

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of D W )  
 ) OAH No. 05-0636-PER  
 ) Div. R&B No. 200-002

**DECISION**

**I. Introduction**

This is D W’s appeal of the Division of Retirement and Benefits’ determination that she did not accrue credited service toward Public Employees’ Retirement System (PERS) retirement while employed as an instructional aide for the \*\*\*\* School District. Though Ms. W made a compelling showing that the school district’s errors in recordkeeping and withholding or forwarding of PERS contributions might have obscured the facts about whether she was entitled to credited service, and she established that the position she occupied, more likely than not, fit the definition of a permanent part-time position within the meaning of the PERS statutes, she did not meet her burden of proving how much credited service she should have accrued for all or in any part of the ten-period at issue. Accordingly, the division’s determination is affirmed.

This decision, however, does not preclude correction of Ms. W’s PERS account under AS 39.35.520(a) to reflect additional credited service if at some point the school district credibly verifies PERS permanent part-time hours for Ms. W and corresponding PERS contributions are made to her account. Absent proof of (or a negotiated agreement establishing) Ms. W’s \*\*\*\* School District hours and earnings, however, the division is not required to adjust her PERS account to reflect credited service for her work at the \*\*\*\* school for 1979-1989.

**II. Facts**

D W first became a PERS member in the late 1970s, when she worked as a full-time employee of the \*\*\*\* School District for one school year, accruing 0.75891 years of credited service.<sup>1</sup> Her PERS contributions for that service were refunded to her, but as she approached retirement and found herself again working in a PERS-covered position, Ms. W arranged to buy back those credits.<sup>2</sup> Ms. W returned to full-time, PERS-covered employment in 2003, when she

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<sup>1</sup> February 1, 2006 Hearing Testimony of D W (W Feb. 1 Testimony) (explaining that Ms. W served as the \*\*\*\* School District’s community schools coordinator for 10 months); January 9, 2006 Screen Print for W, Agency Rec. 51 (showing full-time employment from 10/04/77 through 07/07/1978).

<sup>2</sup> W Feb. 1 Testimony (explaining that Ms. W received a cash payout at the end of her service as community schools coordinator); January 9, 2006 Screen Print for W, Agency Rec. 54 (reporting refund information and showing a refund of \$673.17 in mandatory contributions and interest); January 9, 2006 Screen Print for W, Agency Rec. 55 (report on indebtedness inquiry, showing \$3,645.79 cost to repurchase 0.75891 credit, with interest from 1978).

took a position with the State of Alaska working in vocational rehabilitation.<sup>3</sup> After that she returned to employment with the \*\*\*\* School District in 2005.<sup>4</sup>

This appeal arose from Ms. W's assertion that she also should have accrued credited service toward retirement as a permanent part-time employee in a PERS-covered position for her work as an instructional aide with the \*\*\*\* School District. The division denied her request for PERS credited service for her "part-time service with \*\*\*\* School District during the 1983-1987 school years."<sup>5</sup> The division's reasoning was that a permanent part-time employee must "be regularly scheduled at least 15 hours but less than 30 hours per week in order to participate as a member of the PERS" and that "the verification of the hours [she] worked during [the 1983-87] period does not support participation in the PERS."<sup>6</sup>

Ms. W timely appealed that determination. During the course of the hearing process, she expanded the period for which she believes herself to be entitled to PERS credited service to encompass 1979-82 and 1988-89. An evidentiary hearing was conducted on three non-consecutive days in January and February 2006, to accommodate the parties' and witnesses' schedules, and to allow time for additional records searches to be made. The initial Agency Record on which the division's determination had been based was supplemented with many additional documents, as well as by the testimony of several witnesses. The record was held open after the hearing concluded, to allow Ms. W to attempt to obtain additional documents, and to allow the parties to file post-hearing briefs.

Ms. W's post-hearing brief was timely filed; the division's was not. Permission to file it late was denied.<sup>7</sup> The documentary record and testimony established the facts set out below,

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<sup>3</sup> W Feb. 1 Testimony; January 9, 2006 Screen Print for W, Agency Rec. 52 (showing a hire date of 03/04/2003 for a full-time position, with a termination date of 05/02/2005, during which time Ms. W accrued credited service).

<sup>4</sup> W Feb. 1 Testimony; January 9, 2006 Screen Print for W, Agency Rec. 53 (reporting full-time employment with the \*\*\*\* School District beginning 04/29/2005).

<sup>5</sup> March 9, 2004 Letter from Millhorn to W, Agency Rec. 49.

<sup>6</sup> *Id.* The division acknowledged, both in the denial letter and during a September 28, 2005 Prehearing Conference in this appeal, that the school district had erred in not changing Ms. W's position from temporary to permanent and that the basis for the denial was not the lack of a "permanent" position but rather the lack of sufficient hours to qualify as "permanent part-time" under the PERS statutes.

