BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of K. H.	)	OAH No. 07-0306-PER
	)	Div. R&B No. 2007-014

DECISION

I. Introduction

This is K. H.'s appeal of the Division of Retirement and Benefits' determination that her credited service accrued toward Public Employees Retirement System (PERS) retirement must be reduced. AS 39.35.520(a) requires the division to correct errors in the PERS records it maintains. AS 39.35.520(b)'s legal defense against certain adjustments does not apply. Ms. H. did not prove that she has an equitable estoppel defense against adjustment. The division's determination, therefore, is affirmed.

II. Facts

K. H. began working as a museum clerk for the Department of Education and Early Development in April 2003.[1] Beginning February 1, 2007, her employer scheduled Ms. H. to work a minimum of 20, but no more than 30, hours per week during the summer season (May 15-September 15) and 15 hours per week the rest of the year (the off season).[2] Prior to that change, she had been scheduled to work 37.5 hours per week during the summer season and as needed the rest of the year.[3] During the off season Ms. H. typically was called in to provide two hours of lunch relief when full-time staff members were on leave, but sometimes she was called in for full days.[4]

Ms. H.'s employer reported all of her hours and forwarded contributions for each pay period in which hours were reported, no matter how few.[5] Though early in her tenure as a clerk, Ms. H. characterized her position as "permanent seasonal," she came to understand that her

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1 July 18, 2007 K. H.'s Response to Administrator's Motion for Summary Adjudication (H. Response) at 1.

2 *Id.* at 2; August 13, 2008 Testimony of K. H. ("H. Testimony") (explaining that after the schedule adjustment, Ms. H. sometimes worked more than 20 hours per week but that her employer kept her summer hours below the 30-hour threshold for being a full-time employee).

3 *Id*. at 1 & 2.

4 August 8, 2003 Email from H. to Pre-retirement Services, Agency Rec. 14 (describing work arrangement for off season); Table, Agency Rec. 11-12 (listing hours and contributions for H. by pay period from April 2003 through December 2006, and illustrating that her hours varied in the off season from zero, to a few, to 30 or more per pay period).

5 Table, Agency Rec. 11-12 (showing zero dollars in the contribution columns for pay periods reporting zero hours while including a dollar amount, however small, for pay periods reporting some hours—e.g., $12.01 total contributions for the third pay period of 2004, in which 6.6 hours were reported); *also, e.g.*, Exhibit H-1, p. 17 (showing PERS contribution deducted for two-hour shift worked in January 2004).

employer treated it as a "permanent part-time" position.[6] Based on her own communications with her employer and on information about other employees occupying similar positions, she was led to believe that her status would be that of a permanent part-time employee, and that she would accrue PERS credited service for all hours worked.[7]

Ms. H. took the museum job specifically to accrue credited service, so that she could vest in PERS and receive medical benefits upon retiring.[8] She understood that her employer's way of managing her initial schedule (full-time hours in the summer; as needed the rest of the year) was meant to meet the employer's needs while also allowing her to achieve her goal of accruing credited service for every hour worked.[9] She knew that employees working "on call" did not receive benefits, but she recalls being assured by her employer that her status would be permanent part-time, which would allow her to accrue credit for off-season work.[10]

Despite this assurance, Ms. H. still thought something was odd about the arrangement because she had a good understanding of the difference between full-time, part-time, and on-call work and which kind of work included benefits.[11] Toward the end of her first summer season, when she knew that she was coming up on the time of the year when she would be scheduled to work only small increments of time, she sought confirmation that she would accrue credited service for those hours too.[12] She emailed the division's pre-retirement services the following inquiry:

> I'm not sure if I'm writing to the correct person, but perhaps you can direct me if not. I am a benefited permanent seasonal state employee at museum during the visitor season. I get laid off for the winter, but am listed as "on call." Mostly in the winter I would get called in to cover during 2 hours of lunch time when full time staff take vacations, but might also work some full days if 2 regulars take leave at the same time. If I do 2

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6 *Compare* August 8, 2003 Email from H. to Pre-retirement Services, Agency Rec. 14 (explaining that she was "a benefitted [sic] permanent seasonal state employee") *with* April 28, 2007 Notice of Appeal, Agency Rec. 4-6 (repeatedly referring to the position as permanent part-time or PPT and stating that in the prior summer (2006) she had been explicitly told "[y]ou are a permanent part time employee, who is listed as full time during the summer months in order for you to receive your medical coverage").

