BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE DEPARTMENT OF ADMINISTRATION

In the Matter of:	)	
	)	
C K	)	
	)	OAH No. 06-0860-PER
	)	Div. R & B No. 2006-041

RULING ON MOTION FOR SANCTIONS

C K of No Name is the widow of M W, a member of the PERS system. After Mr. W died in 2005, the division denied survivor benefits to Ms. K, and she appealed. This case went to hearing in late June of 2007, after a standard pre-hearing process spanning several months that included the filing of an administrative record and the pre-filing of exhibit sets.

A central issue at the hearing was Mr. W's intent as to whether to elect a survivor option. The central evidence on this question was his retirement application and associated forms and correspondence. These materials were held by the Division of Retirement and Benefits. Collectively, they represented a small body of documents. In every other PERS matter the undersigned has encountered, the assembly of the key documents has been a prompt, routine, and noncontroversial process.

In this case the process went quite seriously awry, with important components of the administrative record appearing only part-way through the hearing itself. At the end of the hearing, Ms. K moved for the sanctions, to include singly or in combination:

-- Exclusion of all of the division's evidence, resulting in a finding for Ms. K on the merits;

-- Striking the testimony of retirement specialist Kathleen Carson, inferring the negative of what the testimony was offered to prove; and

-- A monetary award including attorneys' fees.

Though styled as a motion for sanctions, the motion explicitly sought relief under 2 AAC 64.290 as well, a regulation authorizing the exclusion of evidence outside the context of sanctions. The division opposed the motion as "frivolous" and requested an award of its own fees for having to respond to the motion.

This order denies both requests for monetary sanctions and denies the effectively case-ending sanctions that Ms. K has suggested. The order enforces the agreed pre-hearing

procedures, however, thereby precluding the division from relying on the late documents and preventing the drawing of inferences in the division's favor from the absence of documents from the late-produced set.

A. Document Production History

About half a year before filing this appeal, C K filed an "Authorization for Release of Information" with the division requesting "all records . . . pertaining to Mr. M."[1] The division supplied a collection of documents that later proved incomplete; it excluded four pages from his retirement application packet and a large volume of correspondence relating to his benefits.[2]

Alaska Statute 44.64.060(b) requires, within 15 days of a request for hearing to challenge an agency decision, that the agency compile and transmit "the record relied upon to support the decision." Twelve days after the hearing request in this case, the division submitted a record consisting of pages numbered P1 to P81. Among other things, the set appeared to contain Mr. W's retirement application and the documents he submitted with it. At a case planning conference held a short time later, the division's counsel confirmed that the assembly of the record was complete.

Counsel for Ms. K were, at some point prior to the hearing, aware that P1 to P81 was not a complete set of documents from the division's files relevant to the case, because they had the pre-litigation set of documents for comparison. For example, the pre-litigation response included at least two documents (later designated 012 and 015) that were plainly part of Mr. W's retirement application packet but were not in the P1-P81 set.

At the case planning conference, the parties agreed that P1-P81 would be deemed already submitted for the hearing record; any "[a]dditional exhibits" would have to be submitted and exchanged with opposing counsel in binders due a week before the hearing.[3] The division submitted a set of exhibits; Ms. K submitted none.

Just prior to the hearing, a retirement supervisor went through Mr. W's file in some manner and discovered two documents that, in the division's view, ought to have been part of the numbered agency record.[4] Neither was in the division's exhibit set. One of these, later

---

1 P5.

2 The items missing from the production are listed at Exhibit B to the Motion for Sanctions (Exhibit B, though not verified by affidavit, has not been objected to and has been relied on by both sides).

3 Scheduling Order, January 9, 2007, at 1-2.

4 Tr. 73 (per Kathleen Lea, "Division would have included [them] in the numbered administrative record had . . . there been no error"); Tr. 66 (per Lea, discovered "About 8:45 this morning").

designated P83,[5] was a "Retiree Information Form" that is quite an important component of the retirement application packet; the other was a 1999 W-4P form later designated P82.[6] There was no mention of the documents until about an hour into the hearing when their existence emerged during questioning of a division witness by Ms. K's counsel.[7] Both were added to the record at that time and, much later, were admitted, one without objection and one over an objection unrelated to the timeliness of its appearance.[8]

Counsel for both parties were less than forthcoming with the administrative law judge (ALJ) and with one another when these two documents emerged. The division's counsel learned that the record was incomplete just before the hearing opened, but she did not mention the documents in the housekeeping session that opened the hearing, during which exhibits and documentary evidence were discussed. She waited until opposing counsel brought out through questioning that the documents existed, and only then offered that "we're happy to produce them."[9] On the other hand, unbeknownst to the ALJ or the division's counsel, Ms. K's attorneys already had a copy of both documents, having obtained them through their release before the litigation began.[10] By the time of the hearing, Ms. K's lawyers had determined that the two document sets were inconsistent and seem to have been thoroughly familiar with both sets.[11]

Later in the hearing, one other document from the pre-litigation set was offered on behalf of Ms. K. This was an e-mail from Mr. W to the division regarding his retirement application, and it probably should have been part of the numbered record. The division objected to its admission on the basis that it had not been pre-filed as a listed exhibit; the objection was overruled and the document admitted.[12]

A last, much larger gap in the record came to light toward the end of the hearing. After Ms. K's counsel had completed cross-examination of the division's final witness, Retirement Manager Kathleen Lea, the ALJ asked Ms. Lea whether Mr. W had submitted proof of his wife's birth date with his application.[13] Ms. Lea responded that she did not know: the proof of birth date was not in the record as filed, but it might be in Mr. W's microfiche file. From her

