BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:	)	
	)	
H. J. W.	)	OAH No. 07-0161-PER
	)	Div. R & B No. 2007-009

DECISION AND ORDER

I. Introduction

H. J. W. appeals the decision by the Administrator of the Public Employees Retirement System ("PERS") to deny his request to change his membership status under PERS from Tier II to Tier I. At the hearing, Mr. W. represented himself; Kathleen J. Strasbaugh, Assistant Attorney General, represented the State of Alaska, Department of Administration, Division of Retirement and Benefits ("division"). Based on the record and the hearing testimony, the Administrator's decision denying Mr. W. Tier I status is reversed. Mr. W. is entitled to Tier I membership in PERS effective June 24, 1986.

II. Findings of Fact[1]

Mr. W. is a peace officer member of PERS under AS 39.35.680(29). As such he is eligible to retire after 20 years of service.[2] He first learned about the benefits of public employment for police officers while he was in the U.S. Army stationed at Ft. Greely near Delta Junction, Alaska. Mr. W. knew one or more of the state troopers who lived there and they told him about the various retirement benefits of PERS employment. After his separation from the military in 1985, Mr. W. moved to Seattle. In 1986, he responded to an employment bulletin for police officers issued by the North Star Borough ("NSB"). He was interviewed by the recruiter in Seattle and subsequently he and two others were hired as Public Safety Officers by the North Star Borough.

Prior to starting his new job, the Borough sent Mr. W. an employment letter that reads in pertinent part:

> I am pleased to inform you that you have been selected for employment with the North Slope Borough. Your appointment becomes effective June 24, 1986 . . . .

[1] Mr. W. bears the burden of proof by a preponderance of the evidence. 2 AAC 64.290(e). In order to prove a fact by a preponderance of evidence, he must show that the fact more likely than not is true. *Id.*

[2] AS 39.35.370(a)(2).

> Your first 12 months of employment will be in a probationary status during which you must demonstrate an ability to perform the duties of your position as a probationary employee. If you satisfactorily perform your employment with the NSB, you will receive your first annual evaluation for your merit anniversary date.
>
> All Borough Police Officers in a permanent status <u>are enrolled</u> in the Public Employees Retirement System. After 90 days of continuous service a deduction equal to 5.0% of your salary is withheld for your retirement benefits. This percentage may change in accordance with the state law. If so, you will be notified.[3]

Mr. W. started his full-time employment for the NSB on June 24, 1986.[4] However, the NSB did not enroll Mr. W. in PERS until September 24, 1986. The delay was pursuant to Borough ordinances that required the imposition of a 90-day waiting period before deducting PERS contributions from a new employee's earnings. The relevant portions of the ordinances read as follows:

> 2.20.130(a) "All employees appointed as candidates for permanent status, with the exception of promoted or transferred employees who served the probationary period as set forth herein, shall serve a probationary period . . . . The probationary schedule shall be six calendar months."
>
> 2.20.140(a) "The following benefits shall be accorded to Borough employees qualifying for their use as outlined in this chapter, subject to the provisions outlined herein:... (5) entry into the Borough's retirement program, for permanent employees only . . . ."
>
> 2.20.140(b) "<u>Use of benefits</u> shall be withheld from probationary employees for the first 90 calendar days with the exception of workers' compensation insurance coverage and paid holidays which shall commence on the date of hire for all employees of the Borough, and in accordance with the following: (1) paid leave may not be taken until the employee has completed a six calendar months; (2) coverage for life and medical insurance shall commence at the end of the first 90 days of employment with the Borough, retroactive to the date of hire; (3) entry into the retirement system will not be effective

[3] Attachment to Mr. W.' Post Hearing Brief, received July 2, 2007 (emphasis added).
[4] Exh. B.

> until the requirements of the Borough's retirement program have been met. Credit for longevity will be retroactive to the date of hire at the employee's option."[5]

In 1986, the Alaska Legislature enacted a law reducing the benefits available to prospective members of PERS, thereby creating a two-tiered retirement system.[6] The 1986 changes apply "only to members first hired under the Public Employees' Retirement System after June 30, 1986."[7] Persons who entered PERS before July 1, 1986, are not subject to the reduced benefits and are referred to as Tier I employees; those who entered after that date are Tier II employees. As a result of the North Slope Borough delaying Mr. W.' retirement benefit deductions until September 24, 1986, the Division considers him to be a Tier II member of the retirement system.

