

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

In the Matter of T.W.)
) OAH No. 07-0497-PER
) Div. R & B No. 2007-020

DECISION

I. Introduction

This is T.W.'s appeal of the Division of Retirement and Benefits' determination that he is not entitled to receive retirement benefits under the Public Employees Retirement System (PERS) for the month of May 2007. Because Mr. W. did not file his application for normal retirement until May 3, 2007, the division correctly determined that his benefits did not begin to accrue until June 1, 2007. Although waivers of application filing requirements can be granted under appropriate circumstances in occupational disability retirement cases, the law does not provide for similar waivers in normal retirement cases. The division's decision, therefore, is affirmed.

II. Facts

Thomas W. signed and dated his application for normal PERS retirement benefits on his 55th birthday, April 24, 2007.¹ He was extremely busy at work and did not realize until May 2, 2007, that he had not delivered the application to the division.² He candidly admits that he "simply forgot to deliver or alternatively mail his PERS application" before the end of April.³ He was aware that he needed to submit his application before the end of April to receive benefits payments effective May 1.⁴

Once he realized that he had not submitted his application, Mr. W. hand delivered it to the division on May 3, 2007. By letter dated May 11, 2007, the division notified Mr. W. that his retirement effective date would be June 1, 2007. He responded with a May 29, 2007 letter, explaining the reasons for his April 24 to May 3 delay in filing the application. The division replied, concluding that because his application was not filed until May 3, under AS 39.35.370(e) Mr. W.'s benefits would be effective June 1, 2007.⁵ This appeal followed.

¹ May 29, 2007 Letter from W. to Shier at p. 1.

² November 8, 2007 Appellant's Brief at p. 2.

³ *Id.*

⁴ May 29, 2007 Letter from W. to Shier at p. 1; November 8, 2007 Appellant's Brief at p. 2.

⁵ June 24, 2007 Letter from Shier to W.

III. Discussion

Mr. W.'s appeal raises a single question: does the law allow him to collect retirement benefits for the month of May 2007 when he did not file his application for retirement benefits with the division until May 3, 2007. Retirement benefits payable under AS 39.35.370 "accrue from the first day of the month after which [three] requirements are met[.]"⁶ The last of those three requirements is that the member applies for retirement.⁷

Until Mr. W. applied, the retirement benefits to be paid to him did not begin to accrue. By regulation, an application for retirement benefits is effective "the day the application is received by the division" unless the application is mailed, in which case the application is effective the day it is postmarked.⁸ Mr. W. did not mail his application; he hand delivered it to the division on May 3, 2007. Accordingly, under the regulation, Mr. W. met the final requirement—filing an application—in May 2007 and, therefore, under the statute his retirement benefits began accruing on June 1, 2007.

Mr. W. has acknowledged that the applicable statute and regulation support the division's conclusion that he is not entitled to benefits for May 2007.⁹ The purpose of his appeal was to explore whether in light of past practice by the former PERS board regarding waiver of deadlines, he should receive retirement benefits for May 2007 notwithstanding the fact that he did not apply until May 3, 2007.

Mr. W. identified three decisions by the former PERS board that he believes support his position:

1. Decision 92-9, in which the board waived the filing deadline for a member seeking occupational disability benefits who applied almost 90 days after termination from her employment;
2. Decision 93-2, in which the board waived the filing deadline for a member seeking occupational disability benefits who applied several months after suffering the allegedly disabling injury; and

⁶ AS 39.35.370(e).

⁷ AS 39.35.370(e)(3). The other two requirements are that the member meets the eligibility criteria, which include having attained retirement age, and that the member terminates employment. Mr. W. had satisfied those requirements before he applied.

⁸ 2 A A C 35.295(a).

⁹ August 27, 2007 Recording of Prehearing Conference; November 8, 2007 Appellant's Brief at p. 2 (acknowledging that he needed to deliver or mail his application by April 30 "to qualify for a May 1, 2007 effective date [and stating that] the statutes governing the PERS retirement effective date clearly require an application to be filed by the last day of the month prior to the effective date of retirement...").

