BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of K. M.	)	
	)	OAH No. 09-0643-PER
	)	Div. R&B No. 2009-0089

DECISION ON SUMMARY ADJUDICATION

I. Introduction

K. M. appeals a decision of November 2, 2009, by the administrator of the Public Employees' Retirement System (PERS) to deny her request that her PERS service credit since 1984 be regarded as peace officer service for purposes of calculating her PERS retirement benefits. The administrator moved for summary adjudication, arguing that the case is untimely.

More than twenty-five years have passed since the incident from which this dispute arises. The period of delay is unreasonable and has resulted in undue prejudice to the administrator. Because the case is now time-barred under the doctrine of laches, the administrator's motion for summary adjudication is granted, and the case is dismissed.

II. Facts

In response to Ms. M.'s appeal, the administrator moved for summary adjudication on the issue of whether the claim is barred by laches. Before reviewing the facts material to the laches issue, some background on the statutory history of PERS service credit for employees of the Alaska Department of Fish & Game (ADFG) is helpful.

a. History of Service Credit for Department of Fish & Game Employees

PERS service credit may be categorized as "peace officer" credit or as "All Others" credit. The peace officer classification allows full retirement after twenty years of service instead of after thirty years, in recognition of the increased risk to employees in the fire and safety occupations.[1] Members receiving peace officer service credit make greater monthly contributions to their retirement funds, as do their employers, to fund in advance the greater benefits the employee will receive upon retirement.[2]

The categories of state employees entitled to peace officer PERS credit has evolved over the years. A 1975 statutory amendment defined "peace officer and fireman" to include employees who were employed full time in the state as a peace officer, chief of police, fireman, and various other specified occupations including field fish and game biologists and

[1] AS 39.35.370(a).
[2] AS 39.35.160(a).

technicians.[3] The law was amended again just a year later in 1976.[4] In this version of the statute, the specific job titles for ADFG employees, such as "fish biologist," were removed and replaced with "qualified employees of the Department of Fish and Game." A regulation was adopted to clarify that

> any person who is a permanent full-time employee (including a seasonal employee) of the Department of Fish and Game, who fills a position that has been certified by the commissioner of fish and game and approved by the commissioner of administration as having duties which necessitate a significant amount of field work, travel, or exposure to hazardous working conditions, is a "qualified employee of the Department of Fish and Game" under AS 39.35.680(32) will be afforded peace officer coverage in the Public Employees Retirement System (PERS).[5]

Thus, whether a particular ADFG position was entitled to peace officer credit was determined jointly by the commissioners of fish and game and of administration.

On June 23, 1983, the statutory definition of "peace officer" was once again amended. This time the "qualified employees" within ADFG were completely eliminated from the category of employees defined as peace officers for purposes of PERS.[6]

While new employees in any position at ADFG would no longer qualify for peace officer service credit after 1983, the amendment did not specify how to classify current employees at ADFG who had previously been receiving peace officer credit. The resolution to this question is documented by a July 8, 1983 memo from the Division of Finance Payroll Supervisor to the Deputy Director of Retirement and Benefits:

> This memorandum serves to confirm our conversation concerning the effect of Senate Bill No. 277 regarding coverage as a "peace officer" (P) for "qualified employees of the Department of Fish and Game."
>
> Please screen all appointing Personnel Actions with the Department of Fish and Game employer code to make sure that the Retirement Status Code in Item #18 is A and not P. If an employee terminated from a P position and is rehired after June 22, 1983, in what <u>was</u> a P position, his Retirement Status Code should also be A. However, if an employee occupied a P position on June 23, 1983 as a "qualified employee of the Department of Fish and Game", and is later <u>transferred</u> to any other position within that department without a break in service, his retirement status code will remain P. Such employees occupying P positions on June 23, 1983 will retain P coverage until their employment is terminated with the Department of Fish and Game or until they elect to irrevocably relinquish peace officer status.[7] [underline in original]

[3] AS 39.35.680(14), am §3 ch 200 SLA 1975.
[4] AS 23.40.680(23) am §§6, 7 ch 245 SLA 1976.
[5] 2 AAC 35.890(a) (Eff. 3/21/92, Register 81; repealed 1/7/01, Register 159).
[6] Sec. 2 ch 27 SLA 1983, amending AS 39.35.680(27).
[7] Exhibit 2.

