In the Supreme Court
of the
State of South Dakota

DEBRA LEE ANDERSON,	)	
	)	
Petitioner-Appellant,	)	No. 28660
	)	
v.	)	
	)	
SOUTH DAKOTA	)	
RETIREMENT SYSTEM,	)	
	)	
Respondent-Appellee	)	
_____	)	

Appeal from the Circuit Court of Meade County
Honorable Gordon D. Swanson, Judge

BRIEF FOR APPELLANT DEBRA LEE ANDERSON

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Attorney for Appellant
Debra Lee Anderson

Robert B. Anderson
Justin L. Bell
May, Adam, Gerdes & Thompson LLP
P. O. Box 160
Pierre, SD 57501
Attorneys for Appellee South Dakota Retirement System

Notice of Appeal filed July 5, 2018

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Jurisdictional Statement

On June 14, 2018, the circuit court entered a Memorandum Decision and Order of Affirmance of the Office of Hearing Examiners' ruling against Debra Lee Anderson. On June 20, 2018, the South Dakota Retirement System gave Notice of Entry. On July 5, 2018, Anderson filed a timely Notice of Appeal.

Statement of the Issues

1. Is *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2604-05 (June 26, 2015), retroactive?

   The agency held that it is; the circuit court held that "retroactivity has no application in this case."

   The most relevant authorities are *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), *Ranolis v. Dewling*, 223 F. Sup. 3d 613 (E. D. Tex. 2016), *Note: Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Communications Privilege*, 58 Wm. & Mary L. Rev. 319 (2016), and *Article: Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 Wis. L. Rev. 878.

2. Is a couple who would have been married previously but for South Dakota's unconstitutional pre-*Obergefell* prohibition of same-sex marriage entitled to be recognized as married previously?

The agency held that they are not; the circuit court agreed.

The most relevant authorities are *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), *Schuett v. FedEx Corp*, 119 F. Supp. 3d 1155 (N. D. Cal. 2016), *Hard v. AG*, 648 Fed. Appx. 853 (11th Cir. 2016), and *Mueller v. Tepler*, 95 A.3d 1011 (Conn. 2014).

3. Is the Office of Hearing Examiners' refusal to rule that Cady and Anderson would have been married before Cady retired in 2012 but for South Dakota's unconstitutional prohibition of same-sex marriage clearly erroneous?

The circuit court ruled that this "is not relevant."

The most relevant authorities are *Article: Backdating Marriage*, 105 Calif. L. Rev. 395 (2017), *In re Estate of Carter*, 159 A.3d 970 (Penn. Superior Ct. 2017), *In re Registered Domestic Partnership*

of Madrone, 350 P.3d 495 (Ore. App. 2015), and *Diaz v. Brewer*, 656 F.2d 1008 (9th Cir. 2011).

4. Did the Office of Hearing Examiners err by refusing to conclude that Debra Anderson would have been Deborah Cady's "spouse," within the meaning of SDCL 3-12-47(80), when Cady died, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U.S. Supreme Court's 2015 decision in *Obergefell*?

   The circuit court ruled that it did not.

   The most relevant authorities are SDCL 1-26-36 and *Yellow Robe v. Bd. of Trs. of the S.D. Ret. Sys.*, 2003 S.D. 67, 664 N.W.2d 517, defining "clearly erroneous."

5. May Anderson be denied benefits because she is a woman, not a man?

   The agency and circuit court ruled that she may.

   The most relevant authorities are *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), *Schuett v. FedEx Corp*, 119 F. Supp.

3d 1155 (N. D. Cal. 2016), *Hard v. AG*, 648 Fed. Appx. 853 (11th Cir. 2016), and *Mueller v. Tepler*, 95 A.3d 1011 (Conn. 2014).

Statement of the Case

The trial court was the circuit court of Meade County. The trial judge was the Honorable Gordon D. Swanson. This case is an appeal from the South Dakota Retirement System's decision denying survivor benefits, based on SDCL 3-12-47(80), to the survivor of a same-sex marriage.

SDRS's Decision failed to address the undisputed issue of whether Debra Anderson would have been married to Deborah Cady before Cady's retirement if South Dakota had not unconstitutionally prohibited same-sex marriage before Cady's death. So Anderson filed a Proposed Supplemental Finding of Fact and Conclusion of Law requesting SDRS to enter such a finding, and a corresponding conclusion that Anderson would have been Cady's "spouse" under SDCL 3-12-47(80) when Cady died, but for South Dakota's unconstitutional prohibition against same-sex marriage before *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2604-05 (June 26,

2015). Appendix 2. SDRS ruled that the evidence does not support the proposed finding and conclusion, and denied the motion. Appendix 3.

The trial court affirmed SDRS's decision denying Anderson spousal benefits and denying Anderson's Proposed Supplemental Finding of Fact and Conclusion of Law. Appendices 4 and 5.

Statement of Facts

"[T]his isn't a gimmick. This isn't an attempt to create attention for gay rights. This is truly two women that have decades of service that are simply trying to be treated fairly. Nothing more. Nothing less." Hearing Transcript ("T.") 21 (Karl Jegeris, Rapid City Chief of Police) (emphasis added).

Deborah Cady worked for the Rapid City Police Department for 26 years. T. 53. She contracted breast cancer in 2004, and retired because of it in 2012. It killed her in 2017. Administrative Record T. 62, Hearing Ex. 4 p. 3, and Hearing Ex. 6.

Deb Anderson was Deborah Cady's 29-year spouse in every way except legally, because South Dakota's law and Constitution forbade same-sex marriage until they were trumped by *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2604-05 (June 26, 2015). *Obergefell* held that "the

right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

Under SDCL 3-12-47(80), "spouse," for purpose of survivor's benefits, is "A person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member."

Anderson and Cady married on July 19, 2015, 23 days after the Supreme Court decided *Obergefell v. Hodges*. Administrative Record, Exhibit 2. So Anderson was married to Cady at the time of her death, and more than twelve months before her death. But her claim for benefits was denied because they were not married when Cady retired in 2012.

The undisputed evidence is that Cady and Anderson *would have been married when Cady retired but for South Dakota's unconstitutional prohibition of same-sex marriage*.

The late Craig Tieszen, a 32-year Rapid City police officer who was chief of police his last seven years, testified that Cady and Anderson both worked for the Rapid City Police Department, and he worked with them throughout their careers. Anderson worked as commander of the uniform division, and in supervisory roles. Cady moved from sergeant to lieutenant to captain. There were only two captains, so Cady answered directly to the police chief. She attained the highest rank of any female officer in the Department ever. Administrative Record Transcript ("T.") 6-8.

According to Tieszen, Anderson and Cady were "well known in the police department as committed partners." Tieszen testified that they "did the same things, acted the same way, [and] talked the same way that I would with my wife." [¶] They socialized together. They shopped together. They vacationed together. They simply acted like partners similar to what I would with my wife." T. 8.

Cady and Anderson relied on each other for decades. They "shared in a lot of decision making . . . they were together at many events, social functions, department functions, those sorts of things." They were

both "very highly respected" in the police department because they "both were excellent employees, excellent police officers, very high integrity, always showed great respect for the Department, never did anything that would be degrading or disrespectful to the department." And they never "flaunt[ed] their relationship." They never engaged in public displays of affection. T. 9-10 (Tieszen).

Both women were "widely accepted in the department as a couple." No one had any reservations about them coming to social events together. People expected them to come together. Tieszen considers this "a good mark for the department, that the department was very accepting of this relationship." T. 10-12.

When Cady got breast cancer, Anderson was her caregiver from beginning to end. Tieszen was asked "Based on everything you observed during your decades with both Debra Anderson and Debra Cady, do you believe they would have been married long before Debra Cady's retirement if marriage had been legal between same-sex couples in South Dakota before Debra Cady's retirement?" He answered "I do." T. 12.

Tieszen explained they "were a committed couple" and "in every way acted as a married couple." He testified: "I also think they weren't married because they were very careful about not wanting to bring any sort of bright lights or disrepute on the department." He added: "I think they realized that being in a – being married in a state that had a constitutional amendment prohibiting it might, you know, put them in a – put them and the department particularly in a bad light." T. 13. As police officers, they took oaths to support the Constitution, and they took those oaths seriously. T. 14 (Tieszen).

Karl Jegeris, the current Rapid City Chief of Police, worked with both Anderson and Cady, but more with Cady, because when there were three captains in the Department, he was one of them and she was another. From when he started in 1995, Anderson and Cady were considered to be a couple. He testified: "just like other married couples within the department that I became aware of, I was aware that they were a couple. And it was really in a very respectful way, which I found to be refreshing at that time in the law enforcement world." T. 16-19.

Chief Jegeris was at their home one evening, working on a float for the Fraternal Order of Police, and everyone was invited to come when they could and help. It was "very apparent to [him] that that was a home they shared. They shared the pets. It wasn't Deb Anderson's dog or Deb Cady's dog. It was their dog. Same thing with the horses and other things like that. [¶] So that to me was as clear of an indicator as you can get [that they were a couple]." T. 18-20.

He was asked "From everything you observed both on duty in the department and off official duty, such as when you went to their home and you observed their pets and you observed how they related to each other, did they appear to you to be in the same form of relationship as a[n] opposite sex couple who was married?" He answered "They did." T. 20.

Chief Jegeris wrote that "Deb Cady passed away in 2017, and Debra Anderson was her legal spouse at the time of her death, as she would have been for decades were it not for complicated legal issues." T. 22. He explained his statement, citing his "observations and [his] understanding of their relationship. They were truly a committed couple for decades.

They were two persons operating as one, and balanced with that they were extremely respectful to law and to the role of law enforcement related to those laws that are created. [¶] And so those two dynamics converging I believe caused them to take the path that they took and to wait until it was legally recognized in the State of South Dakota, the state that they worked and that they were upholding the law for, to do so. They certainly had the opportunity to do so prior, but it would have been – it would have – it would have been controversial. It would have brought potential media attention that wasn't what they were seeking. They were simply seeking to live a normal life like everyone else." T. 23.

Chief Jegeris testified that as law enforcement officers, Cady and Anderson were sworn to uphold the law and the Constitution, and to live their lives in a manner that ensures that the profession and department are respected in the community. By doing something illegal (being married in South Dakota when it was against the Constitution), it could "bring a cloud of doubt over the entire department." T. 24-25.

Chief Jegeris observed Anderson take care of Cady as she went downhill from breast cancer after 2004. Anderson was "devastated" by

Cady's death. The City of Rapid City gave Anderson the funeral benefit that a spouse receives when their spouse dies. T. 27.

Chief Jegeris wrote: "Ms. Cady and Ms. Anderson had been considered a married couple by my Department dating back to the early 1990's, and they were able to make it legal after the Supreme Court decision." Hearing Ex. 4, p. 9. He explained: "It is as it says. Our department considers them a married couple, period, end of story. I speak on behalf of the department." T. 28. The previous two chiefs he worked with, Chief Hennies and Chief Tieszen, treated them as a married couple. So does Rapid City Mayor Steve Allender, another former Rapid City Chief of Police. T. 28-29.

Annie Loyd, who was Deb Cady's oldest friend, is the sister of former prosecutor Paul Bachand. She knew Cady and Anderson essentially from the beginning of their relationship. She was gone from South Dakota for several years, but when she came back, "from the beginning in being around them, they were a married couple." T. 34. "It was our dogs and our house and our vehicles and — everything was our and we. It wasn't mine and hers. That was the vernacular. [¶] And

that's how we treated couples. Because you couldn't get married." T. 34-35. She regarded Cady and Anderson as married in the "1990's, 2000 [and] beyond." T. 36.

Loyd testified that Cady talked to Anderson about getting married in another state, but "it just was not an option as far as they were concerned because it was not legal in the State of South Dakota." T. 38.

Loyd moved back to South Dakota four years ago. She had no doubt that Cady and Anderson were still in a relationship that was the same as a marriage. T. 40-41.

Loyd explained that Cady is buried at the Black Hills National Cemetery, being eligible to be buried there because she was the spouse of Anderson, a military veteran. When Anderson dies, she will be buried next to Cady. T. 41.

Linda Cady, Deb Cady's older sister, testified that Cady and Anderson became a couple shortly after meeting. Deb Cady brought Anderson down to the Cady ranch in Nebraska. The Cadys are a close family. Linda considered Deb Anderson a part of her family for more than 25 years. "All family get-togethers. If Debbie [Cady] was coming,

Deb [Anderson] was coming. That was just – all those holiday[s] – you know, everybody get in the picture and smile. There was no question. Deb was going to be in the family picture because she was part of the family." Deb Anderson became the son that the Cadys' father never had, "because he could sit and talk horses with Deb." T. 45.

Linda Cady considered Deb her sister-in-law, for "almost the entire time" she has known her. She explained "when Debbie [Cady] walked in the door Deb [Anderson] was going to be two steps behind her. I mean, they were always together. So yeah. They were a couple." She considered them married in every way possible except for a marriage certificate. She explained: "they acted like a married couple. They made decisions together. They shared what the other people have already mentioned; their pets, which were their children, their property. You know, it was always ours, not hers. And, again, big decisions, small decisions, they always made them together." T. 46-47.

Long before they were married, Cady and Anderson took each other for better or for worse. For thirteen years, Anderson stuck with Cady while Cady fought breast cancer. T. 48 (Linda Cady).

Linda talked to her sister Deb about getting legally married to Anderson. Deb Cady said she would when it was legal in South Dakota. Linda has no doubt that in the 1990's and 2000's, Cady and Anderson would have married if they could have done so legally in South Dakota. She testified "They were devoted to each other," in fact more devoted than a lot of opposite-sex couples. T. 48-49.

Deb Anderson testified that she is retired from the Rapid City Police Department after 25 years of service. She met Cady in 1986. They became good friends. On July 8, 1988, they were at Sheridan Lake. They walked up a hillside and sat down. Anderson testified: "And that was the moment when we declared our love for each other." T. 53-54.

They lived together from shortly after July 8, 1988, until Cady's death in March, 2017. Their relationship was "wonderful." Cady was her "soul mate. We shared our life. You know, we – we built a home. You know, we – we did everything together, you know. . . . [¶] And, you know, we would make decisions together. We would support each other in those decisions that we made in our career and, you know, in our

personal lives." They considered themselves the same as married, even though that was not an option for them. T. 54-55.

They shared finances, and all the other responsibilities of a married couple. They made all decisions together. They took care of each other. They took care of each other's families if necessary. T. 55. Every year, they celebrated July 8 as their anniversary. On their 20th anniversary they went with friends to Las Vegas. T. 56.

They never made a secret at work that they were a couple. It was well known in the Police Department. They attended police events as a couple. T. 57.

When Massachusetts legalized same-sex marriage [in 2003], they talked about getting married. And when Iowa, being next door to South Dakota, legalized it in 2009, they hoped that someday it would be a possibility for them. Anderson testified: "We agreed that we would marry. But for us it was going to have to be when it was either recognized by the State of South Dakota, which is where we resided and worked, or by the Federal Government, you know, as a nation as a whole." T. 58.

They felt this way because of their chosen profession, law enforcement, and the oath they took: "to uphold . . . the U.S. Constitution, the Constitution of the State of South Dakota, and the laws. And at that time, you know, South Dakota wouldn't recognize it. Even if we went to Iowa and would have married, it still wouldn't have been recognized in the State of South Dakota." T. 58-59.

If they had gone to Iowa and married, and come back to South Dakota, it would have been contrary to the Constitution and laws of South Dakota, and it may have caused controversy in the police department for them and the department as a whole. They had pride in their jobs as police officers and took their jobs seriously. T. 59-60 (Anderson).

In 2009, Cady surprised Anderson with matching rings. Cady wore hers until her death. Anderson still wears hers. T. 61. Anderson misspoke at the hearing and said they were married on July 19, 2017 (T. 62), but Exhibit 2, the Marriage Certificate, shows the correct year is 2015.

Anderson nursed Cady through her onset of cancer in 2004, through surgery, through chemotherapy, through remission, through the return of the cancer and more chemotherapy, and through the decision to end

chemotherapy. During this period, they continued to treat each other as spouses. They "still were very devoted and very loving to each other." T. 62-63 (Anderson).

Argument

I. Standard of review

The standard of review of the Office of Hearing Examiners' Decision is set forth in SDCL 1-26-36. "Conclusions of law, as well as mixed questions of fact and law that require the application of a legal standard, are fully reviewable," with no deference to the agency's decision. This includes construction of statutes and rules. Purely factual issues are reviewed under the clearly erroneous standard, under which they are reversed when "the reviewing court has a definite and firm conviction that a mistake has been made." *Yellow Robe v. Bd. of Trs. of the S.D. Ret. Sys.*, 2003 S.D. 67, ¶ 9-10, 664 N.W.2d 517, 519.

This Court makes "the same review of the administrative agency's decision as the circuit court, unaided by any presumption that the circuit court's decision was correct." *Johnson v. Powder River Transp.*, 2002 S.D. 23, ¶ 12, 640 N.W.2d 739, 743.

II. *Obergefell* is retroactive, so a couple who would have been married previously but for South Dakota's unconstitutional prohibition of same-sex marriage is entitled to be recognized as married previously

A. *Obergefell* is retroactive

Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584, 2604-05 (2015), held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

The decision is retroactive. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993):

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, *regardless of*

> *whether such events predate or postdate our announcement of the rule.* . . . Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, [*Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)], *we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases*. [emphasis added]

Several courts have explicitly held *Obergefell* retroactive. "[T]he court finds that *Obergefell* applies retroactively." *Ranolis v. Dewling*, 223 F. Sup. 3d 613, 622 (E. D. Tex. 2016). "Numerous state courts and agencies" have so held. *Id.* This includes a Pennsylvania court that applied it retroactively to a 2001 same-sex marriage—which at the time was not legally recognized anywhere in the United States—so that "the surviving spouse was able to obtain all rights and privileges of validly licensed, married spouses under the laws of the Commonwealth of Pennsylvania." *Id.* at 624.

Other authorities agree. *Note: Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Communications Privilege*, 58 Wm. & Mary L. Rev. 319, 336 ("Although the Court does not explicitly

state that same-sex couples affected by pre-*Obergefell* law are entitled to retroactive application of post-*Obergefell* law, it is the logical result of the ruling.") (footnote omitted). "If the post-decision history of the Justice Kennedy-penned decisions in *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)] and [*United States v.] Windsor* [570 U.S. 744 (2013)] are any guidance, it seems nearly a foregone conclusion that the retroactive recognition of same-sex marriage rights will be a lasting result of the decision. In those cases, although the majority limited their rulings to the question of the criminalization of same-sex sodomy and the federal recognition of state-sanctioned marriages, and explicitly stayed clear of the larger questions of the rights of same-sex couple, lower courts readily extracted larger lessons about LGBT [Lesbian-Gay-Bisexual-Transgender] rights." *Id.* at 336-37 (footnotes omitted).

