FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

IN THE MATTER OF: **MAGISTRATE JUDGE JESSICA GALLIVAN,**	)	
Appellant,	)	
v.	)	**CASE NO. SX-17-CV-269**
GOVERNMENT EMPLOYEES RETIREMENT SYSTEM,	)	**Cite as: 2019 VI Super 62**
Appellee.	)	

MEMORANDUM OPINION

CARROLL, Senior Sitting Judge.

¶1 Before the Court is the Writ of Review of Magistrate Judge Jessica Gallivan ("Magistrate Judge Gallivan," "Magistrate Gallivan" or "Gallivan") of the Decision and Order of the Government Employees Retirement System Board of Trustees' ("The Board") in Appeal No. 001-15X, issued on June 1, 2017, with an addendum issued on October 13, 2017. The Board's Decision and Order will be affirmed in part and reversed in part.

¶2 Based upon the following memorandum, the Court concludes that Magistrate Judge Gallivan is a Tier II judicial member of the Government Employees Retirement System ("GERS") by virtue of 3 V.I.C. § 7701, which applies to magistrates who become members of the judicial retirement program after October 1, 2005. Notwithstanding the provisions of the Tier II judicial retirement program, the Court concludes that Gallivan is entitled to a 30% annuity for her first term and 20% annuity for her second term when reading the provisions of 3 V.I.C. § 733 (the Tier I statute) and 3 V.I.C. § 7701 (the Tier II statute) together. The Court also concludes that Gallivan's contribution rate was properly found by the Board to be 11% for her first two terms and that Gallivan is entitled to a refund of contributions with interest wrongfully taken from her during her second term, but the Court does not agree with the Board's reasoning supporting its conclusions, and finds that the Board should refund an additional sum of money to Gallivan for interest. Finally, the Court has determined that Gallivan was not denied procedural due process during the course of the hearings before the Board and has also determined that Gallivan did not make an argument in support of her assertion that GERS' adjustments to contribution and annuity rates under 3 V.I.C. § 7701 (Tier II) are unconstitutional.

FACTUAL AND PROCEDURAL HISTORY

¶3 Magistrate Judge Gallivan was initially appointed on June 29, 2009, for a four-year term as a Virgin Islands Superior Court magistrate.[1] At the end of that term in 2013, Gallivan was re-appointed and served a second term until 2017.[2] Since 2017, Gallivan has been serving a third term.[3] Prior to joining the judiciary, Gallivan was employed in the Virgin Islands government as a chief labor negotiator, assistant attorney general, law clerk, and summer intern.[4] As a chief labor negotiator, assistant attorney general, and magistrate judge,[5] Gallivan has been a contributing member of GERS.[6]

¶4 On January 23, 2015, after hearing a news story about changes to judicial annuities made by the Board, Gallivan sent a letter to GERS Administrator, Austin Nibbs, inquiring whether she was classified as a Tier I or Tier II member of the judiciary and as to the judicial annuity to which she would be entitled depending upon her date of retirement.[7] In the letter, Gallivan said that GERS had previously informed her that she was a Tier I member of the judiciary.[8] On January 27, 2015, Nibbs responded to Gallivan, stating that she was a Tier II member of the judiciary subject to an annuity rate of 5% of compensation for each year of judicial service.[9] On January 29, 2015, Gallivan replied, disputing those determinations.[10] On January 30, 2015, Nibbs asserted that the classification would stand and he provided Gallivan with a copy of the "Rules and Regulations for Appeals to the GERS Board of Trustees," indicating that Gallivan could appeal the determinations to the Board.[11]

¶5 On March 9, 2015, Gallivan filed a Petition for Appeal, asking the Board to reconsider their classification of her as a Tier II judiciary member rather than as a Tier I judiciary member; GERS' reduction of her annuity rate to 5% per year, and thus, to less than 30% of compensation

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[1] Board of Trustees of the Government Employees Retirement System, Appeal No. 001-15X, June 1, 2017, Decision and Order, page 3.
[2] Petitioner's Memorandum of Law with points and authorities, page 9.
[3] *Id.* at 10.
[4] *Id.* at 2-3.
[5] Act 7888, § 15 enacted on June 29, 2016 changed the judicial title of "magistrate" to "magistrate judge." It provides: "Virgin Islands Code, titles 4 and 5; title 3, sections 733 and 770*l*; title 14, section 293(a)(5) and section 1905; title 15; title 33, section 3504(c)(1) are amended by striking 'magistrate', 'magistrates', or 'magistrate's', as the case may be, each time they appear, except when appearing in the phrase 'Magistrate Division', and replacing them, respectively, with 'magistrate judge' 'magistrate judges', and 'magistrate judge's'."
[6] Petitioner's Memo of Law at 2-3.
[7] *See* Certified Record of GERS Appeal No. 001-15X, Document 1: Magistrate Judge Gallivan's January 23, 2015, Letter to GERS Administrator Nibbs, page 1.
[8] *Id.* at 2.
[9] *See Id.*, Document 3: GERS Administrator Nibbs' January 27, 2015, Response to Magistrate Judge Gallivan's January 23, 2015, Letter, page 1.
[10] *See Id.*, Document 4: Magistrate Judge Gallivan's January 29, 2015, Letter.
[11] *See Id*, Document 5: GERS Administrator Nibbs' January 30, 2015, Response to Magistrate Gallivan's January 29, 2015, Letter.

per four-year term; and GERS' increase in her contribution rate from 11% to 14% during her second term.[12]

¶6 The hearing examiner appointed by the Board held hearings on May 5, 2016, September 22-23, 2016, and December 1, 2016.[13] On May 15, 2017, the hearing examiner submitted findings of fact, conclusions of law, and recommendations to the Board.[14] On June 1, 2017, the Board issued its Decision and Order, styled as Appeal No. 001-15X,[15] and on October 13, 2017, the Board issued an addendum Decision and Order, which determined the amount of Gallivan's refund with respect to an issue decided in the Board's June 1, 2017, Decision and Order.[16]

¶7 On June 21, 2017, Gallivan filed a petition[17] seeking this Court's review of the Board's June 1, 2017, Decision and Order regarding her pension benefits.[18] On February 5, 2018, this Court found jurisdiction to review the determinations of the Board and granted the petition for writ of review upon finding that no other adequate remedy was available for Gallivan.[19] Following the Court's receipt of the record and the parties' briefs, a hearing was held on December 18, 2018.

STANDARD OF REVIEW

¶8 Once the Superior Court grants a petition for a writ of review, the Court is empowered "to affirm, modify, reverse, or annul the decision or determination reviewed, and, if necessary, to award restitution to the plaintiff, or, by mandate, direct the officer, board, commission, authority,

[12] *See Id.*, Document 6: Magistrate Gallivan's March 9, 2015, Petition for Appeal to Board from Magistrate Gallivan, pgs. 1-2.

[13] *See* Decision and Order of the Board dated June 1, 2017 at 1.

[14] *Id.*

[15] *Id.* at 19.

[16] Board of Trustees of the Government Employees Retirement System, Appeal No. 001-15X, October 13, 2017, Decision and Order.

[17] *See* Petition for Writ of Review. *See also* V.I. R. CIV. P. R. 91(a) which provides that a writ of review must be filed no later than 30 days after the date of the decision to be reviewed. ("A writ of review may be granted by the court upon the petition of any party to any proceeding before, or aggrieved by, the decision or determination of an officer, board, commission, authority or other tribunal established by statute. Such petition shall be filed with the Appellate Division within the time provided by statute, or if none is provided, then no later than 30 days after the date of the decision or determination to be reviewed").

[18] The Board of Trustees is a component of GERS that administers the affairs of the GERS (see 3 V.I.C. § 715(a)(1)) and is not a separate entity for the purposes of a lawsuit (see 3 V.I.C. § 715(b)(6)). 3 V.I.C. § 715(b) provides that the Board of Trustees shall have the powers and duties to "sue and be sued under the name and style of the Government Employees Retirement System of the Government of the United States Virgin Islands."