In a memo of August 15, 1983, the attorney general opined to the commissioner of administration that employees of ADFG who had been certified as qualifying for peace officer status on June 23, 1983, were entitled to continuing coverage so long as the employees continued to fill positions that had been determined to require a significant amount of amount of field work, travel, or exposure to hazardous working conditions as defined in the existing regulation 2 AAC 30.010.[8] According to the A.G.'s memo, there were about thirty employees in this situation.

b. Ms. M.'s Employment History

Ms. M. started working with the state as a volunteer in the mid 1970s. In 1977, 1978, and 1979 Ms. M. worked for short periods as a temporary employee. As a temporary employee, Ms. M. was not entitled to PERS benefits, and the service acquired during these periods was not labeled as either peace officer or All Other, although Ms. M. was able to later acquire service credit for these periods. On May 21, 1980, the state hired Ms. M. as a seasonal employee in the capacity of Fish & Game Technician III with the Alaska Department of Fish and Game.[9]

During the earlier years of her employment, Ms. M. generally started her season from around March to May and worked through the summer season until around October, followed by a period of leave without pay during the late fall and winter months. Her first PERS position in 1980 was classified as a peace officer position, and Ms. M. and the state contributed to her retirement plan accordingly. Ms. M. worked in that position for the summer of 1980 and again in 1981. When she returned for her third season in March of 1982, Ms. M. worked in a position that was classified All Others. In the summer of 1983 she again worked in a peace officer position, and then went back into leave without pay status over the winter.

On February 16, 1984, Ms. M. submitted the following letter to her employer:[10]

> Dear S.,
>
> I wasn't sure if I'd get a "reminder" this year for intent-to-return notification, but I know the deadline is coming up, if not passed, so here's a letter for your records.
>
> I will not be returning for my Cordova catch/escapement sampling position.
>
> I had given more than passing thought to returning, especially with the bait of possibly being put in charge of escapement sampling, but thought perhaps I'd try a new location.
>
> If you should hear of anything in the Tech III range (ha!) I should be on the transfer list by now, and would appreciate any information.

[8] Attachment 'A' to Administrator's Motion for Summary Judgment.
[9] Exhibit 3.
[10] Exhibit 7.

Thank you for all your support, S.; it may have been difficult between us, but you have helped me. Thanks again.

Sincerely,

K. M. M.

According to ADFG and PERS records, Ms. M. was rehired on July 20, 1984, to a position in Juneau, again as a Fish & Game Technician III.[11] The Position Classification Number, or PCN, under which Ms. M. was rehired was an All Others position, as were all ADFG positions after 1983. Ms. M. filled out a new insurance card at this time,[12] and she filled out a form to enroll in the Alaska Public Employees Association. In what appears to be her own handwriting, Ms. M. wrote as her hire date "7/2/84." In spite of these documents, Ms. M. disputes that there was ever a break in her service. She asserts that she merely transferred from one location to another, and that when she started her new position in Juneau in 1984 she should have continued to receive peace officer service credit as she had in the past. In a letter supporting her appeal, Ms. M. asserts that she was unfairly deprived of her peace officer status at least in part because of sexual discrimination.[13]

There appears to be no dispute that Ms. M. was aware that after she began working in Juneau, ADFG was crediting her with All Others and not peace officer service. Ms. M. was sent annual PERS statements showing all of her accrued service credit, with the various periods of employment time labeled as either "peace officer" or "public employee," including periods of leave without pay. Ms. M. wrote to the administrator that "I have over the years attempted many times to resolve this problem (beginning in the late 1980s), and only this year was directed to the path of resolution I am now on."[14] In a letter in support of her appeal, Ms. M. wrote in part, "my pursuit to address the unfair loss of P commenced over 20 years ago, and the length of time it has taken me to bring my appeal to the OAH has compromised my access to individuals 'of the time' to address the 'circumstances of the times.'"[15] In 1992 Ms. M. sent a copy of her annual statement to the Division of Retirement & Benefits, with a handwritten notation that "the break from peace officer to public employee status is still contested."[16] Apparently in response, on March 4, 1992, a retirement technician wrote to Ms. M. that "we are only reporting information

[11] Exhibit 9.
[12] Exhibit 10.
[13] Exhibit 20.
[14] Exhibit 17.
[15] Exhibit 20.
[16] Exhibit 12.

that has been supplied to us by your employer and any changes or corrections must come from them. Please contact your employer regarding this problem and have them notify us of the corrections."[17]

On April 28, 2004, Ms. M. sent the following email with the subject "disputed loss of peace officers status" to Retirement and Benefits Specialist Anthony Brakes:

> Your name was just given to me as someone to whom I should address this question. I dispute my loss of the "peace officer" retirement plan. I have brought this up with a couple of folk before, over the past ten years, but they either weren't in a position to conclude an answer, couldn't direct me, or simply didn't even acknowledge my inquiry. Hopefully you can help.
>
> I was told I "lost" my 20yr retirement privilege back in the 1980s. I never gave up any rights, knowingly, to the peace officer, 20yr plan. The year in question (1984?) I took a job here in Juneau (July?), coming from a pcn I held in Cordova. The Cordova position would have started ~May 16 (I'm fuzzy here, it could have been late May, but "May"), and was never filled in my absence. The Juneau position started approximately July 1 (again would need to check records). At no time did I know or intend, that in switching from one position to the other I would lose my peace officer status.
>
> Now if the above can be resolved, the other sticking point is that, in part because I was told in ~1988 that I had lost my peace officer status, I blindly accepted what was largely an administrative change in regard to my position at the A. C. Hatchery; this position/work was no different than what I had been doing while employed at ADFG-SF, Juneau. It was a position which was funded in part by ADFG-SF through a Memorandum of Understanding (and my work involved well over 50% related to "ADFG-SF" concerns) with the Univ. of AK (administrator) and NMFS. Therefore I thought nothing of it. I believe since, that this A. C. Hatchery position has reverted back to ADFG (not positive, but the point being it's essentially an ADFG position).
>
> I have been at a loss as to whom to turn or how to resolve this. Two people in HQ I spoke with in the past (mid-late 90's?) described my situation as a "gray area". I have dedicated my career to Department work from the time I left high school. Over the past 27+ years with the Department I have accumulated approximately 20+ years of PERS service (and thousands of uncompensated hours…which I'm not pursuing… I have always loved my work). I'm sure you can appreciate the frustration in not getting this addressed or resolved, especially when weighing my lifelong commitment to the Department.
>
> Thanks very much for any direction you can give to me.

