01	194.39	10,423.33	39,028.17	.00	
	08/31/96	01	39,810.58	194.39	10,423.33	39,222.56	.00	
	09/14/96	01	42,032.15	194.39	10,423.33	39,416.95	.00	
	09/28/96	01	44,253.72	194.39	10,423.33	39,611.34	.00	
	10/12/96	01	46,475.29	194.39	10,423.33	39,805.73	.00	
	10/26/96	01	48,696.86	194.39	10,423.33	40,000.12	.00	
	11/09/96	01	50,918.43	194.39	10,423.33	40,194.51	.00	
	11/23/96	01	53,140.00	194.39	10,423.33	40,388.90	.00	
	12/07/96	01	55,361.57	194.39	10,423.33	40,583.29	.00	
	12/21/96	01	57,583.14	194.39	10,423.33	40,777.68	.00	
	YR TOTAL		57,583.14					
	01/04/97	01	2,221.57	194.39	10,423.33	40,972.07	.00	
	01/18/97	01	4,443.14	194.39	10,423.33	41,166.46	.00	
	02/01/97	01	6,664.71	194.39	10,423.33	41,360.85	.00	
	02/15/97	01	8,886.28	194.39	10,423.33	41,555.24	.00	
	03/01/97	01	11,107.85	194.39	10,423.33	41,749.63	.00	
	03/15/97	01	13,329.42	194.39	10,423.33	41,944.02	.00	
	03/29/97	01	15,550.99	194.39	10,423.33	42,138.41	.00	
	04/12/97	01	17,772.56	194.39	10,423.33	42,332.80	.00	
	04/26/97	01	19,994.13	194.39	10,423.33	42,527.19	.00	
	05/10/97	01	22,215.70	194.39	10,423.33	42,721.58	.00	
	05/24/97	01	24,437.27	194.39	10,423.33	42,915.97	.00	
	06/07/97	01	26,658.84	194.39	10,423.33	43,110.36	.00	
	06/21/97	01	28,880.41	194.39	10,423.33	43,304.75	.00	
	07/05/97	01	31,101.98	194.39	10,423.33	43,499.14	.00	
	YR TOTAL		31,101.98					
	01/07/98	50		10,423.33-	.00	43,499.14	.00	
	01/07/98	50		43,499.14-	.00	.00	.00	
	YR TOTAL							

ATTORNEYS AT LAW
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Tel: 401-273-8200 Fax: 401-521-5820
E-Mail-sakenned@gmail.com
aubeeesq@gmail.com

Samuel Kennedy-Smith*
Carleen N.T. Aubee*
*Also Admitted in MA**

April 29, 2015

Teresa M. Rusbino, Esq.
Employees Retirement System of Rhode Island 50
Service Avenue, 2nd Floor
Warwick, RI, 02886

Re: Robert Perfetto v. ERSRI

Dear Attorney Rusbino:

Please find A Memorandum of Law on behalf of Robert Perfetto regarding the above referenced matter. Please contact the office with any questions or concerns.

Thank you.

Very truly yours,

Samuel Kennedy-Smith, Esq.

SKS/peg

Enclosure

CC: John McCann, Esquire
Michael Robinson, Esquire

Re: Robert Perfetto v. ERSRI

CA No.: 2013-5811

ERSRI
2015 APR 30 PM 1:24

MEMORANDUM OF LAW

Robert Perfetto was employed as a teacher at the William M. Davies, Jr. Career-Technical High School during the 2007-08 school year. He then began working at the Rhode Island Training School for the Department of Children, Youth, and Families and eventually ascended to the position of Assistant Principal, Youth Career Education Center. Due to a wrongful termination, Perfetto sought recourse in the Superior Court and was awarded fifty five thousand seven hundred and seventy five dollars ($55,775.00) on or about June 23, 2010 in a Consent Order entered in Case Number PC-2009-2428. During the 2013 school year, Perfetto began considering the prospect of retirement and reached out to the Employees' Retirement System of Rhode Island. Perfetto was given an estimation of his retirement benefits which factored the $55,775.00 payment as counting towards the date and year of receipt. This made - and still makes - good, common sense as Perfetto actually paid taxes on the back wages for the year that they were received. The last three years of employment - from 2010 -2013 - were the three highest years of salary used in calculating his retirement benefits as set forth in R.I.G.L. § 36-8-1(5). Based upon the figures provided him by Retirement Benefit Analyst John P. Midgely, Perfetto elected to retire in August 2013.

In the months after retirement, Employees' Retirement System of Rhode Island informed Perfetto that it had miscalculated his benefits and that the $55,775.00 in back pay actually counted towards the 2009 school year (the year over which Perfetto had previously brought suit). Consequently, Perfetto would receive a significantly lower benefit. See Letter attached herein as **Exhibit A**. Perfetto subsequently brought suit seeking Declaratory and substantive relief - namely a ruling that the original (higher) calculation of benefits be ratified and enforced on the basis of the statute at issue and equitable estoppel, and - in the alternative - that Perfetto be rehired based on a

theory that he entered into his retirement contract due to the Retirement System's misrepresentation of a material fact. Perfetto now finds himself in an administrative appeal of the calculation.

Under R.I.G.L. § 36-8-1(5) " (5) ""Average compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest." R.I.G.L. § 36-8-1(8) defines 'Compensation' as "salary or wages earned and paid for the performance of duties for covered employment." R.I.G.L. § 36-8-1(8) then goes on to specify several types of payment which are not to count for the purposes of compensation such as cashing out sick leave, vacation leave, or compensatory time and salary adjustments granted in anticipation of retirement, among others. See R.I.G.L. § 36-8-1(8).