[19] 5 V.I.C. § 1421 grants the Superior Court the authority to issue writs of review ("Any party to any proceeding before or by any officer, board, commission, authority, or tribunal may have the decision or determination thereof reviewed for errors therein as prescribed in this chapter and rules of court. Upon the review, the court may review any intermediate order involving the merits necessarily affecting the decision or determination sought to be reviewed"); *see also* 5 V.I.C. § 1422 which requires the Superior Court to issue a writ "in all cases where there is no appeal or other plain, speedy, and adequate remedy, and where the officer, board, commission, authority, or tribunal in the exercise of his or its functions appears to have exercised such functions erroneously, or to have exceeded his or its jurisdiction, to the injury of some substantial right of the plaintiff."

or tribunal to proceed in the matter reviewed according to its decision."[20] V.I. R. CIV. P. 91 sets forth procedural rules governing writs of review where the statutes governing an administrative agency are silent. That rule provides that "[u]nless otherwise provided by statute, factual determinations are to be reviewed for clear error while legal findings, statements of law, and the application thereof shall be afforded plenary review."

¶9 When reviewing factual findings under the clear error standard, the Superior Court "should only reverse a factual determination as being clearly erroneous if it is 'completely devoid of minimum evidentiary support or ... bears no rational relationship to the supportive evidentiary data.'"[21] When reviewing any legal findings, "[p]lenary review means applying the same legal standard as the trial court to the same record"[22] so that in an administrative appeal, the Superior Court "review[s] questions of law without deference" to the administrative body.[23] The Supreme Court of the Virgin Islands has explicitly rejected the application of *Chevron* or *Skidmore* deference[24] – federal doctrines applied by federal courts when reviewing the decisions of federal administrative agencies – and requires the Superior Court to "address all legal questions *de novo*, without affording any deference to the interpretations put forth by an administrative agency."[25]

DISCUSSION

¶10 The Government Employees Retirement System became operative on October 1, 1959, to provide retirement benefits to government employees after stated periods of service and the fulfillment of certain conditions.[26] "Chapter 27 Retirement of Personnel; Federal Benefits" (3 V.I.C. §§ 701-741), referred to as the "Tier I" program, generally covers employees who entered employment on or after September 30, 1959,[27] while "Chapter 28A Tier II Retirement Benefits Program" (§§ 3 V.I.C. §§ 750 — 770l), known as the "Tier II" program, largely covers those who became members of the Government Employees Retirement System on or after October 1, 2005.[28]

¶11 Each tier outlines conditions and retirement benefits for employees of the government of the Virgin Islands. Importantly, 3 V.I.C. § 750, the section establishing the Tier II Retirement Benefits Program, provides that "(e) [a]ll provisions of chapter 27 [Tier I] are applicable to this chapter, except to the extent provided otherwise in this chapter." Thus, the provisions of the Tier

[20] 5 V.I.C. § 1423.
[21] *In re the Estate of Small*, 57 V.I. 416, 430 (V.I. 2012) (citing *Rainey v. Hermon*, 55 V.I. 875, 880 (V.I. 2011) (internal quotation marks omitted)).
[22] *Henry v. Dennery*, 55 V.I. 986, 991 (V.I. 2011) (citing *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009)).
[23] *Milligan v. Gov't of the V.I.*, 2015 V.I. LEXIS 137, *5 (V.I. Super. Ct. Nov. 18, 2015) (citing *Bryan v. Fawkes*, 61 V.I. 201, 223-228 (V.I. 2014)).
[24] *Chevron, U.S.A., Inc. v. Natural Res Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[25] *Pedro v. Ranger Am. of the V.I., Inc.*, 63 V.I. 511, 517 n.4 (V.I. 2015) (citing *Fawkes*, 61 V.I. at 223-229).
[26] 3 V.I.C. § 701(a) and (d).
[27] *Id.* § 703.
[28] *Id.* § 752.

I program apply to the Tier II program except to the extent provided otherwise by the Tier II program.

¶12 First, Gallivan argues that the Board misclassified her as a Tier II member of the judiciary and that instead, she should be classified as a Tier I member of the judiciary for all of her terms.[29] Second, Gallivan argues that under Tier I, she is entitled to an annuity rate of 30% and a contribution rate of 11% for her three terms.[30] Third, Gallivan argues that GERS failed to refund the entire amount it owed to her.[31] Fourth, Gallivan argues that she was denied due process before the Board.[32] The Court thus evaluates whether the Board erred in classifying Gallivan as a Tier II member of the judiciary, whether the Board erred in determining her contribution and annuity rates, whether the Board erred in determining any appropriate refund to which she is entitled, and whether Gallivan was denied due process over the course of her appeal.

I. Magistrate Judge Gallivan is a Tier II member of the judiciary.

¶13 Gallivan argues that GERS erred in classifying her as a Tier II member of the judiciary, because when she entered the judiciary on June 29, 2009, Section 733, which covers Tier I members of the judiciary, expressly included magistrates, while Section 770l, which covers Tier II members of the judiciary, did not expressly include the words "magistrates" or "magistrate judges."[33] In response, the Board maintains that Gallivan is a Tier II member of the judiciary, because those who become members of the judiciary on or after October 1, 2005, are members of the Tier II Retirement Benefits Program, while those who become members of the judiciary between January 1977 and October 1, 2005, are members of the Tier I Retirements Benefits Program.[34] The Board states that the retirement benefit programs are separate for regular employees and members of the judiciary, and that while Gallivan has credited service as a Tier I regular employee with respect to her prior government service and participation in the Tier I regular retirement program, she is a Tier II member of the judicial retirement program.[35]

¶14 Based upon the analysis below, the Court concludes that Gallivan is a Tier II member of the judicial retirement program.

A. Magistrate Judge Gallivan became a member of the Tier II judicial retirement program because she was appointed after October 1, 2005, and she was not a member of the Judiciary by previous appointment.

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[29] Petitioner's Memo of Law at 2.
[30] Petitioner's Reply to GERS' Memorandum of Law with Points and Authorities, page 4.
[31] *Id.* at 4-5.
[32] Petitioner's Memo of Law at 12-14.
[33] *Id.* at 7; *see also* Petition for Writ of Review, page 8, ¶ 13.
[34] GERS Memorandum of Law with points and authorities, page 7.
[35] *Id.* at 5.

¶15 To determine whether Gallivan is a Tier I or Tier II member of the judiciary, and which contribution and annuity rates apply to her, the Court begins by identifying the relevant statutory provisions. Sections 733 (Tier I) and 770l (Tier II) outline the retirement pension plans available for members of the Virgin Islands judiciary. Observing that "[t]he first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning[,]"[36] the Court determines whether the language of Sections 733 and 770l has a plain and unambiguous meaning. "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed."[37]

¶16 Section 733 provides that "(a) Membership in the system for members of the Judiciary shall be optional and shall be made available to members of the Judiciary who were in service after January 28, 1977." This section further states that "(b) **Each person who becomes a member of the Judiciary after January 28, 1977, and who is then not a participant by previous appointment**" automatically becomes a member of the system and is subject to compensation deductions unless he or she files notice of election not to participate within 90 days [emphasis added]. Section 733(j) provides that the provisions respecting "conditions governing membership in the system, rates of contribution, conditions for retirement and rates of annuity" apply to all members of the Judiciary serving on and after January 28, 1977. All other sections of the Tier I statute conferring rights and benefits to participants in the System apply with equal force to members of the Judiciary.[38]

¶17 In contrast, Section 770l (Tier II) provides that "(b) **Each person who becomes a member of the Judiciary after" October 1, 2005, "who is not a participant by previous appointment**" automatically becomes a member of the retirement system and is subject to compensation deductions under the Tier II statute unless he or she files a written notice of election not to participate within 90 days [emphasis added]. Under Section 770l(j), non-judicial service may not be considered service under 770l "nor may service as a member of the Judiciary be considered service" for any purpose other than as specified in the section.

