

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

In the Matter of S. S. W. ) OAH No. 06-0100-PER  
\_\_\_\_\_ ) Div. R&B No. 2006-013

DECISION AND ORDER

I. Introduction

This is S.W.'s appeal of the Division of Retirement and Benefits' ("division's") decision that Ms. W. is not eligible to apply for occupational disability benefits under the Public Employees Retirement System (PERS). The division concluded that Ms. W. employment was terminated for cause, not because of her medical condition. The evidence at the hearing and in the documentary record supports that conclusion. The division's decision, therefore, is affirmed.

II. Facts

S.W. began working for the State of Alaska, as a certified nurse aide (CNA) at the \*\*\*\*\* Pioneers' Home, in the late 1980s.<sup>1</sup> While working at the Pioneers' Home in February of 2005, Ms. W. injured her thumb.<sup>2</sup> She attributes the injury to lifting or moving a patient.<sup>3</sup>

After the injury, Ms. W. was off work on medical leave.<sup>4</sup> In the fall of 2005, she was informed that she had run out of leave.<sup>5</sup> She was notified that if she could not return to work by September 19, 2005, she would be "separated from [her] position without prejudice."<sup>6</sup> Ms. W. did not immediately receive the notice letter, but she picked it up from her post office box after learning from a coworker that the Pioneers' Home had posted her position around September 18 or 19.<sup>7</sup> The posting was canceled after Ms. W. pointed out to her employer that her pay stub

<sup>1</sup> January 1, 2006 Letter from W., stating that she began working at the \*\*\*\*\* Pioneers' Home in 1987 (Division Exhibit 12, p. 1); March 30, 2006 Screen Print, showing Ms. W.'s hire date for employer State of Alaska as July 16, 1988 (Division Exhibit 13); April 20, 2006 Testimony of S. W. (W. Testimony"), testifying that she began working for the Pioneers' Home in 1988.

<sup>2</sup> W. Testimony, *also* Report of Occupational Injury or Illness (Division Exhibit 4), reporting a February 9, 2005 thumb injury.

<sup>3</sup> W. Testimony; Report of Occupational Injury or Illness (Division Exhibit 4).

<sup>4</sup> W. Testimony; April 20, 2006 Testimony of Julie Sande ("Sandc Testimony").

<sup>5</sup> September 8, 2005 Letter from Mallinger to W.

<sup>6</sup> *Id.*

<sup>7</sup> W. Testimony.

still showed accumulated leave and she had received some leave donations from coworkers. Ms. W. remained on leave status, with the Pioneers' Home keeping the position open for her.<sup>9</sup>

During Ms. W.'s medical leave period, the administrator of the \*\*\*\*\* Pioneers' Home, Julie Sande, learned that Ms. W. had twice been convicted for theft (concealment of merchandise).<sup>10</sup> The most recent conviction occurred in August 2005 and related to a December 2004 incident.<sup>11</sup> Ms. Sande learned of it from a telephone message left by a community member, calling attention to a November 17, 2005 newspaper report of the conviction.<sup>12</sup> She contacted a human resources specialist about the matter and convened a meeting with Ms. W., who was accompanied by two union representatives.<sup>13</sup> At the meeting, which took place in November, the fact that Ms. W. had a similar conviction from 1998 came out.<sup>14</sup>

By letter dated December 5, 2005, Ms. Sande informed Ms. W. that she was being terminated from her employment. The letter included the following reasons:

[Y]our being found guilty, by jury trial, of concealing merchandise is cause for immediate dismissal. Dishonesty is considered "egregious misconduct" [and your conviction-related] publicity ... raises concerns and questions about the trustworthiness and integrity of the people we employ to care for our most vulnerable senior citizens.<sup>[15]</sup>

The letter also noted that "[d]uring the investigative interview, in the presence of [her] union representative, [Ms. W.] admitted to a 1998 conviction for a similar crime ...."<sup>16</sup> Ms. W. had been cited on March 31, 1998 for violation of AS 11.46.140 (Theft in the Third Degree) for allegedly concealing merchandise in her purse.<sup>17</sup> She pleaded "no contest."<sup>18</sup>

<sup>8</sup> W. Testimony.

<sup>9</sup> W. Testimony.

<sup>10</sup> April 6, 2006 Testimony of Julie Sande ("Sande Testimony"); December 5, 2005 Letter from Sande to W. at p. 1 (explaining that the conviction had been called to her attention by a community member after a report of it appeared in the local newspaper).

<sup>11</sup> August 4, 2005 Verdict (Division Exhibit 5); January 4, 2005 Criminal Complaint, Case No. 14tt-05-Ji CR (Division Exhibit 3) (alleging concealment of merchandise charge from December 20, 2004 incident at Safeway).

<sup>12</sup> Sande Testimony.

<sup>13</sup> Sande Testimony.

<sup>14</sup> W. Testimony. Ms. W. testified that the Pioneers' Home already knew of the 1998 conviction. Ms. Sande testified that she was not aware of it until the November 2005 meeting but that she had been administrator of the home for just three years prior to the hearing. Someone at the Pioneers' Home may have known of the 1998 conviction, but nothing in the record for this appeal suggests that Ms. Sande knew of it prior to November 2005, when she made the decision to terminate Ms. W.'s employment.

