

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
2012 NOV 15 PM 4: 03 SUPERIOR COURT DIVISION  
COUNTY OF WAKE WAKE COUNTY, C.S.C. FILE NO: 12 CVS \_\_\_\_\_

JACK D. PETTY and ALL OTHER )  
GOVERNMENT WORKERS and )  
GOVERNMENT RETIREES )  
SIMILARLY SITUATED, )  
 )  
Plaintiffs, )

v. )

STATE OF NORTH CAROLINA, )  
NORTH CAROLINA DEPARTMENT OF )  
STATE TREASURER, and JANET )  
COWELL IN HER CAPACITY AS )  
STATE TREASURER, )  
 )  
Defendants. )

**COMPLAINT FOR DECLARATORY  
JUDGMENT, PERMANENT  
INJUNCTION, AND REFUND OF  
PENALTIES  
(Jury Trial Demanded)**

NOW COMES Jack D. Petty, by and through undersigned counsel G. Eugene Boyce, R. Daniel Boyce, and Alex R. Williams, individually and for others similarly situated, as representative of the putative Class of citizens of North Carolina, and complains of the Defendants, State of North Carolina (hereinafter "North Carolina" or "the State"), North Carolina Department of State Treasurer (hereinafter "NCDST"), and Janet Cowell in her capacity as State Treasurer, as follows:

**STATEMENT OF PARTIES AND JURISDICTION**

1. Plaintiff, Jack Petty (hereinafter "Retiree Petty"), is a state retiree beneficiary of the Retirement System of the State of North Carolina. Retiree Petty performed services for the North Carolina Department of Transportation for 37 years, 6 months.

2. Retiree Petty, on behalf of others similarly situated, is one of more than 600,000 active and retired Putative Class Members who participate, contribute, or have previously

contributed to the North Carolina Teachers' and State Employees' Retirement System of North Carolina (hereinafter "Retirement System"). The Putative Class Members all have interests paramount to, or at least equal to, the issues raised by this Complaint, and who, collectively, are a necessary party to this action. The Putative Class Members' questions of law and fact are common to all and outweigh the individual question of law and fact.

3. Joinder of all Putative Class Members is impractical.

4. The named, or to be named, Class Members (hereinafter "the Class") will adequately represent the interest of their Class.

5. Defendant NCDST is a state agency that maintains a division called the North Carolina Retirement Systems (hereinafter "NCRS") that is responsible for, among other things, the administration of this state's statutory retirement and benefit plans for the Putative Class Members.

6. State Treasurer Janet Cowell is responsible for overseeing the NCDST, and therefore, the NCRS.

7. Defendant NCDST is headquartered in Raleigh, Wake County, North Carolina.

8. Defendant State Treasurer Janet Cowell is located in Raleigh, Wake County, North Carolina.

9. This Court has personal and subject matter jurisdiction to determine whether Defendants actions were unconstitutional and unlawful in that Defendants were not entitled to penalize Retiree Petty or the similarly situated Putative Class Members under N.C. Gen Stat. § 135-1.

10. Retiree Petty, individually and on behalf of other Putative Class Members similarly situated, is seeking injunctive relief to prohibit Defendant NCDST from further penalizing Retiree Petty and other Putative Class Members similarly situated.

11. Retiree Petty, individually and on behalf of other Putative Class Members similarly situated, is also seeking the enforcement of his constitutional rights, and those of the Putative Class Members similarly situated, who have been, or will be, harmed by Defendants.

12. This Complaint is timely filed and this Court has jurisdiction in accordance with the North Carolina Uniform Declaratory Judgment Act.

### **STATEMENT OF FACTS**

13. Retiree Petty contributed retirement contributions from his wages each pay period to the Retirement System from 1967 through April, 2004. In April, 2004, he qualified for and elected to retire.

14. Retiree Petty began receiving the promised benefits as he had earned and as are provided by law for all retired state employees similarly situated.

15. Following retirement from government services, Retiree Petty accepted and began employment on May 1, 2004 with Rummel, Klepper and Kahl, LLP, a North Carolina limited liability partnership (a Maryland limited liability partnership who engages in business in North Carolina), and provides engineering services.

16. Beginning January, 2011, the Defendants began threatening, and are now currently imposing, upon Retiree Petty substantial monetary penalties for alleged past “overpayments” and for claimed “current penalties”, which are being deducted monthly from retirement benefits.

17. These arbitrary penalties diminish Retiree Petty's and other similarly situated Putative Class Members' state employee retirement income and retirement health coverage and benefits.

18. The sole basis, excuse, reasoning, and/or claim given by Defendants for penalizing Retiree Petty and others similarly situated is that under N.C. Gen. Stat. § 135-3(8)(c) Retiree Petty was "engaged to perform services for, an employer participating in the Retirement System on a part-time, temporary, interim or on a fee for service basis, whether contractual or otherwise." (emphasis added).