¶18 Accordingly, 3 V.I.C. § 733(b) (Tier I) and its counterpart, 3 V.I.C. § 770l(b) (Tier II) each provide that whether a member of the judiciary will be automatically placed in GERS depends upon the date on which that person becomes a member of the judiciary and whether that member was a participant in GERS by previous appointment.

¶19 Gallivan argues that the provisions of Tier II under 770l do not apply to her because that section only applies to those "who are not a participant by previous appointment," and she had been a participant before the enactment of 770l because of her central government service in several positions.[39] This argument is not persuasive upon a careful reading of the statute.

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[36] *Brady v. Gov't of the V.I.*, 57 V.I. 433, 441 (V.I. 2012).
[37] *Id.*
[38] 3 V.I.C. § 733(j).
[39] *See* Petitioner's Memo of Law at 9-10.

¶20 The Court observes that the word "appointment," as it appears in 3 V.I.C. § 733(b) and 3 V.I.C. § 770l(b), is not defined in these statutes. We therefore look to Black's Law Dictionary, which defines "appointment" as "[t]he designation of a person, such as a nonelected public official, for a job or duty; esp., the naming of someone to a nonelected public office[.]"[40]

¶21 The term, "appointment," as used in the context of the statutes, is subject to the following two reasonable interpretations: broadly, as in an appointment for any non-elected public service position not limited to a judicial appointment, or narrowly, as in a judicial appointment only. Since an ambiguous word or term must be defined "with reference to how the clause is used in connection with the whole statute,"[41] the Court observes that Section 770l(j) provides: "[i]n no case may service other than as a member of the Judiciary be considered service for the purposes of this section [3 V.I.C. § 770l], nor may service as a member of the Judiciary be considered service for the purpose other than as specified in this section." Section 733(i) has a similar provision. Thus, both Sections 770l and 733 indicate that non-judicial service may not be considered service for the purposes of the respective statute. Therefore, Gallivan's participation in GERS by a previous appointment for non-judicial service may not be considered service for the purposes of the Tier II judicial statute.[42]

¶22 Further, under Section 770l(b) (Tier II), a person who becomes a member of the judiciary for the first time on or after October 1, 2005, who is not a GERS participant by a previous judicial appointment, is automatically placed in GERS Tier II unless he or she opts out. Because Gallivan became a member of the judiciary after October 1, 2005, because she was not a member of the GERS by a previous judicial appointment, and because she did not elect not to participate in GERS, she became a Tier II judiciary member of the system, subject to the compensation deductions under 3 V.I.C. § 770l. Thus, according to the plain language of the relevant provisions, the Board correctly determined that Gallivan is a member of the Tier II judicial retirement program.

B. The legislative history of 3 V.I.C. § 733 (Tier I) and 3 V.I.C. § 770l (Tier II) shows that Magistrate Judge Gallivan is a member of the Tier II judicial retirement program.

¶23 Gallivan's position is that she should be considered a member of the Tier I judicial retirement program because on June 29, 2009, when she became a member of the judiciary, Section 733 (Tier I) expressly included magistrates, while Section 770l (Tier II) did not

[40] BLACK'S LAW DICTIONARY 116 (9th ed. 2009).
[41] *Joseph v. Roebuck*, 672 F. Supp. 219, 221 (D.V.I. 1987) (citations omitted).
[42] Because Tier I and Tier II must be read to the extent not provided for otherwise in Tier II -- in other words, where Tier II is more specific than Tier I, Tier II controls -- Tier I is only available to those members of the judiciary who meet the requirements of 3 V.I.C. § 733(a), 3 V.I.C. § 733(b), and 3 V.I.C. § 733(j) but not to the extent provided for in 3 VIC 770l(b) and 3 VIC 770l(j). Thus, a person who becomes a member of the judiciary on or after October 1, 2005, but who, anytime between January 28, 1977, and September 30, 2005, participated in the Tier I system as a member of the judiciary, would remain classified as a Tier I member of the judiciary.

expressly include the words "magistrates" or "magistrate judges."[43] Thus, Gallivan contends, on the date that she took office, the Legislature intended for magistrates to be included in Tier I, not Tier II.[44]

¶24 The Court must presume that "[w]hen the legislature adopts a law ... it intended that the entire statute be effective."[45] "Although literal interpretation of a statute is favored, the intention prevails over the letter, and thus, no statute should be read literally if such a reading is contrary to its objective."[46] "[I]n that rare instance where it is *uncontested* that legislative intent is at odds with the literal terms of the statute, then a court's primary role is to effectuate the intent of [the Legislature] even if a word in the statute instructs otherwise."[47] "'For the vast majority of ambiguous statutory provisions ... relying on legislative history to discern legislative intent should be done with caution,' since many 'men and women must vote in favor of a bill in order for it to become law.'"[48]

¶25 Here, having determined that Section 733(i) and Section 770l(j) each resolves the ambiguity in the word "appointment" as used in Section 733(b) and Section 770l(b), respectively, the Court now turns to the legislative history cited by Gallivan to determine whether it indicates a legislative intent contrary to the literal terms of either Section 733 (Tier I) or Section 770l (Tier II).

¶26 The Court observes that on June 29, 2009, the date of Gallivan's appointment, Section 733(b) (Tier I) provided that "each person who becomes a member of the Judiciary after January 28, 1977, and who is then not a participant by previous appointment" automatically becomes a member of the retirement system subject to compensation deductions unless he or she opts out within 90 days.[49]

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[43] Petitioner's Memo of Law at 7; Petition for Writ of Review at 8, ¶ 13 ("GERS erred in concluding that Magistrate Judge Jessica Gallivan is subject to the Tier II Benefits Program under Title 3 VIC 770l since this program did not specifically refer to magistrates or magistrate judges at the inception of her taking office or before she vested in retirement benefits pursuant to Title 3 VIC Section 733. In fact, this section was not enacted by the Legislature of the Virgin Islands until 2013."); *see also id.*, page 9, ¶ 15 ("GERS erred when it ignored the fact that, prior to amending Title 3 V.I.C. 770(l) to include magistrate judges, the Legislature had already amended Title 3 V.I.C. 733(h) to specifically include magistrates in 2007, with Act No. 6919. Thus, there can be no question that Title 3 V.I.C. Section 733 applied to Magistrate Judge Jessica Gallivan at the inception of her taking office in 2009, and her benefits and privileges provided therein vested upon the completion of her first term in 2013.").
[44] *See* Petitioner's Memo of Law at 7-8.
[45] *Gilbert v. People of the V.I.*, 52 V.I. 350, 356 (V.I. 2009) (quoting *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995)).
[46] *Id.* (internal quotations, brackets, and citations omitted); *see also Coco Bros., Inc. v. Pierce*, 741 F.2d 675, 679 (3d Cir. 1984) (quoting *Viacom Int'l Inc. v. Federal Communications Comm'n*, 672 F.2d 1034, 1040 (2d Cir. 1982)) ("While it is true that when clear and unequivocal, the language of a statute is the best and most reliable index of its meaning, it is also true that the surest way to misinterpret a statute or a rule is to follow its literal language without reference to its purpose").
[47] *Gilbert*, 52 V.I. at 357.
[48] *Id.* (quoting *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006)).
[49] Act No. 6391 § 2(l) (V.I. Reg. Sess. 2000). The text of 3 V.I.C. § 733(b) remains unchanged from its original form found in Act No. 6391 § 2(l).

¶27 Also, on the date of Gallivan's appointment, the Tier I statute, Section 733(h), provided that the term, Judiciary "means the judges and magistrates of the Superior Court and the justices of the Supreme Court of the Virgin Islands." [50]

¶28 The Court notes that the text of Section 733(h) in effect on the date of Gallivan's appointment was a product of the 2004 amendment of the V.I. Code which established the Supreme Court of the Virgin Islands[51] and the 2007 amendment of the Code which provided for the Magistrate Division within the Superior Court of the Virgin Islands. [52]

¶29 In contrast to the language in Section 733, on the date of Gallivan's appointment, the Tier II judicial statute, Section 770l(b) provided that "(e)ach person who becomes a member of the Judiciary" after the date of enactment of the statute, October 1, 2005,[53] "who is not a participant by previous appointment" automatically becomes a member of the retirement system unless he or she opts out within 90 days. [54] Also, Section 770l(i) on the date of Gallivan's appointment, defined the term "judiciary" as including only the Judges of the Superior Court of the Virgin Islands. [55]

¶30 Thus, Gallivan is correct that on the date of her appointment, the Tier II judicial retirement statute did not expressly include "magistrates" but the Tier I retirement statute did.