7 H. Testimony (describing understanding of job status based on representations of employer and explaining that she had been told that for many years the other people who occupied the four identically classified positions accrued credited service for all hours worked); *also* August 13, 2008 Testimony of E. C. (testifying that he held his position for 12 years and expected that all his winter hours would accrue service time, not just his summer hours).

8 H. Testimony.

9 H. Testimony.

10 H. Testimony.

11 H. Testimony (illustrating that not only did Ms. H. know that on-call workers did not receive benefits, she also knew about the hours threshold for a part-time employee to receive benefits (15 hours per week), and for a part-time position to become full time (30 hours per week)).

12 H. Testimony.

> hours a day for 6 weeks, would I actually accumulate any hours towards being vested? I know it's not a lot of hours, but it appears I'll be doing several months worth of filling in for those 2 hours. I'm just not sure if on-call counts! My ssn is [number omitted] if you need to see my status.[13]

Due to short staffing problems, the division did not respond to the email for nearly a month.[14]

In the meantime, Ms. H. began checking her on-line account information through the division's website frequently, to see if the hours recorded were the same as the hours she was working.[15] To log in and access her account information, she had to acknowledge reading a disclaimer to the effect that the information to be display contained estimates.[16]

On September 4, 2003, the division responded to Ms. H.'s August 8 email inquiry as follows:

> To accrue service credit towards your vesting or retirement eligibility you must be a permanent full-time or part-time employee. A permanent part-time employee is one who occupies a permanent position which regularly requires working at least 15 hours a week, but less than 30 hours per week. Furthermore, if your position was temporary, the service you accrued would not count towards your vesting or retirement eligibility. If you have any further questions, please reply to this message or contact Pre-Retirement Services at 465-5700. Thanks.[17]

The record contains no reply to the September 4 message nor did the author recall hearing from Ms. H. further about the matter.[18] Ms. H. recalls making number of telephone calls about the matter, and the record establishes that she made at least two to division employees and once met in person, at her workplace, with a division representative.[19]

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13 August 8, 2003 Email from H. to Pre-retirement Services, Agency Rec. 14.

14 August 13, 2008 Testimony of A. B. (B. Testimony) (confirming that he did not respond before the September 4 date on the reply email and that this was longer than the usual turnaround time because the section was short staffed).

15 H. Testimony (explaining that she decided to work a few hours and look at the PERS on-line account information to see if the hours showed up and that she was almost obsessive about checking on line because she wanted confirmation of her understanding that each hour she worked would accrue credited service); *also* Ex. H-7 at 1 (excerpt from website printout which Ms. H. testified represents one page of several illustrating the frequency with which she logged in to check her account).

16 Lea Testimony (describing account log in disclaimer); H. Testimony (confirming that she had to click a button acknowledging the disclaimer to access the on-line account every time she logged in).

17 September 4, 2003 Email from B. to H., Agency Rec. 14; *also* B. Testimony.

18 B. Testimony.

19 Ex. H-7 at 2-3 (logging telephone calls in 2006 from H.); H. Testimony; August 13, 2008 Testimony of P. L. B. (stating that Ms. H. came in on her day off to speak with Ms. V., a regional counselor for the division making a site visit to the museum).

Ms. H. received from the division PERS annual benefits statements for the years ending June 30, 2003-2006.[20] On both pages of each two-page statement, the following language appears:

> The account and service information contained in this statement is based on data reported by your employer(s). Please contact your employer(s) about any discrepancies. The benefit information shown is an estimate. While every effort has been made to ensure the accuracy of your statement, please know it does not have the force and effect of the law, rule, or regulations governing the payment of benefits. All benefits will be paid under the provisions of the applicable Alaska Statutes and Federal law.[21]

In her testimony, Ms. H. acknowledged that she had read this language but did not consider there to be any discrepancy because her employer had assured her she would receive credited service for all her hours.

For more than three years, PERS received contributions to the account of Ms. H. for hours when she worked fewer than 15 per week before the problem was discovered. After learning that Ms. H.'s employer had submitted wages and hours inaccurately for her by reporting time and making contributions for the under 15-hours-worked weeks, the PERS employer reporting entity for state agencies notified the division of the problem.[22] By letter dated April 18, 2007, the division notified Ms. H. that it was correcting her PERS account record by reducing the credited service because her employer had "reported service credit for times when [she] did not meet the requirement to be PERS eligible."[23]

Ms. H. appealed that determination, asserting primarily that the covenant of good faith and fair dealing had been breached and secondarily that AS 39.35.520 prevents the division from adjusting her credited service.[24] The division moved for summary adjudication.[25] Ms. H. responded, agreeing that the matter could be resolved through summary adjudication but disagreeing with the division's result.[26] Oral argument was held on the motion.