"[T]he Supreme Court has established a strong line of precedent to make whole the discrete groups who were victims of unconstitutionally discriminatory laws." *Article: Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 Wis. L. Rev. 873, 878. Same-sex couples such as Cady and Anderson are a discrete group who were victims

of unconstitutionally discriminatory laws that served to "disrespect and subordinate them." *Obergefell*, 135 S.Ct. at 2604.

Anderson can be made whole only if her right to marry Cady is recognized retroactively. Denying her the benefits that she would have received if she had been a man—because if she were a man, she and Cady would have been married long ago—continues to "disrespect and subordinate" both Anderson and Cady.

The Office of Hearing Examiners agreed that *Obergefell* is retroactive. Decision (Appendix 1), p. 5, line 2 ("*Obergefell* is retroactive.")

B. A couple who would have been married previously but for South Dakota's unconstitutional prohibition of same-sex marriage is entitled to be recognized as married previously

Obergefell recognized that marriage involves far more than a ceremony, a marriage certificate, and a formal legal status:

> [States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical death certificates; professional ethics rules;

> campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. *Obergefell*, 135 S. Ct. at 2601 [citation omitted]

This is a property dispute. So it involves the "property rights" explicitly recognized in *Obergefell* as an essential attribute of marriage. The rule that *Obergefell* is retroactive has been applied in many cases about property rights. These include the following.

Schuett v. FedEx Corp, 119 F. Supp. 3d 1155, 1165 (N. D. Cal. 2016) ("DOL [U. S. Department of Labor] guidance following *Windsor* [*United States v. Windsor*, 133 S. Ct. 2675 (2013), which held part of the federal Defense of Marriage Act unconstitutional] makes clear that ERISA's mandatory benefits provisions apply to all spouses, including same-sex spouses.") "The court is not persuaded by defendants' argument that *Windsor* should not be applied retroactively," citing *Harper v. Va. Dep't of Taxation*, *supra*, 509 U.S. at 90-97 (1993), for the rule that "when the

Supreme Court announces a new rule of federal law and applies that rule to the parties before it, the presumption is that the rule applies retroactively." *Id.* at 1163 and 1166.

Hard v. AG, 648 Fed. Appx. 853, 855-56 (11th Cir. 2016) (mother of deceased argued that his intestate share should be distributed to her, because son was not lawfully married under Alabama law to another man when he died; court held that Alabama law of intestate succession required distribution to the man to whom her son was not lawfully married at the time of his death, and rejected mother's argument that *Obergefell* should not be applied retroactively).

Mueller v. Tepler, 95 A.3d 1011, 1023 (Conn. 2014) (common law claim for loss of consortium must be expanded "to couples who were not married when the tortious act occurred, but who would have been married if the marriage had not been barred by state law.")

In re Fonberg, 736 F.3d 901 (9th Cir. 2013) (United States Office of Personnel Management's denial of health benefits for employee's same-sex domestic partner deprived the couple of due process and equal protection

because they were treated differently from similarly-situated couples on account of their sex or sexual orientation).

Diaz v. Brewer, 656 F.3d 1008, 1014-15 (9th Cir. 2011) (State of Arizona may not bar employee health benefits to same-sex spouse who would receive those benefits if of the opposite sex).

Applying this logic to the present case, *Obergefell's* retroactivity bars the State of South Dakota from denying Anderson the death benefits due her as a person who would have been a spouse when Cady retired but for South Dakota's unconstitutional prohibition of same-sex marriage. To deny those benefits is unconstitutional under the federal constitution, because the right to same-sex marriage is guaranteed by the federal constitution, and the right is retroactive. Denying those benefits would perpetuate the previous unconstitutional limitation of marriage to opposite-sex couples. And it would deny Anderson benefits solely because she is a woman, not a man.

The Office of Hearing Examiners ruled against Anderson on this issue, but it is a legal issue, so it is reviewed *de novo*.

III. The critical factual issue is whether Cady and Anderson would have been married before Cady retired in 2012, had South Dakota not unconstitutionally prohibited same-sex marriage

Anderson and Cady were not married before Cady's retirement in 2012. But the facts show conclusively that they would have been married but for South Dakota's unconstitutional prohibition barring them from marrying. A couple is recognized retroactively as legally married if they were not married only because it was previously unconstitutionally prohibited.

Article: Backdating Marriage, 105 Calif. L. Rev. 395 (2017) ("This Article demonstrates that the *Obergefell* decision applies not merely prospectively but also retroactively, and that same-sex couples have a constitutional right to have their marriages backdated to the date they would have married but for the existence of a legal barrier." Despite the "administrative challenges" of backdating, "actual backdating—or its functional equivalent—is constitutionally necessary to remedy constitutional harms to same-sex couples imposed by the preexisting discriminatory scheme.")

An administrative agency awarded benefits after *Obergefell* to the survivor of a same-sex marriage that was illegal when it occurred. *Article: Backdating Marriage*, *supra* at 413-14 (Department of Veterans Affairs awarded survivor benefits after *Obergefell* to survivor of same-sex marriage who had a pre-*Obergefell* wedding in 2003 that was of no legal force and effect because of Washington state's prohibition against same-sex marriage).

Other states have examined a same-sex couple's relationship "to pinpoint the date when they would have married but for a legal barrier to doing so." *Article: Backdating Marriage*, *supra* at 418. "[T]he exchange of rings is particularly strong evidence" of an "intent to marry." *In re Estate of Carter*, 159 A.3d 970, 981 (Penn. Superior Ct. 2017). Cady and Anderson exchanged rings in 2009. Cady wore hers for the rest of her life. Anderson still wears hers. T. 61.

Likewise, *In re Registered Domestic Partnership of Madrone*, 350 P.3d 495, 501 (Ore. App. 2015), holds that whether a same-sex couple is similarly situated to an opposite-sex couple is determined based on "whether the

same-sex partners *would have* chosen to marry before the child's birth had they been permitted to." (emphasis in original)

Even before *Obergefell*, a federal court of appeals barred a state from discriminating against same-sex couples by refusing to provide employee health benefits to a same-sex couple who was not legally married. *Diaz v. Brewer*, 656 F.2d 1008, 1014-15 (9th Cir. 2011) ("the district court correctly recognized that barring the state of Arizona from discrimination against same-sex couples in its distribution of employee health benefits does not constitute the recognition of a new constitutional right to such benefits. Rather, it is consistent with long standing equal protection jurisprudence holding that some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests." (ellipsis in original, internal quotations omitted).

IV. The Office of Hearing Examiners' refusal to adopt Anderson's proposed finding that Cady and Anderson would have been married before Cady retired in 2012 but for South Dakota's unconstitutional prohibition of same-sex marriage is clearly erroneous

The Office of Hearing Examiners' Decision did not find whether, if the law had allowed it, Cady and Anderson would have married before

Cady retired from the Department in 2012. So Anderson submitted a Proposed Supplemental Finding of Fact stating: "Anderson and Cady would have been married at the time of Cady's death, and their marriage would have been both before the member's (Cady's) retirement and more than twelve months before her death, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U. S. Supreme Court's 2015 decision in *Obergefell v. Hodges*." Appendix 2.

The Office of Hearing Examiners refused to adopt the proposed finding of fact, ruling that "[t]he evidence in the record does not and cannot support" it, and that "[a]ny evidence that might lead to support of" the proposed finding "would be speculation, at best." Order on Motion, Appendix 3, p. 2.

But this was clearly erroneous. As shown in the Statement of Facts, and as summarized below, the evidence on this issue was both direct and circumstantial; was from witnesses of the highest quality; and was undisputed. There is nothing speculative about a finding based on such evidence.

The evidence is undisputed, from all the witnesses, that Cady and Anderson would have been married in 2012, when Cady retired, but for South Dakota's unconstitutional prohibition against it. These witnesses included some of the most credible people who will ever testify in a legal dispute.

The late former Rapid City Police Chief Craig Tieszen, a 32-year police officer, testified how close Cady and Anderson were. After this foundational evidence, he was asked: "Based on everything you observed during your decades with both Debra Anderson and Debra Cady, do you believe they would have been married long before Debra Cady's retirement if marriage had been legal between same-sex couples in South Dakota before Debra Cady's retirement?" He answered "I do." He testified they "were a committed couple" and "in every way acted as a married couple." He believes they weren't married because they did not want to bring any disrepute on the department because the South Dakota Constitution prohibited it. T. 12-13.

Karl Jegeris, the current Rapid City Police Chief, was asked "From everything you observed both on duty in the department and off official

duty, such as when you went to their home and you observed their pets and you observed how they related to each other, did they appear to you to be in the same form of relationship as a[n] opposite sex couple who was married?" He answered "They did." T. 20.

He wrote that "Deb Cady passed away in 2017, and Debra Anderson was her legal spouse at the time of her death, as she would have been for decades were it not for complicated legal issues." T. 22.

Annie Loyd testified that she regarded Cady and Anderson as married in the "1990's, 2000 and beyond." T. 38. Linda Cady, Deborah Cady's sister, testified "they acted like a married couple." She regarded Anderson as her sister-in-law "almost the entire time" she has known her. T. 46.

Deb Anderson testified that when Iowa legalized same-sex marriage in 2009, "We agreed that we would marry. But for us it was going to have to be when it was either recognized by the State of South Dakota, which is where we resided or worked, or by the Federal Government, you know, as a nation as a whole." They felt this way because their profession was law enforcement and they had sworn to uphold the law. T. 58-59.

In addition to all this direct evidence, a wealth of circumstantial evidence showed that they shared their lives, shared all decisions, shared their pets, shared their professions, worked together honorably and respectably in them, shared their possessions, loved each other deeply, and took care of each other. They married 23 days after it became legal. Anderson nursed Cady through her breast cancer and treatment for it, to her death. Because Anderson is a veteran, Cady is buried in the Black Hills Veterans' Cemetery, where Anderson will eventually join her.

Neither Anderson nor any of her witnesses was impeached in the slightest. Not on a single fact. Not on a single detail. Not on a single subject. So the conclusion is inescapable that Anderson and Cady would have been married before 2012 if South Dakota law had allowed it.

Conclusion

Will the dead hand of South Dakota's unconstitutional law that prohibited same-sex marriage before *Obergefell* rise up from its grave and bar Anderson, because she is a woman, from receiving what every man in her position would have received?

This Court may wonder: if we rule that Deborah Anderson is entitled to survivor's benefits, how many more same-sex widows or widowers will receive survivor's benefits as a result of our decision? The answer is: probably none. The reason is that no other cases like this one have been brought, and after *Obergefell* was decided on June 26, 2015, same-sex couples have been free to marry, so a survivor of such a marriage will be plainly eligible for benefits under SDCL 3-12-47(80).

A decision in Anderson's favor will recognize the retroactivity of *Obergefell*; will prevent South Dakota's former unconstitutional prohibition against same-sex marriage from victimizing Anderson by denying her benefits based on an unconstitutional statute and constitutional prohibition; will honor Anderson and Cady's commitment as sworn law enforcement officers to obey the law and not bring law enforcement into disrepute; will prevent Anderson from being victimized by her commitment to her oath as a law enforcement officer; and will provide Anderson with the same benefits she would receive if she were a man.

Anderson asks this Court to rule that she is entitled to survivor benefits under SDCL 3-12-47(80) because she and Cady would have been

legally married when Cady died but for South Dakota's unconstitutional prohibition against same-sex marriage.

Dated: August 28, 2018 Respectfully submitted,

/s/ James D. Leach
James D. Leach
Attorney for Debra Lee Anderson

Certificate of Service

On August 28, 2018, I served this brief on appellees by e-mailing it to defendants' attorneys, Robert D. Anderson (rba@mayadam.net) and Justin L. Bell (jlb@magt.com).

/s/ James D. Leach
James D. Leach

Certificate of Compliance

This brief was prepared in Palatino Linotype 13 for Word Perfect. It contains 5681 words.

/s/ James D. Leach
James D. Leach

Appendix Table of Contents

STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS
Pierre, South Dakota

DEBRA LEE ANDERSON

RET 17-01

v.

DECISION

SOUTH DAKOTA RETIREMENT SYSTEM

An administrative hearing was held in this matter on October 31, 2017. James D. Leach, Attorney, appeared on behalf of the Petitioner, Debra Lee Anderson (Anderson). Jacqueline Storm, Attorney, appeared on behalf of Respondent, South Dakota Retirement System (SDRS). Briefs from the parties were submitted pre-hearing. Testifying at hearing were Debra Lee Anderson, Linda Cady, Annie Loyd, Karl Jegeris, and Craig Tieszen.

ISSUES

Whether the South Dakota Retirement System erred in its determination that there was no surviving spouse benefit payable?

FINDINGS OF FACT

1. Deborah Cady was employed by the Rapid City Police Department for a number of years. She advanced through the ranks to become a Captain, a position one rank below Assistant Chief of Police.

2. Ms. Cady was a Class B member of the South Dakota Retirement System.

3. Ms. Cady started her employment history in the SDRS in 1986 and retired effective May 1, 2012. She had 26 years of credited service with SDRS.

4. In her application for benefits to SDRS, after her retirement, Ms. Cady listed her marital status as single.

5. Ms. Cady had a long-term relationship with Ms. Debra Lee Anderson. This was a romantic relationship as opposed to a platonic relationship.

6. The couple met in 1986. According to Ms. Anderson, she and Ms. Cady honored July 8, 1988 as their anniversary date. The couple and their friends celebrated their 20th anniversary in Las Vegas, NV in 2008.

7. Ms. Anderson also worked as a police officer in the Rapid City Police Department. She was not supervised by Ms. Cady, but was in a separate career path through the Department. Ms. Cady and Ms. Anderson both started their respective careers with the RCPD in 1986; Ms. Anderson in February and Ms. Cady in July.

8. The couple was not secretive about their relationship. Starting in July 1988, they lived in the same house and their co-workers recognized them as being a committed couple. The former Chief of Police and the current Chief of Police had much respect for Ms. Cady and Ms. Anderson and believed they were in a committed relationship, similar to a legal marriage.

9. Because they had a same-sex relationship, they were unable to be legally married in South Dakota or have an out-of-state marriage recognized in South Dakota until June 2015 when *Obergefell v. Hodges* was decided by the U.S. Supreme Court. This case is cited at 576 U.S.___, 135 S. Ct. 2584 (2015).

10. Prior to *Obergefell*, the couple discussed getting married outside of South Dakota, but Ms. Cady did not want to get married until it would be legally recognized in South Dakota.

11. Ms. Cady and Ms. Anderson were married in a Las Vegas, NV, ceremony on July 19, 2015. This marriage is recognized by the State of South Dakota.

12. Ms. Cady passed away from breast cancer on March 10, 2017.

13. Ms. Anderson applied for a survivor benefit on March 20, 2017. On the application, Ms. Anderson listed the date of marriage as "07/19/15".

14. Any additional Findings of Fact included within the Reasoning section are incorporated by reference herein.

15. To the extent any of the foregoing are improperly designated and are instead Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

RELEVANT STATUTES

South Dakota laws applicable to surviving spouse benefits are found at SDCL 3-12-47 and 3-12-94. The statutes read in pertinent part:

SDCL 3-12-47 Terms as used in this chapter mean: ...

> (18) "Class B member," a member who is a justice, judge, state law enforcement officer, magistrate judge, police officer, firefighter, county sheriff, deputy county sheriff, penitentiary correctional staff, parole agent, air rescue firefighter, campus security officer, court services officer, conservation officer, or park ranger and is either a foundation member or a generational member;
> ...
> (39) "Foundation member," any member of the system whose contributory service began before July 1, 2017;
> ...
> (58) "Normal retirement," the termination of employment and application for benefits by a member with three or more years of contributory service or noncontributory service on or after the member's normal retirement age;
> ...
> (75) "Retiree," any foundation or generational member who retires with a lifetime benefit payable from the system;
> (76) "Retirement," the severance of a member from the employ of a participating unit with a retirement benefit payable from the system;

(77) "Retirement benefit," the monthly amount payable upon the retirement of a member;

...

(80) "Spouse," a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member;

SDCL 3-12-94. Upon the death of a foundation retiree or any foundation member who has reached normal retirement age, the surviving spouse is eligible to receive a benefit, payable in monthly installments, equal to sixty percent of the retirement benefit that the foundation member was receiving or was eligible to receive at the time of death.

REASONING

Ms. Anderson, in her brief to this Office, reasoned, "Although the denial is correct under South Dakota law, it is unconstitutional under federal law." Ms. Anderson is aware that the South Dakota retirement statutes do not recognize her as Ms. Cady's spouse, as they were married after Ms. Cady retired. Survivor benefits are only payable to the spouse of the retiree, at the time of retirement. At the time of her retirement, Ms. Cady was not married to Ms. Anderson. They had not been married in any sort of public ceremony inside or outside of South Dakota. Although living together as a couple for over 20 years, they had made a decision not to marry until the marriage could be legally recognized within the State of South Dakota.

South Dakota did not recognize same-sex marriages until June 2015, when the U.S. Supreme Court held that a state or a county could not deny a marriage license to a same-sex couple. *Obergefell v. Hodges,* 576 U.S.___, 135 S. Ct. 2584 (2015). Ms. Anderson and Ms. Cady married each other on July 19, 2015. This was after Ms. Cady retired from her job with the Rapid City Police Department. Ms. Cady made her initial application for retirement benefits in May 2012, three years prior to her marriage. Ms. Anderson was not Ms. Cady's spouse as defined by South Dakota retirement law, as the marriage took place after the retirement. SDCL § 3-12-47(80).

Ms. Anderson makes a constitutional argument that the South Dakota marriage laws restricting same-sex marriages prior to *Obergefell* were

unconstitutional and that the ruling of *Obergefell* should be retroactive. *Obergefell* is retroactive. However, in other jurisdictions the retroactive ruling only affects same-sex marriages that were already solemnized in any manner or if the state recognized common-law marriages. In South Dakota, there has to be a marriage ceremony with witnesses. South Dakota does not recognize common-law marriages. SDCL § 25-1-29.

A long line of federal cases have held *Obergefell* to be retroactive, but only if there was an unrecognized marriage between the couple that would have been recognized but for the law against same-sex marriages. See generally, *Schuett v. FedEx Corp.*, 119 F.Supp. 3d 1155 (N.D. Cal. 2016) (solemnized marriage); *Hard v. Attorney Gen.*, 648 Fed. Appx. 853 (11th Cir. 2016) (solemnized marriage); *Ranolls v. Dewling*, 223 F.Supp.3d 613 (E.D. Tx. 2016) (common-law marriage); *Bone v. St. Charles County Ambulance District,* Dist. Court, ED Missouri 2015 (solemnized marriage). This ruling regarding retroactivity has not been adopted by South Dakota courts.

