

**REDACTED DECISION—10-074 RPD—BY GEORGE V. PIPER, ALJ—
SUBMITTED FOR DECISION on JULY 29, 2010 —ISSUED on DECEMBER 29,
2010.**

SYNOPSIS

PERSONAL INCOME TAX - - FEDERAL LAW ENFORCEMENT OFFICER'S RETIREMENT BENEFITS NOT TAXABLE IN PART -- Retired federal law enforcement officer who performed duties similar to those performed by West Virginia state firefighters and police officers and who did not pay into the federal Old-Age, Survivors, and Disability Insurance program of the Social Security Act of 1935, as amended, and did not thereby qualify to receive social security benefits under the civil service retirement system may exclude those retirement benefits from the West Virginia personal income tax pursuant to ruling in *Dodson v. Palmer*.

PERSONAL INCOME TAX -- FEDERAL LAW ENFORCEMENT OFFICERS RETIREMENT BENEFITS TAXABLE IN PART -- Federal law enforcement officer's retirement exclusion is only applicable to the benefits received under the civil service retirement system (total benefits not excluded after change to the federal employees retirement system required federal Old-Age, Survivors, and Disability Insurance program taxes to be paid which qualified Petitioner to receive social security benefits).

FINAL DECISION

On June 22, 2009, Petitioner filed a claim for refund for tax years 2007 and 2008. The Personal Income Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office ("the respondent"), by letter dated December 29, 2009, totally denied the refund claim as not being supported by statutory law.

Thereafter, by mail, postmarked February 11, 2010, the petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. *See* W. Va. Code §§ 11-10A-8(2) [2002] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10-A-10 [2002].

FINDINGS OF FACT

1. Petitioner was employed by the Federal Bureau of Prisons (FBOP) from February 10, 1980 through February 17, 2007. From February 10, 1980 until December 20, 1998, Petitioner was enrolled in the Civil Service Retirement System (CSRS). Effective January 1, 1999 Petitioner voluntarily transferred to the Federal Employee Retirement System (FERS) and remained in that system until her retirement.

2. Federal employees covered under CSRS did not pay into the federal Old-Age, Survivors, and Disability Insurance program of the Social Security Act of 1935, as amended, and did not qualify to receive social security benefits.

3. All federal employees who converted to FERS in 1998 received federal retirement matching funds; however, they were required to pay into social security and did qualify to receive benefits.

4. At the outset of her career with FBOP, Petitioner underwent standard training courses which included intensive firearms training, self-defense training, first responder-in-hostage situations, disturbance control techniques, and yearly refresher courses.

5. During her tenure, the petitioner had daily contact with inmates as a cashier, procurement officer, budget officer or relief medical escort officer. She worked with inmates in the office, escorted inmates when necessary, responded to inmate fights, and worked relief for the correctional officers. Because the inmates were not housed in cells but in barracks without any fences or walls Petitioner was required to walk the perimeter with a loaded shotgun when dense fog made it difficult to observe inmates performing their daily routines.

DISCUSSION

Because Petitioner qualifies as a federal law enforcement officer, the only issue which remains to be determined is whether, based upon the facts in this case, Petitioner qualifies for the tax exemption in W.Va. Code § 11-21-12 (c) (6), as amended, pursuant to the holding in *Dodson v. Palmer*, Civil Action No. 00-C-AP-10 (Monongalia County, W. Va., Cir. Ct. 2000).

The statutory law of the State of West Virginia explicitly excludes from state income tax those pensions and annuities paid to retired West Virginia police officers, State Police officers and deputy sheriffs. West Virginia Code § 11-21-12(c) (6), as amended.

For purposes of establishing special retirement eligibility, the Federal Office of Personnel Management has defined a “law enforcement officer” to mean “an employee whose job duties are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. 5 C.F.R. § 831.902; *see also* 5 C.F.R. §§ 831.901 & 831.903. The federal government has distinguished such “law enforcement officers” from other civil service employees, including military personnel, in that a law enforcement officer’s retirement is calculated using a different formula from the one used to calculate other federal civil service employee retirement benefits.

According to the ruling of the Circuit Court of Monongalia County, West Virginia, in *Dodson v. Palmer*, a person who proves that he or she worked as a federal law enforcement officer and did not qualify to receive social security benefits while working in that job may exclude all of his or her federal retirement income from that job, for purposes of the West Virginia personal income tax.

Since the 2000 ruling in *Dodson v. Palmer*, this tribunal has literally applied the language because exemptions and deductions from tax must be strictly construed against the person claiming the exemption or deduction. *See* Syl. Pt. 1, *RGIS v. Palmer*, 209 W. Va. 152, 544 S.E. 2d 79 (2001); *See also* Syl. Pt. 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E. 2d 20 (1997).

Inasmuch as Petitioner qualifies as a federal law enforcement officer, satisfying the first test under *Dodson*, the only question remaining is whether she is entitled to the full exclusion of her federal retirement income.

Petitioner admits having voluntarily transferred to FERS in 1999, which transfer required her to begin paying into social security; however she argues that this tribunal should fully exclude her years under FERS because she only paid into social security for seven years, not long enough to be vested. That fact, together with the application of the Windfall Elimination Provision¹, eliminates any possibility of receiving her social security benefits.

¹ The Windfall Elimination Provision was passed by Congress to reduce social security benefits of anyone receiving an annuity in whole or in part from a retirement system where he or she did not pay social security taxes and had fewer than thirty (30) years of substantial earnings covered by social security.

The test in *Dodson* is that of being qualified to receive social security benefits, not whether social security benefits will ultimately be received. Accordingly, because Petitioner did not prove that, as a federal law enforcement officer, she did not qualify to receive social security benefits from January 1, 1999 through February 17, 2007, this tribunal finds that Petitioner may not fully exclude her federal retirement benefits from the measure of the West Virginia personal income tax after enrolling in FERS².

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the petitioner, to show that the petitioner is entitled to the refund in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W Va. Code St R. § 121-1-63.1 (April 20, 2003).

2. Petitioner has carried the burden of proof with respect to the issue of whether, as a federal law enforcement officer, she is entitled to the same treatment as the taxpayer in the *Dodson* ruling because Petitioner did not qualify to receive social security benefits under the civil service retirement system.

3. Petitioner has not carried the burden of proof with respect to the issue of whether as a federal law enforcement officer she is entitled to the same treatment as the taxpayer in the *Dodson* ruling because Petitioner did qualify to receive social security benefits under the federal employees retirement system.

² *See* _____ v. Helton, Docket No. 04-343 RPD, issued January 26, 2005.

4. Because seventy (70%) percent of Petitioner's retirement comes from a non-social security retirement plan and thirty (30%) percent from a social security retirement plan, the *Dodson* exclusion applies only to seventy (70%) percent of Petitioner's retirement benefits.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's petition for refund of West Virginia personal income tax for tax years 2007 and 2008 should be and is hereby AFFIRMED, as REVISED in the amount of \$_____.