19. N.C. Gen. Stat. § 135-1 provides the following pertinent definitions needed to interpret N.C. Gen. Stat. § 135-3(8)(c):

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

- (10) "Employee" shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments, bureaus and institutions other than educational, whether such employees are elected, appointed or employed: Provided that the term "employee" shall not include any person who is a member of the Consolidated Judicial Retirement System, any member of the General Assembly or any part-time or temporary employee. Notwithstanding any other provision of law, "employee" shall include all employees of the General Assembly except participants in the Legislative Intern Program, pages, and beneficiaries in receipt of a monthly retirement allowance under this Chapter who are reemployed on a temporary basis. "Employee" also includes any participant whose employment is interrupted by reason of service in the Uniformed Services, as that term is defined in section 4303(16) of the Uniformed Services Employment and Reemployment Rights Act, Public Law 103-353, if that participant was an employee at the time of the interruption; if the participant does not return immediately after that service to employment with a covered employer in this System, then the participant shall be deemed "in service" until the date on which the participant was first eligible to be separated or released from his or her involuntary military service. In all cases of doubt, the Board of

Trustees shall determine whether any person is an employee as defined in this Chapter. "Employee" shall also mean every full-time civilian employee of the Army National Guard and Air National Guard of this State who is employed pursuant to section 709 of Title 32 of the United States Code and paid from federal appropriated funds, but held by the federal authorities not to be a federal employee: Provided, however, that the authority or agency paying the salaries of such employees shall deduct or cause to be deducted from each employee's salary the employee's contribution in accordance with applicable provisions of G.S. 135-8 and remit the same, either directly or indirectly, to the Retirement System; coverage of employees described in this sentence shall commence upon the first day of the calendar year or fiscal year, whichever is earlier, next following the date of execution of an agreement between the Secretary of Defense of the United States and the Adjutant General of the State acting for the Governor in behalf of the State, but no credit shall be allowed pursuant to this sentence for any service previously rendered in the above-described capacity as a civilian employee of the National Guard: Provided, further, that the Adjutant General, in his discretion, may terminate the Retirement System coverage of the above-described National Guard employees if a federal retirement system is established for such employees and the Adjutant General elects to secure coverage of such employees under such federal retirement system. Any full-time civilian employee of the National Guard described above who is now or hereafter may become a member of the Retirement System may secure Retirement System credit for such service as a National Guard civilian employee for the period preceding the time when such employees became eligible for Retirement System coverage by paying to the Retirement System an amount equal to that which would have constituted employee contributions if he had been a member during the years of ineligibility, plus interest. Employees of State agencies, departments, institutions, boards, and commissions who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision. On and after August 1, 2001, a person who is a nonimmigrant alien and who otherwise meets the requirements of this subdivision shall not be excluded from the definition of "employee" solely because the person holds a temporary or time-limited visa.

- (11) "Employer" shall mean the State of North Carolina, the county board of education, the city board of education, the State Board

of Education, the board of trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, or any other agency of and within the State by which a teacher or other employee is paid.

- (13) "Member" shall mean any teacher or State employee included in the membership of the System as provided in G.S. 135-3 and 135-4.
- (14) "Membership service" shall mean service as a teacher or State employee rendered while a member of the Retirement System.
- (20) "Retirement" means the termination of employment and the complete separation from active service with no intent or agreement, express or implied, to return to service. A retirement allowance under the provisions of this Chapter may only be granted upon retirement of a member. In order for a member's retirement to become effective in any month, the member must render no service, including part-time, temporary, substitute, or contractor service, at any time during the six months immediately following the effective date of retirement. For purposes of this subdivision, service as a member of a school board or as an unpaid bona fide volunteer in a local school administrative unit shall not be considered service.
- (22) "Retirement System" shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2.
- (23) "Service" shall mean service as a teacher or State employee as described in subdivision (10) or (25) of this section.

20. Rummel, Klepper and Kahl, LLP is a private corporation engaged in private enterprise.

21. Rummel, Klepper and Kahl, LLP is not a government agency, department, bureau, institution, branch, board, commission of the State or any governmental entity (local, state or federal), and does not "participate in the retirement system, North Carolina Teachers' and State Employees' Retirement System."

22. Rummel, Klepper and Kahl, LLP makes no contribution to, and has never made a contribution to, the Retirement System; nor do they have any authority or control over the Retirement System; nor do they participate, in any way, in the Retirement System.

23. Retiree Petty, for himself and others similarly situated, complains of the current actions now instituted and similar actions threatened by Defendants and sanctioned by the Executive Branch, the Governor, the Attorney General on behalf of the State, the Treasurer of the State of North Carolina and NCRS, all of whom contend that they are entitled to penalize him and others similarly situated for pursuing a means of livelihood through private companies separate and detached of the government entities participating in the Retirement System.