The Retirement System takes the position that the lump sum paid to Perfetto does not count as compensation for the purposes of R.I.G.L. § 36-8-1(5) as it was not both **paid** and **earned** in the year of receipt. This is a red herring. This argument cannot apply as the lump sum payment was **neither paid nor earned** in the year in question. That was the whole point of PC-2009-2428 - that Perfetto was in fact **not** working due to the wrongful termination. The lump sum was characterized as wages or 'compensation' by operation of the consent order.

Admittedly, the 2010 payment was based upon the sum that Perfetto **would** have earned and other financial considerations. However, the order simply recites (attached herein as **Exhibit B**) the basis for the calculation and characterizes it as 'back pay.' Thus, we are not dealing with a situation where Perfetto is seeking to have cashed-out sick time or salary adjustments or overtime. Nor are we dealing with a situation where Perfetto is receiving a deferred salary or some type of correction of a past compensation order. We are dealing with a situation where the Retirement System is seeking to find further shelter behind its previous malfeasance.

In regards to the cases cited by the Retirement System, R.I. Federation of Teachers v. The Employees Retirement System of Rhode Island, et al., 1994 R.I. Super. LEXIS 63 (Bourcier, J.) is distinguishable on any of several grounds. Notably, the case dealt with a systemic issue - i.e. the unintended consequences or fall out of requiring teachers to defer certain portions of their salary. Unless the State is systematically and frequently violating/ignoring State Law by improperly terminating veterans, concerns of 'retirement bloat' discussed in this case would be entirely inapplicable. Furthermore, this is not a situation of statutorily/legislatively mandated salary deferment. This is a situation where Perfetto was improperly denied a position and was compensated and when compensated had that compensation classified as wages. He never actually worked to earn those wages because he was not allowed to work to earn those wages.

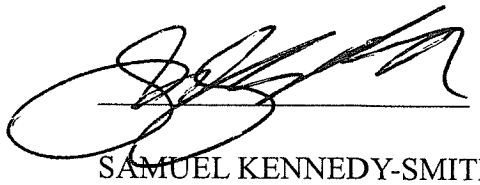
In regards to Asselin v. ERSRI, 1998 (Hearing Officer E. Giannini) Asselin received lump sum payments due to a calculation error in her start date and an incorrect hourly rate. Once again, this is distinguishable from the current circumstances - as noted by the Asselin hearing officer on page five (5) "... the salary or wages earned are paid for the performance of duties." No such duties were ever performed by Perfetto due to the malfeasance of his employers. The same is true of Defelice et al. v. ERSRI, 1998 (Hearing Officer C. Koutsogiane). The lump sum payments in all of the cited cases were lump sum payments predicated on work actually done by the recipients and paid at a later date. That is clearly and irrefutably not the situation that has befallen Mr. Perfetto.

Perfetto is not seeking some sort of windfall payment. He was improperly terminated and later compensated. He paid taxes upon the lump sum payment at the time of receipt to the very same State which is now attempting to slash his retirement benefits. Perfetto is ready willing and able to explore the possibility of being reinstated to his previous position.

In sum, the respondent cannot avoid a necessary consequence of its malfeasance. The cases cited by the Retirement System are distinguishable, and the lump sum payment was characterized as

wages by consent order. The wages count towards the year they were received and the initial calculation of wages was correct.

Robert Perfetto
By HIS Attorneys



SAMUEL KENNEDY-SMITH, Esq.
RI Bar Reg No. 8867
23 Acorn Street
Providence, RI, 02903
401-273-8200
sakenned@gmail.com

CERTIFICATION

TO: Michael P. Robinson, Esq.
John H. McCann, Esq.
Shechtman Halperin Savage LLP
1080 Main Street
Pawtucket, RI, 02860

I hereby certify that I mailed a true copy of the within to the above-named attorney of record.

DATE: April 29, 2015 Patricia German

EXHIBIT A

Employees' Retirement System of Rhode Island

June 20, 2014

Keven A. McKenna
23 Acorn Street
Providence, RI 02903

RE: Robert Perfetto

Dear Attorney McKenna:

We write regarding the above retiree and his request to have a lump sum retroactive payment he received from his employer which represented "back pay in the amount of $55,775.00" for the years 2007-2009 be used in the calculation of his pension benefit. This request cannot be granted.

Mr. Perfetto retired on August 1, 2013. Given his eligibility under Rhode Island General Law (RIGL), the calculation of his Final Average Compensation was based on three (3) consecutive years where compensation was the highest. Specifically, the 78 consecutive pay periods during 2010-2013 where compensation was **earned** and **paid** as provided in RIGL.

The Employees' Retirement System of Rhode Island (ERSRI) received a copy of the Consent Order from the Superior Court which sets forth the amount of back pay to be made to Mr. Perfetto, the period covered and the reasons for the payment. The sum paid in the amount of $55,775.00 reflects moneys received and earned for the school years from 2007 through 2009.

Rhode Island General Laws define average compensation and provides the following:

> RIGL §36-8-1 (5)(a) "Average compensation" for members eligible to retire as of September 30, 2009 shall mean the average of the highest three (3) consecutive years of compensation, within the total service when the average compensation was the highest. For members eligible to retire on or after October 1, 2009, "Average compensation" shall mean the average of the highest five (5) consecutive years of compensation within the total service when the average compensation was the highest.

50 Service Avenue 2nd Floor, Warwick, RI 02886-1021 (401) 462-7600 Fax: (401) 462-7691
E-Mail: ersri@ersri.org Web Site: www.ersri.org

The term "compensation" is defined as the following :

> RIGL §36-8-1(8) "Compensation" as used in chapters 8 -- 10 of this title, chapters 16 and 17 of title 16, and chapter 21 of title 45 shall mean salary or base wages earned and paid for the performance of duties for covered employment, including regular longevity or incentive plans approved by the board, but shall not include payments made for overtime or any other reason other than performance of duties, including but not limited to the types of payments listed below:
>
> (i) Payments contingent on the employee having terminated or died;
>
> (ii) Payments made at termination for unused sick leave, vacation leave, or compensatory time;
>
> (iii) Payments contingent on the employee terminating employment at a specified time in the future to secure voluntary retirement or to secure release of an unexpired contract of employment;
>
> (iv) Individual salary adjustments which are granted primarily in anticipation of the employee's retirement;
>
> (v) Additional payments for performing temporary or extra duties beyond the normal or regular work day or work year.

