

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of: )  
 )  
 R. T. L. ) OAH No. 08-0623-PER  
 ) Div. R&B No. 2008-015

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**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

R. T. L., an active employee in the Public Employees' Retirement System, submitted a request to the Division of Retirement and Benefits, asking that he be provided service credits for a two year period when he was receiving Workers' Compensation benefits but was not on leave without pay status. The administrator denied the request. Mr. L. has appealed.

The administrator filed a motion for summary adjudication. Because the undisputed evidence establishes that Mr. L. is not entitled to service credits for the period at issue, and that the Public Employees' Retirement System (PERS) is not estopped to deny Mr. L.'s request for service credits, the administrator's motion is granted.

**II. Facts<sup>1</sup>**

R. T. L. was first employed in a PERS-covered position on July 5, 1986.<sup>2</sup> On February 13, 1992, Mr. L. incurred an on-the-job injury while employed as a mechanic by the Department of Transportation and Public Facilities.<sup>3</sup> Mr. L. was placed on leave without pay status while receiving Workers' Compensation benefits for that injury, from February 29-March 31 and April 15-30, 1992, and from January 31-March 31 and April 10-14, 1993.<sup>4</sup>

Mr. L. had two back surgeries related to his on-the-job injury.<sup>5</sup> At the request of his employer Mr. L. resigned from his employment effective May 10, 1993.<sup>6</sup> At that time Mr. L.'s

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<sup>1</sup> The facts as stated in this section reflect the undisputed evidence in the record, viewed in the light most favorable to Mr. L..

<sup>2</sup> Exhibit 1, page 2. This exhibit shows Mr. L.'s PERS employment status as it is reflected on the records of the Division of Retirement and Benefits. There is no evidence that the records are inaccurate, and Mr. L. does not dispute that the division's records reflect his actual employment history.

<sup>3</sup> Exhibit 2.

<sup>4</sup> Exhibit 4, pp. 1, 4.

<sup>5</sup> R. 29.

<sup>6</sup> Exhibit 1, p. 2; Exhibit 3. Kathy Lea submitted an affidavit asserting that the division's records show that Mr. L. was on leave without pay status at the time he terminated his employment. Affidavit of K. Lea, ¶5. However, the documents submitted show leave without pay status only for the dates stated in the text. See Exhibit 4.

physical condition had not stabilized, but his treating chiropractor had determined that he would be unable to return to work in his existing position.<sup>7</sup>

In requesting that he resign, Mr. L.'s employer did not inform him that rather than resigning, Mr. L. could remain in leave without pay status.<sup>8</sup> Because he was not informed of that option, Mr. L. resigned rather than continuing on leave without pay status.

By early 1995, Mr. L.'s condition had improved to the point that he was able to return to work in his former position and he requested a re-employment preference pursuant to AS 39.25.158 and 2 AAC 07.097.<sup>9</sup> On March 15, 1995, the re-employment benefits administrator certified his eligibility for return to work as a light duty mechanic.<sup>10</sup> On April 12, 1995, Mr. L. was offered a position as a mechanic<sup>11</sup> and on April 20, 1995, he was rehired into his former position.<sup>12</sup> He remains an employee of the Department of Transportation and Public Facilities.

In 2006, Mr. L. submitted a request to the administrator to provide service credits for the period from May 11, 1993, through April 19, 1995. The administrator denied the request, and Mr. L. filed this appeal.

### **III. Discussion**

Mr. L. asserts that if his employing agency, the Department of Transportation and Public Facilities, had informed him of the option to remain in leave without pay status rather than to resign, he would not have resigned but would instead have elected to remain on leave without pay status. He argues that he should be awarded service credits for the period of time from his resignation until he was rehired, because his employer failed to inform him of the option of remaining in leave without pay status.

The administrator filed a motion for summary judgment, arguing that because Mr. L. was not in leave without pay status, he is not entitled to service credits, and that the doctrine of equitable estoppel does not preclude the Public Employees' Retirement system from denying credits for the period of time at issue.