The retroactive nature of the Supreme Court decision of *Obergefell* cannot create a marriage where none existed. Ms. Anderson and her witnesses testified that Ms. Cady was adamant that she did not want to be married until it was considered legal in South Dakota. Since Ms. Cady and Ms. Anderson were not married prior to Ms. Cady's retirement, Ms. Anderson is not considered to be a spouse of Ms. Cady under state law. Not even the retroactive power of *Obergefell* can create a marriage where there was none. There was a long-term relationship prior to Ms. Cady's retirement, but not a solemnized marriage as required by state law.

The South Dakota Retirement System did not err when it denied surviving spouse benefits to Ms. Anderson.

CONCLUSIONS OF LAW

1. This hearing is held pursuant to SDCL Ch. 1-26 and § 3-12-57.1. This office is given jurisdiction pursuant to SDCL § 1-26D-7.

2. Ms. Cady retired from her job on May 1, 2012. Ms. Anderson and Ms. Cady were married on July 19, 2015. Ms. Cady and Ms. Anderson were not married prior to Ms. Cady's retirement.

3. The SDRS gives a surviving spouse benefit to the spouses of workers who were married prior to retirement.

4. The US Supreme Court case of *Obergefell v. Hodges* has been ruled to be retroactive in many states. South Dakota courts have not made any rulings regarding this case.

5. The retroactive power of *Obergefell* can only legalize a marriage that was considered illegal before the ruling. It cannot create a marriage that did not exist.

6. On June 22, 2017, SDRS Director Rob Wylie, did not err when he denied surviving spouse benefits to Ms. Anderson.

7. Any additional conclusions of law included in the Reasoning section of this Proposed Decision are incorporated by this reference.

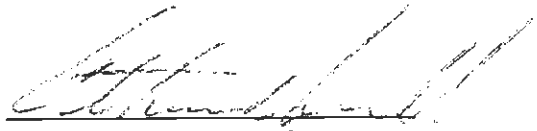
8. To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

Based upon the above Findings of Fact and Conclusions of Law, the Hearing Examiner enters the following:

ORDER

IT IS THE ORDER of the Hearing Examiner that the decision of the SDRS made on June 22, 2017 is affirmed. Ms. Anderson is not eligible to receive surviving spouse benefits of Ms. Cady.

Dated this 1st day of December, 2017.



Catherine Duenwald
Office of Hearing Examiners
523 E. Capitol
Pierre, South Dakota 57501

CERTIFICATE OF SERVICE

I certify that on December 1st, 2017, at Pierre, South Dakota, a true and correct copy of the Decision and Order in the above-entitled matter was sent via E-mail and U.S. Mail or Inter-Office Mail to each party listed below.

Ashley Parsons

Ashley Parsons

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Jim@southdakotajustice.com

Jacquelyn J. Storm
South Dakota Retirement System
222 East Capitol Ave. #8
Pierre, SD 57501
Jacque.Storm@state.sd.us

OFFICE OF HEARING EXAMINERS

FOR THE STATE OF SOUTH DAKOTA

DEBRA LEE ANDERSON

RET 17-01

v.

SOUTH DAKOTA RETIREMENT SYSTEM

Proposed Supplemental Finding of Fact and Conclusion of Law for Debra Lee Anderson

---

The findings of fact and conclusions of law entered by the Office of Hearing Examiners do not address a key factual issue presented by Ms. Anderson at the hearing: whether Anderson would have been legally married to Ms. Cady before Cady's retirement if South Dakota law had not unconstitutionally prohibited it. The evidence is undisputed. Anderson testified that she and Cady discussed this in 2009, when Iowa legalized same-sex marriage, and agreed that they would be married if South Dakota law allowed it, or United States law allowed it for the country as a whole. T. 58. All the circumstantial evidence supports Anderson's testimony. There is no contrary direct or circumstantial evidence. Accordingly,

Anderson proposes the following supplemental finding of fact and conclusion of law:

Supplemental Finding of Fact

1. Anderson and Cady would have been married at the time of Cady's death, and their marriage would have been both before the member (Cady's) retirement and more than twelve months before her death, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U. S. Supreme Court's 2015 decision in *Obergefell v. Hodges*.

Supplemental Conclusion of Law

1. Anderson would have been Cady's "spouse" within the meaning of SDCL 3-12-47(80) when Cady died, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U. S. Supreme Court's 2015 decision in *Obergefell v. Hodges*.

Request for Ruling within Ten Days

Because of the 30-day time limit to appeal, Ms. Anderson respectfully requests a ruling on the proposed supplement finding and conclusion within 10 days.

Dated: December 4, 2017 Respectfully submitted,

/s/James D. Leach
James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
(605) 341-4400 tel
(605) 341-0716 fax
jim@southdakotajustice.com
Attorney for Debra Lee Anderson

Certificate of Service

I certify that on this 4th day of December, 2017, I served this document on the State of South Dakota by e-mailing and mailing a copy of it to the attorney for the State, Jacquelyn J. Storm, SDRS, 222 E. Capitol Ave. #8, Pierre, SD 57501, jacque.storm@state.sd.us.

/s/ James D. Leach
James D. Leach

STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS
Pierre, South Dakota

DEBRA LEE ANDERSON

RET 17-01

v.

ORDER ON MOTION

SOUTH DAKOTA RETIREMENT SYSTEM

An administrative hearing was held in this matter on October 31, 2017. James D. Leach, Attorney, appeared on behalf of the Petitioner, Debra Lee Anderson (Anderson). Jacqueline J. Storm, Attorney, appeared on behalf of Respondent, South Dakota Retirement System (SDRS). A Decision containing Findings of Fact, Conclusions of Law, and Final Order, was made on December 1, 2017. The Notice of Entry of Order was filed by SDRS on December 4, 2017.

On December 4, 2017, the Petitioner Ms. Anderson, through her attorney Mr. Leach, made a motion for a Proposed Supplemental Finding of Fact and Conclusion of Law. Both Anderson and SDRS submitted briefs in regards to this Motion.

The Proposed Finding of Fact is:

> Anderson and Cady would have been married at the time of Cady's death, and their marriage would have been both before the member (Cady's) retirement and more than twelve months before her death, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U. S. Supreme Court's 2015 decision in *Obergefell v. Hodges*.

The Proposed Conclusion of Law is:

> Anderson would have been Cady's "spouse" within the meaning of SDCL 3-12-47(80) when Cady died, but for South Dakota's unconstitutional prohibition against same-sex marriage before the U. S. Supreme Court's 2015 decision in *Obergefell v. Hodges*.

APPENDIX 11

The Proposed Finding states that "Anderson and Cady would have been married at the time of Cady's death." It is already a Finding of Fact that they were married for more than one year at the time of Ms. Cady's death. I'm going to presume that what the Petitioner meant to propose was "would have been married at the time of Cady's retirement."

SDRS replied to the Motion on December 7, 2017, and it appears they did so with the same presumption as I have made above. The SDRS argument is that any marriage between the Anderson and Ms. Cady at the time of her retirement would be speculative. Speculations are not proper Findings of Fact but must be supported by the evidence.

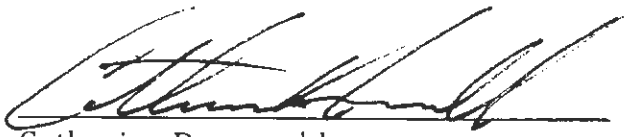
Multiple witnesses credibly testified that Ms. Cady and Ms. Anderson had spoken of marriage for many years, but as a couple were unwilling to go out of state to marry in a ceremony that would not be recognized in South Dakota. It is not speculation that this couple was not married at the time of Ms. Cady's retirement. These supported facts are not in opposition to the Proposed Finding, but are reasons why the Proposed Finding is not factual.

The credible testimony of multiple witnesses properly leads to the entered Findings of Fact; more so than speculation about what Ms. Cady might have done, had the law been different. The law in South Dakota had not changed prior to her retirement, so we do not know whether she and Ms. Anderson would have been married prior to her retirement.

The evidence in the record does not and cannot support the Proposed Supplemental Finding of Fact and Conclusion of Law. Any evidence that might lead to support of the Proposed Finding and Conclusion would be speculation, at best.

The Motion for a Supplemental Proposed Findings of Fact and Conclusion of Law is Denied.

Dated this 8th day of December, 2017.



Catherine Duenwald
Office of Hearing Examiners
523 E. Capitol
Pierre, South Dakota 57501

CERTIFICATE OF SERVICE

I certify that on December 8th, 2017, at Pierre, South Dakota, a true and correct copy of the Order on Motion in the above-entitled matter was sent via E-mail and U.S. Mail or Inter-Office Mail to each party listed below.

Ashley Parsons

Ashley Parsons

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Jim@southdakotajustice.com

Jacquelyn J. Storm
South Dakota Retirement System
222 East Capitol Ave. #8
Pierre, SD 57501
Jacque.Storm@state.sd.us

APPENDIX 13

STATE OF SOUTH DAKOTA	)	IN THE CIRCUIT COURT
	)	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT
DEBRA LEE ANDERSON,	)	
Appellant,	)	
v.	)	File No. 46CIV17-422
SOUTH DAKOTA RETIREMENT	)	
SYSTEM,	)	MEMORANDUM DECISION
Appellee.	)	

This is an appeal from a decision of an Administrative Law Judge from the South Dakota Office of Hearing Examiners, brought pursuant to SDCL Chapter 1-26.

-PROCEDURAL HISTORY-

Appellant, Debra Lee Anderson (Anderson), sought survivor benefits through the South Dakota Retirement System (SDRS) in March 2017 following the death of her spouse, Deborah Cady (Cady), who had retired several years prior. SDRS denied Anderson's application, because Anderson and Cady were not married at the time of Cady's retirement. Anderson followed the necessary steps to obtain internal review of SDRS's decision, most recently by seeking review by the South Dakota Office of Hearing Examiners (OHE). OHE rendered a final decision upholding SDRS's denial of survivor benefits. Anderson filed a timely Notice of Appeal, which brings the matter before this Court.

-STANDARD OF REVIEW-

SDCL 1-26-36 provides the standard of review for an appeal from a decision of OHE:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> 1. In violation of constitutional or statutory provisions;
> 2. In excess of the statutory authority of the agency;
> 3. Made upon unlawful procedure;
> 4. Affected by other error of law;
> 5. Clearly erroneous in light of the entire evidence in the record; or
> 6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. "In accordance with this statute, we review questions of fact under the clearly erroneous standard. ... Findings of fact are clearly erroneous when the reviewing court has a definite and

firm conviction that a mistake has been made. ... Conclusions of law ... are fully reviewable." *Yellow Robe v. Board of Trustees of the South Dakota Retirement System*, 2003 SD 67, ¶ 9 (citations omitted). This Court is to defer to OHE as to disputed factual issues, but review legal issues without such deference.

-ANALYSIS-

The facts in this action are largely undisputed, and Anderson does not challenge any of the findings that were entered by OHE. Anderson and Cady were engaged in a committed, long-term relationship for many years; akin to a common-law marriage. They declared their love for each other on July 8, 1988 and celebrated that date as their anniversary. They were both well-regarded members of the Rapid City Police Department, who advanced through the ranks into leadership positions. They held themselves out openly as a couple, and this fact was widely accepted amongst the Department's other members. Cady retired in May 2012. She applied for retirement benefits through SDRS, listing her marital status as single.

On June 26, 2015, the United States Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Obergefell* held, based on both the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, that "same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold – and it now does hold – that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at ¶ 22. Cady and Anderson were formally married in Las Vegas, Nevada on July 19, 2015.

While *Obergefell* was pending, a similar case, *Rosenbrahn v. Daugaard*, 61 F.Supp.3rd 862 (D.S.D. 2015) was making its way through South Dakota's federal courts. There, the District Court ruled on January 12, 2015 that South Dakota's same-sex marriage restrictions, found in SDCL 25-1-1, SDCL 25-1-38, and S.D. Const. art. 21, § 9, violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. The Court enjoined State officials from relying on those laws to either disallow new marriage licenses or refuse to recognize the legality of prior same-sex marriages. The Court stayed execution of its decision for the pendency of any appeals. State officials appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed on August 11, 2015. The Court noted that the *Obergefell* decision had not invalidated South Dakota's laws – but only those of the States whose same-sex prohibitions were challenged in that case. *Rosenbrahn v. Daugaard*, 799 F.3rd 918, ¶ 2 (8th Cir. 1985). The Court left the question of whether to leave the District Court's injunction in place for the District Court's consideration, in light of the State's assurances that it would comply with *Obergefell's* mandates.

Cady passed away on March 10, 2017. Anderson applied to SDRS for survivor benefits, listing July 19, 2015 as the date of her marriage to Cady. SDRS's basis for denying benefits was

based on South Dakota law (SDCL 3-12-47, 3-12-94), which limits survivor benefits to those who were, *inter alia*, married to the deceased retiree prior to that person's retirement. Anderson met the other criteria to be considered a surviving spouse except the requirement that they were married when Cady retired.

Obergefell gave same-sex marriage protection to two types of couples: 1) those who were denied the right to marry because of their States' laws; and 2) those whose home States fail to recognize marriages that were performed in States that had legalized such unions. *Rosenbrahn* extended the same protection to similarly-situated couples from South Dakota. In the present case, Anderson seeks to extend these rulings to a third group: couples who lived in a state that prohibited same-sex marriages, and chose not to marry in a state where it was allowed -- but would have done so but for their home state's refusal to recognize the marriage's legal validity. Among the various Plaintiffs in *Obergefell* and *Rosenbrahn*, none were in Anderson's position.

The Court finds the factual distinction that Anderson and Cady chose not to marry in another State prior to *Obergefell* significant. Had they done so, and assuming retroactive application of the above decisions,[1] Anderson would presumably prevail here. However, they chose not to take this course of action (for cited reasons that seem plausible and laudable); instead waiting until an option to their liking – going out of State to wed after the Supreme Court said home States must recognize such a marriage – became available.[2] Similarly, if they had sought a marriage license in South Dakota, had it denied based on the existing State laws, successfully challenged that denial in the courts as the Plaintiffs in other States did, then married in South Dakota, Anderson would be entitled to survivor benefits. However, they also chose not to pursue this avenue. This Court agrees with the simple proposition advanced by SDRS and held by the Hearing Examiner: that even retroactive application of *Obergefell* cannot create a marriage where none was ever solemnized according to any State's law at the time of the measuring event (Cady's retirement).

Anderson further contends on this appeal that OHE should have adopted, or at least considered on its merits, her proposed finding that Anderson and Cady would have been married when Cady retired, but for South Dakota's unconstitutional prohibition against same-sex marriage. This is a factual issue, which is of course entitled to deference. OHE declined to

[1] The parties debate whether the Court's ruling in *Obergefell* is to be applied retroactively. In light of this Court's ruling, there is no need to consider that question.

[2] Sometime between June 26, 2015 (the date *Obergefell* was decided) and August 11, 2015 (when the Eighth Circuit announced its decision in *Rosenbrahn*), South Dakota officials apparently decided to extend Obergefell's protections to South Dakotans by not enforcing the State's same-sex marriage prohibitions. The parties dispute the significance of the fact that Cady and Anderson were married in the middle of this window on July 19, 2015; although there is no evidence exactly what date South Dakota decided to follow *Obergefell*. At any rate, in light of this Court's conclusion that the retroactivity issue does not affect its decision, this question need not be reached.

adopt such a finding based on its conclusion that such a finding would be speculative. Even if OHE should have considered that proposed finding on its merits – and further assuming that this Court were inclined to overrule that finding based on the evidence presented or remand to OHE for consideration – it is not relevant, in light of this Court's conclusion that *Obergefell* and *Rosenbrahn* do not extend to couples in her situation.

Plaintiff notes that numerous state courts and agencies have applied *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), retroactively. *Brief for Debra Lee Anderson*, p. 20. For example, in *Ranolls v. Dewling*, 223 F.Supp.3d 613 (E.D. Tex. 2016), the Court held that the Supreme Court's decision in *Obergefell* applied retroactively to a common law married same-sex partner's claim that she had standing to sue as a surviving spouse. *Id.* In doing so, the Court was guided by a Pennsylvania state court decision that applied *Obergefell* retroactively after it found that the decedent and her surviving spouse had been married since 2001 pursuant to Pennsylvania common law. As a result of this finding, the Court held that the surviving spouse was vested with all rights and privileges afforded married spouses under the Commonwealth of Pennsylvania. *Id.* at 624. Unlike *Ranolls*, the triggering event to *Obergefell* retroactivity is not present here. Namely, because South Dakota does not recognize common law marriage as an equivalent to traditional marriage, the date of retroactivity can only be the date the parties entered into marriage. Because Ms. Anderson and Ms. Cady's marriage was *subsequent* to *Obergefell*, retroactivity has no application in this case. (emphasis added).

Plaintiff's reliance on *Hard v. Attorney Gen.*, 648 Fed.Appx. 853 (11th Cir. 2016) is equally unavailing for many of the same reasons. There, a same-sex surviving spouse brought an action against state officials and the administrator of his husband's estate seeking disbursement of proceeds from a wrongful death lawsuit. *Id.* Importantly, the Plaintiff and his decedent spouse were legally married in Massachusetts in 2011. *Id.* at 854. Following the wedding, the couple returned to their home state of Alabama. *Id.* At that time, Alabama refused to recognize same-sex marriages legally performed in another state. *Id.* Because of this position, the decedent's death certificate indicated that he was "never married," and the space for "surviving spouse" was left blank. *Id.* Plaintiff's lawsuit sought, *inter alia*, "a declaration that Alabama's laws prohibiting the recognition of lawful same-sex marriages was unconstitutional and an injunction requiring Alabama officials to recognize marriages of same-sex couples entered into in other jurisdictions." *Id.* In 2015, a district court in the Southern District of Alabama declared that Alabama's same-sex marriage ban was unconstitutional. *Id.* Thereafter, the *Hard* Court stayed its proceedings pending the Supreme Court's resolution of *Obergefell*. *Id.* After the Supreme Court held that same-sex marriage was a fundamental right under the Constitution, Plaintiff moved to lift the stay and for disbursement of his wrongful death spousal share. *Id.* at 855. Additionally, the Alabama Attorney General moved to dismiss the case on mootness grounds. *Id.* The District Court granted both parties' requested relief, and thereafter the Court of Appeals affirmed. *Id.* Contrary to Anderson's contention, the Court of Appeals did not explicitly find that *Obergefell*

was retroactive. Rather, the Court expressly stated that it took no action on the decedent's mother's[3] unpreserved claim that *Obergefell* was not retroactive and could not "make a same-sex marriage that was illegal in 2011 legal for the purposes of a wrongful death settlement in 2014." *Id.* Ultimately, whether the Court made an explicit determination as to *Obergefell* retroactivity is largely immaterial because the Plaintiff and his decedent spouse were married in a state that recognized same-sex marriage. That they were residents of a state that refused to recognize such a union is similarly insignificant because not only was Alabama's ban on same-sex marriage held unconstitutional, but *Obergefell's* holding arguably validated the marriage. That is to say, unlike Ms. Anderson and Ms. Cady, Hard and his husband fell squarely within the class of couples for whom *Obergefell* held there was no lawful basis for a State to refuse to recognize a lawful same-sex marriage on the ground of its same-character: a lawful marriage performed in another state. *Obergefell*, 135 S. Ct. at ¶ 22. Again, the Court finds this distinction significant and ultimately fatal to Anderson's retroactivity argument.

