

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

FILED  
APR 23 1999

BAILEY, et al., v.  
STATE OF NORTH CAROLINA, et al.

FILED BY )  
BY ) File No. 92 CVS 10221, 94 CVS 6904,  
95 CVS 66259 95 CVS 8230

EMORY, et al., v.  
STATE OF NORTH CAROLINA, et al.

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) File No. 98 CVS 0738  
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PATTON, et al., v.  
STATE OF NORTH CAROLINA, et al.

)  
) File No. 95 CVS 04346  
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ORDER REGARDING THE OPTIONAL RETIREMENT PROGRAM  
FOR STATE INSTITUTIONS OF HIGHER EDUCATION

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THIS MATTER came on before the undersigned presiding Judge pursuant to a hearing held on April 23, 1999. Based on matters of record and representations of counsel for all parties, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the parties previously requested the Court to approve a list of retirement plans which qualify as "a federal government retirement system or a North Carolina state or local government retirement system" and that the Court did so in its "Findings of Fact, Conclusions of Law and Order Regarding Class Definition" entered on November 20, 1998.
2. That the November 20, 1998, order has since been modified and augmented by subsequent orders, including an order filed on March 26, 1999 approving the Optional

Retirement Program for institutions of higher education (hereinafter the "ORP"), authorized under N.C.G.S. § 135-5.1, as a retirement plan which qualifies as "a North Carolina state or local government retirement system."

3. That numerous questions concerning the ORP, including vesting issues, were left for future determination and need to be resolved.

4. That the University of North Carolina Optional Retirement Program is unique among the included retirement systems. The ORP is an option or alternative to the North Carolina Teachers' and State Employees' Retirement System ("TSERS"). The ORP was authorized by the General Assembly in 1971. Generally, an administrator or faculty member with the rank of instructor or above at any of the sixteen constituent institutions of The University of North Carolina is eligible to participate in the ORP and that decision is irrevocable.

5. A principal feature of the ORP is the portability of accumulated contribution balances to other institutions of higher learning nationwide. Unlike statutes regarding retirement under TSERS, the statute authorizing ORP does not set out criteria regarding retirement. Compare N.C.G.S. § 135-5 ("Benefits" under TSERS) with N.C.G.S. § 135-5.1 (ORP provisions). As noted by the University of North Carolina publication Choosing a Retirement Program provided to new employees, "[t]here are no age or service requirements to meet in order for a vested [ORP] participant to begin receiving a benefit." Therefore, for the purpose of distributions pursuant to the June 10, 1998, Consent Order,

ORP participants receiving ORP benefits are retirees who are "persons receiving retirement allowances" irrespective of age and service.

6. That, pursuant to N.C.G.S. § 135-5.1 and the contracts entered into with various carriers for ORP participation pursuant to § 135-5.1, employee contributions to the ORP vest immediately and are not forfeitable. Therefore, the portion of any ORP benefits attributable to employee contributions shall be and is exempt from North Carolina state income taxes for any participant who enrolled prior to August 12, 1989.

7. That, pursuant to N.C.G.S. § 135-5.1, and the contracts entered into with various carriers for ORP participation pursuant to § 135-5.1, solely for purposes of this litigation, employer contributions to the ORP are deemed to vest immediately. However, those employer contributions are subject to forfeiture if a participant leaves the University of North Carolina after less than five years' participation and does not begin new qualifying employment, as determined by the terms and conditions provided for by N.C.G.S. § 135-5.1 and the rules and regulations of the ORP. If, in fact, any employer contributions are forfeited or have been forfeited in a particular instance, the participant does not or will not receive any ORP benefits attributable to those employer contributions. Therefore, the portion of any ORP benefits actually paid, or to be paid, attributable to employer contributions shall be and is exempt from North Carolina state income taxes for any participant who enrolled prior to August 12, 1989.

8. That, as a result of Paragraphs 4 and 5 above, all ORP benefits of any type paid to a participant who enrolled in ORP on or before August 12, 1989, are therefore exempt from North Carolina state income tax for tax years 1989 and thereafter.

9. That, to the extent ORP benefits have been subjected to North Carolina state income taxes in one or more of the tax years from 1989 through 1997, the person receiving those benefits and paying North Carolina state income taxes on those benefits is entitled to participate as a class member in this litigation and receive refunds in the same manner as other state and local government class members, provided that he or she enrolled in the ORP on or before August 12, 1989.