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<sup>7</sup> R. 29.

<sup>8</sup> R. 2 (Note, R. L. (November 3, 2008) ("I was asked to resign and was given misleading information at that time.... I wasn't told at that time...that I could have used Workman's Compensation Leave without Pay."); R. 7 (Letter, R. L. to Ms. Michaud, October 1, 2008).

<sup>9</sup> R. 22 (Memorandum, J. R. to K. C., February 15, 1995). 2 AAC 07.097 has been repealed. Re-employment of an injured state employee under current law is governed by 2 AAC 07.228.

<sup>10</sup> R. 21 (Letter, D. S. to K. C. & L. L., March 15, 1995).

<sup>11</sup> R. 24 (Letter, L. P. to R. L.). The offer was contingent on passing the required drug test.

<sup>12</sup> Exhibit 1, p. 2.

A. Standards for Summary Adjudication

Summary adjudication in an administrative proceeding is equivalent to summary judgment in a court case.<sup>13</sup> It is a means of resolving disputes without a hearing when the essential facts are not in contention, and all that must be determined is the legal implication of those facts. If the undisputed evidence establishes that one side or the other must prevail, no evidentiary hearing is required.<sup>14</sup> In evaluating a motion for summary adjudication, if there is any room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom summary adjudication may be granted.<sup>15</sup>

B. The PERS Is Not Estopped to Deny Service Credits

In general, an employee of the State of Alaska is not entitled to service credits while on leave without pay status, except for the first ten days.<sup>16</sup> However, a State of Alaska employee who is on leave without pay status while receiving Workers' Compensation benefits may elect to receive service credits during that time.<sup>17</sup> In this case, it is undisputed that Mr. L. was not on leave without pay status after May 11, 1993. Mr. L. argues that the administrator should provide service credits for the period after his termination from employment, because he resigned based on misleading information provided by his employing agency, the Department of Transportation and Public Facilities.

Mr. L.'s argument reflects principles of estoppel, a legal doctrine under which a party may be barred from asserting a defense to a claim when the claimant has changed his or her position based on conduct or a statement by the party or another for whose actions the party may be held responsible.<sup>18</sup> In order to establish that estoppel applies against the administrator under the circumstances of this case, Mr. L. must show the existence of four elements: (1) PERS or another for whom it may be held responsible made an assertion of fact; (2) Mr. L. reasonably

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<sup>13</sup> Schikora v. State, Dept. of Revenue, 7 P.3d 938, 940-41, 946 (Alaska 2000).

<sup>14</sup> Smith v. State of Alaska, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, ADMINISTRATIVE LAW TREATISE § 9.5 at 54 (3d ed. 1994).

<sup>15</sup> Samaniego v. City of Kodiak, 2 P.3d 78, 82-83 (Alaska 2000).

<sup>16</sup> AS 39.35.330(b).

<sup>17</sup> AS 39.35.330(c).

<sup>18</sup> Under appropriate circumstances, the doctrine of equitable estoppel will be applied to bar the administrator from asserting a defense to a claim. *See generally*, Crum v. Stalnaker, 936 P.2d 1254 (Alaska 1997); Wassink v. Hawkins, 763 P.2d 971 (Alaska 1988); Municipality of Anchorage v. Schneider, 685 P.2d 94 (Alaska 1984).

Another form of estoppel, promissory estoppel, may be applied to require a defendant to honor a promise to a claimant. Mr. L. has not asserted that he was promised service credits. Thus, the doctrine of promissory estoppel is inapplicable.

relied on the assertion; (3) Mr. L. suffered a loss as a result of the reliance; and (4) application of the doctrine of estoppel serves the interest of justice so as to limit public injury.<sup>19</sup>

With respect to the first element, Mr. L. points to the assertion of Department of Transportation and Public Facilities personnel that he “needed...to resign so [the department] could fill my former position,” and its failure to inform him that he could have continued on leave without pay status rather than resigning.