¶31 Significantly, however, on November 9, 2013, the Legislature amended the Tier II judicial retirement statute by inserting the term, "and magistrates" after "judges," as well as adding "justices of the Supreme Court of the Virgin Islands" after "Virgin Islands" and making the effect of the statute retroactive to November 2, 2005.[56] The Tier II judicial retirement statute was thus changed due to the 2013 amendment to read, retroactive to November 2, 2005, that the term "judiciary", as used in § 770l(i), means the judges and magistrates of the Superior Court of the Virgin Islands and justices of the Supreme Court of the Virgin Islands. This statute was amended again in 2016 to replace the term "magistrates" with "magistrate judges."[57]

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[50] Act No. 6919 § 4 (V.I. Reg. Sess. 2007).
[51] Act No. 6687 § 7 (V.I. Reg. Sess. 2004). The purpose of this act was to "amend title 4, Virgin Islands Code to establish the Supreme Court of the Virgin Islands and to rename the Territorial Court of the Virgin Islands and for other purposes", and it inserted "justices of the Supreme Court" before "Judges" in 3 V.I.C. § 733(h).
[52] Act No. 6919 § 2, § 4 (V.I. Reg. Sess. 2007). The purpose of this Act was to amend the Virgin Islands Code to provide for a Magistrate Division within the Superior Court of the Virgin Islands, and it inserted "and magistrates" following "judges" in 3 V.I.C. § 733(h). Thus, Act No. 6919, which established the Magistrate Division contemporaneously added magistrates to the Tier I statute just as Act No. 6687, which established the Virgin Islands Supreme Court, contemporaneously added "justices of the Supreme Court" to the Tier I statute.
[53] *See* 3 V.I.C. § 750(b) ("The second tier program is established to establish retirement benefits for the same purpose as stated in section 701(b) for employees who become members of the System on or after October 1, 2005").
[54] Act No. 6794 § 29 (V.I. Reg. Sess. 2005).
[55] *Id.*
[56] Act No. 7574 § 1(a)-(b) (V.I. Reg. Sess. 2013).
[57] *See* N. 5, *supra.*

¶32 Therefore, the 2013 amendments to the Tier II Judicial Retirement statute clarify that the legislature intended magistrates and justices of the Supreme Court, who were appointed on or after October 1, 2005,[58] to be a part of Tier II, dispelling any doubt as to whether Tier II may apply to magistrate judges. Notwithstanding the Legislature's reasons for expressly inserting "magistrates" (later substituted as "magistrate judges") and "justices of the Supreme Court" into Section 733 (Tier I), there is no indication in the statutes or their legislative history of any legislative intent to abolish the application of 770l's application to magistrate judges. Thus, Gallivan's argument that the legislative history places her in Tier I is unpersuasive. The plain language and legislative history each show that the Legislature intended for a magistrate judge who entered the judiciary for the first time on or after October 1, 2005, to be a Tier II member of the judiciary.

C. Repeal of an Act under 1 V.I.C. § 50

¶33 Gallivan further argues that the later-enacted provisions of Section § 770l, particularly 770l(i)-(k), cannot be applied to her on the ground that 1 V.I.C. § 50 prohibits the repeal or impairment of any acquired right without an express provision providing for the repeal.[59] That section provides that "(a) The repeal of any Act, part of any Act or provision of this Code does not release or extinguish any right acquired . . . unless the repealing Act expressly so provides, and the Act, part or provision shall" remain "in force for the purpose of sustaining any proper action or proceeding for the enforcement of the right."

¶34 The pertinent provisions of Section 770l are described hereafter. Section 770l(i) provides that "the term Judiciary means the Judges and magistrate judges of the Superior Court of the Virgin Islands and justices of the Supreme Court of the Virgin Islands." Section 770l(j) states that "[i]n no case may service other than as a member of the judiciary be considered service for the purposes of this section, nor may service as a member of the judiciary be considered service for the purpose other than as specified in this section." Section 770l(k) has been deleted.[60]

¶35 Since 3 V.I.C. § 750(e) (Tier II) provides that "[a]ll provisions of chapter 27 [Tier I] are applicable to this chapter [Tier II], except to the extent provided otherwise in this chapter [Tier

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[58] Though Act 7574 took effect retroactively on November 2, 2005, Act 7574 implies that the magistrate judges who became members of the judiciary on or after October 1, 2005, are Tier II members of the judiciary, because Act 6794, which created 3 V.I.C. § 770l (Tier II) was approved by the Governor on November 2, 2005. *See* Act No. 6794 (V.I. Reg. Sess. 2005). Thus, Act 7574 took effect retroactively to the date on which Act 6794 took effect, October 1, 2005.

[59] *See* Petitioner's Memo of Law at 2 ("While the GERS seeks to impair MJ Gallivan's benefits and privileges by applying the later-enacted provisions of Title 3 VIC Section 770l, particularly Subsections (i) – (k), Title 1 VIC Section 50, prohibits the repeal or impairment of any acquired right without an express provision providing for such repeal. The VI Legislature did not repeal MJ Gallivan's right to pension benefits and privileges pursuant to Title 3 VIC Section 733, and certainly did not do so before MJ Gallivan was vested, and so any application of Title 3 VIC 770l to MJ Gallivan is faulty and contrary to law. The Board's Decision and Order regarding MJ Gallivan's pension benefits (both as to annuity and contribution rates) should be overturned.").

[60] 3 V.I.C. § 770l (k) has been deleted since 2006. Act No. 6839, § 24, deleted subsections (a) and (k) (*see* Act No. 6839 § 24 (V.I. Reg. Sess. 2006)).

II]," this suggests that Tier II is not a repeal of Tier I but that the tiers must be construed together. Moreover, because this Court has determined that Gallivan is a Tier II member of the judiciary, Gallivan could not have acquired retirement benefits as a Tier I member of the judiciary. However, the Court discusses aspects of this argument below to clarify that if Gallivan did acquire any rights under the Tier I statute, they are not being taken from her.

D. Magistrate Judge Gallivan does not become a Tier I member of the judiciary based upon the doctrine of promissory estoppel.

¶36 Finally, Gallivan asserts that she does not waive any arguments previously made in the proceedings before the Board.[61] The Court observes that during those proceedings, Gallivan suggested that she detrimentally relied on GERS' prior communications to her that she was in Tier I and that her relationship with GERS was contractual.[62] Thus, Gallivan appears to contend that promissory estoppel is a basis for the Court to designate her as a Tier I member of the judiciary. Were this Court to allow Gallivan to be classified as a Tier I member of the judiciary based on promissory estoppel, it would be tantamount to allowing a Virgin Islands agency official to legislate a judge's pension benefits in contravention of the constitutional principle of the separation of powers. Thus, this Court finds that Gallivan cannot secure the status of a Tier I member of the judiciary under the doctrine of promissory estoppel.[63]

II. The annuity rate for Magistrate Judge Gallivan's first term is 30% pursuant to 3 V.I.C. § 733 (Tier I) and 3 V.I.C. § 770l (Tier II).

¶37 Gallivan's annuity for her first term is calculated by considering and reading together the provisions of both the Tier I and Tier II statutes.