As you can see the statutory definition of compensation provides for salary "*earned* and paid".

Since the documents produced show that the earnings were for the performance of duties outside of the calculation period, even though they were received within the calculation period, consistent with RIGL, these payments were not used to calculate Mr. Perfetto's pension benefit.

This letter constitutes official notification of an administrative denial. Pursuant to Regulation No. 4, Rules of Practice and Procedure for Hearings of the Employees' Retirement System of Rhode Island, Section 3.00, any member aggrieved by an administrative action may request a hearing before the Retirement Board. Upon such request, the matter will be deemed a contested case. Such request shall be in writing and shall be sent to the Retirement Board, 50 Service Avenue, 2nd Floor, Warwick, RI 02886,Attention: Frank J. Karpinski, Executive Director, within 60 days of date of the letter from the Executive Director or Assistant Executive Director constituting a formal administrative denial. A request for hearing shall be signed by the member and shall contain the name of the member; date and nature of decision to be contested; a clear statement of the objection to the decision which

must include the reasons the member feels he or she is entitled to relief; and a concise statement of the relief sought. Failure to strictly comply with the procedures outlined above shall be grounds to deny a request for a hearing.

Sincerely,

Frank J. Karpinski
Executive Director

Enclosure: Employees' Retirement System of Rhode Island and Municipal Employees' Retirement System Rule and Regulations No. 4

Cc: Robert Perfetto

50 Service Avenue, Warwick, RI 02886-1021 (401)462-7600 Fax: (401)462-7691
E-Mail: ersri@ersri.org Web Site: www.ersri.org

Employees' Retirement System of the State of Rhode Island
And
Municipal Employees' Retirement System
Of The State of Rhode Island

Regulation No. 4

Rules of Practice and Procedure for Hearings in Contested Cases

Revised: May 12, 2010

Effective: August 26, 2010

TABLE OF CONTENTS

Section 1 Introduction

These Rules of Practice and Procedure are promulgated pursuant to R.I. General Laws Section 36-8-3. The Rules shall be in effect during any hearing on a contested case before the Retirement Board or its duly authorized representatives.

Section 2 Definitions

(1) The definitions set forth in R.I. General Laws Sections 36-8-1, 45-21-2, 45-21.2-2 and 16-16-1, and as further set forth in Regulations promulgated by the Retirement Board, are specifically incorporated by reference herein.

(2) "Contested case" means a matter for which a member requests a hearing because he or she is aggrieved by an administrative action other than a Disability decision. The term shall apply to hearings conducted before Hearing Officers, and thereafter in proceedings before the full Retirement Board.

(3) "Party" means any member, beneficiary, Retirement System, or such other person or organization deemed by the Hearing Officer to have standing.

(4) "Hearing Officer" means an individual appointed by the Retirement Board to hear and decide a contested case.

Section 3 Request for Hearing and Appearance

(1) Any member aggrieved by an administrative action other than a Disability decision, may request a hearing of such grievance. Upon such request, the matter will be deemed a contested case. The procedure for Disability decisions and appeals therefrom shall be governed by the procedures set forth in Regulation Number 9, Rules Pertaining to the Application to Receive an Ordinary or Accidental Disability Pension.

(2) Such request shall be in writing and shall be sent to the Retirement Board within sixty (60) days of the date of a letter from the Executive Director or Assistant Executive Director constituting a formal administrative denial.

(3) A request for hearing shall be signed by the member and shall contain the following information:

i. Name of member;
ii. Date and nature of decision being contested;
iii. A clear statement of the objection to the decision which must include the reasons the member feels he or she is entitled to relief; and
iv. A concise statement of the relief sought.

(4) Requests for hearing should be sent to the Retirement Board at 50 Service Avenue, 2nd Floor, Warwick, RI 02886-1021.

(5) Failure to strictly comply with the procedures outlined in this Section shall be grounds to deny any request for a hearing.

Section 4 Contested Cases – Notice of Hearing

(1) Upon receipt of a request for hearing in matters other than Disability decisions and appeals therefrom, the Retirement Board or its designee shall appoint a Hearing Officer. The appointed Hearing Officer shall hear the matter, find facts and offer conclusions of law to the Retirement Board. The decision of a Hearing Officer shall be subject to approval by the full Retirement Board. The Retirement System's action shall not be deemed final until such time as the Hearing Officer's recommendation has been voted upon by the Retirement Board.

(2) Within forty-five (45) days after receipt by the Retirement Board of a request for hearing, the Retirement Board shall give notice that the matter has been assigned to a Hearing Officer for consideration.

(3) In any contested case, all parties shall be afforded an opportunity to be heard after reasonable notice.

(4) The notice described in subsection (2), above, shall include:

i. A statement of the time, place, and nature of the hearing;

ii. A statement of the legal authority and jurisdiction under which the hearing is to be held;

iii. A reference to the particular sections of the statutes and rules involved;

iv. The name, official title and mailing address of the Hearing Officer, if any;

v. A statement of the issues involved and, to the extent known, of the matters asserted by the parties; and

vi. A statement that a party who fails to attend or participate in the hearing may be held to be in default and have his or her appeal dismissed.

(5) The notice may include any other matters the Hearing Officer or the Retirement Board considers desirable to expedite the proceedings.

Section 5 Contested Cases – Hearings in General

(1) All parties shall be afforded an opportunity to respond and present evidence and argument on all issues involved.