Plaintiff next cites *Diaz v. Brewer*, 656 F.2d 1008 (9th Cir. 2011) as standing for the proposition that a state may not bar same-sex spouses from receiving employee health benefits that they would otherwise be entitled to if of the opposite sex. *Brief for Debra Lee Anderson*, p. 18. However, the considerations that prompted the court's holding in *Diaz* are not present here. For example, in 2008, the Arizona administrative code was amended to expand the definition of eligible "dependent[s]" to include domestic partners, regardless of gender. *Id.* at 1010. In other words, same-sex domestic partners were eligible to receive health-care benefits as a dependent of their state employed partner. *Id.* However, in late 2008, Arizona voters approved an amendment to the state Constitution to redefine marriage as being "between one man and one woman: only a union of one man and one woman shall be valid or recognized as a marriage in this state." *Id.* In 2009, House Bill 2013 was signed into law wherein the term "dependent" was redefined as "spouse" thereby eliminating health-care coverage for previously covered same-sex partners. *Id.* Here, although South Dakota amended its state constitution to similarly redefine the definition of marriage as a union "between a man and a woman," at no point under South Dakota law was the definition of "eligible dependent" expanded to include domestic partners regardless of gender. Put another way, South Dakota law did not confer a benefit to same-sex partners only to thereafter divest them of that right. In fact, the statute at issue still bears identical language even after *Obergefell* took effect. Namely, that a "spouse" is "a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member." *See* SDCL § 3-12-47(80). "When a state chooses to provide [b]enefits [to its employees], it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular." *Diaz*, 656 F.3d at 1013. Unlike the Plaintiffs in *Diaz*, Anderson does not seem to argue that South Dakota's survival benefits statute is itself discriminatory or violative of the Equal Protection Clause. Rather, her challenge focuses exclusively on South Dakota's

[3] Pat Fincher, the mother of the decedent, was allowed to intervene.

unconstitutional prohibition on same-sex marriage. Because of this distinction and the fact that the benefits statute applies equally irrespective of sexual orientation, the Court finds Plaintiff's reliance on *Diaz* unpersuasive.

The final question to be considered is whether this Court should carve out an exception by extending *Obergefell* and *Rosenbrahn* to include South Dakotans who chose not to marry in another State because of this State's same-sex marriage ban. The Court declines to do so.

While the Court has found no case law directly on point, *Hawkins v. Grese*, 68 Va.App. 462, 809 S.E.2d 441 (2018) provides an instructive guide. The Court agrees with Plaintiff insofar as *Hawkins* is factually distinguishable from the present case in that it involves the rights of a third party (e.g., child custody). However, the Court disagrees that its holding is so lacking in substantive value as to render its application meaningless. There the parties were long-term same-sex partners who never married or formed a civil union in another state. *Id.* at 443. Grese became pregnant via artificial insemination and gave birth during the relationship. *Id.* The child was raised in the parties' shared home until the relationship ended. *Id.* Prior to this time, Hawkins never took steps to adopt the child. *Id.* Although the parties informally shared custody of the child following the termination of their relationship, Grese eventually terminated the child's contact with Hawkins. *Id.* Thereafter, Hawkins moved for custody and visitation in the Juvenile and Domestic Relations District Court ("JDR"). *Id.* The JDR court awarded joint legal and physical custody as well as shared visitation. *Id.* Grese appealed the JDR court's decision to the Circuit Court, which ultimately held that Hawkins was a "non-parent," and did not rebut the parental presumption in favor of Grese's custody of the child. *Id.* at 444. Hawkins then sought an initial determination from the Court of Appeals that she was a parent and thus should have been afforded an equal right to custody. *Id.* at 445. In rejecting this view, the Court held that the state's definition of parentage "did not discriminate between same-sex and opposite sex. If the couple is not married, the non-biological/non-adoptive partner ***is not a parent irrespective of gender or sexual orientation.***" *Id.* at 447. (emphasis added). Although the Court was sympathetic to the bond shared between Hawkins and the child, it concluded that the lower court did not violate Hawkins' constitutional rights by declining to recognize her as the child's parent. *Id.* In doing so, the Court held "a classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* Because Hawkins did not take steps to adopt the child nor did the parties ever marry, the Court ultimately found that *Obergefell* provided no relief. *Id.* at 448. *See Sheardown v. Guastella*, No. 338089, 2018 WL 2229058, at *5 (Mich. Ct. App. May 15, 2018) (holding that "Obergefell did not grant same-sex couples anything more than the right to have states recognize their marriage."). Although factually distinguishable, the underlying rationale applies with equal force to the case at bar. For example, just as the state's definition of parentage in *Hawkins* "did not discriminate between same-sex and opposite sex," neither does South Dakota's definition of spouse. *Id.* at 447. Moreover, although Hawkins did not expressly ask the Court to recognize a

formal marriage to Grese, the Court found that her reliance on *Obergefell* "implies we should retroactively construct an informal one." *Id.* at 448. Here, Anderson does ask this Court to create a marriage post hoc despite the fact that she and Ms. Cady never availed themselves of the marriage laws in another state that recognized same-sex marriage. To this end, the *Hawkins* Court concluded "how retroactivity applies to the constellation of rights discovered in *Obergefell* is a question which has not yet been answered, nevertheless, this principle of retroactivity does not license this Court to engage in forensic retrospective marriage construction." *Id.* at 449. This Court agrees.

The Court does not doubt the strength of Ms. Anderson and Ms. Cady's commitment to one another, nor in any way seek to diminish the depth of Ms. Anderson's loss. *Ferry v. De Longhi America Inc.*, 276 F.Supp.3d 940, 953 (N.D. Cal. 2017). While existing societal attitudes toward same-sex marriage have changed significantly in recent time, "the Court [is not] blind to the vestiges of inequity that remain even after the rights of same-sex couples have been declared." *Id.* However, the Court's duty to exercise reasoned judgment cannot be allowed to yield simply because fairness might favor a different result. It is one thing to redefine the concept of marriage but quite another to recognize a marriage that did not exist prior to Ms. Cady's retirement. Neither the Constitution nor *Obergefell* demand such a sweeping result. Regardless of how commendable the reasons, the parties did not obtain a marriage license or otherwise take steps to formalize their marriage until *after Obergefell* took effect. Thus, retroactivity is rendered a nullity. On these facts, the Court cannot find that OHE erred when it upheld SDRS's denial of survivor benefits.

-CONCLUSION-

Based on the foregoing, the decision of the OHE is hereby affirmed.

SIGNED AND ENTERED THIS the 14 day of June, 2018.

BY THE COURT:

Gordon D. Swanson
Circuit Court Judge

ATTEST: Linda Keszler, Clerk of Court

(Deputy)

(SEAL)

FILED
JUN 14 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

APPENDIX 20

STATE OF SOUTH DAKOTA)SS COUNTY OF MEADE	)	CIRCUIT COURT FOURTH JUDICIAL CIRCUIT

DEBRA LEE ANDERSON, Petitioner, vs. SOUTH DAKOTA RETIREMENT SYSTEM, Respondent.	CIV 17-422 **ORDER OF AFFIRMANCE**

This administrative appeal from a Decision by the South Dakota Office of Hearing Examiners (OHE) came on for hearing before this Court pursuant to SDCL § 1-26. The parties submitted written briefs and arguments and stipulated that any hearing would be waived by them.

The Court has considered the written submissions of the parties and the record in its entirety, and the Court having further entered its written Memorandum Decision dated June 14, 2018, a copy of which decision is attached hereto, labeled as Exhibit A and incorporated herein by reference, and good cause appearing therefore, it is hereby

ORDERED, that the Decision of the South Dakota Office of Hearing Examiners dated December 1, 2017, which ruled that Debra Lee Anderson was not eligible to receive surviving spouse benefits relating to Deborah Cady, and the "Order on Motion" entered by OHE dated December 8, 2017, which ruled on supplemental proposed findings of fact are hereby affirmed in their entirety. It is further

(INTENTIONALLY LEFT BLANK)

ORDERED, that the appeal of Appellant Debra Lee Anderson is dismissed.

Dated this 20 day of June, 2018.

BY THE COURT

Gordon D Swanson

Honorable Gordon D. Swanson
Circuit Court Judge

ATTEST:

Clerk of Courts, Deputy

(SEAL)

FILED
JUN 20 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

S.D. Codified Laws § 3-12-47

Current through acts received as of June 30th from the 2018 Regular Session of the 93rd Legislative Assembly, Supreme Court Rule 18-15, and the June 5th, 2018 Primary Elections.

LexisNexis® South Dakota Codified Laws Annotated > Title 3 Public Officers and Employees (Chs. 3-1 — 3-24) > Chapter 3-12 South Dakota Retirement System (§§ 3-12-1 — 3-12-522)

Notice

This section has more than one version with varying effective dates.

3-12-47. Definitions of terms.

Terms as used in this chapter mean:

(1)"Actuarial accrued liability," the present value of all benefits less the present value of future normal cost contributions;

(2)

(3)"Actuarial experience analysis," a periodic report which reviews basic experience data and furnishes actuarial analysis which substantiates the assumptions adopted for the purpose of making an actuarial valuation of the system;

(4)"Actuarial valuation," a projection of the present value of all benefits and the current funded status of the system, based upon stated assumptions as to rates of interest, mortality, disability, salary progressions, withdrawal, and retirement as established by a periodic actuarial experience analysis which takes into account census data of all active members, vested terminated members and retired members and their beneficiaries under the system;

(5)"Actuarial value of assets," equal to the fair value of assets;

(5A)"Actuarially determined contribution rate," the fixed, statutory contribution rate, no less than the normal cost rate with expenses assuming the minimum COLA, and no greater than the normal cost rate with expenses assuming the maximum COLA;

(77)"Retirement benefit," the monthly amount payable upon the retirement of a member;

(78)"Single premium," the lump-sum amount paid by a supplemental pension participant pursuant to a supplemental pension contract in consideration for a supplemental pension benefit;

(79)"Social investment," investment, divestment, or prohibition of investment of the assets of the system for purposes other than maximum risk-adjusted investment return, which other purposes include ideological purposes, environmental purposes, political purposes, religious purposes, or purposes of local or regional economic development;

(80)"Spouse," a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member;

(81)"State employees," employees of the departments, bureaus, commissions, and boards of the State of South Dakota;

(82)"Supplemental pension benefit," any single-premium immediate pension benefit payable pursuant to *§§ 3-12-192* and *3-12-193*;

(83)"Supplemental pension contract," any agreement between a participant and the system upon which a supplemental pension is based, including the amount of the single premium, the type of pension benefit, and the monthly supplemental pension payment amount;

(84)"Supplemental pension contract record," the record for each supplemental pension participant reflecting relevant participant data; a designation of any beneficiary, if any; the amount of the participant's funds rolled into the fund; the provisions of the participant's supplemental pension contract; and supplemental pension payments made pursuant to the contract;

(85)"Supplemental pension participant," any member who is a retiree receiving a benefit from the system, or, if the member is deceased, the member's surviving spouse who is receiving a benefit from the system, and who chooses to purchase a supplemental pension benefit pursuant to the provisions of this chapter;

(86)"Supplemental pension spouse," any person who was married to a supplemental pension participant at the time the participant entered into the supplemental pension contract;

(87)"System," the South Dakota Retirement System created in this chapter;

(88)"Tax-qualifying purchase unit," any participating unit which elects to allow the unit's employees to purchase credited service on a tax-deferred basis by

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28660

DEBRA LEE ANDERSON,

Appellant,

-vs-

SOUTH DAKOTA RETIREMENT SYSTEM,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE GORDON D. SWANSON
CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE
SOUTH DAKOTA RETIREMENT SYSTEM

JAMES D. LEACH
ATTORNEY AT LAW
1617 SHERIDAN LAKE RD.
RAPID CITY, SD 57702
(605) 341-4400

ATTORNEY FOR APPELLANT

ROBERT B. ANDERSON
JUSTIN L. BELL
MAY, ADAM, GERDES &
THOMPSON, LLP
PO BOX 160
PIERRE, SD 57501
(605) 224-8803

ATTORNEY FOR APPELLEE

NOTICE OF APPEAL FILED JULY 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED:

PRELIMINARY STATEMENT

Appellee, South Dakota Retirement System, will utilize the following references throughout this brief:

- South Dakota Retirement System – SDRS or Appellee
- Debra Lee Anderson – Anderson or Appellant
- South Dakota Office of Hearing Examiners – OHE
- Decedent, Debra Joan Cady – Cady
- OHE Administrative Record – AR, followed by page number of the alphabetical or chronological index.
- Transcript of October 31, 2017, Administrative Hearing – T, followed by page number
- Hearing exhibits from the October 31, 2017, Administrative Hearing – Ex, and exhibit number.

JURISDICTIONAL STATEMENT

This is an administrative appeal by Anderson under SDCL 1-26-30 et. seq. Anderson applied for survivor benefits through SDRS on March 20, 2017, following the death of her spouse, Cady. *Ex. 3*. The application was denied by letter dated April 24, 2017. *Ex. 4.*

After Anderson followed the SDRS grievance procedure, a final determination was made which affirmed the denial of benefits. *Ex. 9*. Anderson replied to SDRS by letter dated July 7, 2017. *Ex. 10*. The reply was treated as an appeal and a hearing was scheduled before a hearing examiner of the OHE. *Ex. 11* and *AR 80-82*. A hearing was

held before hearing officer Catherine Duenwald on October 31, 2017. *See, in general, transcript*.

On December 1, 2017, OHE issued a written decision which consisted of Findings of Fact, Conclusions of Law, a narrative, and an Order. *AR 35-41*. The Order affirmed the prior decision of SDRS, which denied Anderson entitlement to spousal benefits as a result of Cady's death. Anderson also submitted a proposed supplemental Finding of Fact and Conclusion of Law. *AR 31-34*. SDRS objected to those proposals (*AR 26-28*) and they were rejected by OHE. *AR 23-25*. A timely appeal to the Meade County Circuit Court in the Fourth Judicial Circuit was filed by Anderson. *AR 1-19*.

On June 14, 2018, the circuit court entered a Memorandum Decision and Order of Affirmance of the Office of Hearing Examiners' ruling against Debra Lee Anderson. On June 20, 2018, the South Dakota Retirement System gave Notice of Entry. On July 5, 2018, Anderson filed a timely Notice of Appeal to this Court.

STATEMENT OF LEGAL ISSUES

Issue 1. DID THE HEARING EXAMINER ERR IN DENYING SURVIVING SPOUSE BENEFITS TO APPELLANT?

The Hearing Examiner held that the Appellant was not entitled to surviving spouse benefits, which was affirmed by the Circuit Court.

Authority:

SDCL 3-12-47(80)

SDCL 25-1-29

Obergefell v. Hodges, 576 US _____, 135 S. Ct. 2584 (2015)

Hawkins v. Grese, 68 Va.App. 462, 809 S.E.2d 441 (2018)

Estate of Kranig, 291 N.W.2d 781 (S.D. 1980)

Issue 2. WAS THE HEARING EXAMINER CLEARLY ERRONEOUS IN REJECTING THE APPELLANT'S PROPOSED SUPPLEMENTAL FINDING OF FACT AND CONCLUSION OF LAW?

The Hearing Examiner rejected Appellant's proposed supplemental Finding of Fact and Conclusion of Law, which was affirmed by the Circuit Court.

Authority:

SDCL 1-26-25

SDCL 1-26-36

Osman v. Karlen and Assocs., 2008 SD 16, 746 NW 2d. 437.

STATEMENT OF THE CASE

This appeal arises from Findings of Fact, Conclusions of Law, and Order entered by OHE, and OHE's rejection of a proposed supplemental Finding and Conclusion received from Anderson. The ultimate result of OHE's decision was to affirm SDRS in its prior denial of spousal benefits to Anderson. The OHE concluded that Cady and Anderson were not married prior to Cady's retirement, and that Anderson did not meet the definition of a "spouse" in terms of entitlement to survivor benefits. OHE further held that there was no "marriage" which was entitled to retroactive effect, since no solemnized marriage existed previously and South Dakota does not recognize common-law marriage. *See, in general, Decision. AR 35-41*. The Memorandum Decision, Findings, Conclusions, and Order were entered after an evidentiary hearing conducted pursuant to the provisions of SDCL 1-26.

On June 14, 2018, the circuit court entered a Memorandum Decision and Order of Affirmance of the Office of Hearing Examiners' ruling against Debra Lee Anderson. On June 20, 2018, the South Dakota Retirement System gave Notice of Entry. On July 5,

2018, Anderson filed a timely Notice of Appeal to this Court.

STATEMENT OF THE FACTS

Anderson and Cady were both members of the Rapid City Police Department. According to two chiefs of police under whom they served, they were well-known in the Department as committed partners (*T8)* and widely accepted as a couple (*T10-11*). According to Craig Tieszen, who served as Chief of Police from 2000-2007, there were no issues within the department about accepting this relationship. (*T12*).

Chief Karl Jegeris testified that since he began work at the department in 1995, it was very clear that the two were a committed couple and had the same relationship as anyone who was married. (*T18, 20*). Jegeris stated "*Our department considers them a married couple, period, end of story. I speak on behalf of the department.*" (*T28, Ex. 4).* In her testimony, Anderson agreed that they had been a well-known couple for many years in the Rapid City Police Department (*T57*).

Anderson and Cady had been involved in a personal and committed relationship since July 1988 (*T54).* They lived together as a couple since shortly after that time (*T54).* SDRS does not and never has disputed or questioned the commitment or genuineness of their relationship, the fact that their relationship was well-known and accepted by others, or that they were both excellent police officers. In fact, in states that recognize a legal common-law marriage relationship, their case presents a compelling argument for the existence of a common-law marriage between the two. However, South Dakota does not recognize such a legal relationship. SDCL 25-1-29.