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20 Division's Exhibits 2-5; H. Testimony (confirming that she received the statements).

21 Division's Exhibits 2-5.

22 Lea Testimony (explaining that the Division of Finance, which is the PERS reporting entity for all state agency employers, discovered the Department of Education's reporting errors and called PERS' attention to it).

23 April 18, 2007 Letter from Shier to H., Agency Rec. 4.

24 April 28, 2007 Notice of Appeal, Agency Rec. 4-6.

25 July 13, 2007 Administrator's Motion for Summary Adjudication.

26 *See generally* July 18, 2007 H. Response.

Summary adjudication was granted in the division's favor, but Ms. H. was given the option to have a hearing to pursue an estoppel defense because the division interjected new argument and evidence on that subject at the reply brief stage of its motion for summary adjudication.[27]

An evidentiary hearing was held on estoppel. In closing argument, Ms. H. argued that she should be permitted to keep the credited service erroneously accrued because her employer had hired her for a permanent part-time position, had consistently told her she was a permanent part-time employee, and had reported all the hours and made contributions for them, and that PERS had accepted the contributions, all of which led her as a reasonable person to believe her employer had created a unique position qualifying as permanent part-time for PERS service accrual purposes. The division countered that Ms. H. had not established any of the four elements required for equitable estoppel.

III. Discussion

Ms. H.'s appeal raises the following general question: under what circumstances can an employee retain credited service accrued solely because the employer erroneously reported hours for the employee when the employee was not in a permanent position that regularly required working at least 15 hours per week? As presented in the context of Ms. H.'s appeal, this general question raises only legal issues, except insofar as the doctrine of equitable estoppel might provide a defense against the adjustment of her credited service.[28]

In particular, the parties' arguments reveal legal, not factual, disputes about the extent of the division's duty under AS 39.35.520 to correct errors, the division's duty to discover errors, and whether (as a matter of law, not equity) the division is barred from correcting Ms. H.'s record of credited service. Those issues will be address first, in subpart A below.

Whether the division is precluded under the doctrine of equitable estoppel from adjusting Ms. H.'s record of credited service rests on fact issues and thus on evidence submitted to the record and testimony taken at the hearing. Estoppel will be addressed in subpart B below.

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[27] June 19, 2008 Order Granting Partial Summary Adjudication and Providing Hearing Option on Equitable Estoppel.

[28] The division also discussed the doctrine of promissory estoppel. July 25, 2007 Administrator's Reply to Appellant's Response to Motion for Summary Adjudication (Administrator's Reply) at 8-12. Ms. H. is not seeking to enforce a promise (either express or implied) made by the division as PERS administrator. Rather, she is attempting to defend against enforcement of the statutory requirement to adjust her record to correct the credited service reporting error. Thus, the doctrine of equitable estoppel could come into play in Ms. H.'s appeal but not the doctrine of promissory estoppel.

A. THE DIVISION'S DUTIES RELATIVE TO CREDITED SERVICE

Ms. H. challenged the division's authority to reduce her credited service, in part, because she was eager to begin receiving retiree health care coverage.[29] To receive retiree health care coverage, a PERS member must be receiving monthly benefits from the PERS plan.[30] A PERS member begins receiving such benefits only after meeting the eligibility requirements for retirement.[31] A PERS member must accrue a certain amount of credited service to be eligible for normal retirement.[32]

"Credited service" is defined as "the number of years, including fractional years, recognized for computing benefits that may be due from the [PERS] plan."[33] Permanent full-time employees accrue credited service "on the basis of one calendar day of service for each day in pay status."[34] A permanent part-time employee accrues credited service "on a pro rata basis to that which would have been earned as a permanent full-time employee."[35] To be a permanent part-time employee for PERS purposes, the employee must "occupy[] a permanent position that regularly requires working at least 15 hours but less than 30 hours a week."[36] Ms. H., therefore, is entitled to receive pro rata credited service for the times when she occupied such a position and day-for-day credited service for the times when she occupied a permanent full-time position.[37]

The problem with Ms. H.'s accrual of credited service stems from the fact that her employer reported her as a permanent part-time employee during the off-season, when she was not regularly scheduled to work at all and usually worked fewer than 15 hours during any particular week in which she was called in. Ms. H.'s employer had a duty to report her PERS

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[29] December 8, 2007 Letter from H. After briefing on the summary adjudication motion but before the estoppel hearing was conducted, Ms. H. accrued the remaining credited service needed to retire with the desired medical benefits and did retire as of May 27, 2008. H. Testimony. The appeal is not moot, however, because any additional credited service awarded as a result of this appeal could affect the calculation of her pension payments.