<sup>7</sup> See June 13, 2006 Order Denying Motion to File Late Post-hearing Brief. The division requested reconsideration of that denial, arguing essentially that it should not be sanctioned for untimeliness by being foreclosed from arguing an important statute of limitations issue. See June 16, 2006 Motion for Reconsideration of Denial of Motion to File Late Post-hearing Brief at 2. Reconsideration was not granted, and the division's post-hearing brief has not been considered in reaching this decision.

Possible statute of limitations and laches defenses were discussed briefly at the end of the hearing. Because Ms. W has not met her burden in this appeal, it is unnecessary to reach the many issues that would have to be resolved to determine whether and, if so, under what circumstances these time bar defenses could be applied to a

which are material to deciding whether Ms. W met her burden of proof that she is entitled to credited service for her work for the \*\*\*\* School District.

#### A. WORK HISTORY AT THE \*\*\*\* SCHOOL

For many years in the interim between the two periods of undisputed PERS-covered employment with the \*\*\*\* School District and the State, Ms. W worked as a self-employed commercial fisher and as an instructional aide at the \*\*\*\* school, where she was an employee of the \*\*\*\* School District.<sup>8</sup> By all accounts, she was a reliable and dedicated aide, much appreciated by teachers and parents, some of whom recalled generally that she worked several hours a day, assisting teachers and students, and even teaching classes, but none of them could recall the specifics of her work hours so many years later.<sup>9</sup>

Ms. W's own recollection is that when she began as an aide at the \*\*\*\* school in 1979 she initially worked three hours per day, five days a week, increasing to five hours per day just a few months later, and that she continued working that schedule until 1989.<sup>10</sup> A new-hire authorization form on the school district's letterhead supports her recollection that she was hired to work as a "Classroom Aide" three hours per day, but the form is undated.<sup>11</sup> From the content and other evidence, the form most likely was completed no earlier than the start of the 1984-85

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situation in which a PERS member seeks correction of the member's PERS account to accurately reflect all credited service the member believes should have accrued.

<sup>8</sup> W Feb. 1 Testimony (explaining that she was self-employed in commercial fishing during the summer seasons between 1979 and 1988, and that during the same period, until she ended her employment to attend to her dying father in November 1989, she worked at the \*\*\*\* school); *also see* Ex. W-1 (W's hand-written timeline used in conjunction with her testimony).

<sup>9</sup> January 20, 2006 Testimony of W C (C Testimony) (stating that Ms. W worked mornings and often into the afternoon, based on his recollection of the 1980-81 and 1981-82 school years); January 20, 2006 Testimony of C F (explaining that his impression was that Ms. W was a full-time employee because she worked the equivalent of a full work day during the 1984-85 and 1985-86 school years); January 20, 2006 Testimony of M D (D Testimony) (answering "yes" to a question about whether Ms. W worked five or more hours per day during the period Ms. D supervised her—i.e., between 1983 and 1985); January 20, 2006 Testimony of C B (discussing work Ms. W did with her son but acknowledging uncertainty as to whether this was the 1980-81 school year and admitting that she does not know the hours Ms. W was working); January 20, 2006 Testimony of D O (stating that he worked at the school from August 1987-July 1997 and though he could not testify to her work schedule he was aware of her interactions with teaching staff concerning certain students in 1987-88); January 20, 2006 Testimony of G J (J Testimony) (explaining that while he was principal of the \*\*\*\* school from 1983-88 he is pretty certain that Ms. W worked five days per week but does not remember the number of hours per day); February 17, 2006 Testimony of J L (recalling that Ms. W worked at the \*\*\*\* school from 1979 until 1987).

<sup>10</sup> January 20, 2006 Testimony of D W (W Jan. 20 Testimony).

<sup>11</sup> *See* \*\*\*\* Schools Authorization for New Hire, Agency Rec. 33. The form purports to authorize the hiring of "D C" as a "classroom aide" for "Hours/Per Day Worked 3." Ms. W married C C toward the end of 1984, and thereafter may have been thought of as D C in the community, though she did not take that name. *See* January 20, 2006 W Testimony and associated timeline at Ex. W-2 (noting marriage with honeymoon and "extra week off at Xmas holiday"); Ex. W-4 (noting on Ms. W's copy of Verification of Service form "Xmas break & Honeymoon week" next to the entry for 12/84).

school year.<sup>12</sup> A separate but also undated form showing Ms. W to have been hired for five hours (presumably per day) as a temporary “Tutorial Aide” more likely than not predated the three-hours-per-day new-hire form.<sup>13</sup>

The sparse records obtained from the school district do not corroborate Ms. W’s recollection that she started in 1979 at three hours per day, moved quickly to five hours per day, and continued working that number of hours each school year until 1989. The two undated hiring forms support only the following findings:

- (1) Ms. W was hired as a Tutorial Aide to work five hours per day at \$8.45 per hour after Mr. J became principal—i.e., no earlier than August 1983, when the 1983-84 school year began;
- (2) Ms. W was subsequently (perhaps for the 1984-85 school year) rehired to fill, or her position was reclassified as, a Classroom Aide position requiring just three hours work per day and paying no more than \$9.91 per hour.