PERS members in peace officer status are eligible to retire after 20 years of service.[8] One significant result of the 1986 changes to PERS for a peace officer is that one who retires before the age of 60 must pay the monthly premium for retiree medical insurance until the age of 60, unless the retiree has 25 years of service.[9] In contrast, Tier I peace officer members retiring after 20 years of service receive system-paid medical insurance after the age of 55.[10]

The North Slope Borough did not inform Mr. W. of the significance of his delayed enrollment in PERS. Sometime in 1987 Mr. W. became aware that the Borough's policy of delaying new employees' PERS enrollment for 90 days affected his retirement benefits due to the law changing on July 1, 1986. He talked with some coworkers in the NSB who had also started employment before July 1, 1986, and who were also considered Tier II employees because of the NSB's three-month waiting period for the commencement of PERS contributions. The group, whom Mr. W. refers to as the "working group," discussed requesting a change in their membership status from Tier II to Tier I, to reflect their actual hire dates before July 1, 1986. Mr. W. (and possibly other group members) contacted the division by telephone and inquired about buying back his PERS time effective as of his first day of employment, June 24,

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[5] Exh. App. 1 at 4. The source of this Borough ordinance is *In the Matter of the Appeal of R. S.*, Decision 02-04, a decision of the former PER Board, to be discussed below.
[6] Ch. 82, SLA 1986.
[7] Sec. 57, Ch. 82, SLA 1986.
[8] AS 39.35.370(a)(2).
[9] § 45, Ch 82, SLA 1986.
[10] AS 39.35.535(c)(1)(A).

1986, but he was told that it would not be possible. Thereafter, Mr. W. spent four years posted to small rural communities such as Wainwright and Anaktuvak Pass and did not pursue the matter further.

In 1991, Mr. W. left the North Slope Borough and was employed by another PERS employer in the Anchorage area. In 2005, Mr. W. had a chance encounter with R. S., one of his coworkers from the "working group." Mr. S. informed Mr. W. that he had successfully appealed the PERS Administrator's denial of his request to change his status from Tier II to Tier I. The former Public Employees Retirement Board ("PER Board" or "Board"), had ruled in Mr. S.'s favor[11] and was affirmed by the Superior Court.

Mr. S. was hired by the North Slope Borough in the same employment recruitment as Mr. W., although he started working for the Borough about one month earlier, on May 26, 1986.[12] Like Mr. W., Mr. S. had a delayed PERS enrollment but did not know there would be a distinction between Tier I and Tier II employees after July 1, 1986. Years later, he sought and was granted the option to buy back the accrued indebtedness for the 90 days he did not contribute to PERS.[13] Mr. S. paid $1,700 to obtain .25 years of service, assuming it would make him a Tier I member. However, no one at the division informed him that the buy back would have a negligible effect on his retirement and that he would remain a Tier II employee.[14] The division allowed Mr. S. to buy back his time on the basis that it was "temporary service" under AS 39.35.345. Although Mr. S. had been hired as a permanent, full-time employee, he did not object to the characterization that the service he purchased was temporary, unaware that without it, he would not have been able to purchase those three months of service.[15] When he was ready to retire, Mr. S. was denied Tier I status and appealed to the former PER Board. In granting his appeal, the Board found that there were specific and unique facts in Mr. S.'s case that led to the result: the Borough's ordinances that allowed for the 90-day delay were not clearly written; the Borough did not adequately explain the differences between Tier I and Tier II to Mr. S.; and the division failed to clarify that even though he was being allowed to buy back time, it still

[11] *S.*, Decision 02-04.
[12] Decision 02-04 at 1.
[13] Decision 02-04 at 2.
[14] Decision 02-04 at 3.
[15] Decision 02-04 at 3.

considered Mr. S. a Tier II member.[16] After the Board granted his request for Tier I status, the division requested reconsideration, claiming that the Board's result could be reached only under the theory of estoppel, which the division claimed was not actually proven.[17] The Board on reconsideration affirmed its earlier ruling, specifically disavowing estoppel as the basis for the decision.[18]

