An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1020

Filed: 18 September 2018

Wake County, No. 17 CVS 1580

WILKES COUNTY BOARD OF EDUCATION, Petitioner,

v.

DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (in official capacity only); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (in official capacity only), Respondents.

Appeal by Respondents from judgment entered 30 May 2017 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 May 2018.

Tharrington Smith, LLP, by Deborah R. Stagner; and Michael Crowell, Attorney, by Michael Crowell, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy General Counsel Blake W. Thomas, Deputy Solicitor General Ryan Y. Park, and Special Deputy Attorney General Joseph A. Newsome, for Respondents-Appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and North Carolina School Boards Association, by Legal Counsel Allison Brown Schafer, for North Carolina School Boards Association, amicus curiae.

McGEE, Chief Judge.

I. Procedural History

The Wilkes County Board of Education ("Petitioner"), filed a "Request for Declaratory Ruling" pursuant to N.C. Gen. Stat. § 150B-4 (2017) and 20 N.C. Admin. Code 01F.0201 *et seq.* on 18 October 2016. Pursuant to this filing, Petitioner requested that the Retirement Systems Division (the "Division") of the Department of State Treasurer (along with State Treasurer at that time, Janet Cowell,[1] and Steven C. Toole, Director of Retirement Systems Division ("Director Toole"), in their official capacities, ("Respondents")) enter a declaratory ruling that the Division's adoption of a "cap factor" for the Teachers' and State Employees' Retirement System ("TSERS") pursuant to N.C. Gen. Stat. § 135-5(a3) (2017) was "void and of no effect because the [Board of Trustees of TSERS (the 'Board')] did not follow the rule making procedures of . . . the Administrative Procedure Act [(the 'APA').]"[2] Director Toole denied Petitioner's request by letter dated 17 November 2016, and Petitioner filed a "Petition for Judicial Review" of Director Toole's decision in Superior Court, Wilkes County, on 16 December 2016. Petitioner moved for summary judgment on 25 April

[1] By the time of the order granting summary judgment, Dale R. Folwell had become the State Treasurer, and he has been substituted as a named Respondent.

[2] The APA is found in Article 2A of Chapter 150B – N.C. Gen. Stat. §§ 150B-1 through 150B-52 (2017). TSERS is established and controlled by the provisions of Article 1 of Chapter 135 of the General Statutes – N.C. Gen. Stat. §§ 135-1 through 135-18.11 (2017).

2017, the matter was heard on 10 May 2017, and the trial court granted summary judgment in favor of Petitioner by judgment entered 30 May 2017. Respondents appeal.

II. Facts

In 2014, the General Assembly enacted new legislation (the "Act"),[3] establishing a cap factor for certain employees covered by TSERS ("members"). 2014 N.C. Sess. Laws 88, sec. 1.(a). The purpose of the Act, in relevant part, was to "adopt a contribution-based benefit cap factor" (the "cap factor"), in order to limit retirement benefits paid by TSERS for certain members whose benefits would have otherwise been significantly inflated because their salaries were substantially greater in their final years of State employment than their salaries for the majority of their earlier State employment. N.C.G.S. § 135-5(a3).[4]

Dr. Marty T. Hemric ("Dr. Hemric") was superintendent of Petitioner for a period of time until his retirement. Because of Dr. Hemric's employment history with the State, he was eligible for TSERS retirement benefits, but was also subject to having his benefits capped pursuant to the provisions of the Act. Upon Dr. Hemric's retirement, the Division informed him and Petitioner that, pursuant to the Act, a

[3] "AN ACT to enact anti-pension-spiking legislation by establishing a contribution-based benefit cap[.]" 2014 N.C. Sess. Laws 88, sec. 1.(a).

[4] This is a simplified explanation of the Act, but an in-depth explanation is not required for our analysis of the issues on appeal.

contribution of $583,353.86 would be required to restore Dr. Hemric's benefits to their "uncapped amount." N.C. Gen. Stat. § 135-4(jj) (2015).[5] Petitioner submitted this amount to the Division on behalf of Dr. Hemric, but also initiated this action, as indicated above, to challenge the validity of the cap factor "adopted" by the Board. Additional facts may be found in *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, __ N.C. App. __, __ S.E.2d __ (2018) (COA17-1017), which is filed concurrently with this opinion.

III. Holding

Our holdings in *Cabarrus Cty.* determine the outcome of the present opinion. For the reasons stated in *Cabarrus Cty.*, we affirm the trial court's grant of summary judgment in favor of Petitioner. *Id.*

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).

[5] The 2015 version of N.C.G.S. § 135-4(jj) includes relevant language that was in effect at the time summary judgment was entered. Because this language was later changed, we cite the earlier version of the statute.