The “Verification of Service” the school district produced lists Ms. W’s “hours worked” as follows:

- 1981—20 hours worked in February; no data for other months;
- 1984—116 hours worked in four months; leave without pay or zero hours for the remaining months;
- 1985—585 hours worked in ten months; leave without pay for the remaining two months;

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<sup>12</sup> *Id.* In addition to using Ms. W’s community-assumed married name, thereby suggesting it was completed after the end-of-1984 marriage, the form indicates that the new-hire was interviewed by “G J.” Mr. J was the principal teacher at the \*\*\*\* school from 1983-88. January 20, 2006 J Testimony. The form also lists the hourly wage as “\$9.91.” The \$9.91 figure on the hourly wage appears to have been altered in that the dollars (9) and the cents (91) appear graphically different and it appears that the original cents figure may have been covered over. This after-the-hiring correction would be consistent with payroll information the school district used to prepare a Verification of Service. *See* \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31 (showing that in 11/84 hourly wage rate was \$9.00 (\$360 divided by 40 hours) but was changed to \$9.91 in 9/85 (\$1,124.79 divided by 113.5 hours)). Ms. W’s wage rate prior to November 1984 appears to have been \$8.45 per hour or less. *Id.* (showing \$8.45 per hour for April-June 1984 (\$642.20 divided by 76 hours) and \$6.10 per hour in 1981 (\$122 divided by 20 hours)). Taken together, the new-hire form and the verification show, more likely than not, that this new hire for three hours per day was for the 1984-85 school year.

<sup>13</sup> *See* Undated form at Agency Rec. 34. This form shows the temporary hire of “D W” in the job class “Tutorial Aide” at an hourly wage of \$8.45 for “hours worked: five” and is signed by G J as “Other [non-superintendent] Administrator.” This wage rate corresponds to the calculated rate for April through June 1984 deduced from information in the school district’s Verification of Service (Agency Rec. 31; Ex. W-4). Since Mr. J was the \*\*\*\* principal beginning with the 1983-84 school year and the wage rate corresponds to three spring months of 1984, more likely than not, the temporary Tutorial Aide hire form authorizing five hours per day predates the late-1984 or after “Classroom Aide” new-hire form.

- 1986—184 hours worked in four months; leave without pay for one month; no data for the other seven months;
- 1987—18 hours worked in two months; no data for the other ten months.<sup>14</sup>

The verification lists the hours worked by month. Only seven of the monthly listings indicate that Ms. W worked more than 60 hours in the month.<sup>15</sup> Four of those months run consecutively through the fall and early winter of 1985.<sup>16</sup> The other three are scattered between the first half of calendar 1985 and spring of 1986.<sup>17</sup>

Two explanations are possible: (1) Ms. W’s recollection that she was scheduled to work at least three hours per day, five days each week, over the entire period of her employment by the \*\*\*\* School District is wrong; (2) the school district’s Verification of Service is wrong. Evidence presented at the hearing supports a finding that the verification likely does not reflect all of the hours Ms. W worked at the \*\*\*\* school over the course of her employment by the school district. In addition to her own testimony, the testimony of others shows that she worked at the school during periods when the verification shows no hours.

For example, W C recalled Ms. W working mornings at least, and possibly into the afternoon, during school years 1980-81 and 1981-82.<sup>18</sup> The school district’s verification lists only 20 hours in a single month of 1981. M D recalled Ms. W working five hours per day in 1983.<sup>19</sup> The school district’s verification lists no hours at all for 1983. D O, who did not begin working at the \*\*\*\* school until August 1987, recalled Ms. W working as an aide while he was

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<sup>14</sup> \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31; *also* Ex. W-4. Though Agency Rec. 31 and Exhibit W-4 are different in appearance and were marked up differently by the agency and Ms. W, the typewritten content on both as to the months, amounts earned and hours worked, as well as Ms. W’s status (“P/T” or “LWOP” – leave without pay) is the same. The version at Agency Rec. 31 is self-authenticating in that it purports on its face to be a document of the \*\*\*\* School District, whereas Exhibit W-4 contains no such identifier, but Ms. W represented that the document was faxed to her by the school district. In a separate exhibit (W-7), Ms. W provided a February 5, 2003 facsimile transmittal cover sheet from \*\*\*\* School District, ostensibly prepared by H S, which from the context could have transmitted the fax version of the verification form Ms. W annotated and submitted as her Exhibit W-4.

<sup>15</sup> \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4 (listing 64.5 hours for 1/85, 62.0 hours for 5/85, 113.5 hours for 9/85, 64.5 hours for 10/85, 65.0 hours for 11/85, 62.0 hours for 12/85 and 74.0 hours for 4/86).

<sup>16</sup> \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4 (listing 113.5 hours for 9/85, 64.5 hours for 10/85, 65.0 hours for 11/85 and 62.0 hours for 12/85).

