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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-373

Filed 07 February 2023

Chowan County, No. 21 CVS 1

KIMBERLY WILLIS, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT
SYSTEMS DIVISION, Respondent.

Appeal by Respondent from order entered 14 December 2021 by Judge
Wayland J. Sermons, Jr., in Chowan County Superior Court. Heard in the Court of
Appeals 2 November 2022.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General
Katherine A. Murphy, for Respondent-Appellant.*

*Hornthal, Riley, Ellis and Maland, LLP, by M.H. Hood Ellis, for Petitioner-
Appellee.*

GRIFFIN, Judge.

Respondent North Carolina State Treasurer, Retirement Systems Division,
appeals from an order finding that Respondent is estopped from denying Petitioner's
eligibility for a Survivor's Alternate Benefit ("SAB") based on her deceased husband's

years of creditable service to the Teachers' and State Employees' Retirement System ("TSERS"). We affirm the trial court's order.

I. Factual and Procedural Background

Petitioner Kimberly Willis is the surviving spouse of Thomas Clayton Willis, II. Mr. Willis was employed by the North Carolina Department of Transportation ("NCDOT") and was a contributing member of TSERS at the time of his death in June 2018.

Prior to his employment with NCDOT, Mr. Willis was employed by North Carolina State University ("NCSU"). "Mr. Willis was initially hired as a temporary employee of NCSU" and "completed one year of temporary employment" on 15 July 1997. "During this time period, and pursuant to a mandate by [the] President of the University of North Carolina, NCSU[] was directed to provide permanent and full-time/full-benefit appointments to all non-professional, temporary employees who had worked for more than one year in such temporary positions."

Shortly after Mr. Willis's one-year anniversary as a temporary employee, written notice was issued to Mr. Willis's supervisor "directing him to submit documentation outlining Mr. Willis'[s] duties and responsibilities for purposes of transitioning Mr. Willis'[s] employment from a temporary position to a permanent position at NCSU." "Due to circumstances over which Mr. Willis had no control, there was a delay in submitting the documentation . . . which, in turn, delayed Mr. Willis'[s] classification as [a] permanent employee" by approximately fourteen months. Mr.

Willis was therefore not classified as a permanent employee until 1 October 1998, at which time he also became a contributing member of TSERS.

Mr. Willis worked as a permanent employee at NCSU until 30 September 1999 and “earned a total of one year of membership service in TSERS.” “Mr. Willis earned 18 years and 1 month of membership service in TSERS while employed at NCDOT.” “At the time of his death, Mr. Willis had a total of 19 years, 1 month of ‘membership service’ in TSERS.”

Mr. Willis named Petitioner as the beneficiary entitled to his accumulated contributions to TSERS in the event of his death. Pursuant to N.C. Gen. Stat. § 135-5(f), the contributing member’s nominated beneficiary “shall be paid . . . the amount of the member’s accumulated contributions at the time of the member’s death, unless the beneficiary elects to receive the [SAB] under [subsection] (m).” N.C. Gen. Stat. § 135-5(f) (2021). In order for Petitioner to be eligible for the SAB under subsection (m), Mr. Willis must have “obtained 20 years of creditable service” to TSERS. *See* N.C. Gen. Stat. § 135-5(m) (2021). Because Respondent determined that Mr. Willis had only “19 years and one month of creditable service at the time of his death,” Respondent denied Petitioner’s request to receive the SAB.

On 1 May 2020, Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings, arguing that Mr. Willis earned more than twenty years of creditable service in TSERS. Specifically, Petitioner argued that Respondent miscalculated the creditable service earned by Mr. Willis during his employment at

NCSU. Respondent later filed a motion for summary judgment, and the Administrative Law Judge (“ALJ”) granted the motion in a final decision issued on 2 December 2020.

The final decision included the following findings of fact:

10. Mr Willis . . . became a member of TSERS on October 1, 1998, the same time at which he became a permanent employee of NCSU.

11. Although Mr. Willis was employed by NCSU prior to October 1998, he remained in a position that NCSU classified as temporary, and therefore, was not a contributing member of TSERS before October 1, 1998.