(2) Members must appear at hearings either personally, or by appearance of legal counsel. Members may represent themselves or be represented by legal counsel at their own expense. Consistent with RIGL §11-27-2 entitled, "Practice of law", any person accompanying the member who is not a lawyer (certified member of the bar of the State of Rhode Island) cannot represent the member in the hearing.

(3) Continuances and postponements may be granted by the Hearing Officer or the Retirement Board at their discretion.

(4) Disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

(5) Should the Hearing Officer or Retirement Board determine that written memoranda are required, the member will be notified by the Hearing Officer or the Retirement Board of the need to file a written document which discusses the issues of the case. Memoranda of law may always be offered in support of arguments offered by the member or the representative of the retirement systems.

(6) The Executive Director may, when he or she deems appropriate, retain independent legal counsel to prosecute any contested case.

(7) A recording of each hearing shall be made. Any party may request a transcript or copy of the tape at their own expense.

Section 6 Contested Cases - Conduct of Hearings before Hearing Officers

(1) Hearings shall be conducted by the Hearing Officer who shall have authority to examine witnesses, to rule on motions, and to rule upon the admissibility of evidence.

(2) The Hearing shall be convened by the Hearing Officer. Appearances shall be noted and any motions or preliminary matters shall be taken up. Each party shall have the opportunity to present its case generally on an issue by issue basis, by calling and examining witnesses and introducing written evidence.

(3) The Member shall first present his or her case followed by presentation of the Retirement System's case.

(4) The Hearing Officer shall have the authority to continue or recess any hearing and to keep the record open for the submission of additional evidence.

(5) If for any reason a Hearing Officer cannot continue on a case, another Hearing Officer will be appointed who will become familiar with the record and perform any function remaining to be performed without the necessity of repeating any previous proceedings in the case.

(6) Each party shall have the opportunity to examine witnesses and cross-examine opposing witnesses on any matter relevant to the issues in the case.

(7) Any objections to testimony or evidence and the basis for the objection shall be made at the time the testimony or evidence is offered.

(8) The Hearing Officer may question any party or any witness for the purpose of clarifying their understanding or to clarify the record.

(9) The scope of hearing shall be limited to those matters specifically outlined in the request for hearing.

Employees' Retirement System of Rhode Island

June 20, 2014

Keven A. McKenna
23 Acorn Street
Providence, RI 02903

RE: Robert Perfetto v ERSRI

Dear Attorney McKenna:

In accordance with Rhode Island General Laws §36-8-3 and Regulation 4, Rules of Practice and Procedures for Hearings in Contested Cased, your request for a hearing has been assigned to:

HEARING OFFICER: Teresa M. Rusbino, Esquire
(401) 741-7378

LOCATION: **Employees Retirement System of Rhode Island**
50 Service Avenue, 2nd Floor
Warwick, RI 02886

You should contact the hearing officer to arrange a mutually convenient time to hold the hearing. A party who fails to attend or participate in the hearing may be held to be in default and have his or her appeal dismissed with prejudice.

Members must appear at hearings either personally or by appearance of legal counsel. Consistent with RIGL §11-27-2 entitled, *Practice of law*, any person accompanying the member who is not a lawyer (certified member of the bar of the State of Rhode island) cannot represent the member in the hearing.

Should you have any additional questions, please do not hesitate to contact me at 401-462-7600.

Sincerely,

Gayle C. Mambro-Martin, Esq.

cc: Robert Perfetto
Michael P. Robinson, Esq.

50 Service Avenue 2nd Floor, Warwick, RI 02886-1021 (401) 462-7600 Fax: (401) 462-7691
E-Mail: ersri@ersri.org Web Site: www.ersri.org

EXHIBIT B

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

ROBERT J. PERFETTO
Plaintiff

v.

C.A. No. 09-2428

R.I. DEPARTMENT OF ADMINISTRATION by and through its Director GARY SASSE, R.I. DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, by and through its Commissioner DEBORAH GIST
Defendants

CONSENT ORDER

The above captioned civil action came before the Court (Silverstein, J.) on June 23, 2010 for hearing on Plaintiff's Motion to Hold Defendant's in Contempt. By agreement of the parties, is hereby

ORDERED, ADJUDGED AND DECREED

1. Plaintiff Robert J. Perfetto's base entry and hire date shall be restored to September 8, 1987. Plaintiff shall be deemed to have continuously served in state service since September 8, 1987; and
2. Plaintiff shall receive credit for ninety six (96) hours of sick leave from August 16, 2008 to July 27, 2009, the date Plaintiff began working at the Rhode Island Training School ("RITS") at the Department of Children, Youth and Families ("DCYF"), per Order of the Court; and
3. Plaintiff shall receive back pay in the amount of $55,775. This sum is based on the total annual salary that Plaintiff had received at the William M. Davies, Jr. Career-Technical High School ("Davies") during the 2007-08 school year, plus additional sums that would have been paid to him during the 2008-09 school year, plus his out-of-pocket medical expenses for the 2008-09 school year, minus sums and benefits Plaintiff had received in payment during the 2008/09 school year; and

4. Plaintiff shall be entitled to work in his present position at the Rhode Island Training School until June 30, 2010; and
5. Defendants shall appoint Plaintiff to an authorized, non-union position at the Rhode Island Training School described as follows:

   Title: Assistant Principal, Youth Career Education Center (unclassified service).

   Class Code: 00836700

   Pay Grade: G-835A

   Work week: Non-standard; and
6. The total annual salary for this position at step 3 is $86,486. This appointment shall occur by July 9, 2010 and Mr. Perfetto shall report to the Rhode Island Training School on Monday, July 19, 2010; and
7. Plaintiff hereby relinquishes and waives any and all claims and grievances he might have against the Defendants, the William M. Davies, Jr. Career and Technical High School, the State of Rhode Island, and any department or agency thereof with regard to his termination from the Davies School in 2008, and he agrees to sign a release so stating; and
8. Plaintiff agrees that the terms of this Consent Order constitute a full and complete settlement of any and claims made by Plaintiff in the civil action denominated as CA 09-2428; and
9. Plaintiff's statutory rights remain.