The fact remains that until July 2015, the couple never took steps to solemnize their marriage in any way. They were fully aware they could have done so in another

state that issued marriage licenses for same-sex couples. (*T68).* Had they chosen to do so, they could have solemnized a marriage early enough so that Anderson would have qualified for spousal retirement benefits. When they did marry, they did so in the state of Nevada on July 19, 2015. (*T62*, *Ex. 2*). As will be discussed more fully below, that marriage took place at a time prior to the formal nullification of South Dakota's constitutional and statutory provisions which held that marriages between same-sex couples were not legally recognizable in South Dakota.

This sequence of certain significant events is important to note. Cady and Anderson first declared their love for each other in July 1988, and moved in together shortly thereafter. *(T54*). They lived together until the time of Cady's death in March 2017. In early-to-mid 2012, Cady retired from the Rapid City Police Department, mainly due to illness. (*Ex. 1)*. She applied for SDRS Retirement Benefits for herself by written application dated February 29, 2012 (*Ex. 1)*. In that application, she listed her "marital status" as "single". *See Ex. 1, T64-65*.

Massachusetts legalized same-sex marriage in 2004, and Iowa did so in 2009 (SDRS asks this Court to take judicial notice of those facts pursuant to SDCL 19-19-201). Cady retired in approximately March 2012. (*Ex. 1*).

In the general election of November 2006, South Dakota voters approved Amendment C to the South Dakota Constitution:

> Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more person in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.

South Dakota Constitution, Article 21, Section 9.

In 2014, seven same-sex couples commenced an action against the Governor and

Attorney General of the State of South Dakota, as well as other defendants in US District Court for the District of South Dakota, Southern Division. *See Rosenbrahn v. Daugaard et al*, 4:14-cv-04081. The Plaintiffs sought a declaration that the South Dakota constitutional and statutory provisions defining marriage were unconstitutional. US District Court Judge Karen Schreier decided the case by cross-motions for summary judgment granting Plaintiffs' motion and denying that of the Defendants. A written decision was issued by Judge Schreier on January 12, 2015. *See Rosenbrahn v. Daugaard, et al*, 651 F. Supp. 3d. 862 (D.S.D. 2015). However, Judge Schreier agreed to stay the judgment, pending appeal:

> …Because this case presents substantial and novel legal questions, and because there is a substantial public interest in uniformity and stability of the law, this Court stays its judgment pending appeal.

651 F Supp. 3d. 862, 877

The case was appealed. During the pendency of that appeal, the United States Supreme Court handed down its decision in *Obergefell v. Hodges*, 576 US _____ _____, 135 S. Ct. 2584 (2015). In response to the decision in *Obergefell*, Plaintiffs filed a motion with the Eighth Circuit Court of Appeals to vacate Judge Schreier's stay so that the decision in *Obergefell* could be enforced. The State filed a motion seeking a declaration that the appeal was moot.

In denying both parties' motions, but affirming Judge Schreier's prior decision, the Eighth Circuit Court of Appeals acknowledged that *Obergefell* did not have the effect of nullifying the South Dakota Constitution or statute which defined marriage:

> South Dakota suggests that Obergefell moots this case. But, the Supreme Court specifically stated that "the state laws challenged by Petitioners in these cases are now held invalid… citations omitted… The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee – not South

Dakota.

Rosenbrahn v. Daugaard, 799 F.3d 918, 921-22 (8th Cir. 2015).

Cady passed away on March 10, 2017. (*Ex. 6)*. Following Cady's death, Anderson filed an application for survivor benefits resulting from the death of Cady. (*Ex. 3*). In the application, Anderson indicated the two had been legally married on July 19, 2015, and in a relationship since July 8, 1988. In order to constitute a "spouse" who may be entitled to survivor benefits under the South Dakota Retirement System, a person must fit the definition of "spouse". That definition is contained in SDCL 3-12-47(80):

> "Spouse", a person who was married to the member at the time of the death of the member, and whose marriage was both before the member's retirement, and more than twelve months before the death of the member;

On July 19, 2015, Anderson and Cady were married in Nevada. *(Ex. 2)*. This occurred at a time when Judge Schreier's stay was still in effect, and the state of South Dakota was not issuing marriage licenses to same-sex couples. When South Dakota's constitutional provision and statutory definition of marriage were nullified by the Eighth Circuit Court of Appeals at a later date, their marriage became recognized. Therefore, the first of the three requirements as to qualify as a spouse were satisfied. That is, Cady and Anderson were legally married at the time of Cady's death.

Likewise, the marriage took place more than twelve months before the death of the member. However, Anderson cannot satisfy the second requirement of the statutory test – i.e. that the marriage took place before the member's retirement in March 2012.

It is undisputed that Anderson cannot satisfy the second prong of the test established in SDCL 3-12-47(80). Therefore, Anderson asked the SDRS and the OHE to speculate that Anderson and Cady would have married prior to 2012, but they did not do

so in an effort to refrain from committing some "illegal" or "unlawful" act. She also contends that, had they been married legally in some state which permitted it, such an act would have caused some disruption in the Rapid City Police Department.

As noted above, Anderson and Cady were in a committed relationship for more than 18 years prior to the adoption of the constitutional provision defining marriage in South Dakota. Therefore, they could have married any time prior to that date in another state which recognized such marriage and not offended any constitutional provision in the State of South Dakota. It is apparent that, at the very minimum, Massachusetts recognized such a marriage in 2004. The couple even discussed that fact, according to Anderson (*T58*). Neither the South Dakota Constitution (after November 2006) nor any statutory provision made same-sex marriage "unlawful" or otherwise criminalized same-sex marriage in South Dakota. The Constitution and statute simply provided that South Dakota did not recognize the legal implications of such a union.

Subsequent to the hearing and initial decision in this case, Anderson submitted a proposed Supplemental Finding of Fact and a proposed Supplemental Conclusion of Law. The import of both is that Anderson and Cady would have been married prior to Cady's retirement in March 2012, but for South Dakota's unconstitutional prohibition against same-sex marriage. See *AR 31-34*. OHE rejected the proposals based on its sound reasoning that the proposals required speculation. *See AR 23-25*.

In her Motion, Anderson did not state exactly when the couple would have been married, other than of course proposing that OHE find that they definitely would have been married prior to Cady's retirement in March 2012. The fact is that no constitutional provision existed prior to November 2006 regarding same-sex marriage in South Dakota.

In addition, no statutory or constitutional provision criminalized the act of legally marrying elsewhere. It is disingenuous for Anderson to argue to the contrary, and equally disingenuous for Anderson to argue that their marriage would have changed the perception of the Rapid City Police Department concerning their relationship or commitment. It is absolutely undisputed from the record that everyone considered them to be "married" due to the nature and sincerity of their commitment. The simple fact is that they chose not to marry, and never solemnized their marriage until July 2015. It is too speculative at this point to now ask this Court, OHE, or SDRS, to recognize a marriage which never existed in legal form – even more speculative to request that the finder of fact determine exactly when they would or would not have married. Anderson and Cady had a choice – to marry or not to marry – prior to July 19, 2015; they made the choice not to do so.

STANDARD OF REVIEW

The OHE Decision, the Findings of Fact and Conclusions of Law entered by OHE, and the OHE's rejection of the proposed Supplemental Finding of Fact and Conclusion of Law by Anderson are the basis for the decision now appealed from.

This Court has consistently stated the proper standard of review for reviewing agency decisions as follows:

> Our review of agency decisions is the same as the review made by the circuit court. *In re Jarman*, 2015 SD 8, ¶8, 860 NW 2d. 1, 5. We "give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL 1-26-36. We may reverse or modify an agency's findings if they are "clearly erroneous in light of the entire evidence in the record." *Id*. Our review under the clearly erroneous standard is highly deferential, and we reverse only if review of the entire record has left us "with a definite and firm conviction that a mistake has been committed." *Osman v. Karlen and Assocs*., 2008 SD 16, ¶15, 746 NW 2d. 437, 443 (quoting *Fine-Ag, Inc. v. Feldman Bros*., 2007 SD 105, ¶19, 740 NW 2d.

857, 863).

Black v. Div. of Crim. Investigation, 2016 SD 82, ¶ 13, 887 NW 2d. 731, 735-736.

In *Osman v. Karlen and Assocs.*, 2008 SD 16, 746 NW 2d. 437, the Supreme Court further defined the clearly erroneous standard of review:

> In applying the clearly erroneous standard, our function is not to decide factual issues de novo. The question is not whether this court would have made the same findings that the trial court did, but whether, on the entire evidence we are left with, a definite and firm conviction that a mistake has been committed. This court is not free to disturb the lower court's findings unless it is satisfied that they are contrary to a clear preponderance of the evidence. Doubts about whether the evidence supports the court's Findings of Fact are to be resolved in favor of the successful party's version of evidence, and of all inferences fairly deducible therefrom which are favorable to the court's action.

Id. at ¶ 15.

Therefore, in reviewing the OHE's decision, this Court cannot disturb the OHE's factual findings unless it is satisfied that those findings are contrary to a clear preponderance of the evidence and must further resolve doubts about the evidence in favor of the OHE's decision. Legal issues may be reviewed de novo.

ARGUMENT

1. THE HEARING EXAMINER DID NOT ERR IN DENYING SURVIVING SPOUSE BENEFITS TO APPELLANT

As noted above, in order to constitute a "spouse" who may be entitled to survivor benefits under the South Dakota Retirement System, a person must fit the definition of "spouse". That definition is contained in SDCL 3-12-47(80):

> "Spouse", a person who was married to the member at the time of the death of the member, and whose marriage was both before the member's retirement, and more than twelve months before the death of the member[.]

The South Dakota Retirement System submits that since Cady retired in March 2012 and thereafter married Appellant on July 19, 2015, that the Hearing Examiner's decision should be affirmed.

The beginning proposition for this appeal is that *Obergefell* is retroactive. If it is not retroactive, Appellants have no viable claim. Neither the United States Supreme Court nor the South Dakota Supreme Court has addressed that issue; accordingly, no controlling case law is applicable to this case.

Appellant, the Hearing Examiner, and the Circuit Court cite cases in which *Obergefell* was deemed retroactive as applied in states that have common law marriage statutes or where couples previously solemnized a marriage prior to *Obergefell* being decided. *See Schuett v. FedEx Cop.,* 119 F.Supp. 3d 1155 (N.D. Cal. 2016) (striking of DOMA on constitutional grounds applied retroactive to solemnized marriage); *Ranolls v. Dewling,* 223 F.Supp.3d 613 (E.D. Tx. 2016) (Obergefell applies retroactively to authorize common-law marriage).[1] However, as reasoned in *Appel v. Celia*, No. CL-2017-0011789, 2018 Va. Cir. LEXIS 15 (Cir. Ct. Feb. 8, 2018), "Courts across the nation appear split as to *Obergefell's* retroactivity. *See, e.g., Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016) (retroactive as applied); *Lake v. Putnam*, 316 Mich. App. 247, 894 N.W.2d 62 (Mich. Ct. App. 2016) (not retroactive as applied)."

Despite some federal district courts having applied *Obergefell* as retroactive to marriages that were solemnized prior to *Obergefell* being handed down and where

[1] The Hearing Examiner also cites to *Bone v. St. Charles Cty. Ambulance Dist*., No. 4:15CV912 RLW, 2015 U.S. Dist. LEXIS 123207 (E.D. Mo. Sep. 16, 2015) and *Hard v. Attorney Gen*., 648 Fed. Appx. 853 (11th Cir. 2016). Appellee submits that those cases do not stand for the proposition that *Obergefell* is retroactive. *Bone* only went as far as to deny a preliminary injunction where the defendant agreed to provide employees with same-sex spouses the same benefits as those offered to employees with different-sex spouses because it was "exact remedy Plaintiffs seek[.]" *Bone*, at *6. In similar reasoning, *Hard* specifically decided that "[w]e need not address this argument" because the case was moot because a state agency received the relief the Petitioner was seeking.

common-law marriage is authorized, it is an open question as to whether *Obergefell* is retroactive in such cases. In making such a determination, it is important to recognize that prior to the *Obergefell* decision¸ controlling precedent of both the United States Supreme Court and the Eighth Circuit held that there was no fundamental right to a same-sex marriage. *See Baker v. Nelson,* 409 U.S. 810 (1972) and *Citizens for Equal Protection v. Bruning*, 455 F.3d 850 (8th Cir. 2006).

In Bruning, the Eighth Circuit made several specific holdings: first, that a class based upon sexual orientation was not a suspect class requiring heightened scrutiny review. *Bruning*, 455 F.3d at 866-67. Second, that states had the power to regulate marriage and classify those persons who could validly marry. *Id.* at 867. Third, that the Nebraska Constitutional provision limiting marriage to a man and a woman had a rational basis and did not violate the Equal Protection Clause. *Id.* at 867-68. Finally, in rendering its decision, *Bruning* specifically referenced and discussed the Supreme Court's decision in *Baker* to support its holding. *Id.* at 870-71. *Baker* dismissed, for want of a substantial federal question, a mandatory appeal from a Minnesota Supreme Court decision holding that same-sex marriage was not a fundamental right and that the Minnesota prohibition on same-sex marriage did not violate either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Baker,* 191 N.W.2d 185, 186-87 (Minn. 1971); *Baker*, 409 U.S. 810 (1972).

These decisions are important in this case because they properly classify *Obergefell* as a "new rule" and contrary to prior precedent of the United States Supreme Court and the Eighth Circuit. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (*Baker v. Nelson* must be and now is overruled). Appellant recognizes the Supreme

Court's preference for retroactivity in *Harper*, holding: "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." 509 U.S. at 89 (emphasis added). However, the Court did not reason that this rule was absolute, did not overrule *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and did not address a situation where the decision overrules a specific prior decision of the Court.

In *Chevron Oil*, the Supreme Court espoused a three-part test to determine whether a law should be applied only prospectively rather than retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application . . . .

Id. at 106-07 (citations omitted).

Certainly, given the fact that the Supreme Court overruled its own precedent, one that was long held, and the fact that the prospective relief provides for an adequate remedy, it is not a given that the *Obergefell* should be given retroactive application. These issues are important and largely left unresolved. *See Pidgeon v. Turner*, 60 Tex. Sup. Ct. J. 1502 (2017) ("We find these arguments both interesting and important, but . . . we express no opinion[.]"

All the foregoing notwithstanding, and despite such being "interesting and important" (as reasoned by the Texas Supreme Court), the South Dakota Supreme Court need not determine whether *Obergefell* is retroactive to determine the outcome of this appeal. Since 1959, South Dakota has not recognized common law marriage. *See Estate*

of Duval v. Duval-Couetil, 2010 S.D. 2, ¶ 7, 777 N.W.2d 380, 382. ("Common-law marriages were statutorily abrogated in South Dakota in 1959 by an amendment to SDCL 25-1-29."). Pursuant to SDCL 25-1-29, a "[m]arriage must be solemnized . . . ." *See generally Estate of Kranig*, 291 N.W.2d 781 (S.D. 1980) (holding persons to not be married despite evidence of intent and treatment of married because, in part, union was not solemnized); *Starret, et al. v. Tyon*, 392 N.W.2d 94 (S.D. 1980) (holding a marriage is still valid if solemnized but no license is received within 20 days). That requirement is applicable to all marriages, regardless of gender or sexual orientation.

In the case at hand, as reasoned by the Hearing Examiner and Circuit Court, even if *Obergefell* is retroactive, Appellant made no attempt to solemnize a marriage with Cady prior to her retirement, despite recognition that Appellant was aware they could legally get married in other states prior to 2015. HT 68:5-7. In addition, nothing criminalized or prevented a wedding ceremony in South Dakota or elsewhere prior to the stay being lifted in *Rosenbrahn v. Daugaard*. It is not disputed by Appellant that she and her partner were fully aware they could have been married in another state that issued marriage licenses for same-sex couples. (*T68)*. Rather, Appellant and Cady made a conscious decision not to solemnize their relationship until they got married on July 19, 2015 in Las Vegas, Nevada (prior to the stay being lifted in *Rosenbrahn v. Daugaard*). HT at 65:15-19.

Appellant cites to a handful of cases and secondary sources which have applied *Obergefell* as retroactive. The Office of Hearing Examiners agreed with Appellant that *Obergefell* is retroactive. Appellee does not necessarily submit otherwise, but would submit that it is not a settled question and that it is a nullity in this case, because as both

the Office of Hearing Examiners and the Circuit Court reasoned, whether *Obergefell* is retroactive is not the underlying issue in this case. Rather, the question is whether Appellee (or the judiciary) may "create a marriage post hoc despite the fact that [Appellant] and Ms. Cady never availed themselves of the marriage laws in another state that recognized same-sex marriage." Circuit Court Memorandum Decision at 7.

Appellant cites some authority which at first glance, would appear to authorize the same. However, those cases are nearly all applying *Obergefell* in states that recognize common law marriage. For example, in *Ranolls v. Dowling*, 223 F.Supp.3d 613 (E.D. Tex. 2016), the Court held that *Obergefell* applied retroactively to authorize a marriage under the state's law authorizing common law marriage. In doing so, it cited a Pennsylvania court which applied *Obergefell* retroactively to common law marriage. *Id.* at 624. However, South Dakota law does not recognize common law marriage, regardless of sexual orientation. SDCL 25-1-29; *See also Estate of Kranig*, 291 N.W.2d 781 (S.D. 1980). Accordingly, the line of cases applying *Obergefell* retroactively to authorize marriage in states with laws authorizing common law marriage are not applicable.[2]

Appellee cites an opinion from a United States District Court for the Northern District of California, specifically *Schuett v. FedEx Cor*p, 119 F.Supp. 3d 1155 (N.D. Cal. 2016). However, in that case, the Court put particular emphasis on the fact that the Plaintiff and her spouse were "married in a civil ceremony at their home. The officiant was a Sonoma County Supervisor, and the ceremony was witnessed by a number of friends and family members." *Id.* at 1159. That is simply not the case at hand, and if it was, the OHE decision could possibly have mandated a different outcome.

[2] This would also apply to *Mueller v. Tepler*, 95 A.3d 1011 (Conn. 2014).

Appellant then cites *Hard v. Attorney Gen.*, 648 Fed.Appx. 853 (11th Cir. 2016). However, that case deals with a case where the Plaintiff was legally married in Massachusetts prior to *Obergefell,* and then returned to their home state of Alabama. Once again, if those were the facts presented in this case, the OHE decision presumably would mandate a different outcome. Maybe of greater importance, the *Hard* Court explicitly refused to rule on whether *Obergefell* was retroactive, finding the question to be immaterial to the outcome of the case. *See id.* at 855.

Appellant also cites *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013), which relates to DOMA's application to civil unions authorized under state law, and was decided prior to *Obergefell*. The case has no application to *Obergefell's* retroactivity, but rather, post *Windsor,* found DOMA's definition of marriage as being unconstitutionally deficient in light of an Oregon law which authorized civil unions. *Id.* at 902-903. However, in the case at hand, Appellant did not enter into a civil union with Cady recognized by any state.

