BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
)
C B)
) OAH No. 05-0633-PER
) Div. R & B No. 2008-003

DECISION AND ORDER

I. Introduction

A. Summary

This appeal relates to whether C B's retirement with normal benefits from his Public Employees Retirement System (PERS) job should be effective April 1, 2005, as the Administrator has determined, or at a slightly earlier date. In March of 2005 the PERS Administrator rejected Mr. B's request for normal retirement benefits effective January 1, 2005; in subsequent proceedings Mr. B has amended his request to seek an effective date of February 1, 2005. Thus two months of benefits, totaling approximately $9000, are presently at issue in this appeal.

The single basis for Mr. B's claim to earlier retirement benefits is the doctrine of equitable estoppel. The administrative law judge has determined that Mr. B's situation does not meet the criteria for estoppel against the PERS system. The evidence shows that Mr. B's loss of anticipated retirement benefits resulted initially from an error on his own part, which Mr. B, to his great credit, is frank enough to acknowledge. The loss was then prolonged by oversights and lack of follow-through by a government entity other than the PERS system. This decision does not determine whether the other entity may have an obligation to reimburse the lost benefits.

B. Evidence Considered

This case was originally heard in 2006. The recording of that hearing was lost, and the administrative law judge who conducted the hearing left the state. The Office of Administrative Hearings endeavored to decide the case on the basis of the remaining record, including notes

from the 2006 hearing. In 2008, a Superior Court Judge vacated the first decision and remanded the matter for a new hearing.[1]

This matter has been considered *de novo* since the remand. The record on which this decision is based consists of (1) the testimony received at the hearing on November 4, 2008; (2) Exhibits A through P from the original hearing, which were re-offered and admitted without objection at the November 4 hearing; and (3) Exhibit P-1, a document first offered at the November 4 hearing and likewise admitted without objection. In accordance with a discussion with the parties at the beginning of the November 4, 2008 hearing, no materials or testimony not offered at the 2008 hearing have been considered. Notably, the deposition of C B, which had been submitted in connection with motion practice prior to the court appeal, was not offered in the 2008 hearing and has not been considered; nor have the exhibits attached to it.[2] The handwritten notes of the administrative law judge who conducted the first hearing likewise have not been considered.

II. Facts

C E. B began working for a PERS employer in a position eligible for retirement benefits early in the 1970s.[3] In 1978 he began working for the Municipality of Anchorage ("Muni"), another PERS employer; he continued with the Muni until his retirement.[4] Mr. B hoped to retire in 2004 with 30.0 or more years of PERS service, which would entitle him to "normal" (full) benefits as opposed to less generous early retirement benefits.[5]

Leave without pay (LWOP) can reduce the amount of credited service for retirement, and thus affect the date on which 30 years is accrued. While employed by the Muni Mr. B had a period of medical leave without pay of a little less than two months in 1980.[6] The Muni has reported no other interruptions in service that would potentially affect his retirement eligibility.

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1 *State, Division of Retirement and Benefits v. B,* No. 3AN-00-00000CI (Alaska Superior Court, Bolger, J., July 28, 2008). Judge Bolger's decision was first distributed to the Office of Administrative hearings in late September. With consent of the parties, the remanded case was then assigned to an administrative law judge who could conduct a new hearing as early as possible, and the November 4, 2008 hearing was scheduled.

2 The deposition and its exhibits do not seem to have been offered as evidence in the 2006 hearing, either, but they were used in the effort to reconstruct a record for decision after the loss of the hearing tapes.

3 Cross-examination of B.

4 *Id.*

5 *See* AS 39.35.370(a).

6 *Id.*; Ex. E.