PER ORDER:

ENTERED:

Justice Michael A. Silverstein

6/23/10

Jeanne Rinaldi

DEPUTY CLERK

Date 6-23-10

True Copy Attest

Office of Clerk of Superior Court
Counties of Providence & Bristol
Providence, Rhode Island

2015 APR 30 PM 1:24 ERSRI

Presented by:

R.I. Department of Administration
By its attorney,

Peter N. Dennehy (#1946)
One Capitol Hill, 4th Floor
Providence, RI 02908

R.I. Department of Education
By its attorney,

Paul Pontarelli (# 3805)
255 Westminster Street
Providence, RI 02903

Assented to by:

Attorney for Robert J. Perfetto:

Keven A. McKenna (#662) Esq.
23 Acorn Street
Providence, RI 02903

Assistant Attorney General:

Richard Wooley (#1452) Esq.
Department Attorney General
150 South Main Street
Providence, RI 02903

True Copy, Attest

Office of Clerk of Superior Court
Counties of Providence & Bristol
Providence, Rhode Island

In The Matter Of:

Employees Retirement System Hearing

Robert Perfetto

September 26, 2014

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
EMPLOYEES' RETIREMENT SYSTEM

IN RE: ROBERT PERFETTO
VS
EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND

PLACE: State Employees' Retirement Board
50 Service Avenue
Warwick, Rhode Island 02886
DATE: September 26, 2014
TIME: 3:00 P.M.

BEFORE: HEARING OFFICER TERESA M. RUSBINO

FOR THE EMPLOYEES' RETIREMENT:
BY: MICHAEL P. ROBINSON, ESQUIRE

FOR ROBERT PERFETTO:
BY: KEVEN A. MCKENNA, ESQUIRE

Also Present: Frank Karpinski, Executive Director

I-N-D-E-X

E-X-H-I-B-I-T-S

(HEARING COMMENCED AT 3:10 P.M.)

HEARING OFFICER RUSBINO: We are on the record in the matter of the appeal of Robert Perfetto, P-e-r-f-e-t-t-o, and today is, I believe the 26th of September, 2014, and my name is Teresa Rusbino, R-u-s-b-i-n-o. I'm the Hearing Officer that is assigned to Mr. Perfetto's appeal. And would the parties to this matter and counsel please identify themselves for the record, beginning with the appellant.

MR. MCKENNA: This is Robert Perfetto. I'm his counsel, Keven McKenna.

MR. ROBINSON: Michael Robinson, counsel for the retirement board, to my left is the Executive Director for the Retirement System, Frank J. Karpinski.

HEARING OFFICER RUSBINO: All right, then, we will proceed with the hearing. Just for the record, I did receive prior to the hearing today, prehearing statements from both the appellant, Mr. Perfetto and through his attorney, Counsel Mr. McKenna, and also from the Employees Retirement System, Counsel Michael Robinson. So I am in receipt of those two

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statements and we can proceed with the hearing beginning with the appellant. Mr. McKenna, did you want to have your witness testify at this time.
MR. MCKENNA: Yes, I do.
HEARING OFFICER RUSBINO: All right, Mr. Perfetto, could you kindly rise your right hand.
Being duly sworn, deposes and testifies as follows:
THE REPORTER: Would you state your name and spell your last name, please.
THE WITNESS: Robert Perfetto, (P-e-r-f-e-t-t-o).
MR. MCKENNA: I'm going to begin by marking as Exhibit 1, our Complaint.
MR. ROBINSON: No objection.
MR. MCKENNA: And asking my witness whether or not he's read it.
HEARING OFFICER RUSBINO: All right. That's fine. So just for the record, you're marking --
MR. MCKENNA: A copy of the complaint.
HEARING OFFICER RUSBINO: All

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right, and that will be a full and no objection from counsel for the Employees Retirement System. So we're going to mark as Appellant's Exhibit 1. And just for the record, Mr. McKenna, that is a copy of --
MR. MCKENNA: It's a printout, it's not a copy, a draft prior to the filing.
HEARING OFFICER RUSBINO: Of a complaint?
MR. MCKENNA: Of a complaint in Superior Court by Robert Perfetto. So we'll call this Number 1.
HEARING OFFICER RUSBINO: So we've marked that as Appellant's Exhibit 1 as a full.
EXAMINATION BY MR. MCKENNA:
Q. To start the questioning off, I'm going to ask Mr. Perfetto, is this complaint one that we filed on your behalf in Superior Court?
A. Yes, it is.
Q. Okay. And just using that as an outline, I'm going to ask you a few simple questions. Do you presently live at in Narragansett, Rhode Island; is that correct?
A. Yes.
Q. And you thought you were retired from the State

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of Rhode Island on or about what date?
A. July 31st, 2013.
Q. Did you receive compensation, back compensation on or about -- I'll do it this way. Did you meet with a representative of the Retirement System prior to retiring?
A. Yes.
Q. What did that representative tell you?
A. He explained the application for retirement and had given me a document indicating what the compensation would be for retirement.
Q. And you have that document in your hand, correct?
A. Yes.
Q. And what did he tell you the compensation would be if you retired?
MR. ROBINSON: Objection, hearsay.
HEARING OFFICER RUSBINO: Sustained.
Q. Did he sign this piece of paper, this gentleman?
A. Yes.
Q. And what was his name?
A. John P. Midgley.
Q. And you received this document from the employment Retirement System on 4/2/2013?

