

CONNOR JAMES R & ZOE E 941197 111495 TAC

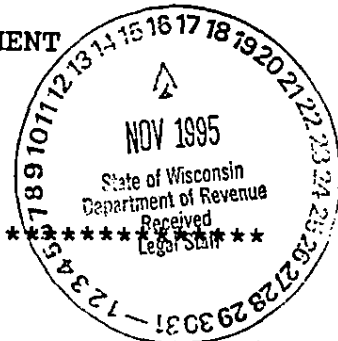
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 Wisconsin Tax Appeals Commission
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STATE OF WISCONSIN
 TAX APPEALS COMMISSION

 JAMES R. AND ZOE E. CONNOR *
 N7447 Linden Drive *
 Whitewater, WI 53190 *
 *
 Petitioners, *
 *
 vs. *
 *
 WISCONSIN DEPARTMENT OF REVENUE *
 P.O. Box 8933 *
 Madison, WI 53708 *
 *
 Respondent. *

Docket No. 94-I-197
 RULING AND ORDER
 AWARDING SUMMARY
 JUDGMENT



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DON M. MILLIS, COMMISSIONER:

The above-entitled matter is before this commission upon respondent's motion for summary judgment filed on June 15, 1995. Both parties have filed briefs and affidavits in support of their respective positions on respondent's motion. Petitioners have submitted briefs under their own name.¹ On briefs for respondent was Attorney Kevin B. Cronin.

FACTS

1. Petitioners are Wisconsin residents residing at N7447 Linden Drive, Whitewater, Wisconsin 53190.
2. Petitioner James E. Connor was employed by the University of Wisconsin-Madison beginning in July of 1962, up until

¹ Petitioners submitted a document denominated as a "motion" for summary judgment, although in form and in substance it is more akin to a brief in opposition to respondent's motion for summary judgment and will be considered by the Commission as a brief. In any case, a motion by the petitioners is not necessary as they are entitled to summary judgment if the submissions of the parties and the record so dictate. §802.08(6), Stats.

his termination from employment on August 23, 1963.

3. By virtue of his employment, Mr. Connor became a member of the State Teachers Retirement System ("STRS") beginning in July of 1962. Mr. Connor was a member of the "combined group" and was assigned a STRS membership number of U88935.

4. Shortly after his termination, on September 6, 1963, Mr. Connor filed with the STRS an APPLICATION FOR WITHDRAWAL OF MEMBERS DEPOSITS WITH INTEREST ("Withdrawal Application").

5. The Withdrawal Application executed by Mr. Connor provided, in part: "I hereby apply for the accumulation from my members deposits ... and agree that payment of said accumulation shall constitute a full and complete discharge and release of all right, interest or claim on my part to state deposit accumulations based on teaching service performed after June 30, 1957."

6. The Withdrawal Application was granted and payment approved on November 1, 1963.

7. Upon the withdrawal of his members accumulation, Mr. Connor had no credit in the STRS retirement deposit fund and no reserve in the STRS annuity reserve.

8. Mr. Connor was not a member of the STRS or any other retirement system listed in § 71.05(1)(a), Stats. (1989-90 & 1991-92), on December 31, 1963.

9. On July 1, 1974, Mr. Connor returned to teaching in Wisconsin, became a member of the STRS, and, as required by law, became a member of the "formula group." He was assigned a STRS membership number of 179368.0.

10. The combined group plan was a defined contribution plan. The formula group plan is a defined benefit plan.

11. Upon his return, the STRS did not grant any credit to Mr. Connor for his employment in 1962 and 1963.

12. The annual retirement account statements issued by the Department of Employee Trust Funds ("DETF") to Mr. Connor in the years following his return to public employment in Wisconsin indicated that DETF did not credit Mr. Connor with credit for his employment in 1962 and 1963.

13. In 1982, the STRS was succeeded by the Wisconsin Retirement System ("WRS").

14. In 1989, the Wisconsin Supreme Court held that § 42.245(1)(c), Stats. (1965), required DETF to credit one-half of their creditable service to STRS members of the combined group between 1957 and 1965 who subsequently took withdrawal of their member deposits. Schmidt v. Wisconsin Employee Trust Funds Board, 153 Wis. 2d 35, 49, 449 N.W.2d 268 (1990).