The division appealed the Board's decision in Mr. S.'s case to the Alaska Superior Court. In its decision, the court agreed that the case presented a unique set of facts, but it affirmed the Board's decision granting Mr. S. Tier I status because he met all the statutory requirements and was enrolled in PERS at the time he commenced employment as a North Slope Borough employee.[19]

At the time of the hearing, Mr. W. was employed as a peace officer for a PERS employer in Anchorage. He had previously purchased additional years of service based on his years in the military and was contemplating retirement. If he retired at age of 55, as a Tier II member, Mr. W. would be required to pay the monthly premium on his health insurance until he reached the age of 60, whereas Tier I members who retire at 55 receive system-paid medical insurance. This is one of his primary issues with having Tier II status in the retirement system. In early 2007, Mr. W. made an inquiry to the division for information as to how to acquire Tier I status. His request was taken as an actual request for Tier I status, which was denied by the Administrator. This appeal followed.

III. Discussion

Mr. W. has requested that his membership status in PERS be changed from Tier II to Tier I because he commenced his employment with the North Slope Borough on June 24, 1986. He claims his case is substantially similar to that of R. S., his coworker whose request to be designated Tier I was granted. The Division opposes Mr. W.' request, asserting that his claim is barred by the statute of limitations and that even if his request were timely, he would not be entitled to Tier I membership status based on the merits of his case.

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[16] Decision 02-04 at 5.
[17] *See In the Matter of the Appeal (on Reconsideration) of R. S.*, Decision 02-14.
[18] *See B. v. S.*, 1JU-02-1045CI at fn. 3 (October 10, 2003).
[19] *B. v. S.* at 11.

Mr. W.' request is not barred by the statute of limitations and his interpretation of the PERS statutes gives the best effect to their purpose and meaning. For these reasons, the Administrator's decision to deny his request is reversed and Mr. W.' request to be granted Tier I status effective June 24, 1986, is granted.

A. Mr. W.' Request to be Granted Tier I Status is Not Time Barred

The division asserts that Mr. W.' request to be granted Tier I status is barred by the statute of limitations. It claims that his right to take legal action to attempt to secure his rights as a Tier I employee accrued in 1986 because that is when he first became employed under PERS. In the alternative, the division maintains Mr. W.' claim accrued no later than 1987 because, based on his testimony, that is the latest date by which he became aware of the significance of the differences between Tier I and Tier II for purposes of retirement. Regardless of which specific limitations period might apply, the division maintains Mr. W. is barred from filing his claim because he sat on his rights until January 2007, when he petitioned the Administrator for a change in his membership status from Tier II to Tier I.

1. Neither AS 09.10.070(a)(5) nor AS 09.10.050 apply to Mr. W.

According to the division, Mr. W.' claim is barred by the statute of limitations applicable to claims arising under a statute, AS 09.10.070(a)(5), which states that a person may not bring an action "upon a liability created by statute... unless the action is commenced within two years of accrual of the cause of action." Using the division's logic, if Mr. W.' claim accrued in 1986 when he first became employed in the PERS system, the two-year statute of limitations would have expired two years later, on or about June 24, 1988.

The division argues in the alternative that if Mr. W.' claim is construed as a contractual claim, it is governed by the six-year statute of limitations in AS 09.10.050 (as amended by AS 09.10.053 in 1997 to provide for a three-year statute of limitations). Thus, according to the division, with either of these limitation periods, Mr. W.' claim would have expired no later than 1992, six years after he was first employed by the North Slope Borough.

The division proposes that if the statute of limitations for contract claims is applicable in Mr. W.' case, the "discovery rule" may apply. In general, this rule means that a statute of limitations begins to run when a person has information sufficient to alert a reasonable person

that he or she has a cause of action.[20] Thus, if Mr. W. is subject to the discovery rule, the division maintains that he had enough information to alert him to a potential claim in 1986 when he received his first paycheck from which no retirement deductions were taken, or at the latest, in 1987, when he realized he was a Tier II employee and discussed the issue with his coworkers. Consequently, the statute of limitations applying to contract claims would have begun to run in Mr. W.' case no later than 1987, and would have expired no later that 1993, six years later.