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A. April 2nd, 2013.
Q. Okay. And you signed this and accepted it on July 9th, 2013?
A. Yes.
Q. Did you sign it based on the representation you would receive, what amount of money?
A. This was what was -- the benefit amount was $79,404.60.
Q. Was that the amount you actually received?
A. No.
Q. Okay. And this is a document that you received from the Board, correct?
A. Yes.
MR. MCKENNA: I ask that this document entered as Number 2, be made a full exhibit.
MR. ROBINSON: I have no objection to that.
HEARING OFFICER RUSBINO: All right.
MR. MCKENNA: Do you mind if I get up and hand it to you?
HEARING OFFICER RUSBINO: That's fine. Thank you, Mr. McKenna. Okay, so no objection from counsel for the Employees'

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Retirement System. We will mark as Appellant's Exhibit 2, as a full exhibit, a document entitled Application For Retirement Employees Retirement System Schedule A. I believe, Mr. McKenna, there was also an Appellant's Exhibit 1. That was a full exhibit. Do you wish to introduce that?

MR. MCKENNA: I thought I did, but if I didn't.

MR. ROBINSON: That was the unsigned version.

MR. MCKENNA: Do you have the original one there?

HEARING OFFICER RUSBINO: No.

MR. ROBINSON: Did you give it to her?

MR. MCKENNA: Oh, yes, here we go. May I hand you Exhibit 1.

HEARING OFFICER RUSBINO: No problem. Again, we have just for the record, Appellant's 1, full exhibit, which is the Complaint, State of Rhode Island Providence County Superior Court of Robert Perfetto, Plaintiff versus Employees' Retirement System of Rhode Island.

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(APPELLANT'S EXHIBITS 1 & 2 MARKED FULL)

Q. Mr. Perfetto, what is the next thing that you recall happening with your relationship with the Employment Retirement System?

A. I received my first check, I believe it was a few months later, and it had to be either the 1st or 2nd of October. As soon as I got the check, I opened it up, and I noticed a discrepancy.

Q. What was the discrepancy?

A. It was about $1,100 a month less than what the benefit indicated.

Q. Is that that letter that you received in your right hand?

A. No. This letter that I received in my hand was the one that was sent to me after I marched up to this office to find out what was going on in regard to my compensation. That came the next day.

Q. All right. Thank you. Do we have a copy of that check that you first received, or not?

A. I have a copy of the check, yes.

MR. MCKENNA: The first check, which is in dispute be marked as a full exhibit, Number 3.

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HEARING OFFICER RUSBINO: So we have Appellant's Exhibit Number 3 being introduced as full. No objection from counsel for the Employees' Retirement System, and we will mark that Appellant's 3, which I believe looks to be a photocopy of a check payable to Robert Perfetto from the Employees' Retirement System of Rhode Island, dated September 30th, 2013. Okay, that will be marked as Appellant 3, full. All right. You may proceed.

(APPELLANT'S EXHIBIT 3 MARKED FULL)

Q. Did you receive with that check of 9/30/13, a stub for the Employees' Retirement System of Rhode Island indicating the amounts of deductions, retro based amount, from which that check was cashed?

A. It's based on two months compensation.

MR. MCKENNA: So we'll call this Exhibit Number 4, and I'll give it to my opposing counsel to look at.

MR. ROBINSON: No objection.

MR. MCKENNA: Ms. Hearing Officer, I will give you a full exhibit number 4.

HEARING OFFICER RUSBINO: Okay, thank you. And no objection?

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MR. ROBINSON: No.

HEARING OFFICER RUSBINO: Okay, so no objection from counsel from the Employees' Retirement System. We will mark as Appellant's Exhibit 4 as a full exhibit, a document dated September 30, 2013, that is from the Employees' Retirement System of Rhode Island, and entitled ERSRI Pension Statement.

(APPELLANT'S EXHIBIT 4 MARKED FULL)

Q. Did you consequently receive a letter from the Employees' Retirement System from John P. Midgley regarding the difference in the calculation?

A. Yes.

Q. Okay. And I'm showing you a copy of that. Is this a true copy?

A. Yes.

MR. MCKENNA: I'm going to mark it as Exhibit 5. I'll show it to opposing counsel.

MR. ROBINSON: No objection.

MR. MCKENNA: Exhibit 5.

HEARING OFFICER RUSBINO: Thank you, Mr. McKenna. We have a document that will be marked Appellant's Exhibit 5 as a full exhibit. No objection from counsel for the

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Employees' Retirement System. And Appellant's Exhibit 5 full is a two-page document. The first page dated October 2nd, 2013, addressed to Appellant Robert Perfetto from John P. Midgley, M-i-d-g-l-e-y, Retirement Benefit Analyst ERSRI. And the second page, again, as one aggregate exhibit is a one-page document, Employees' Retirement System of Rhode Island Pension Record Ordinary Service Preliminary Benefit Schedule A. So, together, that will be marked as Appellant's Exhibit 5.

(APPELLANT'S EXHIBIT 5 MARKED FULL)

Q. Prior to these events, Mr. Perfetto, had you been engaged in a lawsuit where you were complaining that the state hadn't paid you the correct amount of money prior to that? And you since, you've received $55,000 approximately for that, for those missed payments?

A. Yes.

Q. And when did you actually receive that, paid taxes on it?

A. 2010. And I believe I have a W-2 that supports that.

Q. I'm showing you a copy of the form W-2. Does that show that you paid taxes on that amount of

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money when you received it?

A. Yes.

HEARING OFFICER RUSBINO: All right. I have a document in my hands, I believe. Are you seeking to have that marked as Appellant's Exhibit 6 full?

MR. MCKENNA: Yes, please.

HEARING OFFICER RUSBINO: Any objection?

MR. ROBINSON: No.

HEARING OFFICER RUSBINO: No objection from counsel for the Employees' Retirement System. Then we will mark as Appellant's 6 full, a one-page document that I believe is entitled W-2 Wage and Tax Statement 2010.

(APPELLANT'S EXHIBIT 6 MARKED FULL)

Q. I'm drawing your attention to Case Number 092428. Did you enter into a Consent Order before Judge Silverstein at the Rhode Island Department of Education and Rhode Island Department of Elementary and Secondary Education, where you in response to your motion to hold in contempt where they agreed, they made an agreement that was entered into the court

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which said that the exact amount was $55,775, right?