Lastly, Appellant cites to *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), a case that was decided prior to *Obergefell* or *Windsor*. *Diaz* presented a situation where a state health plan granted benefits to dependents in same-sex relationships, and later changed the law effectively revoking those same benefits. *Id.* at 1010. There the Court explicitly found that there was no constitutional right to benefits, but, citing *Lawrence v. Texas*, found there was no rational basis in changing the law to deny benefits to dependents of same-sex relationships. However, the definition of spouse found in SDCL 3-12-47(80), is not discriminatory and applies to all people, regardless of gender or sexual orientation. It simply requires that the "marriage was both before the member's retirement, and more

than twelve months before the death of the member[.]" There is no evidence that this requirement was adopted because of a "desire to harm a politically unpopular group[.]"

The Circuit Court addressed nearly all of these cases in its Memorandum Decision, as they were cited to both the Office of Hearing Examiners and the Circuit Court. Memorandum Decision pg. 4-6. In her brief, Anderson fails to address or rebut any of the analysis outlined by the Circuit Court. Appellee submits that the authority submitted to this Court was properly rejected by the Circuit Court upon the rationale given in the court's Memorandum Decision.

In short, Anderson and Cady decided not to get married until July 19, 2015. SDRS does not dispute that Anderson and Cady were in a sincere and loving relationship prior to that date. But, regardless of sexual orientation, many people have been in long term, loving and sincere relationships who failed to receive benefits entitled to a spouse. The same was true when the Supreme Court acknowledged the statutory abrogation of common law marriage in South Dakota in *Estate of Kranig*, 291 N.W.2d 781 (S.D. 1980). It was also true more recently in *Estate of Duval v. Duval-Couetil*, 2010 S.D. 2, 777 N.W.2d 380. However, the necessary implication of the abrogation of common-law marriage in South Dakota is that a surviving partner from a sincere and loving relationship would not be entitled to certain benefits if the parties did not solemnize a marriage. The same is true here. As reasoned by the Circuit Court:

> It is one thing to redefine the concept of marriage but quite another to recognize a marriage that did not exist prior to Ms. Cady's retirement. Neither the Constitution nor *Obergefell* demand such a sweeping result. Regardless of how commendable the reasons, the parties did not obtain a marriage license or otherwise take steps to formalize their marriage until *after Obergefell* took effect. Thus, retroactivity is rendered a nullity.

Memorandum Decision at Pg. 7.

In support of this conclusion, the Circuit Court properly considered *Hawkins v. Grese*, 68 Va.App. 462, 809 S.E.2d 441(Va. App. 2018). In *Hawkins*, the Court reasoned:

> *Obergefell* provides no help for Hawkins because she and Grese were never married. Hawkins does not expressly ask us to recognize a formal "marriage" to Grese, but her reliance on *Obergefell* implies that we should retroactively construct an informal one. Our Supreme Court has recently held that ceremonial intent trumps legalistic form in marital matters and that solemnization is the *sine qua non* of any marriage, which need not coincide with the formal licensing of the union by the Commonwealth. *See Levick v. MacDougall*, 294 Va. 283, 805 S.E.2d 775 (2017). Even given this wide latitude, there is no marriage here. Hawkins concedes that the parties made no attempt to marry. Whatever a "solemnization" of marriage may be, it is not present in this record. That Hawkins and Grese were legally forbidden to marry in the Commonwealth at the time they began their relationship does not establish that they would have exercised the option if it were available. Moreover, currently, for civil matters, the general rule of retroactivity for Supreme Court precedent holds that
>
> > [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.
>
> *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).
>
> How retroactivity applies to the "constellation of rights" discovered in *Obergefell* is a question which has not yet been answered, nevertheless, this principle of retroactivity does not license this Court to engage in forensic retrospective marriage construction.

Id. at ¶ 18-19.

The Circuit Court properly addressed this precedent and found that although that *Hawkins* is factually distinguishable (it is a custody case), it provided an "instructive guide." Appellee recognizes the factual differences but submits that the underlying rationale exists in both situations: "How retroactivity applies to the 'constellation of

rights' discovered in *Obergefell* is a question which has not yet been answered, nevertheless, this principle of retroactivity does not license this Court to engage in forensic retrospective marriage construction." *Id.* at 449.

Indeed, if the Court were to accept Appellant's position, the question remains as to when they were married? There is never an answer provided to that question by Appellant. Indeed, on the application for survivor benefits that was submitted by Appellant, the "date of marriage" was listed as July 19, 2015, i.e. the date of solemnization. Based on the face of the application as *submitted by Appellant*, benefits are not due. In addition, on Cady's application for retirement benefits, she indicated that she was single and left the spouse information portion of the application blank. Lastly, in Cady's Last Will and Testament, which was executed in 2011, Appellant is not referred to as a spouse, but rather as Cady's "best friend." *See* Exhibit 5. None of this denies that they were in a committed and sincere relationship, but rather goes to documenting that the date of their marriage can only be construed as the date that they solemnized their relationship on July 19, 2015 in Las Vegas, Nevada.

Lastly, in her conclusion, Appellant asks this Court the following question: "Will the dead hand of South Dakota's unconstitutional law that prohibited same-sex marriage before *Obergefell* rise up from its grave and bar Anderson, because she is a woman, from receiving what every man in her position would have received?" The simple answer is no. Appellant is not being denied benefits because of her gender or her sexual orientation. Appellant is being denied benefits because her application does not entitle her to benefits under South Dakota law. The same would be true for any applicant who claimed benefits because of an unsolemnized alleged common law marriage existed,

regardless of gender or sexual orientation. As recognized in the application for benefits, Appellant did not marry Ms. Cady until July 19, 2015. Under of SDCL 3-12-47(80), Appellant is not to be considered a spouse.

II. THE HEARING EXAMINER WAS NOT CLEARLY ERRONEOUS IN REJECTING THE APPELLANT'S PROPOSED SUPPLEMENTAL FINDING OF FACT AND CONCLUSION OF LAW.

Appellant argues that the Office of Hearing Examiners wrongly refused to rule on a critical fact issue when it rejected Appellant's proposed supplemental finding of fact and conclusion of law. However, that is not the case. The hearing examiner *did* rule on the proposed supplemental finding of fact and conclusion of law and rejected them as being speculative and not supported by the evidence. *See* AR 23-25. That rejection met the duty of the Hearing Examiner under SDCL 1-26-25.

In doing so, the hearing examiner had the ability to weigh live testimony that was presented before the Office of Hearing Examiners, and that finding should not be disturbed unless clearly erroneous. "Doubts about whether the evidence supports the court's Findings of Fact are to be resolved in favor of the successful party's version of evidence, and of all inferences fairly deducible therefrom which are favorable to the court's action." *Osman v. Karlen and Assocs.*, 2008 SD 16, ¶ 15, 746 NW 2d. 437. The Office of Hearing Examiners rejected the proposals based on its sound reasoning that they required speculation, which is wholly appropriate, since evidence presented at hearing does not support the proposed finding.

Appellant points to various testimony regarding the "beliefs" of their former co-workers and of Appellant. However, in support of the Hearing Examiner's ruling, there is a stark difference and uncertainty in the testimony. Craig Tieszen provided no

timeframe for when the parties would have been married, only that they lived like a married couple lived. (*T20*). Annie Loyd testified that she regarded them as married "in the 1990's, 2000 and beyond." (*T28*). Deborah Cady testified she regarded Appellant as her sister-in-law "almost the entire time" she has known her. (*T46*). Then, Appellant herself testified in 2009 that: "We agreed we *would* marry." (*T58*) (emphasis added). Her own testimony in the future tense confirms at that point they did not consider themselves married at that time. Appellant followed through and did marry Cady on July 19, 2015.

Once again, if the Court were to accept Appellant's position, the question remains as to when they were married or when would they have married? There is never an answer provided to that question by Appellant or any of her witnesses. Indeed, there are several divergent answers in the record. Indeed, on the application for survivor benefits that was submitted by Appellant, the "date of marriage" was listed as July 19, 2015. Certainly, the Hearing Examiner's decision to reject the proposed finding was not clearly erroneous.

CONCLUSION

For all of the foregoing reasons, Appellee, the South Dakota Retirement System, respectfully requests that the Court affirm the Circuit Court's Order of Affirmance of the Office of Hearing Examiners.

Dated this 28th day of September, 2018.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/Robert B. Anderson

ROBERT B. ANDERSON
JUSTIN L. BELL
Attorneys for Appellee
503 S. Pierre St.
PO Box 160
Pierre, SD 57501
(605)224-8803
rba@mayadam.net
jlb@mayadam.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date above written one electronic copy of the Brief of Appellee in the above-entitled action was emailed to jim@southdakotajustice.com and that two true and correct copies of the foregoing Appellant's Brief and all appendices were mailed by first class mail, postage prepaid to:

Jim Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702

The undersigned further certifies that one original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed by first class mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 and one electronic copy of the Brief of Appellant in the above-entitled action was emailed to scclerkbriefs@ujs.state.sd.us on the date above written.

/s/Robert B. Anderson
ROBERT B. ANDERSON

CERTIFICATE OF COMPLIANCE

Justin L. Bell, attorney for Appellee, hereby certifies that the foregoing Brief of Appellee complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has been used. Brief of Appellee contains 5,750 words and does not exceed 32 pages. Microsoft Word processing software has been used.

Dated this 28th day of September, 2018.

/s/Robert B. Anderson
ROBERT B. ANDERSON

APPENDIX

1-26-25. Form, contents and notice of decisions, orders and findings. A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. It may affirm, modify, or nullify action previously taken or may direct the taking of new action within the scope of the notice of hearing. It shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

Source: SL 1966, ch 159, § 12; SL 1978, ch 13, § 8.

1-26-30. Right to judicial review of contested cases--Preliminary agency actions. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Source: SL 1966, ch 159, § 15 (1); SL 1972, ch 8, § 26; SL 1977, ch 13, § 12; SL 1978, ch 13, § 9; SL 1978, ch 15.

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Source: SL 1966, ch 159, § 15 (7); SL 1972, ch 8, § 29; SL 1977, ch 13, § 16; SL 1978, ch 13, § 10; SL 1978, ch 17; SL 1983, ch 6, § 2.

3-12-47. Definition of terms. Terms as used in this chapter mean:

(1) "Actuarial accrued liability," the present value of all benefits less the present value of future normal cost contributions;

(2) Repealed by SL 2018, ch 33, § 1.

(3) "Actuarial experience analysis," a periodic report which reviews basic experience data and furnishes actuarial analysis which substantiates the assumptions adopted for the purpose of making an actuarial valuation of the system;

(4) "Actuarial valuation," a projection of the present value of all benefits and the current funded status of the system, based upon stated assumptions as to rates of interest, mortality, disability, salary progressions, withdrawal, and retirement as established by a periodic actuarial experience analysis which takes into account census data of all active members, vested terminated members and retired members and their beneficiaries under the system;

(5) "Actuarial value of assets," equal to the fair value of assets;

(5A) "Actuarially determined contribution rate," the fixed, statutory contribution rate, no less than the normal cost rate with expenses assuming the minimum COLA, and no greater than the normal cost rate with expenses assuming the maximum COLA;

(6) "Air rescue firefighters," employees of the Department of the Military who are stationed at Joe Foss Field, Sioux Falls, and who are directly involved in firefighting activities on a daily basis;

(7) "Approved actuary," any actuary who is a member of the American Academy of Actuaries or an Associate or a Fellow of the Society of Actuaries who meets the qualification standards of the American Academy of Actuaries to issue actuarial opinions regarding the system or any firm retaining such an actuary on its staff and who is appointed by the board to perform actuarial services;

(8) "Assumed rate of return," the actuarial assumption adopted by the board pursuant to § 3-12-121 as the annual assumed percentage return on trust fund assets, compounded;

(9) "Beneficiary," the person designated by a member of the system to receive any payments after the death of such member;

(10) "Benefits," the amounts paid to a member, spouse, spouse and family, child, or beneficiary as a result of the provisions of this chapter;

(11) "Board," the Board of Trustees of the South Dakota Retirement System;

(12) "Calendar quarter," a period of three calendar months ending March thirty-first, June thirtieth, September thirtieth, or December thirty-first of any year;

(13) "Campus security officers," employees of the Board of Regents whose positions are subject to the minimal educational training standards established by the law enforcement standards commission pursuant to chapter 23-3 and who satisfactorily complete the training required by chapter 23-3 within one year of employment and whose primary duty as sworn law enforcement officers is to preserve the safety of the students, faculty, staff, visitors and the property of the University of South Dakota and South Dakota State University. The employer shall file with the system evidence of the appointment as a sworn law enforcement officer at the time of employment and shall file evidence of satisfactory completion of the training program pursuant to chapter 23-3 within one year of employment;

(14) "Child," depending on the circumstances, as follows:

(a) For purposes of benefits pursuant to this chapter, an unmarried dependent child of the member, who has not passed the child's nineteenth birthday and each unmarried dependent child, who is totally and permanently disabled, either physically or mentally, regardless of the child's age, if the disability occurred before age nineteen. It includes a stepchild or a foster child who depends on the member for support and lives in the household of the member in a regular parent-child relationship. It also includes any child of the member conceived during the member's lifetime and born after the member's death; or

(b) For purposes of beneficiary-type payments pursuant to this chapter, a person entitled to take as a child via intestate succession pursuant to the provisions of Title 29A;

(15) "Class A credited service," service credited as a Class A member of the system;

(16) "Class A member," any member other than a Class B member or a Class C member and is either a foundation member or a generational member;

(17) "Class B credited service," service credited as a Class B member of the system;

(18) "Class B member," a member who is a justice, judge, state law enforcement officer, magistra APP 4 judge, police officer, firefighter, county sheriff, deputy county sheriff, correctional security staff, parole agent,

air rescue firefighter, campus security officer, court services officer, juvenile corrections agent, conservation officer, or park ranger and is either a foundation member or a generational member;

(19) "Class C credited service," service credited as a Class C member of the system;

(20) "Class C member," any member of the cement plant retirement plan including any retiree or any vested member;

(21) "Classified employees," employees of public school districts who are not required by law to be certified as teachers, employees of the colleges and universities under the control of the board of regents who are not faculty or administrators and come within the provisions of chapter 3-6D, employees of public corporations, employees of chartered governmental units, and all other participating employees not elsewhere provided for in this chapter;

(22) "Comparable level position," a member's position of employment that is generally equivalent to the member's prior position of employment in terms of required education, required experience, required training, required work history, geographic location, and compensation and benefits;

(23) "Conservation officers," employees of the Department of Game, Fish and Parks and the Division of Wildlife or Division of Custer State Park who are employed pursuant to § 41-2-11 and whose positions are subject to the requirements as to education and training provided in chapter 23-3;

(24) "Consumer price index," the consumer price index for urban wage earners and clerical workers calculated by the United States Bureau of Labor Statistics;

(25) "Contributory service," service to a participating unit during which contributions were made to a South Dakota Retirement System, which may not include years of credited service as granted in § 3-12-84 or 3-12-84.2;

(25A) "Correctional security staff," the warden, deputy warden, and any other correctional staff holding a security position as verified by the Department of Corrections and approved by the Bureau of Human Resources and the Bureau of Finance and Management, and determined by the board as Class B members;

(26) "Court services officers," persons appointed pursuant to § 26-7A-8;

(27) "Covered employment," a member's employment as a permanent full-time employee by a participating unit;

(28) "Deputy county sheriff," an employee of a county that is a participating unit, appointed by the board of county commissioners pursuant to §§ 7-12-9 and 7-12-10, who is a permanent full-time employee and whose position is subject to the minimum educational and training standards established by the law enforcement standards commission pursuant to chapter 23-3. The term does not include jailers or clerks appointed pursuant to §§ 7-12-9 and 7-12-10 unless the participating unit has requested that the jailer be considered as a deputy county sheriff and the Board of Trustees has approved the request;

---

(29) "Disability" or "disabled," any medically determinable physical or mental impairment that prevents a member from performing the member's usual duties for the member's employer, even with accommodations, or performing the duties of a comparable level position for the member's employer. The term excludes any condition resulting from willful, self-inflicted injury;

(30) "Effective date of retirement," the first day of the month in which retirement benefits are payable;

(31) "Eligible retirement plan," the term eligible retirement plan includes those plans described in section 402(c)(8)(B) of the Internal Revenue Code;

(32) "Eligible rollover distribution," any distribution to a member of accumulated contributions pursuant to § 3-12-76. The term does not include any portion of a distribution that represents contributions made to the system on an after tax basis nor distributions paid as a result of the member reaching the required beginning date;

(33) "Employer," the State of South Dakota and any department, bureau, board, or commission of the State of South Dakota, or any of its governmental or political subdivisions or any public corporation of the State of South Dakota which elects to become a participating unit;

(34) "Employer contributions," amounts contributed by the employer of a contributing member, excluding member contributions made by an employer after June 30, 1984, pursuant to § 3-12-71;

(35) "Equivalent public service," any public service other than as a justice, a judge, or a magistrate judge and comparable to Class B service as defined by this section, if the service is in the employ of a public entity that is not a participating unit;

(36) "Fair value of assets," the total assets of the system at fair market value for securities traded on exchanges; for securities not traded on exchanges, a value based on similar securities; and for alternative investments, reported net asset value;

(37) "Fair value funded ratio," the fair value of assets divided by the actuarial accrued liability;

(38) "Fiduciary," any person who exercises any discretionary authority or control over the management of the system or the management or disposition of its assets, renders investment advice for a fee or other compensation, direct or indirect, or has any authority or responsibility to do so, or has any discretionary authority or responsibility in the administration of the system;

(39) "Foundation member," any member of the system whose contributory service began before July 1, 2017;

(40) "Foundation retiree," any foundation member who has retired with a benefit payable from the system;

(41) "Firefighter," any full-time firefighter who works at least twenty hours a week and at least six months a year. The term does not include any volunteer firefighter;

(42) "Full-time student," a person who is in full-time attendance as a student at an educational institution, as determined by the board in light of the standards and practices of the institution involved, except that no individual may be considered a full-time student, if the student is paid by the student's employer while attending an educational institution at the request of, or pursuant to a requirement of, the employer;

(43) "Fund," public employees' retirement fund or funds established for the purposes of administration of this chapter;

(44) "Funded ratio," the actuarial value of assets divided by the actuarial accrued liability;

(45) "General employees," full-time municipal employees who are not firefighters or police officers;

(46) "Generational member," any member of the system whose contributory service began after June 30, 2017;

---

(47) "Generational retiree," any generational member who has retired with a benefit payable from the system;

(48) "Health care provider," a physician or other health care practitioner licensed, registered, certified, or otherwise authorized by law to provide specified health services;

