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

IN THE MATTER OF	)	
	)	
B.A.	)	Case No. OAH 06-0829-PER
	)	Div. R&B No. 2006-042

ORDER GRANTING SUMMARY ADJUDICATION AND DISMISSING APPEAL

I. Introduction

B.A. appeals a decision of the Department of Retirement and Benefits to deny a request to reclassify Fish and Wildlife Enforcement Officers as peace officers rather than the general classification "all others" in the Public Employees Retirement System (PERS). The department's decision was based in part on a determination that the request was not timely. Mr. A. appealed the decision, and it was referred to the Office of Administrative Hearings. The administrator moved for summary adjudication, arguing that the appeal is barred by the statute of limitations or by laches. The administrative law judge finds that Mr. A.'s request is barred by laches.

II. Facts

The following facts are undisputed. The position of Fish and Wildlife Enforcement Officer (FWEO) was created by the Department of Public Safety (DPS) in 1983. Mr. A. became a FWEO on a seasonal basis on May 24, 1986. On January 6, 1989, Mr. A. became a full-time FWEO. On June 30, 1990, Mr. A. was promoted to a state trooper recruit position, and since then he has continued to advance in his career as a trooper. On April 1, 1995, the position of FWEO was abolished.

During the time that the FWEO job class existed from 1983 to 1995, the position was categorized in the general "all others" category for purposes of PERS retirement benefits. The position was never included in the "peace officer" category.

One of the principal differences between the peace officer and the general "all others" PERS categories is the amount of contributions made by both the employee and the employer. At the time Mr. A. began working as FWEO in May, 1986, the employee contribution that he made to PERS as a member of the all others category was 4.25 percent of his compensation. At that time, the contribution rate for eligible peace officers and fire fighters was 5 percent of compensation. Beginning in July of 1986, the contribution rate for "all others" was increased to 6.75 percent of compensation, while the rate for eligible peace officers and firefighters was raised to 7.5 percent.

When Mr. A. was promoted to the state trooper recruit position on June 3, 1990, he began paying contributions at the peace officer rate of 7.5 percent, and his employer's contributions increased accordingly.

Shortly after becoming a FWEO in 1986, Mr. A. signed a PERS "Notification of Employment." This form contained a box entitled "Occupational Code" with four options that could be checked: P-Police, F-Fireman, E-Elected Officials, and A-AII Others.[1] The box on Mr. A.'s form was checked "A-All Others." Mr. A. signed a similar form on December 16, 1987. The Occupational Category box on this form contained the same four as the previous form, plus categories for "C-Masters, Mates & Pilots" and "M-IBU." Again, on this form the "A-All Others" box was checked.[2]

On September 23, 2005, Mr. A.'s attorney sent a letter to the Director of the Division of Retirement and Benefits requesting that FWEOs be classified as peace officers. After some correspondence and research, the division's retirement manager replied that it did not intend to change the classification of FWEOs. On July 9, 2006, Mr. A. requested a final determination on the matter. The director issued a final decision on October 23, 2006, with instructions for an appeal. Mr. A. filed an appeal on November 24, 2006.

III. Discussion

The administrator argues that Mr. A.'s claim is barred by at least one of the statutes of limitation or, alternatively, the doctrine of laches. Statutes of limitation require court actions to be filed within a certain time of the occurrence that gives rise to the action.[3] Actions on many liabilities created by statute must be brought within two years.[4] Before 1997, actions on contracts were required to be brought within six years of the time the cause accrued.[5] After 1997, contract claims were required to be brought within three years of the time that the cause accrued.[6]

Statutes of limitation apply to civil actions brought in court. On their face, the statutes do not purport to limit administrative appeals or requests of the PERS administrator. Decisions of the administrator may be appealed to the Office of Administrative Hearings, and OAH decisions may be appealed to Superior Court.[7]

[1] Exhibit 2, page 1.
[2] Exhibit 3, page 1.
[3] AS 09.10.010.
[4] AS 09.10.070(a).
[5] Former AS 09.10.050, amended effective August 1, 1997.
[6] AS 09.10.053.
[7] AS 39.35.006.