The PERS statutes do not specify a time limit within which a member must assert a claim unrelated to disability benefits. Even so, the former PER Board has applied time limits analogous to statutes of limitation in appeals of division actions. The division relies on two decisions issued by the former Board as authority for its argument that the statutes of limitation apply in Mr. W.' case. The first case, *In the Matter of L.M.B.*, Decision 92-1, involved a vested member of PERS who left state employment in 1981 after 10 years of service. In 1990, she applied for non-occupational disability. The division denied her request because it was untimely and because the member did not provide sufficient medical evidence to document the existence of a non-occupational disability at the time of her termination from employment.[21] The Board noted that there was no statute of limitations for non-occupational disability claims in the PERS statutes, but that the division had apparently accepted such applications for as long as two years after termination.[22] In the absence of a specific statute of limitations controlling applications for non-occupational disability, the Board applied a two-year limitations period based on AS 09.10.070(3), the two-year statute of limitations applicable to actions upon a "liability created by statute." The Board found that the member's time to assert her rights began to run at the time of her termination from PERS employment and on that basis denied the retiree's claim.[23]

The former PER Board has also utilized statutes of limitation in a benefit computation claim. *In the Matter of R.M.S.*, Decision 03-18, the former employee was appointed to non-occupational disability retirement in 1982. When she reached the age of 55 in 1992, the division appointed her to normal retirement, which required a change in the calculation of her post

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[20] *Sengputa v. Wickwire*, 124 P.3d 748, 753 (Alaska 2005).
[21] Decision 92-1 at 2.
[22] Decision 92-1 at 3-4. In 2000, the legislature enacted a requirement that members file an application for non-occupational disability claim within 90 days of terminating employment. § 41, Ch 68, SLA 2000.
[23] Decision 92-1 at 4. The Board also found that the applicant had not provided sufficient medical evidence to prove the elements of her claim for non-occupational disability by a preponderance of the evidence.

retirement pension adjustment (PRPA) under AS 39.35.475. She complained about the adjustment to the Administrator in 1993, which was resolved, and in 1995, about a cost of living (COLA) issue, to which the division responded by letter on August 29, 1995.[24] However, the retiree did not take any action on the division's letter until she filed a grievance about it on September 24, 2002, a period of seven years after the division's response to her. The Board found that "under any reasonable statute of limitations assessment," even without an applicable PERS time limitation, her grievance was time barred, either from 1992 or 1995.[25]

The two statutes of limitation that the division asserts apply here – AS 09.10.070(a)(5), or, in the alternative, AS 09.10.050 – are found in AS 09.10, the title of which is "General limitations on civil actions." Specifically, the chapter begins with §10, which states:

> A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.[26]

A civil action is a lawsuit or litigation that is filed in court -- the judicial branch of government -- by a party who is seeking some sort of legal remedy for a perceived wrong.[27] This case is not a "civil action"; it is an administrative proceeding. [28] An administrative proceeding, such as this case, takes place in front of an administrative agency situated in the executive branch of government and usually involves that agency's services in its specific area of expertise or governmental responsibility.[29] Making a request of an administrative agency is not the same as filing a civil action in the court, and the division has not cited any judicial decisions for the proposition that the statutes of limitation applicable to civil actions also apply to administrative proceedings. While AS 09.10.070(a)(5) and AS 09.10.050 (and its successor, AS 09.10.053) bar an untimely "action," and do not use the term "civil action," the division has not

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[24] Decision 03-18 at 2.
[25] Decision 03-18 at 3.
[26] AS 09.010.010 (emphasis added).
[27] An "action" is defined as "a civil or criminal judicial proceeding." *Black's Law Dictionary* (8th ed. at 31) (emphasis added). A "civil action" is a subset of the term "action." *Id.* at 32.
[28] An "administrative proceeding" is "a hearing, inquiry, investigation, or trial before an administrative agency, usu[ally] adjudicatory in nature but sometimes quasi-legislative." *Id.* at 48.
[29] *See generally, Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994).