10. That all ORP benefits paid in tax year 1989 or in any tax year thereafter to any ORP participant who enrolled on or before August 12, 1989, are permanently exempt from North Carolina state income taxes, pursuant to the Consent Order entered in this litigation.

11. In the event an ORP participant leaves or has left the University of North Carolina system and is or has been employed at another institution contracting with the same company, his or her benefits are exempt from North Carolina state income taxes only if his ORP contributions, and the benefits derived therefrom, retain their character as ORP contributions and benefits. Therefore, if an ORP participant leaves, or has left, the University of North Carolina system and transfers, or has transferred, his account into the benefit plan of another employer, any benefits resulting from those transferred contributions

and earnings or that transferred account lose, or have lost, their character as ORP benefits and therefore are not, or will not be, exempt from North Carolina state income tax. On the other hand, if the employee retains his ORP account without transferring it into his new employer's benefit plan, the benefits ultimately payable from his ORP account, assuming the employee enrolled in the ORP on or before August 12, 1989, will be and are exempt from North Carolina state income taxes.

12. In the event an ORP participant leaves or has left the University of North Carolina system and "rolls over" his account into an Individual Retirement Account or other account, those ORP contributions and earnings lose, or have lost, their character as ORP funds. Benefits ultimately paid from such an Individual Retirement Account, or other account, are therefore not exempt from North Carolina state income taxes and are subject to North Carolina state income taxes in the same manner, and to the same extent, as any other withdrawals from that Individual Retirement Account or other account.

13. Based on information available to the parties from the University of North Carolina system and one or more of the individual carriers with which ORP contracts exist, the parties have informed the Court that persons who have ORP accounts with one or more of the ORP carriers may also have contracts and/or accounts with the same carrier or carriers as part of the benefits plan of other institutions, such as private educational institutions in North Carolina or public or private educational institutions in other states. The parties have also learned that, upon retirement and the decision to begin drawing

benefits, a person with multiple accounts has been provided the choice, in at least some instances, to combine the accounts for payment purposes at the time of retirement or to maintain the accounts separately and receive separate checks. In the event that a participant in the ORP has multiple accounts and has received separate checks for his ORP account benefits, the amount exempt from North Carolina state income taxes is the amount paid, or to be paid, in the separate checks for ORP benefits. However, the parties have also been informed that it may be extremely time-consuming and very difficult, if not impossible, to determine at this point the amount of the ORP benefits, as opposed to the other benefits that have previously been combined solely for payment purposes. In addition, the parties have also been informed that in some instances a person who leaves the ORP and begins employment at another institution, with benefits provided by the same carrier or contractor as his ORP benefits, may have simply added the new benefits, from the new employer, on to the same contract he had for his ORP benefits with the same carrier or contractor, without transferring his ORP benefits into the new employer's benefit plan. The Court therefore concludes that persons who, in 1999 or earlier, combined their ORP benefits with other benefits shall treat as exempt a pro rata portion of the benefits based upon the relative period of service in the ORP compared to the total amount of service producing his combined benefits or based on the relative amounts of the ORP benefits compared to the total benefits that make up the combined benefit. Thus, the portion of the combined benefit that is exempt from state income taxes may be determined on the basis of a calculation

comparing the number of years and months of participation in the ORP to the total number of years and months of participation in various plans, including the ORP. For example, an ORP participant who had ten years in the ORP from 1980 to 1990, plus ten years from 1970 to 1980 with a private educational institution, and who combines the benefits from separate accounts for payment purposes at the time of retirement, may claim as exempt one-half ( $\frac{1}{2}$ ) of the total combined benefit. In the alternative, if appropriate documentation is available, then a pro rata portion of the total benefits, based upon the portion attributable to the ORP participation, shall be exempt from North Carolina state income taxes.

14. The parties and carriers will make their best efforts to provide the best information possible to determine as fairly as possible the portion of benefits that should be exempt for ORP retirees who retire or retired in 1999 or earlier or whose benefits cannot be entirely separated. However, to the extent possible, an ORP participant who retires and begins drawing benefits in the year 2000 or after shall be required to maintain his ORP benefits separately, and the State of North Carolina is hereby directed to work with the ORP carriers to ensure that ORP participants are directed to receive their ORP benefits by separate checks and are not allowed, after 1999, to combine their ORP benefits for payment purposes, or otherwise they risk the loss of their North Carolina state income tax exemption.