24. Retiree Petty's private employment is not "as a teacher or state employee" as provided by law.

25. As wrongly defined by Defendants, the term "participates in the retirement system" includes private, non-governmental employers even though such private entities in no way make monetary or any other contribution to, or in any way "participate" in, the Retirement System.

26. Private employers, including Rummel, Klepper and Kahl, LLP, in no way "participate," "control," "take part in," or have "authority in or over," the North Carolina Retirement System, the funds of the government retiree system or the State Health Plan as relating to Service Retirees. Defendants claim otherwise.

27. Upon information and belief, up to the time of this filing, Defendants imposed, and continued to impose, monetary penalties and otherwise diminish the earned periodic retirement income of numerous Putative Class Members who are similarly situated to Retiree Petty.

28. Defendants have penalized Retiree Petty by depriving him in the past and now of \$1,000 per month to recover alleged past "overpayments" and "current penalties." Retiree

Petty's monthly retirement income has been arbitrarily ordered diminished by the sum of \$60,928.27 payable in the sum of \$1,015.64 per month.

29. Upon information and belief, other similarly situated Putative Class Members are being penalized similar to that of Retiree Petty.

30. Defendants threaten to continue penalizing Retiree Petty, and others similarly situated, by arbitrarily reducing their earned retirement income based on their current private salaries in excess of their earned retirement income.

31. The penalty imposed on Retiree Petty will, based on 2011 calculations and from age 64 to 70, result in a total loss to Retiree Petty of at least \$210,000.00 through the year 2017.

32. Upon information and belief, other similarly situated Putative Class Members will be similarly penalized.

**FIRST CLAIM FOR RELIEF**  
**Declaratory Judgment**

33. Paragraphs 1 through 31 are realleged and incorporated herein by reference.

34. The Superior Court Division of the General Court of Justice has jurisdiction to render a declaratory judgment when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise.

35. There exists a genuine controversy between Retiree Petty, and other similarly situated Putative Class Members, and Defendants that arises out of their conflicting contentions as to their respective authority, their legal rights and their liabilities under N.C. Gen. Stat. § 135.



36. The above definitions and statutory quotes support the conclusion that the word “employer” in the phrase “employer participating in the retirement system” refers to government employers and no private, non-governmental entity employers.

37. The above definitions and statutory quotes support the conclusion that the word “service” in the phrase “engaged to perform services for, an employer participating in the retirement system” refers to work completed as teachers or state government employees, and not employees of private, non-governmental entities.

**SECOND CLAIM FOR RELIEF**

**Violation of N.C. Const. Art. I § 19 (Procedural Due Process)**

38. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

39. The violation of the above referenced statute by Defendants resulted in a violation of Plaintiff’s constitutional right to procedural due process in that Defendants did the following:

- a. Deprived Retiree Petty, and other similarly situated, of property rights, to wit: earned retirement income; insurance coverage; and insurance premiums;
- b. Substantially prejudiced the rights of Retiree Petty and others similarly situated;
- c. Exceeded its authority;
- d. Acted erroneously;
- e. Failed to use proper procedure including a failure to properly interpret the above quoted statute;
- f. Acted arbitrarily or capriciously in that the decision to penalize Retiree Petty and others similarly situated indicated a lack of fair, careful consideration, reasoning and exercise of judgment, and omitted procedural requirements that result in manifest unfairness under the circumstances;

- g. Failed to act as required by law;
- h. Failed to afford Retiree Petty and others similarly situated a full and fair due process hearing; and
- i. Defendants decision to penalize Retiree Petty and others similarly situated is not supported by substantial evidence.

**THIRD CLAIM FOR RELIEF**  
**Injunctive Relief**

40. Paragraphs 1 through 21 are realleged and incorporated herein by reference.

41. Injunctive relief should be granted in the absence of a stipulation by all Defendants that it will no longer impose penalties, retroactive payments or diminution in the pension and health care benefits of Retiree Petty and others similarly situated.

**FOURTH CLAIM FOR RELIEF**  
**Refund of Penalties**

42. Paragraphs 1 through 23 are realleged and incorporated herein by reference.

43. This action should be declared a Class Action as to all service retirees similarly situated to Retiree Petty, and Defendants should be ordered to account to the Court all names, addresses and amounts of penalty payments and pension monies taken from Retiree Petty and all Putative Class Members similarly situated and judgment be entered accordingly for appropriate rebates to Retiree Petty and all other Putative Class Members similarly situated.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays the Court as follows:

- 1. Enter judgment against Defendants in favor of Plaintiff;
- 2. Award Plaintiff(s) the costs of this action, including reasonable attorneys' fees as allowed by law, from Defendants;

3. Order that this action be tried by a jury; and
4. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 15 day of November, 2012.

**NEXSEN PRUET, PLLC**

*G. Eugene Boyce/bkc*

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