15. Mr. Connor was a member of the class affected by the Schmidt decision.

16. Despite the Schmidt decision, DETF did not initially credit Mr. Connor with his pre-1965 creditable service. DETF believed that § 40.08(10), Stats., required persons in Mr. Connor's position to submit a written challenge to DETF's annual retirement account statement containing the DETF summary of the amount of creditable service within seven years of first having notice of DETF's failure to grant credit for pre-1965 service.

17. Mr. Connor did not file a written challenge to the DETF summary of his creditable service within this seven-year period.

18. On April 5, 1991, Mr. Connor filed a Forfeited Service Purchase Estimate/Application with DETF seeking the purchase of years of creditable service based upon his public employment in 1962 and 1963 under the STRS. Mr. Connor's public employment in 1962 and 1963 translated into 1.32 years of creditable service.

19. Mr. Connor paid \$5,228.63 for the purchase of this service.

20. Mr. Connor terminated his teaching employment on June 30, 1991 and became an annuitant under the WRS on July 1, 1991.

21. In 1994, the Wisconsin Court of Appeals held that the statute of limitations under § 40.08(10), Stats., commences on the date DETF calculates and pays retirement benefits to the plan beneficiary. Benson v. Gates, 188 Wis. 2d 389, 405, 525 N.W.2d 278 (Ct. App. 1994). The Court of Appeals rejected DETF's policy of requiring a written challenge within seven years of first having notice of DETF's failure to grant credit for pre-1965 service.

22. As a result of the Benson decision, on September 6, 1995, DETF refunded a portion of the amount Mr. Connor paid for the purchase of his forfeited service. This amount was calculated as the cost for one-half year of forfeited service purchased, plus interest.

23. When petitioners filed their state income tax returns for 1990, 1991, and 1992, they failed to include in their Wisconsin adjusted gross income the annuity payments Mr. Connor received during those years from the WRS.

24. Under the date of October 25, 1993, respondent assessed petitioners \$4,201.89 for income taxes during 1990 to 1992.

25. Petitioners filed a timely petition for redetermination.

26. Under the date of May 27, 1994, respondent issued a Notice of Action denying the petition for redetermination.

27. Petitioners filed a timely appeal with this commission.

WISCONSIN STATUTES INVOLVED

Section 42.20 Definitions. In ss. 42.20 to 42.54, inclusive, unless the context otherwise requires:

* * *

(6r)(a) "Member" means a person who, as the result of having been engaged in Wisconsin teaching, has a credit in the retirement deposit fund or a reserve in the annuity reserve fund, or who is or may be entitled to a present or future benefit under the teachers' insurance and retirement law as provided by s. 42.51.
[1963-64 Stats.]

Section 42.242 Benefits under the combined group.

* * *

(5) SEPARATION BENEFITS. Any member who has ceased to be employed as a teacher in the

public schools, state colleges or university in this state, and is not on leave of absence from a teaching position in the public schools, state colleges or university in this state, may be paid the accumulation from the member's deposits made while a member of the combined group based on teaching service performed after June 30, 1957, on filing with the board before the fifteenth birthday anniversary of such member a written request therefor and a full and complete discharge and release of all right, interest or claim on the part of such member to state deposit accumulations based on teaching service performed after June 30, 1957. Withdrawal of accumulations from member's deposits made before said member became a member of the combined group shall be governed by s. 42.49.
[1963-64 Stats.]

Section 42.245 Benefits under the formula group.

* * *

(1) CREDITABLE SERVICE.

(a) Creditable service shall be expressed in years and such fractions thereof as the board determines. The creditable service of each member any time prior to July 1, 1966, shall be the number of years of service as a teacher in Wisconsin teaching (including prior service) theretofore creditable to him pursuant to the applicable statutes and rules, provided that military service meeting the requirements of s. 42.45(2) or (3) shall be included for any such period for which the member makes deposits as provided by s. 42.45 (4). The creditable service of a member with respect to teaching after June 30, 1966, shall be the number of years of subsequent service as a teacher in Wisconsin teaching until such service as a teacher is terminated, but not including any period subsequent to the June 30 following or coincident with his 70th birthday. The board shall fix and determine by proper rules and regulations how much teaching in any year is equivalent to one year of creditable service. Military service after June 30, 1966, shall be creditable on the same

basis as military service prior thereto.

