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

In the Matter of:	)	
	)	
G. S. L.	)	
	)	OAH No. 06-0779-PER
	)	Div. R & B No. 2006-033

DECISION AND ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

G. S. L. has brought a Public Employees' Retirement System (PERS) appeal asserting that cashed-in leave should be treated as compensation for the purposes of calculating her retirement benefit. The case is before the administrative law judge on the parties' cross-motions for summary adjudication. A review of the undisputed facts shows that the PERS Administrator is entitled to prevail.

In this procedurally unusual case, the Division of Retirement and Benefits issued a denial letter declining to include the value of Ms. L.'s cashed-in leave in its calculation of her benefit. The denial was supplied even though Ms. L. had never actually requested the inclusion. Ms. L. appealed the denial. Ms. L. later sought to add employment and retirement issues to the appeal that were not within the scope of the denial. A prior order on motions filed by the division restricted the appeal to the single issue of whether cashed-in leave should be included in compensation for her high years. Summary on adjudication on that issue has been briefed in successive rounds over a period of three months.

II. Factual Background and Procedural History

G. S. L. is a state employee who hopes to retire in 2007. The legal determination to be made in this case turns on the PERS jobs she held prior to July 1, 1977, and the expectations they carried with them regarding the cashing in of leave during the course of employment.

Ms. L.'s first PERS-credited employment was an eight-week job with the City and Borough of Juneau in the spring of 1974.[1] She began her permanent state employment on

[1] Div. Ex. Q-1 at 2.

September 17, 1974 as a probation officer, continuing in that position until February 20, 1976.[2] While a probation officer, she was a member of the General Government Unit (GGU) for collective bargaining purposes.

From February 24 to June 1, 1976 and from January 20 to May 20, 1977, Ms. L. was a legislative aide.[3] In that position, she was an exempt employee and not covered by any collective bargaining agreement.[4] From September 20 to December 22, 1976, Ms. L. was a partially-exempt secretary in the Legislative Affairs Agency, again not subject to any collective bargaining agreement.[5]

In her brief sojourn with the City and Borough of Juneau, Ms. L. never had a right to cash in leave.[6] She likewise had no right to cash in leave when she worked as a probation officer. The state personnel rules that—in the absence of an overriding collective bargaining agreement—govern rights of non-exempt executive branch employees, did not contain a provision for leave cash-in until after 1980.[7] GGU employees obtained the right to cash in leave through a collective bargaining agreement effective May 2, 1977,[8] but Ms. L. had already left the GGU by that time.

In her two seasonal stints as an exempt legislative aide prior to July 1, 1977, Ms. L. was in a daily position that accrued no leave.[9] Accordingly, there was no right to cash in leave.

Finally, Ms. L. briefly held a secretarial position in the Legislative Affairs Agency in the fall on 1976. This position was permanent and earned leave.[10] Legislative employees had a right to leave cash-in after 1986 on the basis of a regulation.[11] In 1976, ten years earlier, it was the practice of the Legislative Affairs Agency "to follow the general leave policies as established by law and regulations of the Department of Administration."[12] As noted above, the state personnel rules then in effect did not contain a provision for leave cash-in.

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2 "Response to Administrator's Brief and Motion for Summary Judgment and Renewed Motion for Summary Judgment" at 2; Div. Ex. Q-1 at 1-2.

3 Div. Ex. Q-1 at 1-3.

4 *Id;* Ex. 4 to Div. Feb. 13, 2007 Motion for Summary Judgment.

5 *Id.*; Affidavit of Pamela Varni (Div. Ex. X), ¶ 5.

6 Div. Ex. R.

7 Div. Ex. A, C, E, N. Ex. N at 11 shows the inapplicability of these rules to exempt employees.

8 Div. Ex. L at 55-56; *see also* Div. Ex. B, D; *cf. McMullen v. Bell*, 128 P.3d 186, 192 (Alaska 2006) (confirming substantially the same factual finding).

9 Affidavit of Pamela Varni (Div. Ex. X), ¶ 4.

10 *Id.*, ¶ 5.

11 2 AAC 08.065; *see also* 2 AAC 08.010 (showing coverage of permanent legislative employees).

12 Div. Ex. X at 4 (LAA memo dated July 29, 1976); *see also* AS 24.10.060 as effective between 1971 and 1987 (reprinted at Div. Ex. V).

At the end of her three-month secretarial job with the Legislative Affairs Agency, Ms. L. resigned and received a cash payment for accrued leave.[13] This was terminal leave under AS 39.20.250(a), not a leave cash-in.

During roughly the same period as her probation officer and legislative aide work, Ms. L. withdrew PERS contributions totaling $5,385.41.[14] Ms. L. mistakenly views these payments as "cashed-in leave,"[15] but they are actually refunds of PERS contributions that she elected to take each time she terminated PERS employment. They have nothing to do with leave.