<sup>17</sup> \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4 (listing 64.5 hours for 1/85, 62.0 hours for 5/85 and 74.0 hours for 4/86).

<sup>18</sup> C Testimony.

<sup>19</sup> D Testimony.

the classroom teacher.<sup>20</sup> The school district's verification lists no hours for Ms. W after May 1987.

G J, who was the principal at the \*\*\*\* school between 1983 and 1988, testified that the \*\*\*\* School District had very serious recordkeeping problems.<sup>21</sup> Evidence indicates that by the time Ms. W was working intensively with the division around 2003 to determine how much credited service she had accrued, the school district's historical records were no longer in tact. The former district employee who worked on payroll matters from 1976-2004, and searched the payroll records prior to leaving her district position, had found the district's records to be missing some W-2 tax withholding forms.<sup>22</sup> She also testified at the hearing and by affidavit that the records on Ms. W's work history with the district were not complete.<sup>23</sup> The district appears to have purged pre-1990 records, though whether this included any specific payroll-related records was not established.<sup>24</sup>

Ms. W disputed the accuracy of the Verification of Service's information.<sup>25</sup> In addition to her testimony, the content of the form itself calls into question the accuracy of the information listed. For instance, when the amounts paid are divided by their associated hours worked, the form suggests that Ms. W's hourly wage fluctuated from \$6.10 in 1981, to \$8.45 at the end of the 1983-84 school year, to \$9.00 for the first several months of the next school year, only to drop to \$8.84 right before summer, then rise to \$8.75 for the first month of the next school year, and rise again the following month to \$9.91, and then to jump to \$10.14 for one month, before dropping back to \$9.91 for several more months, and finally dropping to \$9.13 in the two months listed for 1987.<sup>26</sup> The form also lists Ms. W's type of service in the left-hand column consistently as "P/T" *except* in three months of 1985 for which the form instead lists the abbreviation for leave without

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<sup>20</sup> O Testimony (stating that he was aware that Ms. W was working in the building, though he could not say for sure what her schedule was).

<sup>21</sup> J Testimony (describing, by way of example, the difficulty in finding records of his wife's work as a special education aide until the district superintendent's wife searched for and found the records).

<sup>22</sup> February 17, 2006 Testimony of H M. S (S Testimony) (explaining that in searching for information on Ms. W's past employment with the district, some W-2s were missing and this was reported to the district superintendent).

<sup>23</sup> *Id.*; February 16, 2006 Affidavit of H M. S (stating "when I worked on the matter, there was not complete records found on her [W's] work history ...").

<sup>24</sup> January 1, 2006 "To Whom It May Concern" Letter from B S, Ex. W-5, p. 2 (stating that Ms. S was hired about four years earlier to purge "old records for \*\*\*\* School District for years before 1990" but not describing the type or contents of the records purged).

<sup>25</sup> January 20 and February 1, 2006 W Testimony.

<sup>26</sup> \*\*\*\* School District Public Employee's Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4.

pay and thus does not indicate whether the school district's records showed Ms. W as part-time for those months.<sup>27</sup>

## B. PERS CONTRIBUTIONS

The district's payroll records may have suggested to the employee performing the search that PERS contributions were withheld from Ms. W's earnings in 1981, but that was not established to be so.<sup>28</sup> The division's PERS records do not show any contributions made by the \*\*\*\* School District in Ms. W's name.<sup>29</sup>

The division filed 217 pages of "turnaround" reports showing contributions submitted by the school district for its employees between December 30, 1977 and May 31, 1988.<sup>30</sup> Each report corresponds to a payroll reporting period and lists each PERS member, by Social Security Number and name, for whom the division received from the school district PERS contributions, and shows the contribution amount, as well as the gross salary, hours worked, hire date and the status—i.e., full-time or part-time.<sup>31</sup> A page-by-page, line-by-line review of the reports reveals that Ms. W's name appears in none of the 204 legible pages, under either W or C.<sup>32</sup> Even if the school district did deducted amounts from Ms. W's pay (a fact that has not been established), more likely than not the school district made no PERS contributions on her behalf.

## C. HEALTH CARE COVERAGE

Ms. W testified that part of the inducement the school district used to get her to take the instructional aide job was assurance that she would receive PERS and health care coverage benefits, and that she believed the health care coverage was available only for PERS-covered

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<sup>27</sup> \*\*\*\* School District Public Employee's Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4. For other months the leave-without-pay abbreviation is used only in the "hours worked" column.

<sup>28</sup> Compare February 5, 2003 \*\*\*\* School District Facsimile Transmittal, Ex. W-7 (stating that Ms. S "did not find you [W] had an Public Employees Retirement taken out except for in (1981)") with February 17, 2006 S Testimony (indicating that Ms. S had no recollection of having found confirmation of PERS contributions on behalf of Ms. W other than what might be "in black and white" in the district's records). No pay stub or other documents on which Ms. S based the reference to 1981 PERS withholding was offered into evidence.