Prior to the legislative establishment of the Office of Administrative Hearings, the PERS Board has discussed the statutes of limitations in the context of administrative PERS cases. In *The Matter of Rose Sears*[8] the board stated,

> There is no specific PERS statute setting a limitation on when actions may be filed with the Division other than claims relating to eligibility for disability benefits following an injury. However, this Board has previously concluded, in a claim for non-occupational disability benefits, that an action filed well after two years following the termination of employment was untimely and could not be brought as a consequence of the two-year limitation of AS 09.10.070, a statute which sets a limitation for an action upon a liability created by statute for which no specific limitation been established. See In the Matter of the Appeal of Donna M. Brown, Decision 92-1. Other possibly applicable statutes of limitations include the former six-year limitation for matters brought on a contract claim. AS 09.10.050; amended by AS 09.10.053. This assumes that the time for measuring the applicability [of] the six-year limit (which has since been changed to three year period of limitation for claims arising after 1997) is applicable to Ms. Sears' claim. Under any reasonable statute of limitations assessment, notwithstanding the absence of a time bar specified in a PERS provision, Ms. Sears' claim is appropriately barred.

On its face, the board's reasoning appears to present something of a conundrum. The board acknowledges that there is no PERS statute of limitation, but it then goes on to limit an appeal "as a consequence of AS 09.10.070, a statute of limitation that does not apply to administrative appeals. The most reasonable interpretation of the board's action is that while the board referred to the time periods in the statutes of limitation as guides in determining the reasonableness of delay, the board's decision was ultimately based on the equitable doctrine of laches.

Laches is an equitable defense that applies when two elements are met: the defendant must show (1) that the plaintiff has unreasonably delayed in filing suit and (2) that the delay caused the defendant undue harm or prejudice.[9] While the elements of laches are usually expressed in terms of plaintiff and defendant, the Alaska Supreme Court has also reviewed the application of laches in administrative contexts.[10]

In the *Sears* case, the board considered "other possibly applicable statutes of limitations" in considering whether two years, three years, six years, or some other period of time should be used as a time bar. Ms. Sears had waited either seven or ten years from the time of the division's action to file a complaint, depending on which act is considered as the final decision being appealed. Carefully read, the board's decision can be seen to not actually apply the statute as controlling, but

[8] *In the Matter of the Appeal of Rose M. Sears,* Decision 03-18 (PERS Board February 18, 1992).

[9] *City & Borough of Juneau v. Breck,* 706 P.2d 313, 315 (Alaska 1985).

rather to conclude that "under any reasonable statute of limitations assessment" Ms. Sears' claim was late. Though the board did not specifically state that it was applying the doctrine of laches, the board was attempting to determine whether Ms. Sears had unreasonably delayed in filing her complaint. In doing so, the board was weighing the first element of a laches analysis. In determining how long of a delay should be considered unreasonable, the board compared Ms. Sears' delay to several periods in statutes of limitation, noting that Ms. Sears' delay exceeded all of them. The board's conclusion that "under any reasonable statute of limitations assessment, notwithstanding the absence of a time bar specified in a PERS provision, Ms. Sears' claim is appropriately barred" is not an application of any particular statute of limitation; it is properly regarded as a conclusion that Ms. Sears' delay was unreasonable, and that the first element of laches had therefore been met.

Under this interpretation of the board's decision, the *Sears* case does not stand for the proposition that the statutes of limitation apply to administrative hearings in PERS cases. Rather, the case establishes and reaffirms the board's use of the periods in the statutes of limitation as guidelines for evaluating whether the claimant has unreasonably delayed pursuit of a claim, the first element of a laches defense. This does not mean that in a future case the statutory periods will necessarily control the outcome of a laches analysis. But it does mean that the statutory periods should be considered when one is determining whether a period of delay was unreasonable in a given case.

To meet the second element of laches in the *Sears* case, the division would have had to also find that the system or the administrator would suffer undue harm or prejudice. The board did not make any specific findings on that point, but it appears to have been undisputed in that case that in order to meet the obligation it would be under if Ms. Sears had prevailed, the system would have had to pay benefits dating back at least seven years that had not been budgeted for. It appears to have been assumed or undisputed by the parties that if she had prevailed, Ms. Sears' delay would have caused the system substantial prejudice.