Much later in her career, Ms. L. worked for the Alaska Industrial Development and Export Authority. She was terminated from that position in July of 1992, [16] and then was reinstated, with back pay, under a litigation settlement at the end of the same year.[17] When she was terminated, her employer converted her accrued leave to a cash payment of $6,256.42.[18]

If Ms. L. retires in 2007, the parties agree that her three high years for calculating her retirement benefit are 1992-1994.[19] There was no cashed-in leave in 1993 or 1994.[20] As for the 1992 payment, the division characterizes it as terminal leave (notwithstanding the reinstatement suggesting the termination was illegal) and Ms. L. characterizes it as an involuntary leave cash-in. The division has not counted it in her 1992 compensation.

In late 2001, Ms. L. read an e-mailed union bulletin about a PERS board decision regarding the crediting of cash-in leave as compensation in calculating a retirement benefit.[21] She wrote to the Division of Retirement and Benefits asking, "How will this ruling affect my retirement if I have accrued leave when I retire?"[22] The division responded with a form letter that began, "This is in response to your request to have the value of cashed-in leave included in the calculation of your monthly retirement benefit . . . ."[23] Of course, Ms. L. had not made such a request; she had only asked for information about what might happen *if* she had accrued leave in the future. The form letter went on to tell Ms. L. that her "request" was premature, since she had not yet retired, but that she could make her request again when she applied for retirement.

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13 Affidavit of Pamela Varni (Div. Ex. X), ¶ 5.

14 Div. Ex. Q at 1, ¶ 6; Div. Ex. Q-1 at 10.

15 "Response to Administrator's Brief and Motion for Summary Judgment and Renewed Motion for Summary Judgment" at 2.

16 Ex. 2 to Administrator's motion to dismiss.

17 The settlement documents are found with the Administrator's filing of March 21, 2007.

18 Div. Ex. Q-1 at 8.

19 *See* Div. Ex. Q-1 at 5.

20 Div. Ex. Q at 1, ¶ 3.

21 Agency record at 9.

22 Agency record at 8.

23 Agency record at 7.

On November 6, 2006, the division sent Ms. L. another form letter. This letter referred again to her supposed "request to have your [PERS] benefit calculated to include in your 'average monthly compensation' (used to compute your benefit) the value of leave you cashed in."[24] It then denied her "request," and told her that she had 30 days to appeal.

Ms. L. did not remember having made a request,[25] which is understandable since in fact she had made none. As invited in the November 6 letter, however, she appealed the denial.[26]

This case is solely about the whether the November 6 denial was correct. Ms. L. has other retirement issues that she may wish to have addressed, as well as other potential monetary claims against the State of Alaska, but an order dated March 12, 2007 has excluded them from the scope of this particular appeal.

III. Motion for Summary Adjudication

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[27] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.[28] It is the burden of the party moving for summary disposition to establish that there are no material issues of fact and that any defenses alleged are inapplicable under the facts.[29] This case has no factual disputes to resolve; the evidence is uncontroverted about Ms. L.'s employment history, her receipt of cash in lieu of leave, and rights to leave cash-in in the various positions she held.

The case turns on a narrow legal question set up by the Alaska Supreme Court's recent decision in *McMullen v. State*.[30] In general, in the PERS system a retiring employee "who was hired before 1996 receives a percentage of his average monthly compensation for the three payroll years that yield the highest average, multiplied by the number of years of service."[31] Since July 1, 1977, cashed-in leave has been excluded from the definition of "compensation."

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[24] Agency record at 5.
[25] Agency record at 4.
[26] Agency record at 3.
[27] *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).
[28] *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).
[29] *E.g., Braund, Inc. v. White*, 486 P.2d 50 (Alaska 1971); *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447 (Alaska 1974).
[30] 128 P.3d 186 (Alaska 2006).
[31] *Id.* at 187.

The *McMullen* case confirmed, however, that an employee who enrolled in PERS before that date can elect to have retirement benefits calculated by an earlier retirement system.[32]

In *McMullen,* the Alaska Supreme Court evaluated the claim of Michael McMullen, who like Ms. L. was enrolled in the PERS system prior to July 1, 1977. Just before he retired in 1999, Mr. McMullen cashed in substantial amounts of annual leave, and he maintained that the Division of Retirement and Benefits should include those cash-ins as part of his "compensation" for purposes of calculating his retirement benefit.[33]

The Supreme Court agreed with McMullen that prior to July 1, 1977 state law did not rule out the use of cashed-in leave as part of "compensation" for purposes of calculating the retirement benefit, and it agreed that McMullen could choose to have his benefits calculated under a pre-July 1, 1977 retirement system that applied to him. The Court went on to observe, however, that