¶38 Section 770l(f)(1) (Tier II) provides that "vesting in a service retirement annuity attaches upon completion of one term" for "all members of the Judiciary "at the time of the effective date" of the statute. The statute further provides that "any member is eligible for a judicial annuity beginning at age 50" whose rates are "determined by the Board of Trustees."[64]

¶39 The Board set an annuity rate for Tier II members of the judiciary for the first time on January 21, 2015, at 5% per year for each year of a term.[65] And, the effective date of 3 V.I.C. § 770l(f)(1), was October 26, 2015.[66] Since Gallivan's annuity vested upon the completion of her

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[61] *See* Petitioner's Memo of Law at 17.
[62] *See e.g.*, Cert. Record, Document 49: September 23, 2016, Transcript of Hearing with Exhibits (Vol. III), page 313 ("I think that there's an argument for detrimental reliance and estoppel, yes . . . I think they should be bound by it . . . This is a contractual relationship").
[63] *Accord, State v. Yashar*, 2007 R.I. Super. LEXIS 45, at *123 (R.I. Super. Ct. Mar. 20, 2007).
[64] 3 V.I.C. § 770l(f)(1).
[65] Decision and Order of the Board dated June 1, 2017, at 15-16.
[66] *See* Act No. 7802 (V.I. Reg. Sess. 2015) ("Approved October 26, 2015"). Act No. 7802 § 4(i)(1)(A) rewrote subsection (f)(1). *See also* 2 V.I.Op.A.G. 302 (The effective date of legislation need not be specified in the bill unless the bill is to take effect at some time other than the date of approval by the Governor. The phrase "become effective upon approval by the Governor" when inserted in legislation, is superfluous).

first term, in June 2013, and thus, prior to October 26, 2015, the annuity for her first term vested before both the date that the Board set the annuity rate for Tier II members of the judiciary and the effective date of 3 V.I.C. § 770l(f)(1).

¶40 The term, "vest" is not defined in the statute, but Black's Law Dictionary defines the term "to vest" as conferring "ownership (of property) upon a person," investing a person "with the full title to property", or giving a person "an immediate, fixed right of present or future enjoyment."[67] A "vested right" is one "that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."[68] A "vested pension" is one in which an employee (or employee's estate) has rights to benefits purchased with the employer's contributions to the plan, even if the employee is no longer employed" by the "employer at the time of retirement."[69]

¶41 Because a judiciary member's vested right in the retirement annuity attaches at the completion of each judicial term, and because under the definition of "vested right," an annuity cannot be impaired after vesting, the Board is prohibited from reducing an annuity rate after an annuity has vested. To reduce or to impair the annuity rate after the annuity has vested renders the word "vest" without meaning. Because the Board possesses a duty to distribute an annuity according to the rate as promised on the date that an annuity vests, and because Gallivan's annuity for term one vested at the end of that term in June 2013, the Board is prohibited from reducing or impairing the rate at which her annuity vested.

¶42 We observe that the Tier II judicial pension statute did not provide for an annuity rate for Tier II members of the judiciary until the Board's January 21, 2015, Resolution, which occurred after Gallivan's annuity had vested for term one. The annuity for Gallivan's first term was subject to the rate that existed in June 2013, which was the annuity rate for Tier I members of the judiciary. Under 3 V.I.C. § 750(e), the Tier I annuity rate applies to Tier II members of the judiciary except to the extent provided for otherwise in Tier II. In June 2013, the annuity rates for Tier I members of the judiciary were "after one (1) term in office, 30% of his [or her] compensation while in office."[70]

¶43 Accordingly, Gallivan's annuity for her first term must be calculated under the Tier I annuity rate of 30% of her compensation for that term. The Board was therefore in error by determining that Gallivan's annuity rate was 5% per year of her first term or the equivalent of 20% of her compensation for the term.[71]

III. Magistrate Judge Gallivan's annuity rate is 5% per year for her second term.

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[67] BLACK'S LAW DICTIONARY 1699 (9th ed. 2009).
[68] *Id.* at 1438.
[69] *Id.* at 1248.
[70] 3 V.I.C. § 733(e).
[71] *See* Decision and Order of the Board dated June 1, 2017 at 16-17.

¶44 Because Gallivan's annuity rate for her second term vested in June 2017, after the Board set the annuity rate of 5% per year for Tier II judiciary members on January 21, 2015, Gallivan is entitled to an annuity rate of 5% per year for her second term. Thus, the Board was correct in concluding that Gallivan's annuity rate was 5% per year for her second term.[72] Though it could be argued that under 4 V.I.C. § 122(d) and 4 V.I.C. § 72(c), an annuity rate should not be reduced over the course of a member's full judiciary term from the rate in effect at the start of that term, and here the annuity rate would have been greater under the Tier I judicial pension statute at the start of her second term, the provisions of the Tier II judicial pension statute direct that its terms are controlling "[n]otwithstanding any other law". "[A]ny other law" encompasses 4 V.I.C. § 122(d) and 4 V.I.C. § 72(c). Moreover, 3 V.I.C. § 770l(f) and (f)(1) provide that notwithstanding any other law, a judiciary member's annuity does not vest until the end of a term. For those reasons, Gallivan is entitled to an annuity of 5% per year for her second term, a total of 20%.[73]

IV. Magistrate Judge Gallivan's contribution rate for her first two terms was properly set at 11% by the Board.

¶45 Gallivan argues that her retirement benefits vested upon the completion of her first term in June 2013, prior to the amendment of the Tier II Judicial Retirement statute on November 9, 2013, which took effect retroactively on November 2, 2005, by including magistrates within its terms.[74] Thus, Gallivan argues, she is entitled to the contribution rates of 11% specified in the Tier I judicial retirement statute to give meaning to the word "vest" and to give effect to 4 V.I.C. § 122(d) which prohibits the reduction of the compensation of magistrates during the term of their office.[75]

¶46 The Court begins with an analysis of the contribution rate to which Gallivan is entitled for her first term, which spanned 2009-2013. First, the Court recognizes that a judge's "compensation" includes salary, retirement contributions, and retirement or pension benefits such as an annuity.[76] Second, 4 V.I.C. § 122 regarding the "[s]election, appointment, qualifications and salaries of magistrate judges", provides that magistrates "are judicial officers of the Superior Court" and their compensation "may not be reduced during the term of his [or her] office without his [or her] consent."

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[72] *Id.* at 16.

[73] The Court does not review the propriety of the Board's setting the rate of contribution and annuity for Gallivan's third term. The Board rendered its decision and order on June 1, 2017, Gallivan filed the petition for writ of review on June 21, 2017 and her third term did not begin until after those dates. Accordingly, the Court does not review whether the Board properly set the contribution rate at 14% and the annuity rate at 3.5% per year for Gallivan's third term.

[74] *See* Petitioner's Memo of Law at 7-10

[75] *Id.*

[76] *Joseph v. Gov't of V.I.*, 576 F. Supp. 1335, 1339 (D.V.I. 1983) ("A public employee's pension contributions are an element of compensation . . . . A pension, or a retirement allowance, represents compensation, rather than a mere gratuity") (internal citations omitted).

¶47 Similarly, 4 V.I.C. § 72, on the "[s]election, appointment, qualifications and salaries of judges," prohibits any reduction in the compensation of a judge during his or her term in office, by providing that "(c) No judge's compensation shall be reduced during his [or her] term of office without his [or her] consent."

¶48 Third, the Tier I judicial retirement statute relevant to contribution rates provides that the "**the rate of contribution to the system on the part of a member of the Judiciary who becomes a member of the system shall be 11% of his [or her] annual compensation.**" [emphasis added][77] By contrast, the Tier II judicial retirement statute provides that "**[t]he rate of contribution to the system on the part of a member of the Judiciary who becomes a member of the system shall be determined by the Board of Trustees.**" [emphasis added][78] Accordingly, because an increase in a judiciary member's contribution rate reduces the member's compensation, and because Section 72(c) and Section 122(d) prohibit the Board from decreasing a magistrate's compensation during his or her term without his or her consent, the pension contribution rate cannot be increased during a magistrate's term.