15. The parties have informed the Court that ORP participants may, in some instances, participate in other types of benefit plans or enter into other types of tax-deferral or savings plans or contracts with the ORP carriers. Any benefits paid to ORP participants

resulting from their participation in such other plans or contracts are not exempt from North Carolina state income taxes unless otherwise provided by law.

16. If an ORP participant or retiree enrolled in the ORP on or before August 12, 1989, the benefits exempt from North Carolina state income taxes as a result of this litigation and under the Consent Order entered in this litigation are those ORP benefits paid at any time during tax year 1989 or thereafter, subject to the other conditions and provisions set out in this Order. ORP retirees may participate as class members, and receive tax refunds pursuant to this litigation, for qualifying ORP benefits paid at any time during tax years 1989 through 1997. ORP retirees now, or in the future, who enrolled in the ORP on or before August 12, 1989, are exempt from payment of North Carolina state income taxes on their ORP benefits, subject to the other conditions and provisions set out in this Order.

17. Qualifying ORP benefits include lump sum withdrawals, annuity payments, withdrawals of interest only, and any other types of benefit payments and withdrawals made pursuant to the participants' ORP contracts with the ORP carriers. Benefits paid to beneficiaries, including survivor annuitants and estates, as well as benefits paid to former spouses pursuant to equitable distribution orders or qualified domestic relations orders, are also tax-exempt to the same extent as the original ORP participant's benefits were, or would be.

18. Whenever in this Order a statement is made that benefits are subject to North Carolina state income taxes, the Order shall be interpreted to mean only that they are not



exempt by virtue of this litigation and therefore are subject to North Carolina state income taxes to the same extent as they would be if this litigation did not exist.

19. For purposes of this Order, a participant is deemed to have "enrolled" in the ORP on or before August 12, 1989, if he was both employed by a participating institution and had ORP contributions deducted for the month of August, 1989, or earlier.

Based on the foregoing, it is, therefore,

ORDERED, ADJUDGED AND DECREED

1. That ORP benefits payable to participants in the ORP are and shall be exempt from North Carolina state income taxes for tax years 1989 and thereafter if the participant or retiree enrolled in the ORP on or before August 12, 1989.

2. That persons who have received ORP benefits for one or more of tax years 1989 through 1997, and who enrolled in the ORP on or before August 12, 1989, shall be entitled to participate in this class action as class members and receive refunds of state income taxes paid on those ORP benefits in the same manner and to the same extent as other state retirees, provided that benefits shall be treated as ORP benefits qualified for the tax exemption under the conditions and terms set out in this Order.

3. That persons who receive benefits as beneficiaries, including survivor annuitants and estates, or as alternate payees of ORP participants who enrolled in the ORP on or before August 12, 1989, shall be entitled to participate in this class action as class members and receive refunds of state income taxes paid on those ORP benefits in the same

manner and to the same extent as beneficiaries and alternate payees for other state retirees, provided that benefits shall be treated as ORP benefits qualified for the tax exemption under the conditions and terms set out in this Order.

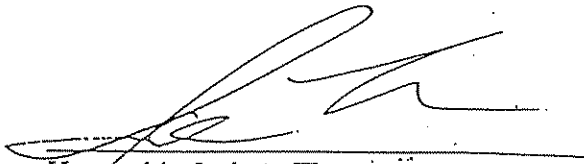
4. That ORP benefits paid for tax years 1998 and thereafter to ORP participants who enrolled in the ORP on or before August 12, 1989, or to the beneficiaries and alternate payees of such participants, shall be exempt from North Carolina state income tax, provided that benefits shall be treated as ORP benefits qualified for the tax exemption under the conditions and terms set out in this Order.

5. That all parties and counsel shall work together and with the ORP carriers to ensure that appropriate information is provided to Class Counsel and that persons who received benefits from the ORP during tax years 1989 through 1997, and who qualify as class members, shall receive appropriate tax refunds in the same manner and to the same extent as other state retiree class members, including beneficiaries and alternate payees, and that this task be accomplished as promptly as possible at this point.

6. That the State of North Carolina shall work with the ORP carriers to ensure that appropriate information is provided to Class Counsel, to ORP participants and retirees, to the beneficiaries and alternate payees of ORP participants and retirees, to the extent possible, to effectuate the Court's direction that ORP participants shall maintain their ORP benefits separately for payment purposes upon beginning to draw ORP benefits in tax year 2000 or thereafter.

7. That this Order is intended to conform to the Court's Order Regarding Class Membership filed September 10, 1999.

This the 19 day of November, 1999.



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Honorable Jack A. Thompson,  
Superior Court Judge

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