[30] AS 39.35.535(a).

[31] AS 39.35.370(e)(1).

[32] AS 39.35.370(a) (permitting appointment to normal retirement when the member has reached a certain age and has five years of credited service, or has 20 years (peace officers and firefighters) or 30 years (all others) of credited service regardless of age). Eligibility for occupational disability benefits is not dependent on credited service (*see* AS 39.35.410), but eligibility for normal and early retirement, as well as for non-occupational disability benefits, is dependent on the member having accrued at least five years of credited service (*see* AS 39.35.370(a) & (b); AS 39.35.400(a)).

[33] AS 39.35.680(10).

[34] 2 AAC 35.330(a).

[35] AS 39.35.300(b).

[36] AS 39.35.680(32).

[37] For PERS purposes, a position is considered "permanent full-time" if it is "a permanent position that regularly requires working 30 or more hours a week[.]" AS 39.35.680(31).

service to the division.[38] The division had a duty to account for Ms. H.'s and her employer's contributions to the PERS plan, and to "maintain an adequate system of accounts and records for the plan."[39]

The division, however, also has an ongoing duty to make adjustments to Ms. H.'s records to correct errors regardless of who made them. AS 39.35.520(a) states, in pertinent part:

> When a change or error is made in the records maintained by the plan or in the contributions made on behalf of an employee or an error is made in computing a benefit, and, as a result, an employee or beneficiary is entitled to receive from the plan more or less than the employee would have been entitled to receive had the records or contributions been correct or had the error not been made, (1) the records, contributions, or error **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 or beneficiary was correctly entitled shall be paid…. If no future payment is due, a person who was paid any amount to which the person was not entitled is liable for repayment of that amount, and a person who was not paid the full amount to which the person was entitled shall be paid the balance of that amount.

(Emphasis added.) This creates a mandatory (not discretionary) duty to correct errors in the records and contributions. The division must correct its records to reflect credited service properly accrued for Ms. H., unless no error actually occurred in the employer's reporting or the division is barred from correcting the records due to its delay in discovering the error or under AS 39.35.520(b).

1. The employer erred by reporting hours as permanent part-time.

Ms. H.'s employer treated her position as if it were a permanent part-time position and reported to the division for PERS purposes all of the hours she worked, even during the off season when she often was called in to work for just a few hours each week.[40] A permanent part-time employee does accrue credited service.[41]

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[38] AS 39.35.070 (providing that "[e]ach employer shall furnish the administrator with records concerning the periods of service, dates of birth, compensation, new entrants into service, death, withdrawals, and other employee data necessary for the proper and effective operation of the system").

[39] AS 39.35.110.

[40] July 18, 2007 H. Response at 1; Table, Agency Rec. 11-12 (listing a dollar amount, however small, for pay periods reporting some hours).

[41] AS 39.35.300(b) (stating that "[a] permanent part-time employee of the state receives credited service on a pro rata basis to that which would have been earned as a permanent full-time employee); *also* AS 39.35.330(a) (providing for a permanent part-time employee to receive pro rata credited service during a leave of absence with pay).

To be a "permanent part-time" employee for PERS purposes, however, the employee must occupy "a permanent position that regularly requires working at least 15 hours but less than 30 hours a week[.]"[42] Until her position was changed by her employer in 2007 so that she would regularly work at least 15 hours per week during the off season and 20 hours per week during the summer season, Ms. H. was not a permanent part-time employee for PERS purposes. Thus, her employer erred in reporting her hours and contributions as if every hour worked was a PERS eligible hour, even if the hour fell in a week for which she was regularly scheduled to work fewer than 15 hours—for instance, to provide lunch hour coverage only.

The division has asserted variously that Ms. H.'s position should have carried the status seasonal with off-season layoff or part-time seasonal.[43] It is unnecessary in this appeal to decide what status Ms. H.'s employer should have used in reporting her hours and contributions to the division in place of the erroneous permanent part-time status. The division has agreed not to remove Ms. H.'s credited service for any week in which she worked at least 15 hours. Initially, the division recalculated her credited service "to remove credit for time worked when Ms. H. was not working at least 15-hours or more per week."[44] This resulted in "a reduction of 0.29828 years of [credited] service."[45] The reduction was lowered to 0.25597 after the division obtained additional information from Ms. H.'s employer about the hours she worked during the winter of 2006-07.[46]

The question, therefore, is not what status should have been used but rather whether the division must allow Ms. H.'s records to continue to reflect credited service for hours worked in weeks for which she was scheduled to and in fact worked fewer than 15 hours. The answer

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42 AS 39.35.680(32).