* * *

(c) Creditable service for Wisconsin teaching prior to September 11, 1965 shall be reduced by one-half of any period included therein with respect to which the required deposits of a member have been withdrawn, unless repayment of any such withdrawal has been made prior to July 1, 1966, pursuant to any applicable law. Nothing in this paragraph shall be construed to reinstate any rights waived in connection with the payment of a withdrawal or separation benefit.

[1965-66 Stats.]

Section 71.05 Income computation.

(1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:

(a) Retirement systems. All payments received from ... the public employe trust fund as successor to ... the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963,

[1989-90 & 1991-92 Stats.]

RULING

Respondent's motion for summary judgment presents a single issue: Was Mr. Connor a member of the STRS as of December 31, 1963 for purposes of § 71.05(1)(a), Stats. (1989-90 & 1991-92)? Mr. Connor meets the remaining requirements of this paragraph, and if Mr. Connor is determined to be a member of the STRS as of December 31, 1963, then the income that is the basis for respondent's assessment is exempt from the income tax.

Respondent, by virtue of its motion, is entitled to

summary judgment only if the record and the affidavits so dictate and there is no genuine issue of material fact. § 802.08(2) and (3), Stats.

Because petitioners rely on an exemption, they bear a heavy burden. "The long-established rule of statutory construction in this state [is] that tax exemptions ... are matters of legislative grace and tax statutes are to be strictly construed against granting the same. One who claims such an exemption must ... bring himself clearly within the terms of the exemption." Ramrod, Inc. v. Department of Revenue, 64 Wis. 2d 499, 504, 219 N.W.2d 604 (1974). While the construction need not be the most narrow, all doubts are to be resolved against the exemption and in favor of taxability. Revenue Dept. v. Greiling, 112 Wis. 2d 602, 605, 334 N.W.2d 118 (1983).

Petitioners assert that because Mr. Connor purchased creditable service based on his employment with the University of Wisconsin in 1962 and 1963, and because of the Schmidt and Benson cases, he should be considered a member of the STRS as of December 31, 1963. Respondent argues that Mr. Connor does not qualify for the exemption under § 71.05(1)(a), Stats., because he did not have a STRS member account as of December 31, 1963.

There is no genuine issue of material fact, and respondent's motion can be resolved based on the submissions of the parties and the record in this matter.²

² Petitioners assert, without benefit of an affidavit, that upon his return to public service Mr. Connor became immediately eligible for health and life insurance. Petitioners argue this

The exemption at issue in this case was enacted by the Legislature in Chapter 267, Laws of 1963, §4. At the time of its enactment, the term "member" for purposes of the STRS had the following meaning:

"Member" means a person who, as a result of having been engaged in Wisconsin teaching, has a credit in the retirement deposit fund or a reserve in the annuity reserve fund, or who is or may be entitled to a present or future benefit under the teachers' insurance and retirement laws as provided by s. 42.51.

§ 42.20(6r)(a), Stats. (1963-64). There is neither an assertion nor evidence by petitioners that Mr. Connor was entitled to a benefit under § 42.51, Stats., in 1963. There is no dispute that Mr. Connor was engaged in Wisconsin teaching. Therefore, Mr. Connor falls within this definition of "member" only if he had a credit in the retirement deposit fund or a reserve in the STRS annuity reserve fund.

Mr. Connor did not have a reserve in the annuity reserve fund because he had not used his member's deposits or state deposits to purchase an annuity or annuities under § 42.242(1)(a), Stats. (1963-64). Moreover, Mr. Connor did not have a credit in the retirement deposit fund because he had taken his members accumulation and, pursuant to § 42.242(5), Stats. (1963-64), waived

necessarily means that he was a member of the STRS prior to his return to public employment in 1974 because, they claim, new members had to wait six months before receiving these benefits. This assertion is not considered because it was not properly before the Commission in an affidavit. Even if it were, the fact that Mr. Connor received these benefits early does not necessarily dictate the conclusion petitioners assert. It may also mean that Mr. Connor was granted benefits to which he was not entitled.

"all right, interest or claim ... to state deposit accumulations." Therefore, Mr. Connor cannot be considered a member of the STRS as of December 31, 1963.

According to petitioners, however, the story does not stop here.