> the bare fact that the statute did not expressly exclude cashed-in leave from the definition of compensation is not enough to support McMullen's argument. . . . [T]he employee must actually have been entitled to the benefit that the state's subsequent action allegedly diminished. As a result, McMullen must show not only that the original statute did not exclude cashed-in leave from the definition of compensation, but also that . . . he actually was entitled to cash in accrued leave.[34]

McMullen, it turned out, was an executive branch employee who had not been a member of either of the bargaining units that had a right to cash in leave prior to July 1, 1977. The personnel rules established that other executive branch employees lacked the right to cash in leave. Since he had had no right to cash in leave before the law changed in 1977, he had never

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[32] *Id*. at 190-91. *McMullen* focused only on the system in effect at the time of enrollment, but it is probably more precise to say that an employee can elect any system available to that employee during the course of the employee's career if that system is superior to the one in effect at retirement. This is because *McMullen* and similar cases are founded on the anti-diminution principle enshrined in the Alaska Constitution: accrued benefits in public retirement systems "shall not be diminished or impaired." Alaska Const., art. XII, sec. 7. Thus, even if a system was not available at the time the employee first enrolled, if the employee later acquired rights in that system the rights would be protected from being "diminished or impaired" and the principles of *McMullen* would apply. Illustrating this point is *State v. Allen,* 625 P.2d 844 (Alaska 1981), in which employees who had first entered public employment under the PERS system were given anti-diminution rights to elect benefits under the short-lived Elected Public Officers' Retirement System that was created and then repealed during the course of their employment. *Allen* found rights and expectations developed during the course of employment to be protected in part because a purpose of retirement systems is "'to induce persons to . . . *continue* in public service.'" *Id.* at 846 (emphasis added) (quoting prior authority). *But see Sheffield v. Alaska Public Employees' Association,* 732 P.2d 1083, 1089 n.15 (Alaska 1987) (stating in *dicta* that expectations created by a 1980 PERS booklet "would have no relevance to the expectations of employees who joined the PERS system prior to the booklet's publication in 1980").

[33] *McMullen,* 128 P.3d at 187-88.

[34] *Id.* at 192.

been in a retirement system that treated cashed-in leave as part of retirement compensation. He lost his case.[35]

Ms. L. is in essentially the same position as Michael McMullen. She enrolled in PERS before the 1977 law change, and she is entitled to have her benefits calculated under a retirement system that applied to her before the law changed. Like McMullen, however, she never was "actually entitled to cash in accrued leave" during any part of her PERS employment prior to July 1, 1977. She had no such right at the City and Borough of Juneau; she had none as a GGU employee because her membership in the GGU was during the period before that unit negotiated leave cash-in; she had none as an exempt, daily employee with no leave benefits during the 1976 and 1977 legislative sessions; and she had none as a legislative secretary in the fall of 1976. Therefore, even if she were to elect to have her benefit calculated under a retirement system in effect prior to July 1, 1977, cashed-in leave could not be included in "compensation" when calculating her benefit.

The foregoing discussion resolves this appeal. All the Administrator determined in the decision under appeal was that Ms. L.'s leave cash-in during her three high years could not be included in compensation for purposes of calculating her retirement benefit. That decision was correct.

It is important to note that Ms. L.'s unusual employment history in 1992 may give rise to other issues relating to the proper calculation of her retirement benefit. For example, as Ms. L. asserted in a letter she wrote on December 24, 2006 to Acting Commissioner Kevin Brooks,[36] it is plausible that the six months between her apparently wrongful termination and her reinstatement later in 1992 must be added to her years of credited service. This is not an issue in the present appeal, however.[37] In her recent pleadings in this case, Ms. L. has alluded to a variety of other potential claims; these are likewise matters to be pursued in another proceeding.

IV. Order

1. Ms. L.'s March 15, 2007 motion for summary adjudication is denied.

2. The Administrator's April 13, 2007 cross-motion for summary adjudication is granted.

3. This appeal is dismissed.

4. The foregoing dismissal is without prejudice to:

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35 *Id.* at 192-93.

36 Ex. 6 to Administrator's motion to dismiss.

37 *See* Order Regarding Motions to Dismiss and for Summary Judgment, March 12, 2007.

a. Any worker's compensation claims Ms. L. may have;

b. Any claims Ms. L. may have to have her period of credited service augmented by her period of involuntary unemployment in 1992;

c. Any claims Ms. L. may have to have her period of credited service augmented by the duration of leave involuntarily cashed in for her in 1992;

d. Any claims Ms. L. may have to enforce the Release and Settlement Agreement of December 10, 1992 through a contract action in court;

e. Any claims Ms. L. may have in court under a Whistleblower statute.

DATED this 23rd day of May, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

This 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 12th day of June, 2007.

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

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