(49) "Highest annual compensation," a member's compensation used to calculate benefits under §§ 3-12-95, 3-12-99 and 3-12-105 before July 1, 2004, which was the highest annual compensation earned by the member during any one of the last three years of contributory service and which was not more than one hundred fifteen percent of the member's final compensation calculated as of the date of the member's death or disability;

(50) "Internal Revenue Code," or "code," the Internal Revenue Code as in effect as of January 1, 2018;

(50A) "Juvenile corrections agent," a designee of the secretary of corrections charged with the care, custody, and control of juveniles committed to the Department of Corrections until the age of twenty-one;

(51) "Law enforcement officer," an agent of the state division of criminal investigation, an officer of the South Dakota Highway Patrol, a police officer, county sheriff, deputy county sheriff, or a firefighter;

(52) "Member," any person who is participating in and has made contributions to the system and is either a foundation member or generational member. A person's membership ceases when the person withdraws his or her accumulated contributions after termination of employment;

(53) "Member contributions," amounts contributed by members, including member contributions made by an employer after June 30, 1984, pursuant to § 3-12-71;

(54) "Military service," a period of active duty with the United States Army, the United States Navy, the United States Air Force, the United States Marine Corps, or the United States Coast Guard, from which duty the member received an honorable discharge or an honorable release;

(55) "Municipality," any incorporated municipal government under chapter 9-3 or any chartered governmental unit under the provisions of Article IX of the Constitution of the State of South Dakota;

(56) "Noncontributory service," for foundation members, service delineated in subdivisions 3-12-89.3 (2), (5), (7), and (8), and for generational members, service pursuant to § 3-12-86;

(57) "Normal cost," the expected long-term cost of the system benefits and expenses expressed as a percentage of payroll;

(58) "Normal retirement," the termination of employment and application for benefits by a member with three or more years of contributory service or noncontributory service on or after the member's normal retirement age;

(59) "Other public benefits," eighty percent of the primary insurance amount or primary social security benefits that would be provided under federal social security;

(60) "Other public service," service for the government of the United States, including military service; service for the government of any state or political subdivision thereof; service for any agency or instrumentality of any of the foregoing; or service as an employee of an association of government entities described in this subdivision;

(61) "Park rangers," employees of the Department of Game, Fish and Parks within the Division of Parks and Recreation and whose positions are subject to the requirements as to education and training provided in chapter 23-3 and whose primary duty is law enforcement in the state park system;

(62) "Parole agent," an employee of the Department of Corrections employed pursuant to § 24-15-14 who is actually involved in direct supervision of parolees on a daily basis;

---

(63) "Participating unit," the State of South Dakota and any department, bureau, board, or commission of the State of South Dakota, and any of its political subdivisions or any public corporation of the State of South Dakota which has employees who are members of the retirement system created in this chapter;

(64) Repealed by SL 2018, ch 32, § 4.

(65) "Permanent full-time employee," any employee who has been placed in a permanent classification who is customarily employed by a participating unit for twenty hours or more a week and at least six months a year. The participating unit shall decide if an employee is a permanent full-time employee and that decision is conclusive;

(66) "Plan year," a period extending from July first of one calendar year through June thirtieth of the following calendar year;

(67) "Police officer," any employee in the police department of any participating municipality holding the rank of patrol officer, including probationary patrol officer, or higher rank and whose position is subject to the minimum educational and training standards established by the law enforcement officers standards commission pursuant to chapter 23-3. The term does not include civilian employees of a police department nor any person employed by a municipality whose services as a police officer require less than twenty hours a week and six months a year. If a municipality which is a participating unit operates a city jail, the participating unit may request that any jailer appointed pursuant to § 9-29-25 be considered a police officer, subject to the approval of the board;

(68) "Political subdivision" includes any municipality, school district, county, chartered governmental unit, public corporation or entity, and special district created for any governmental function;

(69) "Present value of all benefits," the present value of all benefits expected to be paid to all retired, terminated, and active members and beneficiaries, based on past and future credited service and future compensation increases.

(70) "Present value of benefits earned to date," the present value of the benefits currently being paid to retired members and their beneficiaries and the present value of benefits payable at retirement to active members, based on their earnings and credited service to date of the actuarial valuation;

(71) "Projected compensation," a deceased or disabled member's final average compensation multiplied by the COLA commencing each July first for each complete twelve-month period elapsed between the date of the member's death or disability, whichever occurred earlier, and the date the member would attain normal retirement age;

(72) "Projected service," the credited service plus the service which the member would have been credited with at normal retirement age had the member continued in the system and received credit at the same rate the member was credited during the year covered by the compensation that was used in the calculation of the disability or family benefit;

(73) "Qualified military service," service in the uniformed services as defined in § 414(u)(5) of the Internal Revenue Code;

(74) "Required beginning date," the later of April first of the calendar year following the calendar year in which the member attains age seventy and one-half or April first of the calendar year following the calendar year in which the member retires;

(75) "Retiree," any foundation or generational member who retires with a lifetime benefit payable from the system;

(76) "Retirement," the severance of a member from the employ of a participating unit with a retirement benefit payable from the system;

(77) "Retirement benefit," the monthly amount payable upon the retirement of a member;

(78) "Single premium," the lump-sum amount paid by a supplemental pension participant pursuant to a supplemental pension contract in consideration for a supplemental pension benefit;

(79) "Social investment," investment, divestment, or prohibition of investment of the assets of the system for purposes other than maximum risk-adjusted investment return, which other purposes include ideological purposes, environmental purposes, political purposes, religious purposes, or purposes of local or regional economic development;

(80) "Spouse," a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member;

(81) "State employees," employees of the departments, bureaus, commissions, and boards of the State of South Dakota;

(82) "Supplemental pension benefit," any single-premium immediate pension benefit payable pursuant to §§ 3-12-192 and 3-12-193;

(83) "Supplemental pension contract," any agreement between a participant and the system upon which a supplemental pension is based, including the amount of the single premium, the type of pension benefit, and the monthly supplemental pension payment amount;

(84) "Supplemental pension contract record," the record for each supplemental pension participant reflecting relevant participant data; a designation of any beneficiary, if any; the amount of the participant's funds rolled into the fund; the provisions of the participant's supplemental pension contract; and supplemental pension payments made pursuant to the contract;

(85) "Supplemental pension participant," any member who is a retiree receiving a benefit from the system, or, if the member is deceased, the member's surviving spouse who is receiving a benefit from the system, and who chooses to purchase a supplemental pension benefit pursuant to the provisions of this chapter;

(86) "Supplemental pension spouse," any person who was married to a supplemental pension participant at the time the participant entered into the supplemental pension contract;

(87) "System," the South Dakota Retirement System created in this chapter;

(88) "Tax-qualifying purchase unit," any participating unit which elects to allow the unit's employees to purchase credited service on a tax-deferred basis by means of employer contribution agreements as outlined in §§ 3-12-83.1 and 3-12-83.2;

(89) "Teacher," any person who has a valid teacher's certificate issued by the State of South Dakota, who is in the employ of a public school district, and shall also include the certified teachers employed by the Human Services Center, South Dakota Developmental Center--Redfield, State Penitentiary, Department of Education, State Training School, School for the Deaf, School for the Blind and the Visually Impaired, Children's Care Hospital and School, public nonprofit special education facilities, community support providers certified by the Department of Human Services and public financed multi-district education programs;

(90) "Terminated," complete severance of employment from public service of any member by resignation or discharge, not including leave of absence, layoff, vacation leave, sick leave, or jury duty, and involving all termination proceedings routinely followed by the member's participating unit, including payment to the member for unused vacation leave, payment to the member for unused sick leave, payment to the member for severance of an employment contract, severance of employer-provided health insurance coverage, severance of employer-provided life insurance coverage, or severance of any other such employer-provided perquisite of employment granted by the member's participating unit to an active employee;

(91) "Trustee," a member of the board of trustees;

(92) "Unfunded actuarial accrued liability," the actuarial accrued liability less the actuarial value of assets;

---

(93) "Vested," the right to a retirement benefit from the system based on the provisions of this chapter after three years of contributory service or noncontributory service, even if the member leaves the employment of a participating unit, provided that the member does not withdraw accumulated contributions. A member w

leaves the employment of a participating unit is not entitled to benefits under §§ 3-12-95, 3-12-98, 3-12-99, 3-12-104, and 3-12-105.

Source: SL 1967, ch 303, § 2; SDCL § 3-12-2; SL 1968, ch 216, § 1; SL 1970, ch 25, § 1; SL 1973, ch 24, §§ 1, 2; SL 1974, ch 35, § 2; SL 1975, ch 38, § 6; SL 1975, ch 39, §§ 2, 3; SL 1976, ch 40, § 1; SL 1977, ch 28, §§ 1 to 3; SL 1977, ch 29; SL 1977, ch 31, §§ 1 to 3; SL 1978, ch 31; SL 1978, ch 32, § 5; SL 1979, ch 26, § 1; SL 1980, ch 31, § 1; SL 1982, ch 32, § 1; SL 1982, ch 33; SL 1982, ch 34, § 1; SL 1982, ch 35; SL 1983, ch 17; SL 1983, ch 18; SL 1983, ch 19, §§ 1, 2; SL 1983, ch 22, § 2; SL 1984, ch 23, § 1; SL 1985, ch 24, §§ 1, 2; SL 1986, ch 37, §§ 1-3, 11; SL 1987, ch 35; SL 1987, ch 36, §§ 1, 2; SL 1988, ch 30, §§ 1 to 3; SL 1988, ch 31; SL 1989, ch 21, § 40; SL 1989, ch 38, §§ 5, 9; SL 1989, ch 238, § 3; SL 1990, ch 36; SL 1991, ch 29, §§ 1, 2; SL 1991, ch 30; SL 1992, ch 30, § 1; SL 1992, ch 34, §§ 1, 2; SL 1993, ch 38, §§ 1, 2; SL 1993, ch 39, § 1; SL 1993, ch 40; SL 1993, ch 41; SL 1993, ch 42, §§ 1-3; SL 1993, ch 44, §§ 2, 3; SL 1994, ch 32, §§ 1, 2; SL 1994, ch 34, §§ 1, 2; SL 1995, ch 18, §§ 1, 2, 4; SL 1995, ch 23, § 1; SL 1995, ch 24, §§ 1, 11, 15; SL 1996, ch 29, § 1; SL 1996, ch 30, §§ 1, 5; SL 1997, ch 25, § 1; SL 1997, ch 26, § 1; SL 1997, ch 27, § 1; SL 1998, ch 15, §§ 1, 2, 3, 4, 5; SL 1998, ch 16, § 1; SL 1998, ch 17, § 1; SL 1998, ch 17, § 2; SL 1998, ch 18, § 1; SL 1998, ch 19, § 1; SL 1998, ch 110, § 2; SL 1999, ch 14, §§ 1, 2; SL 1999, ch 15, § 1; SL 2000, ch 24, §§ 1, 2; SL 2002, ch 22, §§ 1, 2; SL 2004, ch 35, § 1; SL 2004, ch 36, §§ 1, 2; SL 2004, ch 37, §§ 1, 2; SL 2004, ch 38, § 7; SL 2004, ch 40, §§ 5 to 7; SL 2004, ch 42, §§ 3 to 11; SL 2005, ch 24, §§ 1, 2; SL 2006, ch 17, § 1; SL 2008, ch 20, §§ 1 to 6; SL 2008, ch 21, § 1; SL 2008, ch 24, § 2; SL 2009, ch 138, § 3; SL 2010, ch 20, §§ 1 to 6; SL 2010, ch 21, § 2; SL 2010, ch 23, §§ 3, 4, eff. Apr. 1, 2010; SL 2010, ch 77, § 2; SL 2011, ch 1 (Ex. Ord. 11-1), § 18, eff. Apr. 12, 2011; SL 2011, ch 20, § 1; SL 2012, ch 26, §§ 1 to 6; SL 2013, ch 20, §§ 2 to 5; SL 2014, ch 18, § 1; SL 2014, ch 20, §§ 19 to 22; SL 2014, ch 21, §§ 8, 9 eff. Apr. 1, 2014; SL 2015, ch 25, §§ 1 to 3; SL 2016, ch 32, § 56; SL 2017, ch 27, § 4; SL 2017, ch 28, § 6; SL 2018, ch 32, §§ 1 to 4; SL 2018, ch 33, §§ 1 to 6.

19-19-201. Judicial notice of adjudicative facts. **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of facts that may be judicially noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) Is generally known within the trial court's territorial jurisdiction; or

(2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking notice. The court:

(1) May take judicial notice on its own; or

(2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to be heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 201); SDCL §§ 19-10-1 to 19-10-7; SL 2016, ch 239 (Supreme Court Rule 15-23), eff. Jan. 1, 2016.

25-1-29. Solemnization and recording of marriages required--Common-law marriages prior to 1959 not invalidated. Marriage must be solemnized, authenticated, and recorded as provided in this chapter provided, however, that noncompliance with its provisions does not invalidate any lawful marriage consented to and subsequently consummated prior to July 1, 1959.

Source: SDC 1939, § 14.0110; SL 1959, ch 50, § 2.

In the Supreme Court
of the
State of South Dakota

DEBRA LEE ANDERSON,	)	
	)	
Petitioner-Appellant,	)	No. 28660
	)	
v.	)	
	)	
SOUTH DAKOTA	)	
RETIREMENT SYSTEM,	)	
	)	
Respondent-Appellee	)	
_____	)	

Appeal from the Circuit Court of Meade County
Honorable Gordon D. Swanson, Judge

REPLY BRIEF FOR APPELLANT DEBRA LEE ANDERSON

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Attorney for Appellant
Debra Lee Anderson

Robert B. Anderson
Justin L. Bell
May, Adam, Gerdes & Thompson LLP
P. O. Box 160
Pierre, SD 57501
Attorneys for Appellee South Dakota
Retirement System

Notice of Appeal filed July 5, 2018

Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Other Authorities

Argument

I. SDRS waived the argument that *Obergefell* is not retroactive by failing to file a notice of review, and by failing to argue this in this Court

A. Waiver by failing to file a notice of review

The Office of Hearing Examiners held that *Obergefell* is retroactive. Administrative Record ("AR") 39, Anderson's Opening Brief Appendix 1 at 5. If SDRS wanted to obtain review of this ruling, it was required to file a notice of review in circuit court. SDCL 1-26-36.1. SDRS did not file a notice of review in circuit court, so it waived its opportunity to obtain review of this issue.

This Court may see that Anderson failed to raise this issue in the circuit court, and question whether Anderson thereby waived it. But this Court disposed of this argument in *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶ 11, 850 N.W.2d 840, 842-43. *Whitesell* overruled the waiver argument because the circuit court "did not address or rule" on the issue in question (standing in *Whitesell*, retroactivity here). *Id.* As in *Whitesell*, the circuit court did not address or rule on the issue in question. AR 16, Anderson's Opening Brief Appendix 4 at 3 n.1 ("The parties debate whether the Court's

ruling in *Obergefell* is to be applied retroactively. In light of this Court's ruling, there is no need to consider that question.") So SDRS waived this issue by failing to file a notice of review.

B. Waiver by failing to argue it in this Court

A party waives an issue by failing to argue it in this Court. *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 5 n.1, 575 N.W.2d 225, 228 n.1. SDRS does not argue that *Obergefell* is not retroactive; all SDRS says is that "no *controlling* case law is applicable to this case." SDRS's brief p. 11 (emphasis added). By "controlling" SDRS means a precisely on-point decision from the United States Supreme Court or this Court, because it says that "[n]either the United States Supreme Court nor the South Dakota Supreme Court has addressed that issue; accordingly, no controlling case law is applicable to this case." *Id.*

But SDRS's mere statement that neither this Court nor the United States Supreme Court has issued a precisely on-point decision on whether *Obergefell* is retroactive is not an "argument" as required to present the issue to this Court. An "argument shall contain the contentions of the party with respect to the issues presented, the

reasons therefore, and the citations to the authorities relied on." SDCL15-26A-60(6). SDRS's statement does not meet this definition of an "argument."

And SDRS explicitly concedes that it is *not* arguing that *Obergefell* is not retroactive. "The Office of Hearing Examiners agreed with Appellant that *Obergefell* is retroactive. *Appellee does not necessarily submit otherwise*, but would submit that it is not a settled question and that it is a nullity in this case, because as both the Office of Hearing Examiners and the Circuit Court reasoned, whether *Obergefell* is retroactive is not the underlying issue in this case." SDRS Brief p. 14-15 (emphasis added).

SDRS's position that this issue is a "nullity" (by which SDRS apparently means "irrelevant") is a litigation-driven conclusion that is for this Court to decide. But SDRS's failure to argue the issue means that SDRS has forfeited its right to ask this Court to reverse the agency on this issue.

II. *Obergefell* is retroactive

SDRS responds to the ruling in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), that "we now prohibit the erection of selective

temporal barriers to the application of federal law in non-criminal cases," by misstating the case, asserting that it merely expresses a "preference" for retroactivity. SDRS Brief p. 13. But *Harper* says it "prohibit[s]" non-retroactivity, not that it "prefers" it. Anderson's Opening Brief p. 20. And SDRS does not cite a single case after *Harper* that weakens *Harper's* prohibition against non-retroactivity.

Instead, SDRS relies on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), decided 22 years before *Harper.* But *Chevron Oil* was overruled in *James R. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542-43 (1991), in which five justices held: "It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis [whether 'litigants actually relied on the old rule and how they would suffer from retroactive application of the new.']"

James R. Beam continues: "[t]o this extent, our decision here *does* limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive

application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. *Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application*." *Id.* at 543 (citations omitted, emphasis added).

Applying this rule here, *Obergefell's* retroactive application to the parties in *Obergefell* applies *Obergefell* to all others—such as Anderson— who seek its prospective application.

Pommer v. Medtest Corp., 961 F.2d 620, 627 (7th Cir. 1992), describes *James R. Beam*: "Although no more than three Justices signed any of the opinions in that case, the disparate expressions make it clear that six members of the Court concur with Justice Souter's conclusion that 'once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application.'" So even before *Harper*, *Chevron Oil* was overruled by *James R. Beam*.

SDRS does not point to a single case holding that *Obergefell* applies prospectively only. SDRS claims that two intermediate appellate court cases, *Lake v. Putnam*, 894 N.W.2d 62 (Mich. App. 2016), and *Hawkins v. Grese*, 809 S.E.2d 441 (Va. App. 2018), and one trial court case, *Appel v. Celia*, 2018 Va. Cir. LEXIS 15 (Fairfax County), did not apply *Obergefell* retroactively. But all three cases are far off point.