<sup>29</sup> February 17, 2006 Testimony of Kathy Carson (describing search of the division's records); May 10, 2006 Affidavit of Bernadette Blankenship (Blankenship Aff.) at ¶ 3 (transmitting and authenticating "turnaround" reports on \*\*\*\* School District's employee PERS contributions for December 30, 1977-May 31, 1988).

<sup>30</sup> See generally BATES Nos. 000001-000217 (filed under seal, under cover of May 10, 2006 Blankenship Aff.). The practice of the school district during the years in question was to send in PERS contributions identified to the particular employee, and to receive confirmation the following month in the form of a turnaround report from the division. February 17, 2006 S Testimony.

<sup>31</sup> E.g., *id.* at 000017; also May 10, 2006 Blankenship Aff. at ¶¶ 2 & 3.

<sup>32</sup> Thirteen of the 217 pages are illegible or blank. Because pages on either side of the 13 do not list Ms. W, and her testimony was that she generally worked a consistent schedule and had outstanding attendance, it is unlikely that her name appeared on those 13 pages but nowhere else in the ten-plus years of reports.

positions.<sup>33</sup> She was able to locate several documents from 1985-86 showing billings for medical care on which Aetna was listed as a payer or insurer.<sup>34</sup> She located one Explanation of Benefits form dated November 5, 1986, showing that Aetna paid 90% of the cost for her eye examination. The explanation form lists \*\*\*\* School District. It does not explicitly say that the district was the plan holder, but that is the most reasonable inference.

None of these documents mentions the Public Employees' Retirement System. No plan document or other proof of the contents of the school district's health care coverage plan for the time period in question was submitted. At most, the testimony and billing records support a finding that in 1985-86 Ms. W had health care benefits from the \*\*\*\* School District. They do not support a finding that she was working in a PERS-covered position at the time.

### III. Discussion

Ms. W's appeal raises the question: is she entitled to credited service toward PERS retirement for work as an instructional aide at the \*\*\*\* school when her employer did not report her as a PERS-covered, permanent part-time employee and submit her hours and earnings data to the division, and did not make PERS contributions in her name? A PERS member must accrue a certain amount of credited service to be eligible for normal retirement.<sup>35</sup> "Credited service" is defined as "the number of years, including fractional years, recognized for computing benefits that may be due from the [PERS] plan."<sup>36</sup> A permanent part-time employee accrues credited service "on a pro rata basis to that which would have been earned as a permanent full-time employee."<sup>37</sup>

To be a permanent part-time employee for PERS purposes, the employee must "occupy[] a permanent position that regularly requires working at least 15 hours but less than 30 hours a

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<sup>33</sup> W Jan. 20 & Feb. 17 Testimony.

<sup>34</sup> August 20, 1986 Bartlett Memorial Hospital invoice ("Aetna Life—State 220" listed as payer); December 10, 1985—September 22, 1986 Jerry F. Zemlicka, DMD, billing ledger (mentioning Aetna in four entries); December 11, 1985 & August 16, 1986 Family Practice Physicians invoices (listing Aetna in the "Insurance or Responsible Party" blank).

<sup>35</sup> AS 39.35.370(a) (permitting appointment to normal retirement when the member has reached a certain age and has five years of credited service, or has 20 years (peace officers and firefighters) or 30 years (all others) of credited service regardless of age). Eligibility for occupational disability benefits is not dependent on credited service (*see* AS 39.35.410), but eligibility for normal and early retirement, as well as for non-occupational disability benefits, is dependent on the member having accrued at least five years of credited service (*see* AS 39.35.370(a) & (b); AS 39.35.400(a)).

<sup>36</sup> AS 39.35.680(10).

<sup>37</sup> AS 39.35.300(b). Permanent full-time employees accrue credited service "on the basis of one calendar day of service for each day in pay status." 2 AAC 35.330(a).



week.”<sup>38</sup> Ms. W would be entitled to receive pro rata credited service for periods when she occupied such a position. She would have to prove two things: (1) that her instructional aide position regularly required working at least 15 but no more than 30 hours per week and (2) how much credited service she is entitled to receive.

#### A. REGULAR REQUIREMENTS

The division’s determination, in effect, questioned whether Ms. W’s instructional aide job regularly required working at least 15 hours per week. In the March 9, 2004 letter denying Ms. W’s request for credited service (Agency Rec. 49), the division stated:

Your work history indicates that, while you did have short periods during the school year when you worked the required hours, they were preceded and followed by either hours below the required number or no hours at all indicating you were not regularly scheduled for the minimum 15 hours per week.

The school district’s Verification of Service shows an irregular pattern of work, or no work at all, for school years 1981-87, and only rarely shows more than 60 hours in a month. Even discounting gaps attributable to leave without pay taken over the summer and during school breaks, the verification depicts an irregular pattern of work, or no work, except arguably for calendar year 1985.

The division’s conclusion, therefore, was reasonable on the record before it. Whether that conclusion remains sound in light the record as supplemented through the hearing process depends on what weight should be given to the school district’s verification and other records, and to the testimony of Ms. W and her witnesses.

