

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

IN THE MATTER OF:)

R. O.)

) OAH No. 07-0577-PER
) Agency No. 2007-026
)

DECISION AND ORDER

I. Introduction

R. O. appealed a decision of the Division of Retirement and Benefits (“Division”) denying her request that July 1, 2007 be recognized as her effective retirement date rather than August 1, 2007. As a result of the Division’s determination that her effective retirement date was August 1, 2007, Ms. O. did not receive full Public Retirement System (“PERS”) retirement benefits for the month of July, 2007.¹

The hearing in this matter was held before Administrative Law Judge James T. Stanley on December 28, 2007. Ms. O. represented herself. Toby Steinberger, Assistant Attorney General, represented the Administrator. In addition to herself, witnesses called to testify by Ms. O. were Kathy Lea (Retirement Manager, Division of Retirement and Benefits), Judith Hall (Retirement and Benefits Specialist II), Brad Bylsma (Manager, Equipment Fleet Parts, and Ms. O.’s former supervisor), Faye Parker (Human Resource Technician III), and Shawna Crews (Human Resource Technician II). Counsel for the Administrator called Worth Barthel (Human Resource Technician III, formerly with Retirement and Benefits) and Pat Shier (Director, Division of Retirement and Benefits). The hearing was recorded. Exhibits 1-25 were admitted into evidence; Ms. O.’s attachments (19 pages) to her Notice of Appeal filed September 14, 2007) were also admitted into evidence.

II. Facts

Ms. O. began working for the State of Alaska, Department of Transportation (“DOT”) on July 1, 1977. During her thirty years at DOT, Ms. O. worked the same shift, Monday through Friday, except for a brief period in 1977 when she worked a four-day week. She was on written notice at the commencement of her state service that (1) she could “...retire at any age if you

¹ Ms. O.’s monthly benefit for July 2007 would be approximately \$2736, per an August 8, 2007 benefit summary provided by the Division of Retirement and Benefits.

have accumulated 30 or more years of credited service;” and (2) “payments begin the first of the month, following the month in which you retire and submit your application.”² The term “credited service” means the number of years, including fractional years, recognized for computing benefits due from PERS.³

In 2004, Ms O. began inquiring about and planning for retirement with thirty years of service. The Division advised her in writing on December 8, 2004 that as of December 6, 2004, she had accrued approximately 27.43562 years of service; the same letter advised her that “...if you continue to work full time without a break in service, you will have accrued thirty years of service on June 30, 2007. This is an estimate based upon what has been reported to our system and does not take into account any unreported leave without pay.”⁴

Ms. O. was advised by letter from the Division on June 22, 2006 that “(A)s of June 18, 2006 you had accrued 28.96712 years of service. If you continue to work full-time, without a break in service, you will have accrued 30 years of service on July 11, 2007 and therefore be eligible to retire on August 1, 2007.”⁵ Ms. O. questioned the July 11, 2007 retirement date because it differed from the earlier letter from the Division; she sent an email to Judy Hall on July 10, 2006 registering her confusion over the retirement date. Judy Hall responded that same day advising that Angie Houston, Retirement Technician with the Division, would research the matter and respond to Ms. O. Ms. Houston advised Ms. O. by email on July 17, 2006 that “(Y)our request has been forwarded to me for research and response. I have calculated the date that you will reach your 30 years of membership service. If you continue to work full time, without a break in service, you will accrue 30 years of membership service on June 30, 2007.”⁶

On February 13, 2007, Ms. Houston wrote to Ms. O. and advised that “(A)s of February 11, 2007 you have accrued 29.58904 years of membership service. In addition, you have been credited .03014 years of paid worker’s compensation service. This number is an estimate based on what has been reported to our system and service verifications completed by you employer.

² Exhibit 24, p. 5, *Alaska Public Employees’ Retirement System Information Handbook*, effective July 1, 1977.

³ *Id* at 57.

⁴ Exhibit 2.

⁵ Exhibit 3, p. 8.

⁶ A photocopy of the email from Ms. O. to Ms. Hall, and from Ms. Hall to Ms. O., copy to Ms. Houston, and Ms. Houston’s response is an exhibit to Ms. O.’s Notice of Appeal.

If the information is correct and you continue to work full-time without a break in service, you will accrue 30 years of service on June 30, 2007.”⁷

Ms. O. filed her application for retirement benefits on February 23, 2007, specifying that retirement benefits “...to become effective the 1st day of July, 2007.”⁸ On March 2, 2007, the Retirement Processing Unit of the Division wrote to Ms. O. and advised, *inter alia*, that “(Y)our retirement will be effective July 1, 2007, subject to your eligibility to receive PERS benefits in accordance with PERS statutes and verification of your credited service.”⁹

Ms. O. completed her employment clearance form on June 29, 2007, her last day on the job, and specified that her separation date was “6/30/07.”¹⁰ On July 7, 2007, the Division of Finance sent a memorandum to a Division retirement technician and stated that “(T)he following member is retiring effective: July 1, 2007.”...”Employee’s name” R. M. O.”¹¹