In this case, like in the *Sears* case, there does not appear to be any dispute that the period of delay would result in prejudice to the system, and that the second element of laches has therefore been met. Reclassifying Mr. A.'s service time as a FWEO to public safety service would create an increased liability for the duration of Mr. A.'s life. While Mr. A. has yet to

[10] *Lazy Mountain Land Club v. Matanuska-Susitna Borough, 904 P.2d 373, 377 (Alaska 1995); Copper River School District v. State,* 702 P.2d 625, 629 (Alaska 1985). In both cases the doctrine was found not to apply, but not because

retire, the system could have made appropriately increased contributions to fund the liability over a decade ago if the claim had been brought in a timely manner. Mr. A. has not disputed the division's assertion that the passage of time has eroded its ability to retrieve documents evidencing legislative intent and to locate witnesses with credible memories of the time when the FWEO position was created. Absent a showing of a very good reason for delay, this prejudice is undue. As in *Sears,* the real issue in this case is whether the period of delay was unreasonable, and thus whether the first element of laches applies.

In determining whether Mr. A.'s delay in making the request in this case is unreasonable, it is necessary to first establish what the period of delay was. The underlying issue in Mr. A.'s case is whether he received the correct type of service credit for his employment from 1986 to 1990. While Mr. A. will not use the credit he acquired until he decides to retire, he received the credit along with his paycheck each pay period during his employment. There is undisputed evidence that Mr. A. was aware of the nature of the credit he was receiving at the time he received it. The relevant time period for determining when any period of limitation began to run was when Mr. A. received the credit. The last time Mr. A. received "all others" credit was just before he was promoted to a trooper recruit in June, 1990.

In his request to the administrator dated July 9, 2006, for a determination of the correct credit for a FWEO, Mr. A. wrote,

> Our efforts have spanned several years. They have included attempted remedies from within our department, through legislative bills that did not make it to a vote, and most recently through a class action with a private attorney. To date, we have not been successful. Our most recent attempt through an attorney resulted in an opinion from Kathy Lea, retirement manager, ruling against our assertion (February 2006). I have since met with Kathy, and I believe our attorney did a poor job in presenting our case.[11]

In his request for an appeal to the OAH, Mr. A. wrote,

> It continues to frustrate myself, as well as twenty or so colleagues who are part of this that your office continues to assert that we just started this process. There is documentation that goes back to 1994 and continues until now.[12]

It is unclear what Mr. A. may have done in 1994 to challenge the kind of credit he was receiving. The division asserts that it "knows of no grievance or contest, and has found no record of any lawsuit, filed by A. against his employer to establish entitlement to peace officer status." But even if Mr. A. had taken some kind of action in 1994, it would have occurred

the forum was administrative.

[11] Decision record at page 3.

[12] Decision record at page 2 (letter of November 20, 2006, accompanying appeal form).

approximately eight years after he began receiving "all others" credit, and four years after the last day he received such credit. Mr. A.'s first request that his FWEO service credit be classified as peace officer credit was made on September 23, 2005. Thus, the period of delay was at least fifteen years.

In determining whether a fifteen-year period of delay is unreasonable, the first step should be, as in the *Sears* case, comparison with the statutory period. Just as in *Sears,* one could argue about which period is most applicable. There is the two-year period of limitation in AS 09.10.070, a statute which sets a limitation for an action upon a liability created by statute for which no specific limitation been established, that would seem to apply. One could argue that the three- or six-year period for contracts should apply. But again, as in *Sears,* it does not matter which period is applied; Mr. A.'s delay exceeds all of them by a very long time, a strong indicator that the delay was unreasonable. Mr. A. has asserted in his letters that his efforts have "spanned many years," but he has not offered any explanation for a delay in making a request for reclassification of his FWEO service time, other than possibly a hope many years ago that the legislature might pass a law obviating the need. But if Mr. A. believed he had a valid claim, there was no need to wait for the legislature to act.

There is no apparent reason in this case not to follow the board's precedent of relying on statutory periods as indicators of reasonable periods for filing a claim or action. Regardless of whether one compares the limitations period for statutory liability or for contracts, Mr. A.'s delay of over fifteen years is unreasonable.

IV. Conclusion

Mr. A. has unreasonably delayed filing the request that is the basis of the administrator's decision. The delay has caused undue prejudice. Mr. A.'s claim is barred by laches. The administrator's motion for summary adjudication should be granted, and Mr. A.'s appeal should be dismissed.

V. Order

IT IS HEREBY ORDERED that the administrator's motion for summary adjudication be GRANTED. Because Mr. A.'s claim is untimely, this case is hereby DISMISSED.

DATED this 14th day of November.

By: DALE WHITNEY, 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 14th day of November, 2007.

By: DALE WHITNEY
Administrative Law Judge

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

Case Parties
11/14/07