

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

In the Matter of:)	
)	
B . W . J .)	O A H No. 07-0069-PER
_____)	Div. R&B No. 2007-04

DECISION ON SUMMARY ADJUDICATION

I. Introduction

The administrator issued a decision determining that B.W.J. had received retirement benefits to which he was not entitled, and had been paid benefits in excess of the amount due. Accordingly, the administrator suspended payment of any further benefits, pending repayment of the amount overpaid plus interest.

Mr. J. filed an appeal and the administrator filed a motion for summary adjudication. Based on the undisputed facts, the administrative law judge concludes that Mr. J. has not shown a legal ground for relief. The motion is therefore granted.

II. Facts

B.J. applied for early retirement in 1990, under the provisions of a retirement incentive program under which individuals who were not yet eligible for retirement, but who were within a specified number of years of eligibility, could qualify for retirement in advance of their normal retirement date.

In his application, Mr. J. stated that his birthdate was July 4, 1943, and he submitted a document purporting to be a 1969 certified copy of his birth certificate, showing a birthdate of July 4, 1943.¹ With that birthdate, Mr. J. was eligible for the retirement incentive program. The administrator granted the application and Mr. J. was appointed to retirement status effective November 1, 1990, with benefit payments beginning that month.²

On December 19, 2006, the administrator notified Mr. J. that the division of retirement and benefits was in possession of a 2006 certified copy of his birth certificate, which showed a birthdate of July 4, 1945. With that birthdate, Mr. J. was not eligible for the retirement incentive program, and his earliest date of retirement eligibility was August 1, 1995.

¹ R. 43, 46, 49-51.

The division recalculated the amount of Mr. J.'s pension payments using that date as the retirement date. It then calculated the amount Mr. J. had been overpaid (or underpaid) over the period of time since November 1, 1990, including the payment of medical insurance premiums on Mr. J.'s behalf through July 31, 1995. The division determined that the Public Employees' Retirement System had made overpayments in the principal amount of \$96,210.03, as of December 1, 2006, including \$16,115.18 in medical insurance premium payments through July 31, 1995.³ Calculating interest on that amount at the rate of 7% per year, the division determined that the total interest due on the overpayments was \$144,143.03, as of December 1, 2006. The division calculated the total amount of overpayment, including principal and interest, as \$229,353.06.

Applying an actuarial factor, the division determined that repayment of the total amount overpaid, plus interest, would require payment by Mr. J. of \$448.75 per month (in addition to foregoing pension payments) into the Public Employees' Retirement System for the actuarial period. Accordingly, the administrator notified Mr. J. that his retirement benefits, including both pension payments and medical insurance premiums, was suspended until the total amount due, including interest, was repaid.

III. Discussion

The administrator's decision that is the subject of this appeal was to suspend pension payments and medical insurance premium payments until the total amount due was repaid, because amortizing the amount due for the actuarial period would yield a negative payment. On appeal, Mr. J. did not dispute the amount owed. At the prehearing conference, Mr. J.

requested an informal conference with the administrator to discuss making payment arrangements that would enable him to maintain some portion of his benefit, such as medical coverage, but he did not dispute the division's calculations of principal, interest, or the actuarial period. The administrator's motion for summary adjudication asks that the administrator's decision "to deny further PERS benefits to Mr. J. be affirmed.

For purposes of the motion for summary adjudication, all facts are viewed in the light favorable to the non-moving party. Mr. J. does not dispute that he was ineligible for the 1990 retirement incentive program, that the division has correctly calculated his principal indebtedness, that interest was correctly calculated, and that repayment on the actuarial schedule

² R. 52.

³ R. 5.

would require him to make monthly payments for the actuarial period and to forego pension payments during that time.