43 July 13, 2007 Administrator's Motion for Summary Adjudication at 9 (stating that the employer "should have reported Ms. H.'s status as being a seasonal employee accruing PERS service credit for part of the year and being put on leave during the off-season"); July 13, 2007 Affidavit of Rachel Atkinson (Atkinson aff.) at ¶ 5 (asserting that "[t]he appropriate status for these positions was 'part-time seasonal'").

44 July 13, 2007 Affidavit of Bernadette Blankenship (Blankenship aff.) at ¶ 8.

45 July 13, 2007 Blankenship aff. at ¶ 9.

46 July 25, 2007 Blankenship aff. at ¶ 3. It is not entirely clear that the additional information related to hours worked before Ms. H.'s employer changed her work schedule in February 2007 to ensure that she would be "regularly assigned to work 15 hours or more per week year round" (*see* July 25, 2007 Correcting Affidavit of Rachel Atkinson at ¶ 3). The division's backup for the revised recalculation, however, does show that the division is treating some of the hours reported during the off-season period (September 16-May 14) as PERS eligible hours. July 25, 2007 Blankenship aff. at ¶ 3 and Attachment 1 (table showing, for instance, that 75 of the 105.50 hours reported by the employer for the 9/14/2005-12/31/2005 period are eligible hours). The most reasonable inference, therefore, is that the division continues to credit Ms. H. with service for any week in which she worked at least 15 hours.

would be "yes" only if a legal or equitable defense prevents the division from complying with the statutory mandate in AS 39.35.520(a) to correct errors.

2. The division had no duty to discover the error at any specific point.

Ms. H. asserts that "the division was negligent in its duty to assure only eligible hours be accepted for service credit."[47] Her brief cites no authority for this duty. She agrees her employer made the error and the division and her employer are not responsible for one another's errors (are not in privity).[48] Careful review of PERS statutes and regulations reveals no specific duty for the division to act as a gatekeeper to stop erroneous reporting by employers.

To the contrary, the AS 39.35.520(a) requirement to correct errors "in the records maintained by the plan or in the contributions made [by an employer] on behalf of an employee …" contemplates that some errors will make it through the employer-reporting gate, into the plan's records. If the division had a duty to catch all reporting errors at a specific point in time, and was barred from correcting errors discovered later (as Ms. H.'s argument implies it should be), the division also would be barred from correcting errors correction of which would favor a PERS member.

In short, the division's duties to keep records, account for contributions and correct errors found in the records it keeps do not translate into a requirement to reject erroneous reports of credited service at the point of reporting, or at any other specific time, unless the time bar in AS 39.35.520(b) applies.

3. Error correction is not barred under section 520(b).

AS 39.35.520(b) restricts the exercise of the error correction duty if correction would result in "[a]n adjustment that requires the recovery of benefits …." Specifically, it prohibits the division from making adjustments to correct errors that would result in recovering overpaid benefits after two years, unless the member contributed to the error.[49]

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[47] July 18, 2007 H. Response at 1.

[48] H. Response at 1.

[49] A member contributes to the error if the member provides erroneous information or should have known the amount of benefits being paid was in error and yet continued to collect excess benefits instead of calling the error to the division's attention. *See* AS 39.35.520(b), which states:

> An adjustment that requires the recovery of benefits may not be made under this section if
>
> (1) the incorrect benefit was first paid two years or more before the member or beneficiary was notified of the error;
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> (2) the error was not the result of erroneous information supplied by the member or beneficiary; and
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> (3) the member or beneficiary did not have reasonable grounds to believe that the amount of the benefit was in error.

Section 520(b) serves the function of providing a PERS member with a legal defense to enforcement of the section 520(a) requirement to make adjustments otherwise needed to correct errors. It imposes a two-year time limit on adjustments that would require repayment of benefits. It also tempers the potential effect of that error-correction time limit on the PERS plan by precluding a member from invoking the time limit if the member contributed to the error by supplying erroneous information or should have known that he/she was being overpaid.[50] As such, section 520(b) is a time bar (like a statute of limitations) on the division's right, on behalf of the PERS, to recover overpayments if, through no fault of the member, the division delays initiating the adjustment for more than two years.