The Division sent Ms. O. a letter on August 8, 2007 which advised, *inter alia*, that “(Y)ou are appointed to retirement effective August 1, 2007.”¹² On August 11, 2007, Ms. O. sent an email to Pat Shier, Director, Division of Retirement and Benefits, advising that “(D)espite DRB telling me I had all my time in and could retire on 6/30, I was one day short. I have since made up that day.”¹³ Director Shier responded by letter dated August 17, stating:

In reviewing your application, and your Public Employees’ Retirement System (PERS) file, I found that there was no mistake made by the Division of Retirement and Benefits in regards to when you would reach thirty (30) years of service. On multiple occasions you were informed that you would obtain 30 years of service by working through June 30, 2007. You terminated on June 29, 2007 and once an employee terminates employment, no further service accrues.

Due to the fact that we have numerous employers within our system, and their employees work a variety shifts, there is no way that we could have known that Saturday, June 30, 2007 was your regular day off.

⁷ Exhibit K.

⁸ Exhibit 6.

⁹ Exhibit 7.

¹⁰ Exhibit 8.

¹¹ Exhibit 9.

¹² Exhibit 12.

¹³ Exhibit C.

Based on our statutes and regulations, I must deny your request to make your retirement effective date July 1, 2007.¹⁴

Ms. O. timely filed her appeal of the denial on September 14, 2007.¹⁵ In her notice of appeal letter, Ms. O. pointed out that she had discussed her retirement with at least seven employees¹⁶ of the Division and was never told (before terminating her service) that she needed to work on Saturday, June 30, 2007, in order for her retirement to be effective on July 1, 2007. Ms. O. attached as an exhibit to her appeal, a copy of the Division's "Benefit Estimator" which indicated that if her hire date was July 1, 1977 (correct and undisputed), then she would have 30.01096 years of service on July 1, 2007.

III. Discussion

An employee becomes eligible for normal retirement benefits after accruing thirty years of credited service.¹⁷ Benefits become payable to a retiree on the first day of the month following the retiree's compliance with the eligibility requirements, termination of employment and application for retirement.¹⁸

Resolution of Ms. O.'s appeal requires that several questions be addressed. A key fact question is whether Ms. O. was ever informed that she must work on Saturday, June 30, 2007 (she did not work on Saturday during her 30 years of service), or whether this is something that she should have discovered on her own. A key legal question is whether 2 AAC 35.330 (PERS member must work Monday to receive credit for preceding Saturday) applies to Ms. O.. The ultimate question is whether the Division is estopped to deny Ms. O. benefits for the month of July 2007 because she did not work on Saturday, June 30, 2007.

The Alaska Supreme Court applied the doctrine of equitable estoppel against the government in *Crum v. Stalnaker*,¹⁹ a benefits retirement case. The court applied the standard test for estoppel against the government and described the four elements as follows:

- (1) the governmental body asserts a position by conduct or words;
- (2) the private party acts in reasonable reliance thereon;
- (3) the private party suffers resulting prejudice; and

¹⁴ Exhibit 13.

¹⁵ Exhibit 14, p. 1.

¹⁶ Judy Hall, Jennifer Hartsock, Trish Beckwith, Chris Cummins, Angie Houston, Shari Kemp, and Pam (last name unknown).

¹⁷ AS 39.35.370(a)(3).

¹⁸ AS 39.35.370(e).

¹⁹ 936 p.2d 1254 (Alaska 1997).

- (4) the estoppel serves the interest of justice so as to limit public injury.²⁰

The *Crum* case involved a retired teacher who had been denied the opportunity to convert his accumulated sick leave to credited retirement service because he had missed the statutory deadline for filing such a request. The appellate court in *Crum* found that the Division had induced reliance, which resulted in prejudice to Mr. Crum by failing to provide him with the necessary application for retirement, and by providing him with the retirement application document, which indicated that it would not be necessary for Mr. Crum to take any additional steps to receive full retirement benefits. Viewing the evidence as a whole, the court concluded that the Division was equitably estopped from enforcing the deadline to file additional documentation against Mr. Crum.

The Division asserted on at least five occasions that Ms. O. would have 30 years of credited service on June 30, 2007, which would in turn make her effective retirement date of July 1, 2007.²¹ Several weeks after Ms. O. thought she was effectively retired on July 1, 2007, the Division informed her that her retirement date would be August 1, 2007 because she had not worked on June 30, 2007. I find that the Division's letters and representations led Ms. O. to reasonably believe that she would have 30 years of credited service on June 30, 2007. Before terminating her state service, on the one occasion that she was informed (mistakenly) that she would not be eligible for retirement until July 11, 2007, she promptly inquired and was reassured on February 13, 2007 that she would have 30 years of service on June 30, 2007.²²

The Division relies on 2 AAC 35.330(a) which provides as follows:

Service credit for permanent full-time employees is granted on the basis of one calendar day of service for each day in pay status. Regularly scheduled days off and holidays are allowed as credited service, provided that the employee was held in pay status on the regularly scheduled workdays immediately preceding and following the holiday or regularly scheduled days off.