12. While Petitioner’s evidence tends to show that Petitioner should have been classified and moved to a permanent position at NCSU sooner, Petitioner did not proffer evidence that would establish that Mr. Willis was a contributing member of TSERS prior to October 1, 1998.

The ALJ therefore concluded that Petitioner was not entitled to the SAB pursuant to N.C. Gen. Stat. § 135-5(m).

On 4 January 2021, Petitioner filed a petition for judicial review in Chowan County Superior Court. Petitioner argued that Mr. Willis was erroneously “only given credit for 1 year of service in TSERS [while at NCSU] because of the State’s (i.e. NCSU’s) failure to timely submit [the] paperwork” transitioning him from temporary to permanent employment with NCSU. Because of the State’s error, Petitioner contended that Mr. Willis should have earned an additional “14 months” of creditable service as a “de facto ‘permanent employee’ at NCSU from July 15, 1997

until October 1, 1998.”

This matter was heard on 6 December 2021, after which the trial judge issued an order holding that “Respondent [wa]s estopped from denying at least eleven (11) months of [Mr. Willis’s] employment with [NCSU] from July 15, 1997 until October 1, 1998 as ‘creditable service’ with the State of North Carolina[,] and Respondent [wa]s thus estopped from denying that [Mr. Willis] had twenty (20) years of ‘creditable service’ at the time of his death[.]” Accordingly, the trial court concluded that “Petitioner ha[d] the right to elect to receive the [SAB]” under N.C. Gen. Stat. § 135-5(m).

Respondent timely appealed.

II. Analysis

Respondent argues that Petitioner is not entitled to the SAB under N.C. Gen. Stat. § 135-5(m) and that the trial court erred by “applying estoppel to [Respondent] and reversing the final decision of the ALJ.” We disagree.

“In cases appealed from administrative tribunals, we review questions of law *de novo*[.]” *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006). “Under [a] *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover County. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks omitted).

N.C. Gen. Stat. § 135-5(m) provides:

Survivor's Alternate Benefit. – Upon the death of a member in service, the beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the [SAB] . . . provided that all four of the following conditions apply:

- (1) a. The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance, or

b. *The member had obtained 20 years of creditable service . . . or*

b1. The member was a law enforcement officer who had obtained 15 years of service as a law enforcement officer and was killed in the line of duty. . . .
- (2) At the time of the member's death, one and only one beneficiary is eligible to receive a return of his accumulated contributions.
- (3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection to apply.
- (4) The member had not commenced to receive a retirement allowance as provided under this Chapter.

N.C. Gen. Stat. § 135-5(m) (2021) (emphasis added). Neither party disputes that prongs (2)-(4) are satisfied in this case. Mr. Willis was also not eligible “to commence retirement with an early or service retirement allowance,” nor was he a law enforcement officer. Accordingly, the sole issue in this case is whether Mr. Willis had obtained twenty years of creditable service to TSERS at the time of his death.

“[G]enerally speaking, an employee gets a day's credit for a day's work.”

McCaskill v. Dep't of State Treasurer, Ret. Sys. Div., 204 N.C. App. 373, 392, 695

S.E.2d 108, 122 (2010). Respondent concedes in its brief that “Petitioner’s forecast of evidence tended to show that, had NCSU reclassified [Mr.] Willis’s position in a timely fashion, [Mr.] Willis . . . would have been credited with membership service at NCSU for a longer period of time, and perhaps, at the time of his death, he would have earned the required 20 years of creditable service necessary for Petitioner to be entitled to the SAB.” Nonetheless, Respondent argues that “there is no basis here for estoppel to be applied against [Respondent], and the application of estoppel would impair the exercise of [Respondent’s] governmental powers.”

[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts . . . ; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which is at least calculated to induce a reasonably prudent person to believe such conduct was intended to be relied and acted upon; [and] (3) knowledge, actual or constructive, of the real facts. As related to the party claiming estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such character as to change his position prejudicially.

Hawkins v. M. & J. Fin. Corp., 238 N.C. 174, 177–78, 77 S.E.2d 669, 672 (1953) (citations omitted). Although Respondent is a governmental entity and thus “is not subject to an estoppel to the same extent as a private individual or a private corporation[,] . . . an estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary

to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the [entity].” *Fike v. Bd. of Trustees, Teachers’ and State Emps. Retirement Sys.*, 53 N.C. App. 78, 81–82, 279 S.E.2d 910, 913 (1981) (quoting *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953)).