¶49 Here, the Board set the contribution rate for Tier II members of the judiciary for the first time on January 22, 2015, at 14% of their salary.[79] This date fell in the approximate middle of Gallivan's second four-year term. In its Decision and Order, the Board concluded that the January 22, 2015, contribution rate increase for all Tier II judiciary members could not apply to Gallivan until the beginning of her third term in June 2017.[80] The Board reasoned that the contribution rate of 11%, which was in effect at the start of both of her first and second terms, was the rate to which she was entitled for those terms, because 4 V.I.C. § 122(d) required the contribution rate of 11% to remain in effect until the completion of her second term.[81] Accordingly, the Board was correct in concluding that the contribution rate of 11% could not be reduced during her second term under 4 V.I.C. § 122(d).

¶50 But the Board also reasoned that Gallivan's contribution rate for her first two terms was 11%, since at the time of Gallivan's initial appointment, Gallivan "was informed that she would be paying 11%, the same rate as the Tier I judges",[82] and GERS accepted the 11% contribution rate—thus, "GERS should be estopped from ignoring that rate . . . until Appellant's [Gallivan's] term is completed in 2017."[83] The Board explained that "[s]ince the GERS accepted Appellant's contribution rate at 11% upon her initial appointment and into her second 'term' appointment, GERS acquiesced to that rate, which is the same as establishing a rate of 11%."[84]

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[77] 3 V.I.C. § 733(d).
[78] 3 V.I.C. § 770(l)(e).
[79] *See* Decision and Order of the Board at 14.
[80] *See id.* at 14-15.
[81] *See id.* at 14-17.
[82] *Id.* at 14.
[83] *Id.* at 15.
[84] *Id.*

¶51 This reasoning is not based on the terms of 4 V.I.C. § 770l(e), and thus, is unpersuasive. Eleven percent is the correct contribution rate for Gallivan's first two terms not because the Board "accepted" or "acquiesced" to Gallivan's contributions of 11% of her salary during her first two terms, but because the Board had not yet set a rate that applied to Tier II members of the judiciary until the middle of Gallivan's second term. In fact, the Board failed to set a contribution rate for Tier II judiciary members for more than nine years—from October 1, 2005, until January 22, 2015. Eleven percent is the applicable contribution rate for Gallivan's first two terms because it was the contribution rate set for Tier I judiciary members and the Tier II judicial retirement statute provides that "[a]ll provisions of chapter 27 [Tier I] are applicable to this chapter, except to the extent provided otherwise in this chapter", and because there was no provision for a contribution rate for Tier II members until the middle of Gallivan's second term. Accordingly, the contribution rate of 11% that was set for Tier I judiciary members applies to Gallivan's first two terms, even though Gallivan is a Tier II judiciary member.

V. Magistrate Judge Gallivan is entitled to a refund of her overpayment of contributions with interest, and this sum should be calculated based upon a theory of restitution.

¶52 The record indicates[85] that the Board refunded Gallivan for GERS' overcharges over the period from January 2015 through the pay period ending May 27, 2017,[86] and for interest on the overcharges. Gallivan now argues that GERS failed to refund all of the monies owed to her and asks the Court to "require the GERS . . . to refund all monies collected in excess of 11% to Petitioner, along with statutory interest at 9%."[87] Gallivan states that GERS "withheld interest based on its poor performance as a system", charging her "for its poor performance in 2015."[88]

¶53 Gallivan had argued before the Board that she was entitled to interest on the refund at a rate of 9% per year under either 11 V.I.C. § 951(a)(1) or (2)[89] which provide for interest for "(1) all monies which have become due" or for "(2) money received to the use of another and retained beyond a reasonable time without the owner's consent, either express or implied." In contrast, GERS argued that it could not be charged pre-judgment interest under 5 V.I.C. § 426(b),[90] which provides that notwithstanding the provisions of any law, "pre-judgment interest shall not be charged against the Government of the Virgin Islands on any judgment or decree for the payment of money by the Government." [91]

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[85] *See* Appellant's June 8, 2017, Response to Order of 7th June 2017, page 1; *see also* Decision and Order of the Board dated October 13, 2017, at 4.
[86] Appellant's Response to Order of 7th June 2017, at 1, N. 3.
[87] Petitioner's Reply at 4-5.
[88] *Id.*
[89] *See* Decision and Order of the Board dated October 13, 2017, at 1.
[90] *See id.* at 1-2.
[91] 5 V.I.C. § 426(b), entitled "Interest on money judgments and decrees", is found in Chapter 41, on "Judgments Generally" of Title 5 on "Judicial Procedure."

¶54 The Board disagreed with both Gallivan and GERS and concluded that none of the statutes cited by the parties "adequately address[ed] the issue before the Board"[92] Instead, the Board concluded that the question of interest in this case was governed by 3 V.I.C. § 762(a).

¶55 In reaching the conclusion that Section 762(a) applied to Gallivan, the Board observed that there was no statutory provision with respect to refunding money to a member for overpayments in contributions.[93] Yet the Board found that the language of 3 V.I.C. § 762(a) was close enough to apply to this matter.[94] That section provides that "[u]pon withdrawal from service, any member who does not have ten years of credited service and is not then eligible for a service retirement annuity is entitled to receive a refund of the accumulated contributions, plus regular interest as defined in section 751, including contributions made by the member to any superceded retirement system." Under Section 751 which is part of the Tier II retirement statute, "regular interest" means "interest accrued on a member's contributions, after the date of enactment of this program, compounded annually, at the rate as shall be determined by the Board, from the experience of the system."[95] The Board concluded that based on the language of Section 762(a), "the interest that can be awarded to Appellant on her overpayment is regular interest which must be determined by the Board based on the experience of the system."[96]

¶56 The Board then went on to analyze the meaning of the phrase "regular interest which must be determined by the Board based on the experience of the system." The Board observed that no rate for regular interest exists in Chapter 28A (Tier II) but a rate does exist in Chapter 27 (Tier I), 3 V.I.C. § 702(k),[97] which provides that "'[r]egular interest' shall mean interest at such rate as shall be determined by the Board from the experience of the system which shall not be less than two percent nor more than four percent per annum." The Board observed that "it is unclear whether the term 'based upon the experience of the System' means the rate of inflation, the annum interest based on the invest of the System, the System's rate of investment return or some other measure."[98] The Board used the System's investment rate of return as a measure of the regular interest on Gallivan's overpayment of contributions to the System.[99]

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[92] *See* Decision and Order of the Board dated October 13, 2017, at 2-4.
[93] *Id.* at 1-3.
[94] *See id.* at 3 ("The Board has decided that Appellant should be awarded a refund based on her overpayment of contributions to the system. While the statute is silent on the amount of interest that is to be paid, based on an overpayment of contributions, 3 V.I.C. § 762(a) provides that upon withdrawal of service, any member who is not then eligible for a service retirement annuity is entitled to receive a refund of the accumulated contributions, plus regular interest as defined in section 751. The statute does not contain any other provisions that deal with the issue of calculating interest other than the type that is outlined in § 762(a). Because the statute does not provide for any other method of calculating interest, the standard outlined in 3 V.I.C. § 762(a) for interest payments on a refund seems appropriate to be followed here.").
[95] 3 V.I.C. § 751(4).
[96] Decision and Order of the Board dated October 13, 2017, at 3.
[97] *See id.* at 3.
[98] *See id.* at 4.
[99] *Id.*

¶57 Ultimately, the Board concluded that Gallivan was entitled to a total refund of $10,809.60, consisting of Gallivan's overpayment ("accumulated contributions"[100]) of $9,590.48 and interest in the amount of $1,219.12. [101] The Board calculated the $1,219.12 in interest based upon the system's "investment rate of return" as "determined by the System's Investment Officer."[102] The Board provided a chart in its October 13, 2017, Decision and Order, which indicates that GERS lost $70.96 on Gallivan's overpayments in 2015 due to an investment rate of return of -2.1% but gained $517.25 on the overpayments in 2016 due to 7.2% in accrued interest and gained $772.83 on the overpayments in 2017 due to 7.7% in accrued interest.[103] The Board added together $772.83 and $517.25 for a sum of $1,290.08, from which it subtracted $70.96, for a difference of $1,219.12.[104] It was this amount of interest added to the principal of the overpayment that was refunded to Gallivan.