What weight, if any, to give to the school district’s Verification of Service form is problematic. For instance, if the form were viewed as a source of credible information, the pattern of work hours it reports would support an inference that in calendar year 1985 Ms. W worked *on average almost* 15 hours per week and, excluding partial leave without pay months, that she *averaged* more than 65 hours per month.<sup>39</sup> If the information is fully credible, it would not support Ms. W’s position that she was a permanent part-time employee within the meaning of the PERS statutes because an average of almost 15 hours per week is not the same as at least

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<sup>38</sup> AS 39.35.680(32).

<sup>39</sup> \*\*\*\* School District Public Employee’s Retirement System Verification of Service, Agency Rec. 31 & Ex. W-4 (showing total hours of 585 for the ten months excluding June and July, yielding an average of nearly 59 hours per month, or roughly 14.6 hours per week, and 535.5 hours attributable to the eight months for which leave without pay was not taken, yielding an average of almost 67 hours per month).

15 hours per week. If the information is not entirely credible, the difficulty becomes how to determine whether her position regularly required working fewer or more than the hours listed.

More likely than not, at the time the Verification of Service form was prepared, the school district's records were not complete and the form does not accurately report the hours Ms. W worked during her years at the \*\*\*\* school. This undermines the verification form's credibility as evidence of when Ms. W worked how many hours. Even assuming that the form under reports the number of hours she worked, it would support a finding only that the school district's records consulted in preparing the form showed that Ms. W worked at least nine and perhaps more than 113.5 hours per month in 21 of the 64 months falling between February 1981 and May 1987. The form would not support a finding about how many, if any, hours she worked in the other 43 months, or in 1978, 1979, 1980 and after May 1987. Since the verification form is not even a good indicator of how much Ms. W actually worked, it reveals little about what would be considered regularly required work hours for the instructional aide position she occupied.

Ms. W was unable to produce records of her own—old pay stubs or tax records—from which it might be possible to deduce how many hours she actually worked, and thus likely was scheduled to work, during specific pay periods or tax years.<sup>40</sup> Ms. W's memory, refreshed by conversations with teachers and parents, and by review of what records she was able to locate, was clear as to the years in which she worked at the \*\*\*\* school and generally what her work schedule was, and she testified credibly on those subjects, but she was not able to testify as to how many hours she actually worked in any specific time periods at issue.<sup>41</sup>

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<sup>40</sup> The record was held open to allow Ms. W to request copies of her tax records from the IRS. *See* February 17, 2006 Hearing Recording. She reported that she was unable to obtain the records because the IRS told her it does not retain records going back more than ten years. *See* April 7, 2006 Status Conference. She also testified, as did her husband, C C, that her only copies/originals of some of her personal records were hand delivered or mailed to the division and then lost. *See generally* Hearing Recording from February 1 & 17, 2006 (cross examination of W); January 29, 2006 Affidavit of C W. C at 3. Whether lost by the division or the postal service, the loss of these records, while unfortunate, does not justify an inference that they would have supported Ms. W's claim for credited service. Even assuming the lost records would have provided relevant evidence, without knowledge of what specific records were included and of their contents, no inferences can fairly be drawn about what, if anything, they would have proven concerning Ms. W's work for the \*\*\*\* School District.

<sup>41</sup> February 17, 2006 W Testimony. When questioned on cross examination about whether she disputes the hours listed on the school district's Verification of Service form, Ms. W answered that she believes them to be incomplete but, due to the lapse of time between her employment with the district and the decades-later hearing, she understandably could not recollect specifically how many hours she worked in the months about which she was questioned. In response to a question about how delayed start dates for aides due to migrant education funding issues affected her work schedule, Ms. W acknowledged that her memory of specifics about her schedule from approximately 27 years earlier was not perfect. She stated that she could not swear that in no year did her work start later than the beginning of the school year (usually late August), though she explained that the need to have aides available to work with disabled students from the outset of the school year put her work in a different category from that of other aides.

Some of Ms. W's witnesses provided testimony corroborating her assertion that the instructional aide position was a five-days-per-week job that required the aide to work at least three hours per day.<sup>42</sup> The undated new-hire form that would have been prepared sometime after Mr. J became principal in 1983 (and most likely for the 1984-85 school year) also substantiates the view that the position required at least three hours per day. Because the school district's verification form was not entirely credible but the testimony was, especially in light of the new-hire form recital of required hours, Ms. W succeeded in proving that the instructional aide position she held with the \*\*\*\* School District, more likely than not, regularly required working enough hours to be a PERS-covered position that, for whatever reason, the school district failed to report as such.<sup>43</sup>

## B. HOURS OF CREDIT

The difficulty with Ms. W's appeal is that though she has established that in most, if not all,<sup>44</sup> of the school years at issue, she occupied a position that likely qualified as PERS-covered, it was a part-time position. Had it been a full-time position, she would have been entitled to credited service "on the basis of one calendar day of service for each day in pay status."<sup>45</sup> Proving which days she was in pay status still would have presented a difficult challenge—one likely not met on the strength of the record for this appeal—but not as difficult a challenge as proving that *plus* the hours she actually worked and how much she was paid.