3. Decision 93-9, in which the board waived the filing deadline for a member seeking occupational disability benefits who applied an undisclosed number of days late.

All three of these PERS members shared two things in common: they applied late for occupational disability (not normal) retirement benefits; each delayed applying because (according to the board) he or she expected to be able to return to health and to work.

Simply put, these three members appear to have had a delayed realization that they might be eligible for occupational disability retirement benefits. In contrast, Mr. W. was well aware that he was eligible for normal retirement on his 55th birthday. That is evident in the fact that he filled out the application form on his birthday, April 24, 2007, and in his acknowledgment that he knew he needed to file by the end of April to ensure that his benefits would begin in May. Unlike the members in three board cases, Mr. W.'s delay was in filing the application, not in realizing that he might be eligible for benefits.

Mr. W. argued that his situation is similar to that of the members in the three disability benefits cases because he and they all faced the same late application risk: forever losing a benefit—for him, one month's worth of normal retirement benefits; for the three others, the ability to collect disability benefits.¹⁰ He is correct that in terms of the consequences that can flow from applying late, an applicant for normal retirement faces a risk of lost benefits just as does an applicant for disability benefits. Factually, Mr. W.'s appeal and the three board cases are analogous in that in all involved late applications and the potential loss of some portion of the benefits for which the applicant might have been eligible if he or she had applied sooner.

This similarity, however, would be *material* only if the relevant legal standard were the same. The key factual distinction between Mr. W.'s situation and that of the PERS members in the board cases is that the three members were seeking occupational disability benefits under AS 39.35.410, not normal retirement benefits under AS 39.35.370. The application requirements for occupational disability retirement in effect when the three board cases were decided in the early 1990s were quite different from today's application standard for normal retirement, particularly in one important respect. Section 410 explicitly allowed the board to waive a filing requirement "for cause" if the applicant for disability retirement benefits was

¹⁰ December 20, 2007 Recording of Oral Argument.

"unable to meet a filing requirement"¹¹ Section 370 has no similar provision for members seeking normal retirement.

In the three board cases, the board found "cause" to waive a filing deadline under circumstances that Mr. W. asserts did not make the members "unable to meet" the filing requirement.¹² The board apparently was persuaded in each of the three cases that the member's belief that he/she would recover health and be able to return to work made the member "unable" to apply until the member realized his/her medical condition and prospects for recovery made a return to work unlikely.¹³ Certainly, it is debatable whether members are literally "unable to meet a filing requirement" if they delay filing in the misplaced hope that they will recover their health. Perhaps Mr. W.'s view that the board improperly construed the word "unable" would be found correct, if that issue were properly raised in this appeal. It is not, for two reasons.

First, these three cases could be treated as precedents, if at all, only for a subsequent case under AS 39.35.410—an occupational disability retirement benefits case, not a normal retirement benefits case in which no law provides for a waiver akin to that provided by section 410. Even then, they could be precedents only if the subsequent case fell under the version of section 410 in effect in 1999 and earlier. As potential precedents, these three cases did not survive the amendment of section 410(f) that changed the waiver provision from an inability-to-meet-requirements test to an extraordinary-circumstances test.

Second, even if the identical ("unable to meet a filing requirement") waiver standard applied to a normal retirement case, if Mr. W. is correct that the board wrongly decided the three cases, the division is not required to perpetuate that error by, in effect, waiving a filing deadline for people such as himself who were perfectly able to file on time but simply forgot to mail or deliver the application promptly after it was prepared. An executive branch agency is not

¹¹ AS 39.35.410(f) (1999). Subsection (f) was rewritten in a 2000 amendment and now contains an "extraordinary circumstances" standard for waiver of an application requirement for occupational disability. *Compare* AS 39.35.410(f)(2007).

¹² December 20, 2007 Recording of Oral Argument; December 13, 2007 Appellant's Reply at pp. 2-3; November 8, 2007 Appellant's Brief at pp. 3-4.