On October 5, 2004, Ms. B met with Debbie Bialka, a Regional Counselor with the Division of Retirement and Benefits, to explore his retirement.[7] There is no dispute about the substance of their conversation. Mr. B indicated he hoped to terminate his employment on December 17, 2004 with more than 30 years of service.[8] Ms. Bialka determined that he would apparently have 30 years of service by that time,[9] but she mentioned that leave without pay is a potential complicating factor "that has to be worked in."[10] She warned that retiring with less than 30 years of service would result in a reduced benefit, and she suggested that he contact the Muni for a verification of service to "ensure no LWOP, etc."[11] She orally gave him an estimate of his retirement benefit based on the service credit and approximate retirement date under discussion, but she did not give him a paper copy owing to her concern about the LWOP uncertainty.[12]

Mr. B submitted an application for retirement in late October of 2004, requesting normal retirement effective January 1, 2005.[13] The application itself did not indicate a proposed termination date, as that information is not requested on the application. The application's instructions warned the applicant, in bold letters:

> It is always a good idea to ask your employer(s) to verify your PERS service before you terminate employment. Verifying your service is especially important if: (1) you have worked part-time, or (2) you just barely have enough PERS service to retire.[14]

The instructions also reminded applicants that "[a]ccrued LWOP that exceeds 10 working days in any calendar year is not creditable under the PERS."[15]

Applications for retirement cannot be granted or denied until the individual actually terminates; at that time final PERS service can be verified to determine eligibility and an exact benefit can be calculated.[16] Accordingly, Mr. B's application did not immediately receive final processing.[17] In the meantime, in late November or early December Mr. B received his regular

[7] Direct testimony of B and Bialka; Exhibit M. Although her legal surname is Bialka-Benedict, Ms. Bialka goes by only the first half of that name.
[8] Direct testimony of Bialka; Exhibit M.
[9] *Id.*
[10] Direct testimony of B (paraphrasing Bialka).
[11] Exhibit M (Bialka's contemporaneous record of meeting); direct testimony of Bialka; ALJ exam of Bialka.
[12] *Id.*; redirect exam of Bialka.
[13] Ex. C.
[14] Ex. P-1 at 8.
[15] *Id.* at 7.
[16] Cross exam and ALJ exam of Lea.
[17] A preliminary review to identify missing documents and errors would have been performed as soon as the application was received. ALJ exam of Lea.

annual statement from PERS. The statement provided his account status as of June 30, 2004 and placed his "estimated" normal retirement date at December 1, 2004.[18] The statement was similar to ones Mr. B had received for a number of years.[19] There is no evidence that Mr. B considered this statement a resolution of the question of the exact date his thirty years would be fully accrued.[20] There is no testimony or other evidence admitted to the record for this decision that Mr. B received any communications from the division, apart from his annual statement, between the Bialka meeting in October and December 16, 2004.

On November 29, 2004 an employee in the Muni's Employee Relations Department faxed a Verification of Salaries and Service form to the division, showing Mr. B's nearly two months of LWOP from 1980.[21] On the cover sheet the Muni employee wrote: "Looking for retirement date. Didn't know if this LWOP previously reported. This is the only LWOP time I found."[22] On December 3 she followed up by e-mail, saying: "Please let me know on what date he will have his 30 years. He is wanting to make sure of the date before giving his retirement notice."[23] She copied Mr. B with the e-mail.

The division's response to these inquiries was delayed, partly because the relevant part of the PERS computer system was down for a week.[24] On December 16, division employee Evangeline Houston responded to the Muni employee by e-mail, telling her that Mr. B "will have earned 30 years of membership service on December 24, 2004."[25] This statement was correct: the day on which Mr. B would have had the full thirty years of service needed for him to receive normal retirement on January 1, 2005, as he desired, was, indeed, December 24, 2004.[26] Houston supplemented the e-mail with a telephone message left on Mr. B's voice mail at work.[27]

In the meantime, Mr. B had already terminated on December 15. To assist his employer in filling his position with a replacement, he had advanced his termination date from the

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18 Ex. D at 1.
19 Cross exam of B.
20 If Mr. B had relied on the annual statement, his reliance would not have been reasonable. His situation would be analogous to that explored in *In re J.S.,* Decision No. 04-01 (Teachers' Retirement Board Feb. 25, 2004) (no equitable estoppel where teacher retired in reliance on annual statements; reliance was not reasonable since teacher (like B) had received reminders to verify service accrued).
21 Ex. E.
22 *Id.*
23 Ex. F.
24 Direct testimony of Houston.
25 Ex. G.
26 Direct testimony of Lea. The parties do not dispute the correct thirty-year accrual date.
27 Ex. H; direct exam of Houston.