If the foregoing regulation applied to Ms. O.'s situation before this tribunal, it would be fatal to her case. However, 2 AAC 35.330 did not become part of the Alaska Administrative Code until 1983, six years after Ms. O. became a member of PERS. The regulation was preceded by

²⁰ *Id* at 1256.

²¹ Ms. O. testified that she had numerous conversations with retirement personnel concerning her strong desire to retire July 1, 2007 and was never made aware that she might need to work on June 30, 2007.

²² February 13.

similarly worded PERS (board) Regulation No. 78-8, adopted by the PERS Board on October 28, 1978; more than one year after Ms. O. became a member of PERS.²³ In pertinent part, Regulation No. 78-8 states:

Service credit for permanent full time employees shall be granted on the basis of one calendar day of service for each day in pay status. Regularly scheduled days off and holidays shall be allowed as credited service, provided that the employee was held in pay status on the regularly scheduled works days immediately preceding and following the holiday or regularly scheduled day off.

A person's rights under the state's PERS vest when the person joins the system.²⁴ Because Ms. O.'s rights under PERS vested on July 1, 1977, and because 2 AAC 35.330(a) and Regulation 78-8 had *not* been adopted when Ms. O.'s rights under PERS vested, the two regulations²⁵ cited by the Division are not dispositive and do not control the outcome of her appeal. On July 1, 1977, Ms. O. could not have known as a matter of law that in order to retire on July 1, 2007, she would need to be in pay status on June 30, 2007.

The Division has argued that Ms. O. terminated her state service on Friday, June 29, 2007 because her historical event display printout indicates that she terminated June 29, 2007.²⁶ In contrast, Ms. O. points out that she stated on her Employment Clearance Form that her separation date was June 30, 2007. The record supports a finding that while Friday, June 29, 2007 was Ms. O.'s last day on the job, her last day in pay status was going to be Saturday June 30, 2007, just as it had been for the preceding 30 years.

IV. Conclusion

The Division has asserted through its words and conduct that Ms. O. would accrue thirty years of service on June 30, 2007, and thus would be eligible to retire on July 1, 2007. She did not know and was not informed that Saturday, June 30, 2007 would be treated differently from each Saturday after July 1, 1977 which she did not work, but for which she did receive credited service. She reasonably relied upon the Division's representation that she would have accrued thirty years of service by June 30, 2007. Based upon the Division's representations, she

²³ Exhibit 18.

²⁴ *Hammond v. Hoffbeck*, 627 P.2d 1052 (Alaska 1981).

²⁵ Exhibit 18, Board Regulation 78-8, and 2 AAC 35.330

²⁶ Exhibit 1. This document appears to have been prepared after Ms. O. left state service.

reasonably assumed to her detriment that she could retire effective July 1, 2007, and filed her retirement application accordingly.²⁷

The prejudice experienced by Ms. O. is the loss of the retirement benefit that she would have received for July 2007 if she had known that the Division would require her to work on June 30, 2007. If Ms. O. had known prior to June 30, 2007 that the Administrator would take the position that she must work on June 30, 2007 in order to retire July 1, 2007, she probably would have worked June 30, 2007 to avoid the ensuing appeal and hassle. Of course, AAC 35.330 and Regulation No. 78-8 were not in place when her rights vested in the PERS; accordingly, the requirement imposed by current regulation to work the day before and after a regular day off in order to receive credit for the regular day off would not apply to Ms. O.. Regardless of the legal issue, Ms. O. was focused on retiring July 1, 2007 and would have readily worked her first Saturday in 30 years of state service.

The record established by Ms. O. in this case satisfies the first three *Crum* elements (Division assertions; reasonable member reliance; and prejudice to member). The fourth element is satisfied because the application of equitable estoppel against the Division does not significantly prejudice the public interest.²⁸ In this case, the application of estoppel will prevent Ms. O. from suffering a substantial and unfair hardship while causing virtually no harm to the public.²⁹

V. Order

IT IS HEREBY ORDERED that the Administrator's decision of August 17, 2007 to deny Ms. O.'s retirement benefits for the month of July, 2007 is **REVERSED**.

DATED this 29th day of July 2008.

By: Signed
James T. Stanley
Administrative Law Judge

²⁷ Exhibit 6.

²⁸ See *Crum* at 1258, citing with approval the language in *Municipality of Anchorage v Schneider*, 685 P.2d 94, 97 (Alaska 1984) which states "(W)hen the public will not be significantly prejudiced, and the other elements of the theory are present...foreclosing the use of estoppel causes arbitrary and unjust results."

²⁹ See *Crum* at 1258, citing with approval 2 C. Antieu, *Municipal Corporation Law*, sect. 16A.06 (1984), which states that "courts should be encouraged to weigh in every case the gravity of the injustice to the citizen if the doctrine (of estoppel) is not applied against the injury to the commonwealth if the doctrine is applied."

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 4th day of September, 2008.

By: Signed
Signature
James T. Stanley
Name
Administrative Law Judge
Title

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