Ms. H. takes the position that credited service is a "benefit," in and of itself, and thus under section 520 should not be adjusted more than two years after the erroneous reporting by her employer.[51] If she were correct, the division would be time barred from looking back more than two years to correct any reporting or contribution errors by Ms. H.'s employer, as long as the other elements of the time-bar defense were met.

Service credits, however, are not "benefits" within the meaning of section 520(b). That section speaks of adjustments that require "recovery of benefits" when it imposes the time bar on the division's ability to correct records. It goes on to speak of "the incorrect benefit [having been] first **paid** two year or more before the member … was notified of the error[.]"[52] It contemplates something that can be paid—i.e., has a monetary value—like pension or disability benefits payments, medical benefits, or death benefits. This is especially apparent when section 520(b) is read in context with other provisions of title 39, chapter 35 of Alaska's Statutes that also use the word "benefits."[53] For instance, the purpose of that chapter is

> to encourage qualified personnel to enter and remain in service with participating employers by establishing plans for the **payment** of

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50 *Id*.

51 July 18, 2007 H. Response at 4.

52 AS 39.35.520(b)(1) (emphasis added).

53 Absent a statutory or regulatory definition giving "benefits" a special meaning, it must be interpreted "according to reason, practicality, and common sense, 'taking into account the plain meaning and purpose of the law as well as the intent of the drafters.'" *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.3d 624, 628 (Alaska 2007) (citations omitted); *see also* AS 01.10.040(a) (requiring that words and phases be construed "according to their common and approved usage" and that technical words be construed according to their "peculiar and appropriate meaning" if they have acquired such a meaning).

"Benefits" has not been given a special meaning in AS 39.35 or in the PERS regulations (2 AAC 35). Ms. H.'s assertion during oral argument that the PERS plan document, in effect, defines "benefits" broadly enough to include credit service accrual as a benefit, because the document refers to active employees receiving benefits, overlooks the fact that active employees are paid "benefits" (e.g., medical and death benefits) before retirement.

> retirement, disability, and death **benefits** to or on behalf of the members.[54]

Chapter 35 gives the PERS administrator authority "to contract with public and private entities to provide record keeping, **benefits payments**, and other functions necessary for the administration of each plan in the system."[55] It also speaks in terms of "benefit payments" when establishing rules for reemployment of retirees.[56]

As used in chapter 35, "benefit" and "benefits" are words that connote something that can be paid, not something used to calculate how much to pay a member. Credited service is the latter: "the number of years, including fractional years, recognized for computing benefits that may be due from the plan[.]"[57] It is used to calculate benefits.[58] Credited service also affects eligibility to collect benefits.[59]

In sum, accrual of credited service is a prerequisite to receipt of retirement benefits and the amount of credited service affects the computation of benefits due, but credited service is not itself a benefit. AS 39.35.520(b) creates a two-year time bar on "recovery of benefits." Had Ms. H. been retired and receiving benefits for more than two years before she received notice of the reporting error that caused her record to incorrectly reflect her credited service, the division might have been precluded from recovering overpaid benefits but not from correcting the record and adjusting future benefits payments. Since Ms. H. received notice of the error while she was still employed by her PERS employer and was not yet eligible to receive retirement benefits, the section 520(b) defense does not apply.

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54 AS 39.35.001 (emphasis added).

55 AS 39.35.004(c) (emphasis added).

56 AS 39.35.150(a) & (b).

57 AS 39.35.680(10) (defining "credited service" as used in AS 39.35.095 – AS 39.35.680).

58 AS 39.35.370(c) (explaining how the amount of the monthly retirement benefit is calculated and thereby illustrating that credited service is part of the formula); AS 39.35.485(a) (using credited service in the calculation of the minimum benefit); AS 39.35.150(a) (explaining that additional pension to be paid to reemployed retirees is "based on the credited service and the average monthly compensation earned during the period re-employment"); AS 39.35.420(c) (using credited service to calculate the amount of non-occupational disability benefits); AS 39.35.430(b) (illustrating that credited service is a factor in calculating occupational death benefits); AS 39.35.680(4) (using credited service period in determining the "average monthly compensation" figure used to calculate benefits payments).

59 AS 39.35.370(b) & (c) (requiring that members have certain numbers of years of credited service to retire); AS 39.35.400(a) (requiring that a member accrue at least five years of credited service before becoming eligible for non-occupational disability benefits); AS 39.35.535(c) (requiring retiring members who wish to receive major medical coverage to have a certain number of years of credited service to elect that coverage).