Mr. L. does not assert that any employee of the Division of Retirement and Benefits spoke with him about his options before he decided to resign, or that the division had a duty to advise him of his rights before he made that decision, or that the division had an administrative practice of doing so. The only evidence of any communications to Mr. L. from PERS that touched on the issue of leave without pay are informational brochures that informed Mr. L. of his right to receive service credits in the event he was on leave without pay status while receiving Workers’ Compensation benefits, which is precisely what Mr. L. says he should have been told. The communications that Mr. L. complains of were made by the Department of Transportation and Public Facilities, not by the Division of Retirement and Benefits on behalf of PERS and the administrator.<sup>20</sup>

Because no employee or agent of the Division of Retirement and Benefits communicated with Mr. L. about his rights at the time he resigned, the division did not misadvise him and it is therefore not subject to the doctrine of equitable estoppel based upon its own communications

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<sup>19</sup> See Crum v. Stalnaker, 936 P.2d 1254, 1256 (Alaska 1997).

<sup>20</sup> This fact distinguishes this case from two prior administrative decisions by the Office of Administrative Hearings, and one by the Teachers’ Retirement System Board, all cited by the administrator, in which the doctrine of equitable estoppel was deemed inapplicable when the division’s erroneous statements of fact were based on erroneous information provided by the employer. See, In Re B.C., OAH No. 08-0010-PER (April 28, 2008); In Re C.B., OAH No. 05-0633-PER (December 15, 2008); In Re Applicant, TRS No. 99-1 (April 5, 1999).

If the facts in this case were substantially identical to the facts in the cited cases, the rule of law stated in the prior PERS cases would be applied in this case, unless it were determined to have been mistaken. See generally, May v. State, Commercial Fisheries Entry Commission, 168 P.3d 873, 884 (Alaska 2007); Alaska Public Interest Research Group v. State, 167 P.3d 27, 42 (Alaska 2007).

The administrator has cited no judicial authority for the proposition that the doctrine of equitable estoppel may not be applied against a party who asserts a position in reliance on erroneous information from a third party, nor was any such authority cited in the administrative decisions that the administrator relies on. Holmberg v. State, 796 P.2d 823 (Alaska 1990), referenced in the TRS Board decision cited by the administrator, addresses a different legal doctrine, collateral estoppel, in the context of sequential disability proceedings, and is therefore not on point. Similarly distinguishable are more recent cases to the same effect. See Palmer v. Municipality of Anchorage, Police and Firemen’s Retirement Board, 65 P.3d 832 (Alaska 2003); Lopez v. Administrator, Public Employees’ Retirement System, 20 P.3d 568 (Alaska 2001). Compare, e.g., Flanigan v. West Virginia Public Employees’ Retirement System, 342 S.E.2d 414, 420 (W. VA. 1986) (“The functional relationship between the supervising employer...and the respondents [the West Virginia PERS] with respect to employee pension rights is one of privity.”).

with Mr. L. Nor is there any evidence of facts that might arguably be deemed grounds for application of equitable estoppel against the division based on the department's assertions: there is no evidence, for example, that the department employees who spoke with Mr. L. prior to his resignation from state service were acting as agents of PERS, or that the division had any role in their training or supervision with respect to communicating employees' rights under PERS. Under these circumstances, the undisputed evidence shows that the first element of the doctrine of equitable estoppel does not apply. Therefore, it is not necessary to determine whether any of the other elements apply.

#### **IV. Conclusion**

Mr. L. was not entitled to service credits after he resigned. The administrator is not estopped to deny service credits under the undisputed facts in this case. The administrator's decision to deny Mr. L.'s request for service credits is sustained.

DATED July 21, 2009.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

#### **Adoption**

This Decision is issued under the authority of AS 39.35.006. 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 25th day of August, 2009.

By: *Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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