A. That's correct.

Q. And is this that document?

A. Yes, it is.

HEARING OFFICER RUSBINO: And you said that was a case against the Department of Administration?

THE WITNESS: Yes.

HEARING OFFICER RUSBINO: So you were a teacher?

THE WITNESS: Yes.

Q. And there was a consent order?

A. Yes.

Q. Has that Consent Order ever been changed?

A. Not to my knowledge.

HEARING OFFICER RUSBINO: And the date of that, Mr. McKenna?

MR. MCKENNA: The date is June 23rd, 2010. This is the Superior Court Clerk's stamped date. And the court clerk signed it on 6/23/10, and the Attorney General Mr. Pontarelli signed it on the same date, and I'm just going to submit this because I can't take this staple off.

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MR. ROBINSON: Do you want a clean copy of it?

MR. MCKENNA: If you've got a clean copy, that would be great. Thank you, so much.

MR. ROBINSON: You're welcome.

HEARING OFFICER RUSBINO: And are you seeking to mark that as Appellant's 7?

MR. MCKENNA: Full.

MR. ROBINSON: No objection.

HEARING OFFICER RUSBINO: All right. No objection from counsel from the Employees' Retirement System, we will mark as Appellant's 7 full. And that an aggregate, a three-page document, a photocopy of a document entitled State of Rhode Island Superior Court Robert J. Perfetto versus Rhode Island Department of Administration and Rhode Island Department of Elementary and Secondary Education Consent Order. And I believe you've indicated the date as June 23rd, 2010, and that's a three-page document, and the aggregate that will be marked Appellant's 7 as a full exhibit.

(APPELLANT'S EXHIBIT 7 MARKED FULL)

Q. Did you authorize the department of -- strike that. Did you authorize the Employment

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Retirement System to distribute that money in a method that was in accordance with that Consent Order, in other words, you received the money once, but you didn't receive it the two years before that?
A. No, I received it that year, and my W-2 reflects that.
Q. So you didn't agree that they distribute that money for the purpose of the pension system like it was received in three payments?
A. No.
Q. And that is the essence of our dispute?
A. Well, also, in March of 2013, prior to Mr. Midgley meeting with me. I explained to him on the telephone that I had that document and I came to the Retirement Board --
HEARING OFFICER RUSBINO: When you say that document, just for the record, is that Appellant 7, the Consent Order?
THE WITNESS: Yes.
HEARING OFFICER RUSBINO: All right, thank you.
A. And I explained to Mr. Midgley that I was going to drop it off to him, and I came here personally and I did drop it off. So he had

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that information prior to me meeting with him in April.
Q. So did he use that, as you looked at the documents already submitted, was the first calculation done by Mr. Midgley include a $55,750 owed received on the date of June of 23rd?
A. I'm assuming it was, because my calculations that I had in my head that I had written down of the three years included what was on my W-2. So no one explained to me that it was not going to be included at any time.
Q. Do you know -- strike that. Let me try to word this. When you paid taxes, you were paying taxes on the basis of a cash basis accounting, do you understand that?
A. Yes.
Q. It wasn't on the basis of accrual accounting, was it?
A. No.
Q. The state paid you money. How many years did you work for the state?
A. I think all together, it was a little over 30.
Q. You worked for the state 30 years, and they used

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cash basis accounting to pay you, correct?
A. Yes.
Q. And you assumed that your retirement would be based on a cash basis accounting?
A. Yes.
Q. So, when Mr. Midgley did his initial accounting, it seemed right to you?
A. Yes.
Q. And when you started to receive the check, you noticed it wasn't based on a cash based accounting, was it?
A. I couldn't answer that at the time, because when I saw the amount, I said, well, there must be a mistake, and that's when I marched up here. No one had ever contacted me or informed me -- not even a telephone call. Do you want me to go on?
Q. No, I'll ask you a question. So you would agree as a matter of your position, Midgley's original letter based on a cash basis account, money received is money accounted for, is what you expected in your pension?
A. Yes.
MR. ROBINSON: Objection.
Q. And you did not expect the Employee Retirement

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System to use the system of accounting called "accrual," meaning when you earned it, not when you paid, that's when they do the accounting?
A. That's correct.
Q. And that brings us to our cases. Do you agree that you think that the board should reflect the accounting practices with the State of Rhode Island which is a pay-on-cash basis account which your pension should be set on a cash basis accounting and originally set forth in Mr. Midgley's initial letter?
A. Yes.
Q. So you're asking the Board to readjust its error of you trying to use accrual accounting to reduce the amount of your pension?
A. Yes.
Q. Is there any other point that I haven't covered?
A. No, I think you covered most of it.
MR. MCKENNA: May I ask my brother if he has any questions that he wishes to ask?
HEARING OFFICER RUSBINO: Just prior to having Mr. Robinson begin his cross-examination, I just wanted to clarify. Mr. Perfetto, obviously, you worked as a teacher. Could you tell me where that was, and

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was that entirely for the 30 years? I'm just trying to get that from my own background information.
THE WITNESS: Most of that time was at the Davies Career and Technical High School. And then the last four years at the Rhode Island Training School.
HEARING OFFICER RUSBINO: And both of those, what you referred to when you say approximately 30 plus years you were employed, that was at Davies Career and Technical High School in Rhode Island, and then the Rhode Island Training School?
THE WITNESS: Yes.
HEARING OFFICER RUSBINO: And you were a teacher?
THE WITNESS: Teacher and administrator.
HEARING OFFICER RUSBINO: All right, thank you.
EXAMINATION BY MR. ROBINSON:
Q. Mr. Perfetto, you were asked, initially, about the complaint that you had filed in Superior Court, correct?
A. Yes.