established that either statute bars an administrative proceeding to obtain a benefit that the claimant alleges is due under applicable law.[30]

2. Mr. W.' cause of action had not yet accrued when he requested a change from Tier II to Tier I status

Assuming, without deciding, that either AS 09.10.050 or AS 09.10.070(a)(5) applies to an administrative proceeding, the period of limitations could not expire before the individual's right to file a civil action accrued. In this case, Mr. W.' right to bring a civil action to obtain the benefits that he asserts will be due to him under law will not accrue until he retires. The term "accrued" essentially means the time when the right to bring a lawsuit comes into being. An analogy can be made to the statute of limitations in the negligence or malpractice context. The statute of limitations in those cases ordinarily begins to run when all the elements of the claim have been met, including damages or injury to the plaintiff.[31] Applying this guideline to the retirement and benefits arena, a person would not suffer damages until having retired and received the first retirement check that is lower than the amount expected.

A cause of action might be said to accrue when the member receives official notice, such as an appointment letter, of his or her specific retirement benefits, or, in this case, upon official notice from the Administrator that a particular benefit request has been denied. But even under that theory, Mr. W.' cause of action would not have accrued in 1986, when he first began PERS employment, nor in 1987, when he realized that he was not considered a Tier I employee. At the earliest, his cause of action would have accrued when he received the Administrator's letter denying his request to change his membership status from Tier II to Tier I, or, in the absence of his request for the adjustment, at the time he retired and received a lesser level of benefits than he would have received as a Tier I retiree.

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[30] At least one OAH interlocutory ruling has determined in another context that AS 09.10.070(a)(5) does not apply to the claimant in proceedings before the OAH because they are not civil actions filed in court. *See In re M. M.*, OAH No. 06-0802-PER, Decision on Motions for Summary Adjudication at 5. Another PERS decision appears to agree, but for other reasons a specific ruling on the statute of limitations issue in that case was deferred as most likely moot. *In re F. N.*, OAH No. 07-0012-PER. There is some authority that general statutes of limitations apply against the government in certain administrative proceedings, in the absence of a specifically applicable statute. *See* 2 Am. Jur. 2d Administrative Law, §272, at 289 (1994). *See also*, N. Harlow, Annotation, "Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine," 51 A.L.R.4th 1147 (1987). One OAH ruling has dismissed an appeal for timeliness issues, finding that a claimant's 15-year delay in requesting reclassification of his job class was unreasonable, based on the theory of laches. *In re B. A.*, OAH No. 06-0829-PER.

Neither of the former PERS Board cases cited by the division is to the contrary. In the first case, L.M.B. had terminated her PERS employment ten years before she applied for and was denied non-occupational disability. Similarly, R.M.S. was already a retiree and was receiving benefits before making an inquiry about the COLA issue and later filing a grievance about the division's response. The limitations period the Board applied in each case clearly began to run when they retired, many years before both of these individuals initiated their claims, whereas at the time of his request to be classified as Tier I, Mr. W. had not yet retired and his claim for the benefits allegedly due under law had not yet accrued.

As to the division's suggestion that the discovery rule might apply, the discovery rule has not been extended by case law to actions arising under AS 09.10.070, as noted by the former PERS Board in the R.M.S. case.[32] To allow the discovery rule, in the absence of a specific statute of limitations, to dictate when a cause of action had to be filed in the retirement and benefits context would invite a flood of anticipatory lawsuits filed by members seeking to preserve their future rights. That would likely become unduly burdensome for the division.

Accordingly, the division has not established that Mr. W.' request for the Administrator to change his membership status from Tier II to Tier I is barred by the statutes of limitations.

B. Mr. W. is Entitled to Tier I Status Effective as of June 24, 1986

Mr. W. claims he is entitled to Tier I status because he began working for the North Slope Borough on June 24, 1986, before the effective date of the legislation that created Tier II status in the retirement system. The division maintains Mr. W. is not entitled to Tier I status because he was not enrolled in PERS until September 24, 1986, the end of his 90-day waiting period.

Mr. W. asserts his situation is similar to Rick S.'s, his coworker who was granted Tier I status by the former PER Board and the Superior Court. The division says this case is not like Mr. S.'s because he was allowed to buy back his time and also because the Board said his situation presented an unusual and unique set of facts, which are not present in Mr. W.' case.