<sup>15</sup> December 5, 2005 Letter from Sande to W. at p. 1.

<sup>16</sup> *Id.*

<sup>17</sup> March 31, 1998 \*\*\*\*\* Police Department Uniform Citation No. 08898, alleging concealment of meat and cigarettes. (Division Exhibit 1, p. 1.)

<sup>18</sup> April 3, 1998 Clerk Notes for Case No. 1fe-98-ffeCR (Division Exhibit 1, p. 2).

In deciding whether to terminate Ms. W.'s employment, Ms. Sande considered the two convictions and Ms. W.'s prior disciplinary history.<sup>19</sup> Ms. Sande "found a pattern of misconduct" in Ms. W.'s prior history regarding resident abuse, insubordination, and inappropriate relationships with residents.<sup>20</sup>

Sometime during or after November 2005, Ms. W. applied for occupational disability benefits, asserting that she had "no use of [right] hand" due to the February 2005 injury.<sup>21</sup> On December 20, 2005, the division denied Ms. W.'s application for occupational disability benefits because she had been dismissed from her employment "for cause[,] not due to a physical or mental condition . . . ." <sup>22</sup>

On January 20, 2006, Ms. W. filed an appeal of the division's decision, asking that she be allowed occupational disability benefits until she is able to return to work because she "was terminated while on workers comp. because of a misdemeanor [sic] that does not involve [her] duties as a CNA." <sup>23</sup> After Ms. W. and the division were allowed a period of time for discovery, an evidentiary hearing was held on April 20, 2006.

At the hearing, Ms. W. called two character witnesses: A.Y. and N.C. Both were former coworkers of Ms. W. at the \*\*\*\*\* Pioneers' Home and both testified that Ms. W. is a good CNA and that they would be comfortable working with Ms. W., despite her recent criminal conviction.<sup>24</sup> The division called two witnesses: Ms. Sande, who testified to the circumstances of Ms. W.'s termination from employment as described above, and a division employee, Kathleen Lea, who established that the division continued receiving both employee and employer contributions to Ms. W.'s PERS account through December 2005.<sup>25</sup>

<sup>19</sup> Sande Testimony; December 5, 2005 Letter from Sande to W. at p. 1.

<sup>20</sup> December 5, 2005 Letter from Sande to W. at pp. 1-2. *See also* Division Exhibit 10 (series of communications concerning Ms. W.'s disciplinary history regarding conduct concerning Pioneers' Home residents).

<sup>21</sup> *See* Undated Disability Retirement Application excerpt (Division Exhibit 8). The contents of the undated form, specifically two notations to the effect that Ms. W. was "still seeing" two medical providers for whom she listed "Nov 05" as date of last treatment," shows that the application must have been filed during or after November 2005.

<sup>22</sup> December 20, 2005 Letter from Millhorn to W. at p. 1 (filed with agency record; also submitted as Division Exhibit 11).

<sup>23</sup> January 9, 2006 Letter from V/flfc (received by the division January 20, 2006, as attachment to completed appeal form).

<sup>24</sup> April 20, 2006 Testimony of YtM» & QflfcMt

<sup>25</sup> April 20, 2005 Testimony of Kathleen Lea ("Lea Testimony"). Ms. Lea, a retirement manager for the division, testified that the division continued to receive contributions to Ms. Lea's PERS account through December 2005, and that the contributions were calculated as a percentage of Ms. W.'s pay. Ms. W. said that she had been

## HI. Discussion

Ms. W. and the division agreed that this appeal raises an issue about why Ms. employment was terminated, not whether she is disabled.<sup>26</sup> To be eligible for occupational disability benefits, an employee must not only be unable to work due to a disability, but also must have left the employment relationship because of the disability and not for some other reason.<sup>27</sup> If the employment relationship is terminated for some other reason, the employee is not entitled to occupational disability benefits.<sup>28</sup> The issue in Ms. W .'s appeal, therefore, is whether her employment was terminated because of her thumb injury or, as her former employer asserts, because of misconduct.

According to the Alaska Supreme Court, a broad inquiry that goes beyond the employer's motivation is required to determine whether the employment relationship was terminated because of the disability or for some other reason.<sup>29</sup> The inquiry starts by determining when the employment relationship terminated and then moves to determining why it was terminated.<sup>30</sup>

### A. DATE OF TERMINATION

For purposes of the PERS disability statutes, termination of employment occurs upon complete severance of the employer-employee relationship.<sup>31</sup> When an employee remains in leave status, and stays in contact with the employer so that the position will be held open for that employee's possible return, complete severance of the relationship has not occurred.<sup>32</sup> That was Ms. W .'s situation in late 2005.

required to refund to the state for an overpayment in excess of \$300 and asked whether this was related to the contributions. Ms. Lea responded that the records she consulted showed nothing about an overpayment refund. Ms. W . did not offer evidence about the overpayment refund, other than this passing reference to it. The evidence, therefore, shows that Ms. W. more likely than not remained on the state's payroll, making PERS contributions and having employer contributions made for her, until sometime in December 2005.