In 1965, the Legislature created the formula group, members of which could receive benefits under a defined benefit plan. Ch. 250, Laws of 1965, §5; § 42.244-245, Stats. (1965-66). This plan based annuities, in part, on a formula that utilized: (1) years of creditable service, (2) final average compensation, (3) a formula factor, and (4) a measure of social security benefits. § 42.245(2)(b)2.a., Stats. (1965-66). This change, for the first time, introduced to the STRS the concept of "years of creditable service." § 42.245(1), Stats. (1965-66).

All persons who became members of the STRS after November 30, 1965 were required to be members of the formula group. § 42.244(1)(d), Stats. (1965-66). Members of the combined group of the STRS prior to that date had the option of electing to join the formula group. § 42.244(1)(a) and (c), Stats. (1965-66). In order to accommodate the conversion of combined group members into the formula group, the statute had to allow for the conversion of years of service prior to the effective date of the formula group into years of creditable service. Thus, § 42.245(1)(a), Stats. (1965-66), provided that the "creditable service of each member any time prior to July 1, 1966, shall be the number of years of service as a teacher in Wisconsin teaching (including prior service)"

However, § 42.245(1)(c), Stats. (1965-66), provided that "[c]reditable service for Wisconsin teaching prior to the effective date of this paragraph shall be reduced by the one-half of any period included therein with respect to which the required deposits of a member have been withdrawn"

The plaintiff in the Schmidt case was a teacher and member of the STRS from 1957 until 1963, when he left public employment and withdrew his member's deposit. Schmidt, 153 Wis. 2d at 37-38. In the course of his withdrawal, the plaintiff signed a waiver of his rights to the state deposit accumulation much the same as Mr. Connor had. Id. at 38. The plaintiff returned to public employment in 1964, and, after the enactment of Chapter 250 of the Laws of 1965, he opted to join the formula group. Id. at 38-39.

The Wisconsin Supreme Court held that, while the plaintiff had waived his right to money which accumulated in his retirement fund through state deposits, the plain language of § 42.245(1)(a) and (c), Stats., grants creditable service to the plaintiff, notwithstanding the withdrawal of his members accumulation. Id. at 46, 49.

By virtue of Mr. Connor's return to public service (and the mandatory membership in the formula group that accompanied his return), the impact of the Schmidt decision is that he is entitled to one-half of the creditable service to which he would otherwise be entitled based on his public employment in 1962 and 1963.

This effect, however, does not make Mr. Connor a member

of the STRS as of December 31, 1963. The enactment of § 42.245, Stats. (1965-66), simply granted to him credit under the formula group plan for his prior service upon his return to the STRS. This grant by the Legislature two years after he left the STRS does not make him a member of the STRS as of December 31, 1963 because it did not reinstate his credit in the retirement deposit fund. In fact, the Wisconsin Supreme Court specifically held that this statute does not reinstate any right to state money he forfeited when he withdrew his members accumulation in 1963. Schmidt, 153 Wis. 2d at 49.

This result was not affected by Mr. Connor's purchase of 1.32 years of creditable service in 1991. (He apparently purchased this service based on the pre-Benson understanding that he had not sought the automatic awarding of credit in a timely manner.) Again, all this purchase accomplished was adding 1.32 years to his years of creditable service. It did not reinstate his credit in the retirement deposit fund.

The Benson decision likewise had no effect on Mr. Connor's status as a member of the STRS as of December 31, 1963. The Benson decision dealt only with the statute of limitations for persons who wanted to challenge DETF's denial of their creditable service contrary to § 42.245(1), Stats., and the Schmidt decision. The Benson court merely held that the statute of limitations commences on the date DETF calculates and pays retirement benefits to the plan beneficiary, not when the participant first has notice of DETF's failure to grant credit. Benson, 188 Wis. 2d at 405.

This decision did not make Mr. Connor a member of the STRS as of December 31, 1963 because it did not reinstate his credit in the retirement deposit fund.

For the foregoing reasons, respondent's motion for summary judgment is granted.

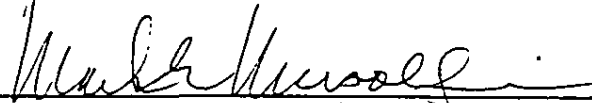
Therefore,

IT IS ORDERED

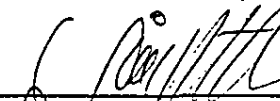
That respondent's action on petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 14th day of November, 1995.


WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Joseph P. Mettner, Commissioner



Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"