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[31] *Sengupta v. Wickwire* at 753.
[32] Decision 03-18 at 3.

The S. court decision was not appealed to the Alaska Supreme Court so it does not have precedential authority in Mr. W.' case such that it must be followed. However, the Superior Court's analysis serves as a compelling guide here.

1. Mr. W. became a member of PERS on June 24, 1986

The North Slope Borough is a PERS employer. In the early 1970's, the Borough entered into a participation agreement with the State in which it agreed as follows:

> (1) The [Borough] agrees to begin participation in the Retirement System as of July 1, 1972 with the payment of employer contributions and withholding of employee contributions to begin with wages earned in the first full pay period beginning September 30, 1972.
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> (2) The [Borough] agrees that all eligible employees except employees in the following designated categories will participate in the Retirement: Public Employee Program On the Job Training and Temporary Hire.
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> (3) The [Borough] agrees to make contributions each year which are sufficient to meet the normal cost attributable to inclusion of its employees…
>
> . . . .
>
> (5) the [Borough] agrees to comply with the requirements of the statutes and regulations pertaining to the Retirement System. It agrees that eligible employees are bound by these statutes and regulations, and by the terms of this agreement…. The State agrees for its part as follows: (1) The [Borough] departments, groups, and classifications of employees designated above are included in the Retirement System and are entitled to all the rights, benefits, and privileges afforded "employees" as that term is used in the Retirement System, and are subject to all conditions, duties, and liabilities imposed upon "employees."[33]

Mr. W. was hired as a permanent full-time public safety officer by the North Slope Borough, starting on June 24, 1986. He received an employment letter from the Borough that reads in part:

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[33] Attachment to the Administrator's Proposed Findings of Fact and Conclusions of Law, received June 22, 2007 (emphasis added).

> I am pleased to inform you that you have been selected for employment with the North Slope Borough. Your appointment becomes effective June 24, 1986 . . . .
>
> Your first 12 months of employment will be in a probationary status during which you must demonstrate an ability to perform the duties of your position as a probationary employee. If you satisfactorily perform your employment with the NSB, you will receive your first annual evaluation for your merit anniversary date.
>
> All Borough Police Officers in a permanent status are enrolled in the Public Employees Retirement System. After 90 days of continuous service a deduction equal to 5.0% of your salary is withheld for your retirement benefits. This percentage may change in accordance with the state law. If so, you will be notified.[34]

In addition to the Borough's letter confirming his start date of June 24, 1986, and his permanent employee status, Mr. W.' submitted a copy of his first annual evaluation that was completed for the one-year time period from June 25, 1986, through June 25, 1987.[35] This document indicates his work was deemed satisfactory and he was recommended for a merit increase.[36]

The North Slope Borough's employment letter to Mr. W. indicates that all police officers "are enrolled" in the retirement system, which is a statement of present tense. Without other language identifying a different start date for PERS membership, the phrase "are enrolled" means that the enrollment occurs on the employee's starting date of employment. That the deductions for retirement benefits begin 90 days later does not mean the employee is enrolled in PERS 90 days later. That would be inconsistent with the earlier statement that police officers "are enrolled" in the retirement system. A new employee could just as easily interpret the 90-day delay as a Borough-provided benefit of employment, tantamount to a signing bonus.

The language in the Borough's employment letter stating the police officers "are enrolled" in PERS is consistent with the PERS statutes. Alaska law states clearly and unambiguously that PERS membership becomes effective as of the date of the employee's commencement of employment. AS 39.35.120(a) provides that:

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[34] Attachment to Mr. W.' Post Hearing Brief, received July 2, 2007 (emphasis added).
[35] Exh. App. 3.