For example, in *Fike*, the petitioner was employed as a professor at NCSU. *Fike*, 53 N.C. App. at 78, 279 S.E.2d at 911. The petitioner’s wife, also employed at NCSU and a contributing member of TSERS, was diagnosed with a terminal illness, so the petitioner consulted the payroll and benefits manager at NCSU to inquire about “retirement options, salary continuation, and social security benefits for his wife.” *Id.* The petitioner testified that he had “signed various documents” and “filled out the retirement application as guardian” for his wife in August 1978. *Id.* However, the payroll manager testified that “she thought the form for retirement . . . was supposed to be filed at a later time” and thus initially failed to send in the required forms to the Retirement System. The forms were not received until October. *Id.* at 78–79, 279 S.E.2d at 910. The petitioner’s wife passed away in October. *Id.* at 79, 279 S.E.2d at 912.

The Retirement System found that because “the application for retirement was filed with the Retirement System [in] October, and the System was in no way responsible for any delay in the filing of the application, the earliest possible effective date for [the wife’s] retirement was 1 November.” *Id.* According to the Retirement System, because the wife died before 1 November, she was “never retired and [the

petitioner] was not entitled to a monthly benefit from [TSERS].” *Id.*

On appeal, this Court held that the Retirement System was estopped from denying retirement benefits to the petitioner. *Id.* at 80–81, 279 S.E.2d at 912–13. The Court reasoned that the benefits manager had represented to the petitioner that “he had done everything that was necessary, and that all was in order” with respect to the retirement application. *Id.* at 81, 279 S.E.2d at 913. Although it was “doubtful that the Retirement System had sufficient control over [the payroll manager], or her employer, for her to be its actual agent,” the Court held that “evidence of representations to the contrary [were] sufficient to estop the Retirement System from denying” retirement benefits to the petitioner. *Id.*

As in *Fike*, the employee at NCSU responsible for submitting the necessary paperwork failed to submit it timely. This is despite the fact that NCSU represented to its employees, “pursuant to a mandate by [the] President of the University of North Carolina,” that all “temporary employees who had worked for more than one year in such temporary positions” were to be “provid[ed] permanent and full-time/full-benefit appointments.” As with the petitioner in *Fike*, Mr. Willis “was neither responsible for nor contributed to the delay in submitting the transition documentation.” Mr. Willis had no reason to know that he was not classified as a permanent employee in accord with NCSU policy, and, in any event, “we do not agree that he was required to make extensive inquiry for himself after being advised that he had done all that he need do.” *Id.*

Although it is similarly “doubtful that [Respondent] had sufficient control over” the employee responsible for submitting the paperwork, or NCSU, for the employee “to be its actual agent,” we hold that Respondent’s reliance on NCSU to classify employees as temporary or permanent for retirement purposes cannot shield it from estoppel. *Id.* Specifically, Respondent cannot rely on another State agency’s mistake to deny an individual a benefit to which she is otherwise entitled. *See id.* A contrary holding would only invite “untoward results” which this Court seeks to avoid in these cases. *See McCaskill*, 204 N.C. App. at 393, 695 S.E.2d at 123.

Lastly, Respondent argues that, “even if there were a factual basis for applying estoppel to [Respondent], an estoppel argument cannot be relied upon to order [Respondent] to provide a benefit that would otherwise be prohibited by statute” because doing so would “impact the exercise of Respondent’s governmental powers.” This argument is refuted not only by our holding in *Fike* but also because the statute specifically permits individuals to submit a “request [to] the Board of Trustees to modify or correct service credit that was earned prior to retirement.” N.C. Gen. Stat. § 135-4(d) (2021). We are confident that Respondent can manage to make the correction needed to afford Petitioner the benefit to which she is entitled without compromising the exercise of its governmental powers.

III. Conclusion

For the foregoing reasons, the order of the trial court is affirmed.

AFFIRMED.

WILLIS V. N.C. DEP'T OF STATE TREASURER

Opinion of the Court

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).