¶58 The Board correctly observed that no interest rate for contribution overpayments is provided for in Chapter 27 (Tier I) or Chapter 28A (Tier II). While 3 V.I.C. § 762, entitled "Refunds", provides conditions for refunds for accumulated contributions made by a member of the System, nothing in that section deals with returns of overpayments with interest to the System. Section 762 deals only with members who are withdrawing from service who have less than ten years of credited service and who are then not eligible for a service retirement annuity.[105] Section 762(a) thus indicates that a member who withdraws from service[106] [107], and who does not have ten years of credited service[108], and who, at the time of withdrawal from service, is not eligible for a retirement annuity, is entitled to a refund for accumulated contributions, plus regular interest. Section 762(a) clearly does not deal with the situation in this case regarding the interest rate to be applied to an overpayment by a member of the System. Accordingly, the Board erred in determining that the refund rate described in 3 V.I.C. § 762(a) applies to a refund for a member's overpayments in contributions to GERS due to GERS' overcharges.

¶59 Although the rate of Gallivan's interest on her overpayment to GERS is not calculated pursuant to 3 V.I.C. § 762(a), Gallivan is entitled to restitution from GERS for her overpayments. Here, GERS has shown that it accrued interest on Gallivan's overpayments, and thus, the Court looks to whether Gallivan is entitled to an award of interest on a restitution

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[100] 3 V.I.C. § 702(l) (defining "accumulated contributions" in the "Definitions" section of Chapter 27 (Tier I)). "Accumulated contributions" are "the amounts contributed by a member as a deduction from compensation, without interest."
[101] Decision and Order of the Board dated October 13, 2017, at 4.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] 3 V.I.C. §762(a).
[106] 3 V.I.C. § 702(r) "Withdrawal from service" means "complete severance of employment of any member as an employee of the employer by resignation, discharge, dismissal or death."
[107] 3 V.I.C. § 702(g) "Service" means "employment as an employee of the employer for salary, wages or compensation."
[108] 3 V.I.C. § 702(j) "Credited service" means "prior service and membership service".

theory. Restitution is measured by the defendant's unjust gain, not by the plaintiff's loss. [109] Restitution's central purpose "is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount." [110] Further it is not necessary to show proof "that the plaintiff was damaged, much less the amount of any damage."[111]

¶60 In *Walters v. Walters*, 60 V.I. 768 (V.I. 2014), the Virgin Islands Supreme Court held that in order to recover for unjust enrichment, a plaintiff must prove "(1) that the defendant was enriched, (2) that such enrichment was at the plaintiffs expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff."[112]

¶61 Here, the parties have satisfied the elements of unjust enrichment. GERS was enriched by the overpayments in the amount of $9,590.48 and by the interest that GERS gained on the overpayments in the amount of $1,290.08 (from $517.25 in interest gained in 2016 and $772.84 in interest gained in 2017).[113] Furthermore, GERS' enrichment was at Gallivan's expense. GERS knew about the overpayments and corresponding gains in interest; and in equity or good conscience, GERS should have returned the overpayments with gains in interest to Gallivan. Thus, although the parties focused narrowly on the pension statutes in the underlying record and in their briefs before this Court, and failed to discuss the equitable remedy of restitution, the record shows that the facts in support of restitution have already been established by the parties. Therefore, the Court will order the return of Gallivan's overpayments in contributions on a theory of restitution, and not based upon the pension statutes.

¶62 On a theory of restitution, Gallivan is entitled to a refund for contribution overpayments and GERS' interest gains—but not losses – on those overpayments. The Board refunded only $10,809.60, because it included GERS' loss of $70.96 in interest on Gallivan's overpayments in 2015. Because the Board should have refunded $10,880.56 to Gallivan, and not $10,809.60, the Court will order the Board to pay an additional sum of $70.96 to Gallivan.

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[109] *See United States ex rel. Taylor v. Gabelli*, 2005 U.S. Dist. LEXIS 26821, at *20 (S.D.N.Y. Nov. 3, 2005) ("Damages differs from restitution in that damages is measured by the plaintiffs loss; restitution is measured by the defendant's unjust gain" (quoting Dan B. Dobbs, Law of Remedies: Damages, Equity, Restitution § 3.1, 208 (2d ed. 1993)).

[110] *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722 (Temp. Emer. Ct. App. 1982); *see generally id.* at 722-723 ("Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiffs expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded") (citing Restatement of Restitution, Sec. 1, Comment e (1937)).

[111] *Id.*

[112] *Walters v. Walters*, 60 V.I. 768, 776 (V.I. 2014).

[113] A negative rate of return on interest is not a gain, and thus, the Court does not include the loss in interest of $70.96 based upon Gallivan's overpayments in 2015 in its calculation of any interest that GERS gained on Gallivan's overpayments.

VI. Magistrate Judge Gallivan failed to make an argument in support of her assertion that GERS' adjustments to contribution and annuity rates are unconstitutional.

¶63 The Court observes that in her closing brief before the Board, Gallivan asserted that "the decision of GERS to make adjustments to contribution rates on a wholesale basis for the members of the judiciary based on Title 3 V.I.C. 770l, as well as applicable annuity rates, is unconstitutional under the Revised Organic Act, as amended."[114] But in that brief and in her briefs submitted to this Court, Gallivan failed to cite any case law in support of her assertion and failed to cite to any potentially relevant provisions in the Revised Organic Act, and thus, has not challenged the constitutionality of a specific provision(s) in 3 V.I.C. 770l (Tier II) with respect to a specific provision(s) in the Revised Organic Act. "[I]n general, the Court will not make a [party]'s arguments for him [or her] when he [or she] has failed to do so,"[115] and the Court declines to make any constitutional arguments on Gallivan's behalf.

VII. Magistrate Judge Gallivan was not denied procedural due process.

¶64 Finally, Gallivan argues that the hearings before the hearing examiner appointed by the Board were procedurally flawed, depriving her of due process.[116] She does not cite any case law or statutes to support her argument that she was deprived of due process. But, she asserts that Administrator Nibbs provided her with the rules and regulations governing appeals before the Board, and that those rules and regulations appeared to have not been signed by anyone.[117] Gallivan contends that accordingly, the Board has not "properly promulgated rules and regulations to govern the appeals before it".[118] Further, Gallivan argues that over the course of the hearings, the Board and the hearing officer violated Rules Nos. "715-1(e)", 715-6", "715-8(a)," and "715-13" of the rules and regulations governing appeals before the Board.[119]

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[114] *See* Cert. Record, Document 63: Appellant's April 3, 2017, Closing Brief, page 13.

[115] *Joseph v. Joseph*, 2015 V.I. LEXIS 43, *5 (V.I. Super. Ct. Apr. 23, 2015) (citing *People of the Virgin Islands v. Penn*, 53 V.I. 315, 318 (V.I. Super. Ct. 2010)) (denying a defendant's motion to dismiss when he did not present any argument or case law supporting his claim of discrimination) and *Schneider's Dairy v. Serv. Pers. & Emples., Teamsters Local Union No. 205*, 2013 U.S. Dist. LEXIS 174350, *5-6 n.1 (W.D. Pa. Dec. 10, 2013) ("It is not the Court's job to research and construct legal arguments open to parties ... In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate") (internal citation omitted)); *see also In re Catalyst Litig.*, 2015 V.I. LEXIS 145, *3-6 n. 12 (V.I. Super. Ct. 2015) ("The Supreme Court of the Virgin Islands has established that in order for a motion to be properly before the court, parties must support their arguments by citing the proper legal authority, statute or rule") (citing *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-346 (V.I. 2009); *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 238-239 (V.I. 2013)); *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument.").

[116] *See* Petitioner's Memo of Law at 12-16.

[117] *See id.* at 12.