B. EQUITABLE ESTOPPEL

The appeal Ms. H. filed did not assert equitable estoppel as a defense to the division's correction of her records.[60] The division raised estoppel in its motion for summary adjudication.[61] Since estoppel can require a fact-intensive inquiry, Ms. H. was permitted to respond to the division's equitable estoppel arguments and exhibits through an evidentiary hearing. She was informed through the summary adjudication order that to successfully assert the defense of equitable estoppel, she would have to prove four elements:

(1) the division, as PERS administrator, asserted a position by conduct or words;

(2) Ms. H. acted in reasonable reliance on the PERS-asserted position;

(3) Ms. H. suffered prejudice resulting from her reliance on that position;

(4) applying estoppel serves the interest of justice, so as to limit public injury.[62]

The first three elements of the test are inextricably linked. Prejudice must flow from reliance; reliance must be reasonable; reliance must be on the position asserted by PERS, not on someone else's assertion. Though advice or statements by a PERS member's employer can be a factor in whether the member's reliance on a position asserted by PERS was reasonable, the position itself must be asserted through conduct or words attributable to PERS (i.e., by the division when acting for the PERS administrator).[63]

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[60] Instead, Ms. H.'s appeal invoked the AS 39.35.520(b) two-year time bar against adjustments addressed in Part A.3 above and asserted that the state had violated the covenant of good faith and fair dealing. *See* April 28, 2007 Notice of Appeal (Agency Record 1-6) at 4-6. Ms. H. abandoned her good faith and fair dealing point by not pursuing it, consistent with her acknowledgment that the PERS and her employer are not responsible for one another's conduct. If her employer in fact promised that, as a condition of her accepting employment as a museum clerk, she would accrue credited service toward retirement for every hour she actually worked, even though the PERS laws preclude that from happening for people not regularly scheduled to work at least 15 hours per week, her contract grievance is with her employer, not with the retirement system.

[61] July 13, 2007 Administrator's Motion for Summary Adjudication at 9-13 (discussing estoppel case authorities when arguing that PERS is not responsible for errors by Ms. H.'s employer).

[62] June 19, 2008 Order Granting Partial Summary Adjudication and Providing Hearing Option on Equitable Estoppel at 10 (citing *Crum v. Stalnacker,* 936 P.2d 1254, 1256 (Alaska 1997), which applied estoppel against the government test to a Teachers' Retirement System case and set out the four elements).

[63] *E.g.*, Alaska PERB Decision No. 93-16 (Nov. 12, 1993) (concluding that the member "acted in reasonable reliance on advice rendered by her employer and the Division" when she left PERS employment and moved out of state, having received a statement from PERS showing 5.183 years of credited service, as well as three letters from state officials commending her on five years of service, but in fact was short .038 years due to a period of leave without pay); Alaska PERB Decision 98-13 (June 25, 1998) (concluding that the member had reasonably relied on information provided to him by the division about crediting of his temporary service when he made a decision to retire under a retirement incentive program); Alaska PERB Decision 99-9 (Oct. 4, 1999) (applying estoppel to prevent the division from denying a member Tier I retirement when .185 years of his service were in a temporary (not PERS eligible) position but the member had reasonably relied on the division's projections about his eligibility for Tier I status).

Ms. H. accepted and continued working in her position with the museum at least partly in reliance on assurances by her employer, the Department of Education and Early Development, that the position was permanent part-time and would accrue PERS credited service for all hours worked. No such assurances were provided by PERS' representatives. She points to the PERS annual statements and the fact that PERS accepted the contributions submitted by her employer as evidence that it was reasonable for her to believe that her employer succeeded in setting up a unique position in which she could accrue credited service for all hours worked. To prove the first two elements of estoppel—reasonable reliance on a position asserted by PERS through conduct or words—Ms. H. would have to show that

(1) the content of the annual statements asserted a position by PERS in words or that PERS' acceptance of the contributions was conduct through which PERS asserted a position,

(2) the position asserts was that Ms. H. would accrue credited service even for the hours in weeks when she was scheduled to work fewer than 15 hours, and

(3) she reasonably relied on the asserted position.

The annual statements say nothing about Ms. H.'s job at the museum, as contrasted with any other PERS job that might be reflected in an annual retirement benefits account update. They do not say whether the contributions recorded to her account were from a particular job, what her job status was as between full- and part-time, or how many hours she was scheduled to work each week. The statements do not even list the hours reported by her employer. They include an "Account Summary" listing Ms. H.'s cumulative "total service" in years and an "Annual Contribution Summary" listing her total contributions in dollars for the one-year period covered. Comparing the four statements reveals that between 2003 and 2006 Ms. H.'s "total service" grew at the rate of 0.43 to 0.45 years each year, or just over five months.[64] Thus, one can deduce from the statements that Ms. H.'s employer reported hours beyond those worked during the May-September summer season. Using other information, such as pay stubs or her own recollection of hours she worked and when she worked them, Ms. H. might have been able to deduce from the statements that her employer was indeed reporting all of the hours she worked and making contributions based on all of them.