- In *Lake v. Putnam*, *supra*, 894 N.W.2d at 67, plaintiff did not present "any evidence to support a conclusion that she and defendant would have been married but for the law in Michigan (or in Florida, where the parties also resided for a period of time)." The plaintiff did not provide "any evidence reflecting the parties' intent to marry," and defendant "adamantly denie[d] that she would have ever married plaintiff even if legally able to do so." These facts are far from the present case, in which the parties wanted to be married, exchanged rings, and agreed in 2009 that they would marry when it

was legal in South Dakota. And *Lake* does not say that *Obergefell* is not retroactive.

- Likewise, in *Hawkins v. Grese*, *supra*, 809 S.E.2d at 449—unlike the present case—the parties did not "establish that they would have exercised the option [to marry] if it were available." The issue in *Hawkins* was whether "non-biological parents in planned families comprising same-sex couples and their children are in fact *parents*." *Id.* at 444 (emphasis in original). It would be hard to find an issue farther away from the issue in this case. And *Hawkins* does not hold that *Obergefell* is not retroactive. If *Hawkins* had held that *Obergefell* was prospective only, it would not have had to address any of the facts.
- Similarly, the trial court decision in *Appel v. Celia*, 2018 Va. Cir. LEXIS 15 (Fairfax County), addresses an issue far afield from the present case: whether the parties' "divorce decree should state that there are two children

born of the parties," where the children were born through assisted conception in a same-sex marriage. *Appel* * 2. *Appel* explicitly does *not* address whether *Obergefell* is retroactive. *Appel* * 12. *Appel* says that courts "appear split" on this subject, but the only case it cites as not applying *Obergefell* retroactively is *Lake v. Putnam*, which as shown in the first bullet point above is far off point and says no such thing.

In addition to the foregoing about SDRS's three cases, they all involve children, so they inherently focus on a third person, the child, and the delicate and sensitive issues in legal issues involving children. The present case has nothing to do with children. Instead, it deals with property rights, as to which *Obergefell* has been applied retroactively numerous times, as discussed in the Anderson's Opening Brief p. 23-25. SDRS does not cite a single case in which *Obergefell* has not been applied retroactively to any issue, let alone a property rights issue.

Finally, SDRS questions whether *Obergefell* should be applied retroactively because it established a new rule of constitutional law.

But this is only one test of three from *Chevron Oil*, *supra*, which was overruled in 1992 as described above.

III. SDRS concedes that "Had they chosen to do so, they could have solemnized a marriage [outside South Dakota] early enough so that Anderson would have qualified for spousal retirement benefits"

A. SDRS thus admits that in light of *Obergefell*, a valid South Dakota marriage before Cady's retirement is not required to satisfy SDCL 3-12-47(80)

SDRS admits that because of *Obergefell*, a valid South Dakota marriage is not required to satisfy SDCL 3-12-47(80), by stating: "*Had they chosen to do so, they could have solemnized a marriage early enough [in another state] so that Anderson would have qualified for spousal retirement benefits*." Brief p. 5 (emphasis added). SDRS later repeats this admission, stating that if Cady and Anderson had married in Massachusetts, then returned to South Dakota, "*the OHE decision presumably would mandate a different outcome*." Brief p. 16 (emphasis added).

So SDRS admits that *even though same-same marriage was illegal in South Dakota in 2012, when Cady retired, Anderson would have qualified for benefits under SDCL 3-12-47(80) had she and Cady married outside South Dakota—an act that would have been legally meaningless in South Dakota because South Dakota's Constitution and laws violated*

the United States Constitution by prohibiting recognition of same-sex marriage in South Dakota. Or in other words, because of *Obergefell*, a valid South Dakota marriage before Cady's retirement is not required by SDCL 3-12-47(80).

B. SDRS may not condition benefits on Cady and Anderson having failed to marry outside South Dakota when their marriage would have been illegal in South Dakota

SDRS's novel, unsupported, and irrational theory is that Anderson would receive benefits only if she and Cady ignored South Dakota law. SDRS's message is "you may benefit from the law only if you previously disregarded it." This message is contrary to what every responsible parent teaches their children: obey the law. It is contrary to every citizen's duty: obey the law. And it is contrary to every law enforcement officer's sworn duty: obey the law.

SDRS's theory is: be a scofflaw, you win; obey the law, you lose. SDRS has no authority for this position or anything close to it. And SDRS does not explain why, or on what legal theory, Anderson must be denied benefits under SDRS 3-12-47(80) because she and Cady, honoring their oaths as law enforcement officers, and seeking not to bring disrepute on the Rapid City Police Department, did not to engage in

the act of marriage outside South Dakota when it was illegal in South Dakota.

In SDRS's view, a legally meaningless act would make all the difference. But no legal principle justifies denying a person benefits because she failed to engage in a meaningless act. By definition, a meaningless act has no significance. *Webster's Unabridged Dictionary of the English Language* (Random House 2001) at 1191 ("meaningless" means "without meaning, significance, purpose, or value").

C. Anderson is not asking SDRS to "create" a marriage for her—she is asking SDRS not to penalize her because same-sex marriage was unconstitutionally illegal in South Dakota until 2015

The Hearing Examiner ruled: "The retroactive nature of the Supreme Court decision of *Obergefell* cannot create a marriage where none existed." AR 39, Anderson's Opening Brief Appendix 1 at 5. SDRS reiterates this argument by saying that the issue is whether Anderson or the judiciary may "create a marriage *post hoc* despite the fact that [Appellant] and Ms. Cady never availed themselves of the marriage laws in another state that recognized same-sex marriage." SDRS Brief at

15 (bracketing in original), quoting Circuit Court Memorandum Decision p. 7.

But the issue is not "creation" of a marriage. The issue is whether SDRS may lawfully penalize Anderson because the State of South Dakota unconstitutionally denied her the right to marry Cady before Cady retired in 2012.

The answer to this issue must be "no." No one may benefit from their illegal or unconstitutional acts. *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 2002 S.D. 8, ¶ 32, 639 N.W.2d 192, 203, citing "the ancient common-law maxim 'Nullus commodum capere potest de injuria sua propria' (Co Litt 148 b) anglicized as section 49 of our 1919 code providing that 'no one can take advantage of his own wrong.' These principles require no exposition, and are supported by an almost imperative public policy." So SDRS cannot take advantage of the State's wrong in unconstitutionally forbidding same-sex marriage until after Cady retired.

Anderson's Fourteenth Amendment rights were violated by the State's unconstitutional ban on same-sex marriage. She is therefore entitled to a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

("[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded"), quoting *Blackstone's Commentaries on the Laws of England*, vol. 3 at 23. Or as this Court put it in *Putnam v. Pyle*, 232 N.W. 20, 22 (S.D. 1930), quoting Spelling, *Extraordinary Relief*, vol. 1: "No maxim is more firmly rooted in English and American jurisprudence than the one which, given a free translation, declares that 'no wrong shall exist without a remedy.'"

The remedy to which Anderson is entitled is commensurate with the constitutional violation she sustained. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.") *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.")

The equities lie with Anderson. It is undisputed in the record that Anderson and Cady waited to get married until *Obergefell* legalized same-sex marriage, because until then it was illegal in South Dakota;

because as law enforcement officers they had taken an oath to uphold the laws of South Dakota; and because they did not want to bring disrepute on the Rapid City Police Department by flouting those laws. The late Rapid City Chief of Police Craig Tieszen so testified. Transcript ("T.") 13-14. So did the current Rapid City Chief of Police, Karl Jegeris. T. 22-25. So did Deb Anderson. T. 58-60. None of these witnesses were impeached or contradicted in any way. No evidence suggests that Anderson and Cady's marriage was delayed by anything other than their respect for the law. This Court will decide whether respect for the law by law enforcement officers may now be used as a sword against Anderson to deny her the benefits to which she otherwise would be entitled.

Police officers put their lives on the line for the rest of us every day. Two Rapid City police officers were shot and killed in the line of duty not many years ago. T. 21-22. Surely their respect for the law is entitled to deference.

SDRS says there would have been nothing illegal about Anderson and Cady going out of state to marry before 2012. But illegality and

respect for the law are different. And illegality and seeking to avoid bringing disrepute on the Rapid City Police Department are different.

IV. The Office of Hearing Examiners' refusal to adopt Anderson's proposed finding that Cady and Anderson would have been married before Cady retired in 2012 but for South Dakota's unconstitutional prohibition of same-sex marriage is clearly erroneous

In response to Anderson's assertion that the Office of Hearing Examiners was clearly erroneous in rejecting as "speculation" whether Cady and Anderson would have been married in South Dakota before 2012 but for South Dakota's constitutional prohibition of same-sex marriage, SDRS makes three arguments.

First, SDRS says that the hearing examiner had the ability to weigh live testimony. Brief p. 20. But the hearing examiner did not reject *any* testimony as not credible. The hearing examiner did not, and does not, describe *any* defects in the character or testimony of any witness that could have justified a finding that the witness's testimony was not credible. In fact, SDRS's ruling says *nothing at all about credibility and does not rest on credibility*—it rests on the concept that the proposed finding is "speculation" and "not

factual." So SDRS's first argument fails because the hearing examiner did not rest her ruling on credibility.

Second, SDRS argues that "there is a stark difference and uncertainty in the testimony." Brief p. 20-21. This argument fails for two reasons. The first is that it is wrong. There are no relevant differences or uncertainties in any testimony with respect to any relevant point, nor does the hearing examiner describe any.

The second is that the agency did not rest its finding of "speculation" and "not factual" on alleged discrepancies in the testimony. Because this Court reviews the *agency's* decision, the decision must be reviewed based in *the agency's rationale, not the later rationale of SDRS's lawyers who attempt to find some basis to sustain the agency.* This has been a settled principle of administrative law for 76 years:

- "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be

sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

- "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962).
- "We do not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself." *NLRB v. Yeshiva University*, 444 U.S. 672, 685 n.22, and *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714 n.1 (2001) (same).

Third, SDRS argues that if the Court accepted Anderson's argument, it does not answer the question of when they would have been married. As discussed in section V.A. below, the date they would have married is irrelevant, provided it was before Cady retired on April

30, 2012. SDRS Hearing Exhibit 1. On this point, the evidence was uniform, unimpeached, and uncontradicted.

SDRS's position is that this Court should uphold the agency's finding of "speculation" despite the completely undisputed, unchallenged testimony of the Rapid City Chief of Police (Karl Jegeris), the late former Rapid City Chief of Police (Craig Tieszen), Deb Cady's oldest friend (Annie Loyd, sister of a former prosecutor), Deb Cady's sister (Linda Cady), and Deb Anderson. A stronger, more convincing group of witnesses is almost unimaginable.

Far from being "speculation," the testimony of these witnesses, combined with the witnesses' credibility and the strong corroborating circumstantial evidence discussed in Anderson's Opening Brief p. 32, is more persuasive than the testimony on most factual issues in most lawsuits. Civil jury trials are regularly decided based on weaker evidence than Anderson presented here. Accused criminals are regularly convicted based on weaker evidence than Anderson presented here.

In reality, SDRS asks this Court to abdicate its statutory role of reviewing factual determinations for clear error, as required by

SDCL 1-26-36(5), and replace it with a strict hands-off policy as to any agency finding.

V. SDRS's other arguments fail

A. The exact date before Cady's 2012 retirement when Cady and Anderson would have married is irrelevant

SDRS repeatedly says that Anderson cannot prove an exact date before Cady's 2012 retirement when she and Cady would have married. This is true. But so what? The only date that matters is April 30, 2012, the date Cady retired, because the "married at the time of retirement" element of SDCL 3-12-47(80) is the only requirement that Anderson arguably does not meet. So it makes no difference how long before that date that Cady and Anderson would have married, if such a marriage had been legal in South Dakota.

But for South Dakota's prohibition of same-sex marriage, Cady and Anderson would have been married long before April 30, 2012. They declared their love for each other on July 8, 1988, and lived together until Cady died in 2017. They considered themselves the same as married. They shared finances and the other responsibilities of a married couple. They made all decisions together, took care of each other, and took care of each other's families. T. 54-55.

Cady and Anderson worked in the Rapid City Police Department, where their relationship was completely open and completely accepted. T. 8-12 and 16-19. Five police chiefs treated them as a married couple. They openly shared everything, just like any other happily married couple. T. 18-20. Anderson was part of the Cady family for more than 25 years. T. 45-47.

When Cady got breast cancer in 2004, Anderson nursed her through onset, surgery, chemotherapy, remission, recurrence, more chemotherapy, and death. During this period they "Still were very devoted and very loving to each other." T. 62-63.

In 2009, when Iowa legalized same-sex marriage, they agreed they would get married when it was legalized by South Dakota or by the federal government for the country as a whole. T. 58. The same year, they exchanged identical rings, which Cady wore for the rest of her life, and which Anderson still wears. T. 61.

When Cady's breast cancer forced her to retire, she knew about "this ridiculous provision" (requiring a valid marriage at the time of retirement in order for Anderson to receive retirement benefits, even though same-sex marriage was illegal in South Dakota). "And she

wanted to make sure Anderson was taken care of. But she couldn't work any longer. And she knew she couldn't get married yet. And she talked about it." T. 36-37.

All these facts are undisputed. A more complete description of Anderson and Cady's relationship is found in the Statement of Facts in Anderson's Opening Brief. The synopsis just given shows that they would have married before April 30, 2012, had it been legal in South Dakota. It would be irrational to believe that, given their history of being in love, living together, and sharing everything since 1988, then agreeing in 2009 to be married if it became legal in South Dakota, and exchanging rings in 2009, and with Cady aware of the marriage requirement when she retired for Anderson to receive retirement benefits, they would have *postponed* their marriage until after Cady retired, *in order to ensure that Anderson would not receive the statutory benefits when Cady died that every other spouse received.* The only rational conclusion is that if same-sex marriage were legal in South Dakota before Cady retired on April 30, 2012, they would have married before then. And they were married 23 days after it became legal in South Dakota and nationwide.

B. The forms that Anderson and Cady completed in 2011 and 2015 not describing themselves as "married" are honest—and irrelevant

SDRS relies on Cady's Last Will and Testament, executed in 2011, describing Anderson as her "best friend," and on Anderson's having completed a form saying that she was married to Cady on July 19, 2015. Brief p. 19. These statements are true and irrelevant. Cady and Anderson could not be recognized as married in South Dakota until after *Obergefell*. Their statements have nothing to do with the legal issue in this case: whether a same-sex couple who would have been married before Cady's retirement in 2012, but who were not married solely because South Dakota unconstitutionally forbade same-sex marriage, is entitled to be recognized as married when Cady retired.

C. The Eighth Circuit proceedings after *Obergefell* are irrelevant

SDRS points out that *Rosenbrahn v. Daugaard*, 799 F.3d 918 (8th Cir. 2015), holds that *Obergefell* did not moot plaintiffs' challenge to South Dakota's prohibition on same-sex marriage. In the most technical sense this is true, because South Dakota was not a party to *Obergefell*. In a practical sense, the decision is hard to

understand, because *Obergefell* was the law of the land. No one could read it and think that the United States Supreme Court intended to create a cross-country checkerboard in which some states would be allowed to prohibit same-sex marriage and some would not. And South Dakota assured the court that it would comply with *Obergefell*. *Id.*, 799 F.3d at 922.

So what was at issue in *Rosenbrahn* after *Obergefell* was decided? The answer is simple: money. The State wanted *Rosenbrahn* found moot so it would not have to pay the plaintiffs' attorneys' fees. The State's inability to get *Rosenbrahn* found moot cost it hundreds of thousands of dollars— $289,190 in the district court (*Rosenbrahn v. Daugaard*, Order for Award of Attorneys' Fees and Costs, No. 14-CV-4081, D.S.D., So. Div. (Doc. 81, September 28, 2015) (Circuit Court Alphabetical Index at 67-68)—and fees in the Eighth Circuit in an amount not of record. See http://www.scotusblog.com/2015/08/did-obergefell-settle-the-same-sex-marriage-issue/ (last visited October 5, 2018), explaining that the State of Nebraska (like the State of South Dakota) attempted to have the Eighth

Circuit declare the Nebraska same-sex challenge moot in order to avoid having to pay plaintiffs' attorneys' fees.

What does any of this have to do with this case? Nothing. If SDRS thinks it has something to do with this case, Anderson is unable to discern what it is.

D. SDRS's complaint that Anderson did not address the circuit court's analysis at p. 4-6 is both wrong and irrelevant

SDRS says that Anderson's brief does not address the circuit court's analysis of Anderson's cases at p. 4-6 of the circuit court's decision. Plaintiff disagrees. Anderson's Opening Brief in this Court addresses all those cases, other than *Sheardown v. Guastella*, 2018 Mich. App. Lexis 2509, which like *Lake v. Putnam* and *Hawkins v. Grese* (addressed in section II above) is not on point, because plaintiff did not attempt to prove that the parties would have married had they been allowed to do so before *Obergefell.* And like *Lake v. Putnam* and *Hawkins v. Grese*, *Sheardown v. Guastella* does not hold that *Obergefell* is not retroactive. SDRS appears to agree that *Sheardown* is irrelevant, because it does not cite it.

More to the point, Anderson's Opening Brief and this Reply Brief address the reasons why the Hearing Examiner, whose decision is what this Court reviews, and SDRS are wrong. In the process, those briefs address the circuit court's rationale. Surely any point in the circuit court's decision that SDRS thought significant would appear in SDRS's brief. And Anderson has addressed every significant point in SDRS's brief.

Conclusion

Slavery used to be legal. Women used to be unable to vote, or to be lawyers or judges. And same-sex couples used to be unable to marry.

In all this now-discarded law, the class of people involved—African-Americans, women, and same-sex couples—was uniquely disadvantaged and discriminated against in violation of their fundamental constitutional rights, as we understand them in 2018. The legal vestiges of slavery and women's disenfranchisement are long gone. This case will decide whether legal discrimination against same-sex couples lives on.

As a question of policy, no person within the mainstream of our society thinks slavery should be legal, or that women should be unable to vote, practice law or serve as judges, but many mainstream people still think same-sex couples should not be allowed to marry. In this Court of law, only the law matters. And when the law is applied here, it yields only one result: that Debra Lee Anderson is entitled to the benefits she seeks, and that she would receive without dispute if she were a man so that she would have been able to marry Deborah Cady before Cady retired.

Dated: October 11, 2018 Respectfully submitted,

/s/ James D. Leach
James D. Leach
Attorney for Debra Lee Anderson

Certificate of Service

On October 11, 2018, I served this brief on appellees by e-mailing it to defendants' attorneys, Robert D. Anderson (rba@mayadam.net) and Justin L. Bell (jlb@magt.com).

/s/ James D. Leach
James D. Leach

Certificate of Compliance

This brief was prepared in Palatino Linotype 13 for Word Perfect. It contains 4778 words.

/s/ James D. Leach
James D. Leach