> … [a]n employee of a political subdivision or public organization that becomes an employer shall be included in the system on the effective date of the employer's participation or the date of the employee's commencement of employment with the employer, whichever is later.[37]

Not only does an employee become a PERS member upon beginning employment, but PERS membership is a condition of employment, thus making the employee's participation in the system mandatory.[38]

The division claims that the language of the 1986 Tier II authorizing statute prohibits Mr. W. from PERS membership until after July 1, 1986. The division's position is that he was not hired under the retirement system until September 24, 1986, when the North Slope Borough first began to deduct and submit his PERS contributions. The division relies on the legislation creating Tier II membership status, which states that it applies:

> only to members first hired under the Public Employees' Retirement System after June 30, 1986. Changes in the Public Employees Retirement System enacted in this Act that require a reduction in benefits to members of the retirement system apply only to members who are first hired under the retirement system after June 30, 1986. Other sections of this Act apply to all members of the Public Employees' Retirement System, regardless of the date of hire.[39]

The division's interpretation of the phrase "first hired under the Public Employees' Retirement System" is inconsistent with AS 39.35.120(a), which states that an individual becomes a PERS member upon commencement of employment. The division has not identified language in §57, Chapter 82, SLA 1986, or elsewhere in the statutes, to support its argument that an employee becomes a PERS member upon commencement of PERS contributions. The phrase "first hired under the Public Employees' Retirement System" found in the 1986 legislation suggests only that the individual would have to have been hired after the PERS system was in place and operational. This would naturally preclude someone's employment for a non-PERS

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[36] *Id.*
[37] Emphasis added.
[38] Membership is not mandatory only for elected officials, university employees and retirees who become re-employed. AS 39.35.120(b).
[39] §57, Chapter 82, SLA 1986 (emphasis added).

employer, plus any work done by the individual before PERS came into existence. The Tier II authorizing legislation does not defeat Mr. W.' eligibility for Tier I membership status.

The division further argues that Mr. W. was not a PERS member when he first began working for the North Slope Borough because he was not making PERS contributions until September 24, 1986, and thus did not meet the definition of "active member." According to AS 39.35.680(1), an "active member" is an employee "who is employed by an employer, is receiving compensation for seasonal, permanent full-time, or permanent part-time services, and is making contributions to the plan . . . ." In addition, AS 39.35.310(a) addresses the "active member." The statute provides that:

> [a]n active employee is entitled to credited service for periods of employment with a political subdivision or a public organization beginning with the effective date of the employers participation with the system . . . .

While it is true that Mr. W. was not an "active member" for the first three months of his North Slope Borough employment, these provisions merely specify the rights and responsibilities of an "active member." Mr. W. was not making contributions to the system until after the 90-day delay instituted by North Slope Borough was completed, but this is not fatal to Mr. W.' membership in PERS. There is no provision in the PERS statutes that prevents an individual who is not an "active member" from being a member. Hence the need for the modifier "active." In fact, as the division notes, there are several different classes of members in the system.[40]

The division argues that the S. case was decided on the basis of estoppel, so the analysis in that case should not be applied in Mr. W.' case because the elements of estoppel are not present here. The S. case was not decided by the PERS Board based on the theory of estoppel. Although the elements of estoppel were discussed both by the Board and the court, there is no language in either the Board or court decision that confirms the theory of estoppel formed the basis for granting Mr. S. Tier I status. Quite the contrary, in fact – the court examined the transcript on appeal and indicated that the Board had specifically disavowed estoppel as the reason the Board decided the case as it did.[41]

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[40] *See* AS 39.35.680(22).
[41] *Bell v. Swanson* at n. 3.

2. Mr. W. is entitled to make his PERS contributions for the period from June 24, 1986 through September 24, 1986

Although not briefed by the parties until after the hearing, the issue of Mr. W.' financial obligation in light of the determination that he is entitled to Tier I membership should be addressed. Mr. W. volunteered to purchase his service time for the three months the North Slope Borough delayed making contributions on his behalf.

Mr. S. was allowed to buy back his time under the provisions of AS 39.35.345, which provides that a vested employee may make "retroactive contributions" to the plan for full-time temporary service rendered to a PERS employer. Although Mr. S.'s service for the first three months of his employment with the Borough clearly was not temporary, the division characterized the time as temporary, and since Mr. S. did not object, both the PER Board and the court affirmed the buy back. The evidence in Mr. S.'s appeal indicates the division has allowed at least a few individuals to buy back their time pursuant to the statute. This was confirmed by Kay Goynton, the division's witness in Mr. W.' hearing. She added that the division's former practice is now considered inappropriate and was eliminated during Mr. S.'s appeal.