December 17 date he gave Debbie Bialka.[28] Thus, he had terminated nine days short of eligibility for normal retirement.

Mr. B forthrightly accepts responsibility for terminating too soon. For example, he opened his direct testimony with the following:

> The short and sweet of it is that I thought I had the time to retire. I left my job before having that confirmed. I screwed up. I should have checked. I didn't.[29]

He acknowledges that he knew the Muni had sent a verification of service to PERS, but that he never went back to the Muni to ask how much LWOP they reported.[30] He terminated without knowing that information. Apart from submitting his application, he never contacted the Division of Retirement and Benefits after his October conversation with Ms. Bialka.[31]

Mr. B did not get the division's message left on his voice mail the day after he terminated; in all likelihood the voice mail account was deleted, and its contents lost, soon after the message was left.[32] The Muni employee who received Ms. Houston's e-mail on December 16 (giving the December 24 date for thirty years' accrual) did not pass that information on to Mr. B.[33]

Before taking final action on Mr. B's application to retire effective January 1, 2005, the division needed post-termination confirmation of the date he actually terminated. This information would eventually reach the division—roughly in six weeks—through routine payroll reporting, but the division's practice is to make earlier, specific requests for actual dates of termination from the employer, so that benefits can be finalized more promptly.[34] The first such request to the Muni in Mr. B's case was automatically generated in the last week of December, 2004; followup requests were generated in the first and second weeks of January.[35] There was no response from the Muni.[36]

On Tuesday, February 8, 2005, Mr. B's actual termination date finally reached Ms. Houston through the routine payroll reporting channel.[37] Realizing for the first time that he had terminated earlier than the date she had provided on December 16, Ms. Houston immediately

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28 Cross exam of B.
29 Direct testimony of B (Dig. file 1 at 24:00).
30 Cross exam of B (Dig. File 1 at 46:30).
31 *Id.* (Dig. File 1 at 46:30 – 48:45).
32 Direct testimony and cross exam of B.
33 Direct and ALJ exam of Houston; direct testimony of B; Ex. H.
34 Direct and ALJ exam of Houston.
35 ALJ exam of Houston.
36 *Id.*

telephoned her contact at the Muni.[38] According to Houston's contemporaneous notes, the Muni employee then "realized she had never contacted member to inform him of the date."[39] The Muni employee promised to research the matter and tell PERS how to proceed.[40]

Houston was quite concerned at this point, and left reminder messages with her Muni contact on the Thursday and Friday of the same week, without response.[41] Unknown to her, the Muni had mailed a letter on Wednesday, February 9, informing Mr. B of the shortfall and telling him he "may wish to contact PERS to determine how the nine days shortfall affects your retirement goals."[42]

On Monday, February 14, Mr. B (who had not yet received the Muni's letter) called the division on his own initiative because he had not received his first check.[43] Ms. Houston told him of the nine-day shortfall.[44] She also seems to have attempted to reach the supervisor of her contact at the Muni.[45]

Between the 14th and the 16th Mr. B evidently conferred with the Muni, and on February 16 he instructed PERS to "hold off processing" his retirement application while he and the Muni explored putting him back to work for nine days to complete the thirty years needed for full retirement.[46] This was the eventual solution, with the extra days apparently worked between March 7 and March 18.[47] Mr. B was appointed to retirement effective April 1, 2005, and began receiving normal retirement benefits then.[48]

Had he not terminated too soon, Mr. B could have received normal retirement benefits beginning January 1, 2005. The approximate monthly benefit to which he was entitled upon thirty years of service was $4354.[49] The eventual consequence of his error in December 2004 was the loss of benefit payments for January, February, and March, all of which he would otherwise have received. Had he been notified of his error promptly after it occurred, it is likely

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[37] *Id.*

[38] Direct and ALJ exam of Houston; Ex. H.

[39] Ex. H.

[40] *Id.*

[41] *Id.*; direct exam of Houston.

[42] Ex. I. The letter was copied to a PERS supervisor, reaching that destination on February 16.