[118] *Id.*

[119] *Id.*

¶65 The Court's research reveals that Rules Nos. "715-1(e)", 715-6", "715-8(a)", and "715-13" do not exist in the Virgin Islands Code or the Virgin Islands Rules and Regulations, nor do any rules or regulations governing appeals before the Board, confirming Gallivan's assertion that the Board has not officially promulgated such rules. But while the Board had no promulgated rules for administrative hearings in effect over the course of Gallivan's hearings, and still lacks such rules, the Court is not aware of any authority requiring procedural rules governing a hearing before a Virgin Islands agency to be officially promulgated to allow an agency to comply with procedural due process requirements.

¶66 In order to be effective, agency regulations must be filed and published in accordance with 3 V.I.C. § 933.[120] Further, the Virgin Islands Code[121] defines the term, "regulation" as "every rule regulation or order, amendments thereto or revocations thereof, made by any agency, except a rule, regulation or order which – (1) relates only to the organization or internal management of the agency; or . . . (3) is directed to a specifically named person or group of persons and does not apply generally throughout the Virgin Islands."

¶67 Because the rules governing the appeals before the Board are directed only to petitioners before the Board and do not apply generally throughout the Virgin Islands, the Court finds that those rules do not constitute "regulations" within the meaning of 3 V.I.C. § 911(b). Thus, the fact that the Board has not promulgated rules for appeals before it in accordance with 3 V.I.C. § 913 and 3 V.I.C. § 933 does not render those rules ineffective.

¶68 The fundamental procedural safeguards that were required to protect Gallivan's interests at stake in the hearings were notice and an opportunity to be heard in a meaningful manner. "When an agency exercises adjudicatory authority, it has a duty to comply with the rules of due process."[122] Though the procedures may vary according to the interest at stake, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[123] "The essential elements of due process of law are notice and opportunity to defend," and "[i]n determining whether such rights were denied, we are governed by the substance of things and not by mere form."[124]

¶69 Gallivan's position is that she was not afforded due process for the following reasons: (1) the Chairman of the Board never appeared at or presided over any of the hearings in violation of Rule No. 715-6, and instead, a board member presided over the hearing as the hearing officer, over Gallivan's objections;[125] (2) that the court reporter, as opposed to the Chairman of the

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[120] Further, 3 V.I.C. § 913, entitled "Approval by the Governor; review by the Legislature; public notice", outlines the procedures for the filing and publication of regulations.
[121] 3 V.I.C. § 911(b).
[122] *Gov't of the V.I. v. Caneel Bay Plantation*, 5 V.I. 655, 661 (V.I. Super. Ct. 1966). *See also In re Amendments to the Virgin Islands Supreme Court Internal Operating Procedures and Style Guide*, S. Ct. Prom. No.2014-003, at A-7 (V.I. Mar. 14, 2014).
[123] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
[124] *Estate of Skepple v. Bank of Nova Scotia*, 2018 V.I. Supreme LEXIS 24 (V.I. 2018) (quoting *Simon v. Craft*, 182 U.S. 427, 436 (1901) (citations omitted).
[125] *See* Petitioner's Memo of Law at 12.

Board, swore in the witnesses at the hearing, also in violation of Rule No. 715-6, over Gallivan's objections;[126] (3) that "most (if not all) of her [the hearing officer's] rulings were inappropriately and unlawfully made by Board Counsel" and that the Board Counsel "also inappropriately asked many questions of witnesses and presumed an active role in the hearing process" and "pointed to 'cue cards' to either dictate, persuade or inform the hearing officer how to rule";[127] that (4) the hearing officer allowed records and testimony that were not part of the record below, "such as the written opinion and testimony of Rocky Joyner", in violation of Rule 715-1(e), over Gallivan's objections;[128] and that (5) because Rocky Joyner testified at the hearing via telephone, Gallivan was disadvantaged by her inability to see or hear him in person.[129]

¶70 In response, the Board argues that Gallivan received notice of the hearings, participated in all of the hearings, which comprised more than twenty hours, and presented a twenty-two-page closing brief after the hearings concluded.[130]

¶71 The record reflects that Gallivan was present at all of the hearings, thus indicating that she received notice of the hearings. Further, the record is devoid of facts showing that Gallivan was denied a meaningful opportunity for her arguments to be heard at the hearings. Gallivan fails to demonstrate how any of the violations of rules governing appeals before the Board are within the scope of due process protection. Gallivan does not show how the Chairman's absence from the hearings and failure to swear in witnesses violated her due process rights. Notably, the Board asserts that the Chairman recused himself from presiding at the hearing, because he is a personal friend of Gallivan.[131]

¶72 Regarding the hearing officer's rulings, Gallivan fails to point to any specific rulings, specify under which rules or laws the rulings of the hearing officer were inappropriately or unlawfully made, or otherwise indicate how the hearing officer's rulings denied Gallivan a fair hearing.

¶73 With respect to Gallivan's objection that the Board permitted the expert testimony of Joyner, who was not an appellant, appellee, or authority-below, Gallivan cites Rule No. 715-13 which provides that "[n]o person may participate in the hearing proceeding who is not an appellant, appellee, or authority-below. Any other person, with the permission of the Board may address the Board, on any matter before it, but only after the record proceeding has been closed."[132] But Gallivan does not establish how a violation of Rule No. 715-13 is within the scope of due process protection. Further, the Board's June 1, 2017, Decision and Order,

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[126] *Id.*
[127] *Id.* at 12-13.
[128] *Id.* at 13. Rocky Joyner is a Seagal Advisors Actuary Consultant (*see* Decision and Order of the Board dated June 1, 2017 at 6).
[129] *Id.* Gallivan also asserts that "[t]he Rules and Regulations do not permit anyone to attend by phone" without citing to a particular rule.
[130] *See* GERS' Memo of Law at 11-13.
[131] *See id.* at 11.
[132] *See* Petitioner's Memo of Law at 13.

indicates that Joyner's testimony regarded the funding of pensions and was not essential to the Board's method for calculating Gallivan's annuity, but rather was superfluous to its Decision and Order.[133] Similarly, Gallivan asserts that Joyner's testimony was "erroneous and irrelevant" to her case.[134]

¶74 In addition, Gallivan critiqued Joyner's opinion and methodology.[135] Gallivan's closing brief before the Board thus demonstrates that Gallivan had the opportunity to review and respond to Joyner's opinion prior to the issuance of the Board's June 1, 2017, Decision and Order. Gallivan also does not demonstrate how she was disadvantaged, and moreover, denied a fair hearing, because the Board permitted Joyner to testify via telephone and did not require Joyner to testify in person. Accordingly, the Court does not find that Gallivan was denied due process before the Board.

CONCLUSION

¶75 For the foregoing reasons, the Court finds that Gallivan is a Tier II Member of the GERS judicial retirement program, and that she is entitled to an annuity of 30% of her salary for her first term and 5% per year of her salary for her second term or 20%. The Board was correct in its determination that the contribution rate for Gallivan's pension should have been 11% of her salary for the first two terms, but this rate is based upon a reading of the applicable statutes, and not on promissory estoppel or any contract theories. The Court also concludes that Gallivan's refund and interest on that refund should be calculated on a theory of restitution, and not based upon the statute that was used by the Board. The Court found that using the correct theory to calculate the refund, an additional sum of $70.96 was owed to Gallivan. Gallivan failed to make an argument in support of her assertion that GERS' adjustments to contribution and annuity rates under 3 V.I.C. 770l (Tier II) are unconstitutional. Finally, Gallivan was not denied due process during the course of the proceedings before the Board.

¶76 An Order consistent with this Memorandum Opinion shall follow.

Dated: April 26, 2019

HON. JAMES S. CARROLL
SENIOR SITTING JUDGE OF THE
SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Clerk of Court ___/___/___

by: __________
Donna Donovan
Court Clerk Supervisor 4/26/19

[133] *See* Decision and Order of the Board dated June 1, 2017, at 15-16.
[134] *See* Petitioner's Memo of Law at 13.
[135] *See* Appellant's Closing Brief at 15-16.