The administrator's decision does not state the legal ground upon which the action taken is based. The administrator did not state that Mr. J.'s status as a retiree had changed, or that his eligibility for coverage under the applicable health care plan had been terminated. Rather, the letter indicates that Mr. J. will no longer receive monthly pension payments and that the Public Employees Retirement System will cease making monthly medical insurance premium payments on his behalf. It appears that the purpose of the letter is to notify Mr. J. of an adjustment to his monthly pension payment and medical insurance premium payments, as provided in AS 39.35.520(a) which states:

When a change...is made in the records maintained by the plan....and, as a result, an employee...is entitled to receive from the plan...less than the employee would have been entitled to receive had the records...been correct, (1) the records...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...was correctly entitled shall be paid.⁴

AS 39.35.520(d) provides authority to charge interest on overpayments at the rate provided by regulation, as the division has done in this case. If, as appears from the record, the administrator's decision that is the subject of this appeal was an adjustment to Mr. J.'s payments and benefit entitlement as provided in AS 39.35.520(a), then, to the extent that Mr. J. seeks to avoid an adjustment on an admitted liability, Mr. J.'s remedy (if it is not time-barred)⁵ would be to seek a waiver of adjustment from the commissioner pursuant to AS 39.35.522(a), which states:

- (a) Upon request by an affected member..., the commissioner of administration may waive an adjustment or any portion of an adjustment made under AS 39.35.520 if, in the opinion of the commissioner of administration,
 - (1) the adjustment or portion of the adjustment will cause undue hardship to the member or beneficiary;

⁴ Prior to 2005, the statute referred to the "System" (the Public Employees' Retirement System), rather than the "plan."

⁵ See AS 39.35.522(b). Arguably, the time for filing a request for a waiver of adjustment has been equitably tolled, or the administrator's letter advising Mr. J. that his remedy was an appeal to the Office of Administrative Hearings estops the commissioner to deny an untimely request for waiver. See generally, Kaiser v. Umialik Insurance, 108 P.3d 876, 880 (Alaska 2005); Fred Meyer of Alaska, Inc. v. Bailey, 100 P.3rd 881, 886 (Alaska 2004). The commissioner's decision on the timeliness of a request for waiver, like her decision on the merits of such a request, is not subject to appeal under AS 39.35.006, and is therefore not within the mandatory jurisdiction of the Office of Administrative Hearings. See AS 44.64.030(a)(24). The administrative law judge expresses no opinion on either the timeliness issue or on the merits of such a request.

(2) the adjustment was not the result of erroneous information supplied by the member...;

(3) before the adjustment was made, the member...received confirmation from the administrator that the employee's...records were correct; and

(4) the member or beneficiary had no reasonable grounds to believe the employee's...records were incorrect before the adjustment was made.

Because Mr. J. does not dispute the amount due or the administrator's authority to make an adjustment, he has not raised any legal or factual issues that must be resolved on appeal from the administrator's decision. There are ancillary issues that could have been addressed by the administrator as a component of the adjustment to future payments or benefit entitlements, and which need not be the subject of a waiver request directed to the commissioner. For example, the administrator did not determine whether she was legally required, or had discretion, to separately account for the amounts owed for repayment of pension payments and for repayment of medical insurance premiums. Nor did the administrator address whether the withholding of future medical insurance premiums should be credited to Mr. J.'s account.

Finally, the administrator did not address whether, if Mr. J. made monthly payments in the actuarially determined amount of \$448.75, the Public Employees' Retirement System would be required, or have discretion, to resume payment of monthly insurance premiums. Because the administrator's decision did not identify or address any of these ancillary issues, and Mr. J. did not raise them on appeal, they need not be decided at this time. Similarly, it is not necessary at this time to decide whether those ancillary issues have been knowingly waived or unintentionally forfeited.

IV. Conclusion

Mr. J. has not identified any error in the administrator's calculations, and he has not claimed that the administrator acted outside the scope of her legal authority in suspending pension payments and medical insurance premium payments at this time. The motion for summary judgment is therefore granted. This decision is limited to confirming the administrator's calculations and her decision to suspend the payment of benefits and medical insurance premiums under the present circumstances. The preclusive effect of this decision on any ancillary issues will be decided if those issues are raised in a subsequent case.

DATED September 10, 2007

By: Andrew M. Hemenway
Administrative Law Judge

ORDER OF ADOPTION

1. The undersigned, in accordance with AS 44.64.060, does not adopt the proposed decision dated July 26, 2007, and instead under AS 44.64.060(e)(2) issues a final decision amended in light of the administrator's proposal for action.

2. Under the authority of AS 39.35.006, the undersigned, in accordance with AS 44.64.060, adopts the Decision and Order dated September 10, 2007, 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 September 10, 2007.

By: Andrew M. Hemenway
Administrative Law Judge

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

Case Parties
9/10/07