[43] Direct testimony of B and Houston; Ex. H.

[44] *Id.*

[45] Direct exam of Houston; Ex. H.

[46] Ex. J. Had the application been processed before this occurred, he would have been appointed to early retirement with significantly reduced benefits for the rest of his life, which he did not desire. Direct exam of Houston.

[47] Direct testimony of B; Ex. L.

[48] Direct testimony of B; *see also* Ex. N.

[49] Ex. D.

that he could have completed the missing nine days of work prior to January 31, 2005, and thus avoided the loss of his February and March benefits.[50]

III. Discussion

It is undisputed in this case that on December 15, 2004, his last day of creditable service prior to the March reemployment, Mr. B lacked the thirty years of service needed for normal retirement. Had he continued to work until he had the full thirty years he needed, his last day of service would have been December 24, 2004, and he could have been eligible to receive a normal retirement benefit as early as January 1, 2005.[51] His unfortunate misunderstanding led to the loss of three months of benefits.

The basis under which PERS might be responsible for such a loss is the doctrine of equitable estoppel, which can come into play when an employee has reasonably acted in reliance on misinformation provided by the Division of Retirement and Benefits. To be able to recover under this doctrine, Mr. B would have to prove each of the following elements:

> (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.[52]

If these four elements were present, the division would be estopped to deny--that is, precluded by equity from denying--that the position it asserted was true, and it would have to live by that position. In this case, however, the first two elements are entirely missing.

First, prior to December 16, 2004 the division never asserted a position regarding the amount of service Mr. B would have on a given date. It simply projected his benefits on the basis of the information supplied to it. The most significant such projection was the oral one discussed with Ms. Bialka in October. There is no dispute that Mr. B knew Ms. Bialka was not giving him a thirty-year retirement date at that meeting and that he still needed his verification of service from the Muni before that could be done. When, on December 16, the division finally asserted a position regarding the normal retirement date, the position it asserted was correct, and Mr. B would have suffered no harm had he relied on it.

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[50] Direct testimony of B (Dig. file 1 at 33:00).

[51] *See* AS 39.35.370(e).

[52] *Crum v. Stalnacker*, 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government test in a Teachers' Retirement System case).

Second, to the extent that Mr. B relied on earlier projections, hopes, or estimates discussed with or obtained from the division, his reliance was not reasonable. He knew that information regarding LWOP had been transmitted to the division at the end of November and that the Muni was awaiting word on the appropriate termination date. He left without waiting for the answer or checking with the division himself to obtain the answer.

Mr. B does not blame others for his error, and he does not claim that his departure on December 15 was wise or reasonable. He feels, however, that there was unnecessary delay in correcting the error—that he should have been notified much sooner of his premature departure.

With regard to the Division of Retirement and Benefits, this is not a fair criticism. The division had no way of knowing that the Muni had not passed on the information about termination date it provided on December 16. Moreover, beginning in late December the division made three routine written requests to the Muni for confirmation of Mr. B's actual retirement date, and those requests went unanswered. Had they been answered, the division could have alerted the Muni and Mr. B to the problem in time to correct it before February 1. Without an answer the division remained ignorant that there was a problem.

The lack of response from the Muni prevented the division from learning the actual termination date until it came to light through the payroll reporting system on February 8. Beginning that day, the division acted immediately and urgently on the information, making repeated calls to the Muni. Conceivably, had the Muni acted with the same urgency the problem might have been corrected before March 1, but again, slow response time delayed resolution into the following month.

The Public Employees Retirement System and the Municipality of Anchorage are separate entities. This decision resolves only the liability of the former. There is no legal basis to ascribe responsibility for any portion of Mr. B's losses to the Retirement System.

IV. Conclusion

The Division of Retirement and Benefits correctly determined that Mr. B lacked thirty years of credited service on December 15, 2004, and it is not estopped to apply that determination. The Administrator's decision of March 23, 2005, rejecting Mr. B's request to

have his benefits effective prior to the date he actually met the eligibility requirements for normal retirement, is affirmed.

DATED this 10th day of November, 2008.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

This Decision and Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 15th day of December, 2008.

By: *Signed*
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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