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Q. That matter was dismissed by the Superior Court, and you were permitted to engage in your administrative remedies which is what we're doing here today; is that fair?
A. Yes.
Q. I'm showing you a copy of the order and judgment. Have you had an opportunity to review these documents that were entered in Superior Court?
A. There were two of them.
Q. One order and one judgment.
MR. MCKENNA: Oh, yes.
Q. Do you recognize that as the order and judgment entered by the court following the hearing on our motion to dismiss your complaint?
A. Yes.
MR. ROBINSON: I'd ask that this be marked as a full exhibit?
HEARING OFFICER RUSBINO: So this would be Respondent's Exhibit A.
MR. MCKENNA: No objection.
HEARING OFFICER RUSBINO: No objection from Mr. McKenna, attorney for the Appellant. We'll mark it Respondent's Exhibit A, a copy of -- I just want to make sure I have

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the correct -- is that a four page --
MR. MCKENNA: Yes.
HEARING OFFICER RUSBINO: -- four-page document. Are we looking at the four-page document that is entitled Complaint?
MR. ROBINSON: The Complaint was Petitioner's 1. The Order and Judgment are Respondent's A.
HEARING OFFICER RUSBINO: Okay, so the Order and Judgment will be Respondent's A. All right. So, again, no objection from Appellant's counsel. We will mark Respondent's Exhibit A as a full exhibit. Do you want those kept jointly or kept together or as two separate exhibits?
MR. ROBINSON: That's fine.
HEARING OFFICER RUSBINO: Okay, so we'll keep them together as one exhibit, four pages, entitled, "State of Rhode Island Robert Perfetto versus Employees' Retirement System Judgment, dated June 30th, 2014," and similarly, "State of Rhode Island Superior Court Robert Perfetto versus Employees' Retirement System Order," also dated June 30, 2014, and in the aggregate, that will be marked as Respondent's A

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full.
(RESPONDENT'S EXHIBIT A MARKED FULL)
MR. ROBINSON: Thank you. Can I take a moment to look at the exhibits you have for a moment?
HEARING OFFICER RUSBINO: Yes.
MR. MCKENNA: Could we get copies of all exhibits so I can get them to my client?
MR. ROBINSON: Well, it would be part of the record, administrative record. Do you want them now?
MR. MCKENNA: Yes.
MR. ROBINSON: These are just courtesy copies of three exhibits that are in.
HEARING OFFICER RUSBINO: All right.
MR. ROBINSON: The original exhibits, can I take them back?
MR. MCKENNA: Sure.
MR. ROBINSON: I'm going to go through it.
MR. MCKENNA: All right, thanks.
Q. Okay. Mr. Perfetto, I apologize for some degree of duplication here, but in order to keep my record as clean as possible, I'm going to do it

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this way. I'm showing you a copy of a document and I'll ask you if you recognize that?
A. Yes.
Q. That's your application for retirement with the retirement system?
A. Yes.
Q. And that form was completed in July of 2013; is that correct?
A. Yes.
Q. And that's consistent with your memory, which is that you applied through the retirement system to retire in or about July of 2013?
A. Yes.
MR. ROBINSON: I'd ask that that be marked as Respondent's B.
MR. MCKENNA: No objection.
HEARING OFFICER RUSBINO: All right. So we're marking Respondent's Exhibit B as a full exhibit.
MR. MCKENNA: Probably, these documents are easier to understand if we put them in chronological order.
MS. RUSBINO: I just want -- for the record, I just want to say that we're marking as Respondent's B full. No objection

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from counsel for the Appellant. We're marking as a full exhibit, a two-page document photocopy entitled Employees' Retirement System of Rhode Island Application for Retirement, Employees Retirement System Schedule A. You may proceed.
(RESPONDENT'S EXHIBIT B MARKED FULL)
Q. And Mr. Perfetto, in connection with your application to retire, you met with a counselor, correct?
A. Yes.
Q. And you were provided with an Estimate of Benefits form; is that fair to say?
A. Yes.
Q. And I'm showing you the document. Is that a copy of what you received at your meeting with the Retirement System counselor in July of 2013?
MR. MCKENNA: Objection.
A. No, I never met with anyone in July.
Q. So when did you meet with a retirement counselor?
A. April of 2013.
Q. So it was prior to submitting your retirement application?
A. Yes.
Q. And is this a copy of the Estimate of Benefits

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form that was provided to you as a result of that meeting?
A. Yes, I believe we have an exhibit.
MR. MCKENNA: He had two meetings.
THE WITNESS: I had two.
MR. MCKENNA: You're talking about the first meeting.
Q. Well, let me ask him about it. When was your first meeting with the retirement system?
A. April of 2013.
Q. And April of 2013, was your first meeting with the Retirement System?
A. Yes, the first meeting.
Q. When was your second meeting with the Retirement System?
A. October 1st.
Q. After you had been advised that you would receive a check indicating that your pension was not as you originally was told?
A. Yes.
Q. Okay, so you only had one meeting with the retirement sytem before retiring; is that correct?
A. Yes.
Q. And the document that I've shown you, is that a

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copy of the estimate of benefits that was provided to you at your meeting with Mr. Midgley before you elected to retire?
A. No, this isn't, because the one that I had, he saw me.
Q. That was signed by Mr. Midgley?
A. Yes.
HEARING OFFICER RUSBINO: This is Respondent's B full.
MR. ROBINSON: No, that's not it.
Q. Mr. Perfetto, I'm going to show you copies of all the documents that were admitted, and I'll just ask you to tell me which one you're referring to?
A. It's not -- what you're showing me here was not presented to me in April of 2013.
Q. So, is it your testimony that you did not receive an Estimate of Benefits Form prior to retiring?
A. No, I did. I'm just looking for the one that went with the package that I had.
MR. ROBINSON: Off the record just for a moment.
(OFF THE RECORD)
MR. ROBINSON: Can we go back on