[64] Division's Exhibits 2-5 (showing an increase from 2.86 years as of June 30, 2003, to 3.31 years as of June 30, 2004, then to 3.74 years as of June 30, 2005, and finally to 4.17668 years as of June 30, 2006, for a difference from one year to the next, respectively, of 0.45, 0.43 and 0.43688 per year).

Ms. H.'s ability to reach such a conclusion, however, does not mean the division asserted a position through the annual statements or by acceptance of the contributions that she was entitled to accrue credited service for hours worked during weeks when she was scheduled for fewer than 15 hours. The annual statements warn that they are based on information from the employer. They direct the PERS member to contact the employer about any discrepancies. They state that the benefits information shown is an estimate. They reveal that the estimate rests in part on past and projected future years in service.[65] The statements, therefore, inform the PERS member of the retirement benefits the member might receive in the future, if certain contingencies occur and if the information the employer provided proves to be correct.

When the division simply projects benefits based on information supplied to it by a PERS member's employer, and what the member actually relied on is the employer's erroneous assertion, the first element of estoppel is not met.[66] That is what happened here. Ms. H. relied on assurances from her employer, not the division, that she would accrue credited service for all hours worked.

The second element of estoppel—reasonable reliance—is not met either. Even if Ms. H. also found reassurance in what she deduced about hours and contributions her employer was reporting to PERS from reading the annual statements, that does not constitute reasonable reliance on a position asserted by PERS. The division, acting for PERS, consistently told Ms. H. that credited service did not accrue for someone scheduled to work fewer than 15 hours per week. That was Ms. H.'s own understanding of the requirement for permanent part-time status as well. The annual statements, in effect, warned that the benefits projections were only as good as the information Ms. H.'s employer reported and Ms. H. knew there was something wrong with on-call employees who worked fewer than 15 hours per week receiving credited service.

In short, Ms. H.'s reliance on the reassurance she found in the annual statements' indication that her employer was indeed reporting more hours than she worked during the summer season, and making contributions accordingly, was not reasonable in the face of her own knowledge, what she had been told by division representatives, and the disclaimer language in the annual statements. What she was able to deduce from the annual statements may have made

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[65] *See, e.g.*, Division's Exhibit 4, p. 1, block on right middle of page (estimating normal retirement age and projecting future benefits amount if work at present earnings were to continue to normal retirement age).

[66] *In the Matter of B.C.*, OAH No. 08-0010-PER at 4 (March 29, 2008) (concluding that the PERS member failed to prove the first element of estoppel because the division's projection of a normal retirement date was based on an erroneous verification of data from the employer).

reliance on ***her employer's*** asserted position about accrual of credited service more reasonable, but this does not change the fact that her employer, not PERS, misinformed her about entitlement to credited service for all hours worked.

Ms. H. has not met her burden of proof on the first two elements of an estoppel defense against adjustment of her PERS records. It is unnecessary to reach the remaining two elements. This decision, therefore, does not address whether she was prejudiced by working hours during the off season or whether the interest of justice would favor requiring PERS to make pension payments to her based on hours of service not allowed to other PERS members with under-15-hours-per-week work schedules.

IV. Conclusion

Ms. H. is not entitled to credited service for periods in which she was regularly scheduled to work fewer than 15 hours per week. Under AS 39.35.520(a), the division was required to correct Ms. H.'s PERS account record of credited service. The legal defense AS 39.35.520(b) provides against certain adjustments does not apply here because credited service is not itself a "benefit" and, at the time the division notified her of the adjustment, Ms. H. had not yet started receiving retirement benefits. The division, therefore, is not seeking to recover benefits paid to Ms. H. Rather, it is simply correcting her PERS account records to avoid paying higher benefits than she is entitled to receive.

Ms. H. did not prove that she reasonably relied on a position asserted by the division, acting for PERS, that she would receive credited service for all hours worked. Instead, the evidence in the record, including the testimony from the estoppel hearing, showed that she relied on misleading information from her employer. The division's determination that Ms. H.'s credited service must be adjusted, therefore, is affirmed.

DATED this 15th day of May, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

Adoption

The undersigned, in accordance with AS 44.64.060, adopts this Decision 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 11th day of June, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

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