<sup>26</sup> During the April 20, 2006 hearing, Ms. W. and the division's counsel reiterated their mutual understanding that if this appeal were to result in a finding that Ms. W. was terminated not for cause, but due to her medical condition, a remand to the division would be in order for a determination about whether Ms. W. suffers from an occupational disability within the meaning of the PERS statutes.

<sup>27</sup> AS 39.35.410(a); *also Rhines v. State*, 30 P.3d 621,625-628 (Alaska 2001) (affirming determination that former employee was not eligible for occupational disability benefits because she had been terminated for non-medical reasons, i.e., due to a reorganization that eliminated her position).

<sup>28</sup> *Rhines*, 30 P.3d at 625-628 (illustrating that a disability must be the cause of the termination for the terminated employee to be entitled to disability benefits).

<sup>29</sup> *Id.* at 625.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 626 (holding that the employment relationship continued while the employee was on a medical-leave of absence because she did not cut off ties with the employer and, in fact, called the office several times, and interviewed for the position created through reorganization that eliminated her position, so that the new position would be held open for her).

In September 2005, when her employer thought she was out of leave and gave notice that her employment would be terminated, Ms. W. contacted the employer and arranged to remain in leave status by pointing out that she continued to have accrued and donated leave. This contact also led to her employer canceling the posting of her position and holding it open for her.

Additionally, when Ms. Sande called her in for a meeting after learning of the newspaper report of the recent conviction, Ms. W. attended the meeting and was accompanied by union representatives. These are not the acts of a person who has already severed an employment relationship, but rather of someone trying to preserve that relationship.

Ms. W. and her employer continued making contributions to her PERS account through December 2005. This, coupled with her leave status, continuing contact with the employer, effort to have her position held open, and meeting to try to preserve her employment relationship, make it more likely than not that her employment relationship with the \*\*\*\*\* Pioneers' Home continued until sometime in December 2005. Accordingly, the evidence shows that Ms. W.'s employment relationship did not terminate before the meeting at which she, Ms. Sande and the union representatives discussed her conviction and, more likely than not, terminated when Ms. Sande issued the December 5, 2005 letter asserting "cause for immediate dismissal."

#### B. CAUSE OF TERMINATION

The concept of "legal causation" applies to determine whether employment termination was caused by a disability or something else.<sup>33</sup> The starting point is to ask whether the employee would have been terminated "but for" the disability.<sup>34</sup> The focus of the inquiry is on the time of the termination.<sup>35</sup>

When the \*\*\*\*\* Pioneers' Home terminated Ms. W.'s employment in December 2005, she was on medical leave due to the thumb injury, but her inability to return to work at that time was not the "but for" cause of her termination. Ms. W. presented no evidence that she would not have been terminated "but for" the thumb injury. She drew no connection between that injury and the misdemeanor conviction that led to her termination. Nothing in the record suggests that Ms. Sande's motive for consulting with a human resources specialist, meeting with

<sup>33</sup> *Id.* at 625.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Ms. W. and her union representatives, and then issuing the December 5, 2005 letter describing the cause for immediate dismissal in any way related to the thumb injury.

The December 5<sup>th</sup> letter shows that the Pioneers' Home, acting through its administrator Ms. Sande, terminated Ms. W. for "off-duty misconduct," primarily because of the then-recent discovery of Ms. W.'s theft convictions, and partly because of past disciplinary problems. Taken together, the convictions and past problems with resident abuse and inappropriate relationships gave Ms. W.'s employer cause to be concerned that she "cannot be trusted to not steal from [the home's] residents, many of whom are afflicted with dementia and unable to recognize or even realize the loss of money or property."<sup>36</sup>

Ms. W. disagrees, asserting through her own statements and her character witnesses that she can and should be trusted to continue working with the residents. It is unnecessary to decide whether she is in fact trustworthy when it comes to caring for the Pioneers' Home residents. Her employer terminated the employment relationship not because of the thumb injury, but because of a legitimate concern about her suitability to continue working with vulnerable senior citizens. Whether her employer was right or wrong about the threat she poses to the senior citizens does not alter the conclusion that the cause of her termination was something other than her thumb injury.

#### IV. Conclusion

Ms. W. has not shown that the \*\*\*\*\* Pioneers' Home terminated her employment because of her thumb injury. Instead, the evidence shows that her employment was terminated for misconduct, principally because of her theft convictions and the resulting concern about entrusting vulnerable senior citizens to the care of a person who has been convicted of theft. The division's denial of Ms. W.'s application for occupational disability benefits, therefore, is affirmed.

DATED this 22<sup>nd</sup> day of March, 2007.

By: Terry L. Thurbon  
Chief Administrative Law Judge

<sup>36</sup> December 5, 2005 Letter from Sande to Wjfc at p. 1 (Division Exhibit 9).

Adoption

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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of April, 2007.

By: Terry L. Thurbon  
Chief Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties  
4/16/07