The hours worked are critical in Ms. W's case for two purposes: (1) calculating the pro rata credit; (2) calculating how much the school district should have forwarded in PERS contributions. General statements, based on recollection of decades-old work arrangements, such as offered by Ms. W's former colleagues and supervisors, and Ms. W's own recollection of what

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<sup>42</sup> See *supra* note 9.

<sup>43</sup> The record for this appeal suggests a number of reasons why the school district might have failed to report Ms. W's position as PERS covered. The district's initial PERS participation agreement executed in 1976 provided only for full-time employees to participate in PERS. Agency Rec. 1. In 1993, the agreement was amended, retroactive to 1976, so that the part-time employees for whom the district had been making PERS contributions could remain PERS members. Agency Rec. at 15-25. It appears that Ms. W's position may not have been changed in the district's records from temporary to permanent when it should have been. The school district reportedly had serious recordkeeping problems. None of these possible causes are attributable to the PERS.

<sup>44</sup> The only school years within the ten year period at issue for which no evidence other than Ms. W's testimony supports finding that worked at the school are 1979-80 and 1988-89. Mr. C provided corroboration for 1980-82; Ms D provided corroboration for 1983-85; Mr. F provided corroboration for 1984-86; Mr. J provided corroboration for 1983-88; Mr. O provided corroboration for 1987-88; and the verification form provided limited corroboration for one month of 1981 and for 1984 through mid-1987.

<sup>45</sup> 2 AAC 35.330(a).

her normal schedule and school year start date were, however credible they are, stop short of providing a basis on which to calculate pro rata credit.

The annotations Ms. W made on the Verification of Service form and her related testimony indicate that even if her instructional aide position normally required someone in the position to be working, month in and month out, throughout the entire school year, the start of work might be delayed pending migrant education funding and leave without pay might be taken at other times.<sup>46</sup> Her testimony also indicated that she went from a three to a five-hour work day at an undetermined point some months after beginning work at the \*\*\*\* school. The new-hire form and the temporary hire form suggest the reverse—that she first worked a five-hours-per-day schedule and later went to a three-hours-per-day schedule. The verification form indicates that her hours varied from month to month. Though the form does not provide credible proof of the precise number of hours she worked, it does suggest that the district found what may have been relatively complete (but inaccurately reported) payroll information for calendar year 1985. That information shows variability in the hours worked, ranging from 23.5 hours to 113.5 hours per month.

For a job with less variability—e.g., one for which the evidence showed that the employee worked 20 hours, no more no less, each week all year, with the same amount of leave without pay taken each year—it might be possible to calculate pro rata credited service without the benefit of timesheets, pay stubs or other proof of the specific hours worked. That is not Ms. W's situation.

Here, it cannot simply be assumed that Ms. W worked a certain number of hours per week consistently over a period of years, nor can it be assumed which weeks she worked versus which she took as leave without pay, or even whether school started and ended for the year on a particular day and whether she started working immediately at the beginning of each of the

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<sup>46</sup> Ms. W's annotated copy of the verification form (Ex. W-4) notes "Migrant Ed. funding delays count for aide hiring" next to the zero-hours, leave-without-pay entries for September and October of 1984. She explained at the hearing that the school sometimes had to wait to bring aides on staff until as late as October because the migrant education funding was dependent on a head-count of students. She added that her position should not have been impacted by this because she worked with special education students who needed assistance from the beginning of the school year. Her testimony on the effect of delayed funding on her start date, though sincere, was a generalization about what should have been so and thus was not sufficient credible evidence to establish that in each of the ten years at issue here the instructional aide position she occupied required work beginning in late August, even if migrant education funding was not yet secured.

The annotated copy also notes for the December 1984 period, for which the district listed "leave without pay" and zero hours, "Xmas break & honeymoon week." This, coupled with Ms. W's testimony about episodes of leave she took over the years, to deal with personal and family medical issues, shows that she was able to and did take time off without pay.

school year. It is tempting to say that she should be given credit for the hours listed on the school district's Verification of Service form. As discussed above, however, the information on that form is not completely credible.

If it were certain that Ms. W worked, at a minimum, the hours on the verification form, and that none of the hours listed are higher, rather than lower than or exactly, what she worked, it would be possible to credit her with those hours without giving her something other PERS members working part time do not get. But this is not certain. The discrepancies between the established hourly wage rates and the ones calculated from the amounts paid for the hours worked listed on the form for 1985-87 suggest that either the hours or the amounts paid are wrong for some of the pay periods listed. For four of the pay periods, unless the amount paid is wrong, the hours worked must be overstated to achieve the amount paid at the established wage rates.<sup>47</sup>

It may be that the hours listed in the verification form are accurate but the amounts listed are wrong, or the wage rate really did bounce around from \$9.00 to \$8.84 to \$8.75 to \$9.91 to \$10.14 to \$9.91 and finally to \$9.13 in the span of 12 months. Without the underlying payroll records it is impossible to tell. And without those records, or other credible evidence of the specific hours worked and related earnings over the ten year period for which Ms. W asserts she should have accrued credited service, it is impossible to accurately calculate pro rata credits or the amount of PERS contributions the school district should have withheld from and forwarded for Ms. W.