---

5 The document is also 015 in the June 22 production, to be discussed later.
6 The document is also 017 in the June 22 production, to be discussed later.
7 Tr. 64ff.
8 Tr. 175-77.
9 Tr. 67, 74-75.
10 Motion for Sanctions, Exhibit B, p. 1, lines 015, 017.
11 *See, e.g.*, Tr. 117.
12 Tr. 117-18. The document became K Exhibit 1. A second K exhibit was offered and admitted, but this was only a more legible copy of a document already in the P1-P81 set. Tr. 145-46.
13 Tr. 203.

response, it was apparent that Ms. Lea knew the collection of Mr. W's application materials might be fundamentally incomplete. Upon request of the division, and over objection from Ms. K's counsel, the ALJ directed a systematic review of the microfiche.[14] This generated a considerable volume of new material, including pages from Mr. W's original retirement application packet. If admitted, the new material would permit an important negative inference damaging to Ms. K's claim.[15]

B. Admissibility and Sanctions

1. 001-215

The materials gathered from the microfiche at the end of the hearing have been numbered 001 to 215 and filed in the case as an exhibit to the Affidavit of Pete Fisher. They have not formally been admitted as hearing evidence, the question of their admissibility having been deferred for later motion practice.[16] The present motion for sanctions is, initially, the anticipated motion on admissibility of those documents, although it seeks relief going beyond their mere exclusion.

There is some room for debate over how much material should be included in an agency record. Traditionally, the record in a PERS matter that turns on the intent of a retiree as expressed in his retirement application would include the whole of that application—and the division here acknowledges that some omitted items "should have been included[17]—but there is in fact no law or regulation that unequivocally requires such completeness. If the agency did not review or rely on the whole application in reaching its conclusions about its intent, it arguably could withhold the parts not relied upon unless directly asked for them. In this case, the division was asked for relevant materials beyond those it "relied upon" in its prior decision in two ways: First, before the litigation it had received a release requesting "all records . . . pertaining to Mr. M," and it had provided a response that left out at least 30 such documents.[18] Second, it was asked to, and agreed to, designate and show to opposing counsel any exhibits it would rely on at the hearing a week in advance of the hearing.

Going into the hearing, the division knew that its review of the microfiche was not sufficiently thorough to be sure of netting all parts of the application packet.[19] It nonetheless did

---

14 Tr. 206-11.
15 Tr. 207-08, 227.
16 Tr. 233-34.
17 *E.g.*, Opp. to Motion for Sanctions at 4.
18 P5; Exhibit B to Motion for Sanctions.
19 Tr. 203-04.

not care to go back and make a thorough check. This may not be wrongful in itself (although it is a little troubling in the context of the pre-litigation document release), but unquestionably it undermines the division's current position that it ought to be excused from the requirement for pre-hearing disclosure of exhibits and permitted to add documents discovered during the hearing in the very file it had elected not to check beforehand.

A failure to disclose key information in advance of the hearing harms the parties and the process in several ways. First, it deprives the opposing party of an opportunity to reassess (and perhaps withdraw) a claim not borne out by the evidence before the large outlay of time and expense a hearing entails. Second, it makes for a chaotic hearing that wastes time. Third, it risks giving beneficiaries the impression that their retirement system is not committed to addressing their claims fairly.

The handling of document disclosure in this case does not support releasing the division from its commitment to identifying in advance of the hearing all materials outside the numbered record on which it would rely. Documents 001 – 215 will therefore be excluded. All testimony about them will be disregarded, and no inferences will be drawn from what was not found during the late file search. These consequences flow from 2 AAC 64.290(a), and are not imposed as a sanction.

2. P82-83

P82 and P83 were added to the record during the hearing, but without any objection as to timeliness. Their admission will not be disturbed.

3. Exhibit 1

Exhibit 1 was the single document Ms. K sought to rely on at the hearing outside the numbered record. She had not listed it as an exhibit in advance of the hearing. The division objected to its admission because it was not listed.

Exhibit 1 is an e-mail from Mr. W to Linda Weed of the division regarding his retirement packet. Retirement Supervisor Bernadette Blankenship, who signed the division's initial denial letter regarding Ms. K's claim, testified that she reviewed that e-mail; indeed, she recalled the substance of the e-mail at the hearing a year later.[20] Even though Ms. Blankenship had reviewed the document in connection with her decision, the division did not include it in the P1 to P81 set. Relative to the circumstances surrounding 001 – 0215, these circumstances present a somewhat

[20] P55-56; Tr. 107. Since Ms. Blankenship testified to the document's contents, its admission or exclusion as an exhibit is not of great import.

closer question whether this document should have been excluded for failure to comply with the exhibit deadline. Since there is no pending motion relating to this document, its admission will not be disturbed.

4. All other evidence

Ms. K requests much broader exclusion of evidence as a sanction for misconduct. This office's authority to impose nonmonetary sanctions is found in 2 AAC 64.360. Sanctions are authorized only where a party has failed "to comply with an order." The division did not fail to comply with any orders in this case. Asking for permission to admit documents that were not timely listed as exhibits under a case planning order is not a violation of the case planning order; it is simply a request that can be granted or denied under the terms of the order.

5. Fees

This office is not authorized to assess attorneys' fees against parties unless there is a showing of bad faith, frivolous tactics, or tactics intended solely to cause unnecessary delay.[21] None of these three circumstances has been shown to apply, and both parties' requests for a fee award are denied.

C. Conclusion

Except for the evidentiary rulings under 2 AAC 64.290 made in Part B-1 above, Ms. K's motion for sanctions is denied.

DATED this 17th day of December, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 17th day of December, 2007, a true and correct copy of this **document** was mailed to Christine Williams, counsel for Ms. K; and Joan Wilkerson, AAG.

By: *Signed*
Kimberly DeMoss

[This document has been modified to conform to the technical standards for publication.]

[21] AS 44.64.040(b)(2).