¹³ In PERS Board Decision 92-9, the board found that the member had "recognized the apparent permanency of her condition" only after seeking medical treatment, after her employment terminated. In PERS Board Decision 93-2, the board found that the member "applied for occupational disability benefits as soon as she realized that her condition was not improving" following operations and a bone fusion. In PERS Board Decision 93-9, the board's written decision was vague about the particulars of the member's medical condition but concluded that his "untimely filing was based upon a good-faith belief in the prospects of health recovery

required to perpetuate its errors from one adjudication to the next.¹⁴ The doctrine of *stare decisis* (binding precedent) does not require perpetuation of an erroneous decision that contravenes an applicable statute.¹⁵ Thus, if Mr. W. is correct that the board erred when it found cause for the waivers in the three cases because those PERS members were not literally "unable" to apply sooner, the division is not obliged to perpetuate that error by waiving filing deadlines, even in occupational disability retirement cases, let alone in normal retirement cases for which no waiver is explicitly provided.

When acknowledging during oral argument that the three board cases might not have the effect of binding precedent in his appeal, Mr. W. took the position that the three decisions put a policy in place favoring waiver of deadlines even if a member was not truly "unable to meet a requirement." He argued compellingly that the grace the board extended to the three PERS members should, as a matter of equity, be extended to other members, including him. The difficulty with that argument lies in the fact that the three board cases concerned occupational disability benefits under AS 39.35.410. Assuming, without deciding, that the board's decision did embody a policy of granting waivers more freely than the language of former section 410(f) might have permitted, nothing in those three decisions suggests that the board intended to set a policy freely granting waivers to applicants for normal retirement. Indeed, the board could not have set such a policy without usurping the role of the legislature.

Mr. W.'s reliance on the occupational disability cases, in effect, asks that a waiver standard enacted by the legislature specifically for occupational disability retirement benefits cases be imported into the statute that governs entitlement to normal retirement benefits. The legislature could choose to do that, but it has not. An executive branch adjudicator (whether a board or an administrative law judge) does not have the discretion to change a statute by importing into it a waiver standard found in another statute.¹⁶ The former PERS board's

¹⁴ *May v. Alaska Commercial Fisheries Entry Comm'n*, 168 P.3d 873, 882-885 (Alaska 2007) (concluding that the commission was not required to perpetuate an error by awarding fishery participation points in the instant case simply because it had done so in an earlier—wrongly decided—permit adjudication).

¹⁵ *Id.* at 883-884.

¹⁶ PERS members eligible for normal retirement sometimes obtain relief through the adjudication process under the doctrine of equitable estoppel from harm caused when they miss deadlines or fail to satisfy other requirements. *See, e.g.*, PERS Board Decision 04-14 (invoking equitable estoppel to allow a member to receive retirement benefits for the two months prior to her application because the division did not timely respond to her questions and the board found that if it had she likely would have filed her application earlier); PERS Board Decision 2000-06 (awarding the member the equivalent of five months' benefits payments because she delayed applying for normal retirement until after she turned 55 in reasonable reliance on advice from the division). Mr. W. has not invoked the doctrine of equitable estoppel, nor could he in light of his admission that no one misled him about the filing requirements but instead he "simply forgot to deliver or alternatively mail his PERS

decisions on which Mr. W. relies, therefore, do not support his position that the administrative law judge can waive the requirement that his application had to be filed by the end of April to accrue benefits beginning in May.

IV. Conclusion

Mr. W.'s retirement benefits began accruing on June 1, 2007, the first day of the month after he completed the last requirement—i.e., filing of his application. The former PERS board's practice of waiving deadlines for members seeking occupational disability benefits was based on specific statutory authority to waive filing requirements. That authority does not exist in the statute governing normal retirement. Accordingly, the division's denial of Mr. W.'s request for retirement benefits for the month of May 2007 is affirmed.

DATED this 26th day of December, 2007.

By: 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 22nd day of January, 2008.

By: Terry L. Thurbon
Chief Administrative Law Judge

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

Case Parties
1/23/08