The school district did not forward PERS contributions in Ms. W's name, or report hours and earnings for her from which credited service might be calculated. That error rests with the district, not with the PERS. Despite vigorous efforts, Ms. W was unable to prove how much credited service she should have accrued or what amount of PERS contributions would need to be made up before the retirement system could be expected to pay her retirement benefits based on her years at the \*\*\*\* school. The division cannot be required to treat Ms. W more favorably than another PERS member who accrued credited service as a permanent part-time employee. Thus, it would be inappropriate to order the division to change its records to reflect credited service for Ms. W based on assumed but unproven hours, or to require the division to attempt to

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<sup>47</sup> See \*\*\*\* School District Public Employee's Retirement System Verification of Service, Agency Rec. 31 (showing entries for 5/85, 8/85, 4/87 and 5/87 for which the amount paid, divided by the established wage rate of \$9.91, or even the \$9.00 amount that appears to have been used in error until corrected as suggested by the new-hire form's notations, yields fewer hours than listed).

collect from the school district and Ms. W PERS contributions based on an assumed but unproven hours figure and a guessed-at wage rate.

The division would not be precluded from correcting its PERS account record on Ms. W, and adjusting her retirement payments accordingly, if the \*\*\*\* School District were to credibly verify permanent part-time hours of service and make the appropriate PERS contributions at some point in the future. Indeed, under AS 39.35.520(a), such a correction would be required.<sup>48</sup> On the strength of the record in this appeal alone, however, such a correction is not required.

#### **IV. Conclusion**

The problem with D W's accrual of credited service stems from the fact that one of her employers, the \*\*\*\* School District, never reported her as a permanent part-time employee for PERS purposes or made contributions to the PERS for her account. Through her appeal, Ms. W established that more likely than not this was an error. Credible evidence supported a finding that the instructional aide position she occupied was a permanent part-time position within the meaning of the PERS statutes during some, if not all, of the ten years at issue. She was unable to meet her burden of proof, however, on how much credited service should have accrued to her account.

Accordingly, and for the reasons detailed above, the Division of Retirement and Benefits, acting as PERS administrator, is not required as a result of this appeal to add credited service to Ms. W's PERS account for her 1979-89 work at the \*\*\*\* School District. This decision is without prejudice to Ms. W's ability to request a correction of her record under AS 39.35.520(a) if and when the school district provides a credible verification of hours and earnings, and the

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<sup>48</sup> The division has an ongoing duty to make adjustments to PERS records to correct errors regardless of who made them. AS 39.35.520(a) states, in pertinent part:

When a change or error is made in the records maintained by the plan or in the contributions made on behalf of an employee or an error is made in computing a benefit, and, as a result, an employee or beneficiary is entitled to receive from the plan more or less than the employee would have been entitled to receive had the records or contributions been correct or had the error not been made, (1) the records, contributions, or error shall be corrected, and (2) as far as practicable, future payments or benefit entitlement shall be adjusted so that the actuarial equivalent of the pension or benefit to which the employee or beneficiary was correctly entitled shall be paid. . . . If no future payment is due, a person who was paid any amount to which the person was not entitled is liable for repayment of that amount, and a person who was not paid the full amount to which the person was entitled shall be paid the balance of that amount.

associated PERS contributions are made.

DATED this 28<sup>th</sup> day of June, 2008.

By: Signed  
Terry L. Thurbon  
Chief Administrative Law Judge

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of D W )  
 ) OAH No. 05-0636-PER  
 ) Div. R&B No. 200-002  
\_\_\_\_\_ )

**ADOPTION ORDER**

Having considered the July 22, 2008 Proposal for Action filed by the Division of Retirement and Benefits, the undersigned, in accordance with AS 44.64.060, adopts the June 28, 2008 proposed decision as the final administrative determination in this matter, without any changes. It would be inappropriate in the context of this appeal to prejudge the credibility of any future verification of hours and earnings that may be submitted to the division regarding Ms. W's service as a Public Employees' Retirement System (PERS) member or to rule on the propriety of any adjustment to her records she or the division may seek to make in the future under AS 39.35.520. Any future actions taken or refused by the division regarding Ms. W's PERS records might be subject to a new administrative appeal, but this case is now closed at the executive branch level and the decision is final as to the issues raised in this appeal.

Judicial review of the final decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 30<sup>th</sup> day of July, 2008.

By: Signed  
Terry L. Thurbon  
Chief Administrative Law Judge

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