Based on its estimate of the salary Mr. W. was receiving at the time he enrolled in PERS, the division has calculated that his monthly employee contributions would be $372.08 per month, the combined total of which is $1,116.24.[42] The interest charges, calculated at 7% through August 1, 2007, would total $3,590.96, thus making the total indebtedness $4,707.20 as of August 1, 2007.[43] In the alternative, the division estimated the total lifetime actuarial reduction in Mr. W.' benefits would be $39.93 per month.[44]

In addition to the above indebtedness for Mr. W.' employee contributions, the division insists that Mr. W. must pay an additional $33,135.05 to pay, in present value figures, the cost to the division to provide Tier I benefits to Mr. W. in the absence of his employer's contributions. Most of that figure is the cost to the system to provide Mr. W. with the Tier I version of the retiree health plan. The division estimated that total at $28,032, calculated at an average amount of $876 per month times 32 months, the approximate number of months from Mr. W.'

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[42] *Affidavit of Kathy Lea* at p. 4.
[43] *Id.*
[44] *Id.* Mr. W.' interest charges must be recalculated through August 1, 2008, the approximate date this decision will become final.

anticipated retirement until the date he turned 60 years of age.[45] The other portion of the added figure the division proposes Mr. W. must pay is $5,103.05, the total present value for making the 10% cost of living adjustment (COLA) available to him, even though he might not use it.[46]

Mr. W. is not obligated to pay the cost for the division to provide him with Tier I benefits, over and above the cost of his employee contributions, plus interest, for the period from June 24, 1986, through September 24, 1986, when the Borough apparently finally began deducting employee contributions from his earnings and making the employer's contributions on his behalf. The ruling in this case granting Mr. W.' request for Tier I status has a financial impact in two separate and distinct contexts. The first consists of Mr. W.' employee contributions (and his employer's), for the 90-day period of delay. The second is the financial impact of awarding Mr. W. Tier I status in PERS and any unanticipated increases in the cost of the benefits which will not be covered by the employee and employer contributions plus interest.

Those costs are acknowledged, but they are not Mr. W.' responsibility: he became a PERS member upon the commencement of his employment on June 24, 1986. Through no fault of his own, he did not make his employee contributions into the PERS system for the first 90 days of his employment. This order directs Mr. W. to make only those contributions. The North Slope Borough's responsibility is a separate matter and cannot be determined here. Regardless of whether the Borough policy was legally correct, it appears, at a minimum, to have been inconsistent with the provisions of its participation agreement with the State regarding the retirement system. As the Superior Court stated in its decision affirming Mr. S.'s appeal, "whether or not the State and the Borough should have been allowing a 90 day 'wait' period is not for the court to decide."[47]

IV. Conclusion

Mr. W. commenced employment as a public safety officer with the North Slope Borough on June 24, 1986. Thus, based on the statutes governing the Public Employees Retirement System, Mr. W. became a member of PERS on that date and is therefore entitled to Tier I membership status. Mr. W. must pay his employee contributions, plus interest, for the period from June 24, 1986, through September 24, 1986, the date the North Slope Borough began

[45] *Affidavit of Kathy Lea* at p. 2-3.
[46] *Affidavit of Kathy Lea* at p. 4.

deducting his employee contributions. Mr. W. is not obligated to pay his employer's contributions, nor the total cost to the division to provide Tier I benefits to him. The Administrator's decision denying him Tier I benefits should be reversed.

V. Order

- The Division's denial of Mr. W.' request to be transferred from Tier II status to Tier I status is reversed;
- Mr. W. is entitled to Tier I membership as of June 24, 1986;
- Mr. W. is liable for the cost of his employee contributions, plus interest, for the period from June 24, 1986, through September 24, 1986, payable in one lump sum no later than the date of his retirement, or calculated by the division as a lifetime actuarial reduction from his retirement benefit, as he chooses.

DATED this 19th day of June, 2008.

By: *Signed*
Kay L. Howard
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 31st day of July, 2008.

By: *Signed*
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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

[47] *B. v. S.* at 11.