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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-167

Filed 7 November 2023

Union County, No. 21 CVS 2842

UNION COUNTY BOARD OF EDUCATION, Petitioner,

v.

RETIREMENT SYSTEMS DIVISION, DEPARTMENT OF STATE TREASURER,
Respondent.

Appeal by Petitioner from Order entered 15 December 2022 by Judge Hunt Gwyn in Union County Superior Court. Heard in the Court of Appeals 19 September 2023.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Patricia R. Robinson, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary W. Scruggs, Special Deputy Attorney General Marc X. Sneed, and Special Deputy Attorney General Olga Vysotskaya de Brito, for Respondent-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

The Union County Board of Education (Petitioner) appeals from an Order entered 15 December 2022 affirming the Final Decision of the Administrative Law

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Judge (ALJ) granting Summary Judgment to the Retirement Systems Division, Department of State Treasurer (Respondent). The Record before us tends to reflect the following:

Respondent manages the Teachers' and State Employees' Retirement System (TSERS), which pays eligible retired teachers and state employees a fixed monthly pension calculated by a statutory formula which includes the retiree's four highest-earning consecutive years of state employment. The Final Decision in this case upheld an assessment against Petitioner for an additional contribution to Respondent to fund a pension for one of Petitioner's retired employees pursuant to anti-pension-spiking legislation (Contribution-Based Cap Act or the Act) applicable to TSERS.

Here, Petitioner's employee retired 1 August 2017 and became a member of TSERS prior to January 2015. At the time, Respondent was using a cap factor of 4.5 to calculate the contribution-based benefit cap, which in turn was used to calculate the additional contribution assessed to Petitioner. In July 2022, Respondent sent a notice to Petitioner requiring payment of \$13,269.18 as the additional contribution required to fund Petitioner's employee's pension.

On 5 March 2021, Petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings. On 10 September 2021, an ALJ denied the Board's Motion for Summary Judgment and granted Summary Judgment to Respondent. On 8 October 2021, Petitioner filed a Petition for Judicial Review in Union County Superior Court, seeking reversal of the ALJ's decision. On 15

December 2022, the Superior Court entered an Order affirming the Final Decision of the ALJ. Petitioner filed Notice of Appeal on 18 January 2023.

Appellate Review

This Court has jurisdiction to review a final judgment of a Superior Court, “including any final judgment entered upon review of a decision of an administrative agency[.]” N.C. Gen. Stat. § 7A-27(b)(1) (2021). However, in civil cases, a party must file notice of appeal “within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure.” N.C.R. App. P. 3(c)(1) (2023). In determining the deadline to timely file an appeal under the North Carolina Rules of Appellate Procedure, “[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.” N.C.R. App. P. 27(a) (2023); *see also* N.C. Gen. Stat. § 1A-1, Rule 6(a) (2021) (under the Rules of Civil Procedure, filing deadlines are calculated in the same manner).

Here, the Superior Court entered the Order on 15 December 2022. The Order was served on both parties the same day. Thirty days from the date of filing of the Order was 14 January 2023. However, under Rule 27(a), because 14 January 2023 was a Saturday, and the following Monday was a holiday—Martin Luther King, Jr. Day—the last day to timely file an appeal was 17 January 2023. Although Petitioner

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served its Notice of Appeal on 13 January 2023, Petitioner’s Notice of Appeal was not filed with the Wake County Clerk of Court until 18 January 2023, making it facially untimely. “Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal.” *Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014) (citing *Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d 781, 784 (2011)).

Moreover, “it is [the appellant’s] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects th[e] appeal to dismissal.” *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855 (2002). The appellant’s burden includes showing his notice of appeal was timely filed, and failure to do so is a jurisdictional error. *Bradley v. Cumberland Cnty.*, 262 N.C. App. 376, 382, 822 S.E.2d 416, 420 (2018).

Here, rather than address the delayed filing of its Notice of Appeal in the Record or in briefing, Petitioner ignores this facial defect. Instead, the Record merely stipulates that the Notice of Appeal was timely *served*. In its brief, Petitioner asserts without authority that it “timely appealed to this Court” on 13 January 2023. Petitioner also makes no mention of the defect in the Grounds for Appellate Review section of its brief.¹

Thus, Petitioner failed to establish it timely filed its Notice of Appeal.

¹ Nor did Petitioner file a conditional Petition for Writ of Certiorari in the Court seeking review of the Superior Court Order in the event its Notice of Appeal was untimely.

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Therefore, this Court does not have jurisdiction to review this case. Consequently, we are compelled to dismiss this appeal.

In doing so, however, we observe that this case raises the same issues as those addressed in *Harnett County School Board v. Retirement Systems Division, Department of State Treasurer*, __ N.C. App. __, __ S.E.2d __ (COA22-750, filed Oct. 17, 2023). Thus, were we to reach the merits of this appeal, our prior decision would be binding. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

Conclusion

Accordingly, for the foregoing reasons, we dismiss Petitioner’s appeal.

DISMISSED.

Judges STADING and THOMPSON concur.

Report per Rule 30(e).