In an affidavit accompanying the administrator's motion, Mr. Brakes stated that he did not specifically recall this email and could not locate any response that he might have sent, but that his practice was to investigate and respond to questions within ten days, and his response to this inquiry would have been to direct Ms. M. to ADFG, because it is the employing agency and not

[17] Exhibit 13.

the Division of Retirement and Benefits that has the authority to resolve position classification issues.

III. Discussion

Ms. M. asserts that the PERS service credit she has accrued since 1984 while working for the Alaska Department of Fish and Game (ADFG) and for the University of Alaska should be categorized as "peace officer" credit. The administrator argues that Ms. M.'s claim, arising from a decision made in 1984, is barred as untimely. The administrator has moved for summary adjudication on this issue. "Summary adjudication" is a request to make a decision based on the record without a hearing, and it is appropriate when there are no material issues of fact in dispute.[18]

The administrator argues that Ms. M.'s claim is barred under the doctrine of laches. "Laches" is an equitable doctrine that applies when two elements are met: the person asserting the doctrine must show (1) that the other party has unreasonably delayed in filing a suit or claim and (2) that the delay caused undue harm or prejudice to the defendant.[19] While the elements of laches are usually expressed in terms of "plaintiff" and "defendant" in the context of litigation in the courts, the Alaska Supreme Court has also reviewed the application of laches in administrative contexts.[20]

The doctrine of laches and the applicability of state statutes of limitation to PERS cases were considered in a very similar previous case. In *In the Matter of B. A.*, the employee asserted that his service credit with the Department of Public Safety as a fish and wildlife enforcement officer should have been regarded as peace officer service and not All Others.[21] The claim in that case was not based on any particular action of the employer at the time of the employment, but rather a simple argument that, as law enforcement officers, fish and wildlife enforcement officers were the kind of employees that ought to receive peace officer credit. The employee in that case had been in the position from 1986 to 1990, and had requested the reclassification of his earned PERS service credit in 2006.

The doctrine of laches was considered in the *B.A.* case in light of earlier decisions made by the PERS Board, which was the predecessor to the Office of Administrative Hearings for

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[18] 2 AAC 64.250.

[19] *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (Alaska 1985).

[20] *Lazy Mountain Land Club v. Matanuska-Susitna Borough, 904 P.2d 373, 377 (Alaska 1995); Copper River School District v. State*, 702 P.2d 625, 629 (Alaska 1985). In both cases the doctrine was found not to apply, but not because the forum was administrative.

[21] *In the Matter of B.A.*, OAH No. 06-0829-PER (November 14, 2007).

review of decisions of the administrator. In particular, that case cited *In the Matter of R.M.S.*, a case in which the PERS board had relied on statutes of limitation to declare a case time-barred. [22] The *B.A.* case concluded that state statutes of limitation, which provide specific deadlines for filing lawsuits, apply only to cases brought in court and not to administrative appeals. The *B.A.* case noted, however, that even though they do not directly apply to administrative cases, statutes of limitation provide a valuable beginning point of comparison to determine whether a claim has been unreasonably delayed under the doctrine of laches, which does apply to administrative cases.

Before determining whether a period of delay was unreasonable under laches, it is necessary to establish the length of the period in question. This requires identification of the specific action that has allegedly given rise to the claim. Since an amount of PERS service credit is awarded for each pay period, one could argue that Ms. M.'s right to challenge the kind of credit she was awarded accrued when she received the credit with each pay period. This was the conclusion in the *B.A.* case, but that case differed in that more than fifteen years had passed since the last time the employee had received All Others credit. Ms. M. challenges the All Others credit she started receiving in 1984, but she is also challenging all the credit she has received right up to the most recent pay period, for which there has been no delay at all.

An important difference between the *B.A.* case and Ms. M.'s case is that Ms. M. challenges a single specific action of the employer taken in 1984, while the employee in *B.A.* was alleging generally that the nature of his employment made it proper for characterization as peace officer service. Thus, in *B.A.* an injustice allegedly occurred every time the employee was awarded some service credit. Ms. M. has provided some evidence supporting the proposition that her job also presented the kinds of hazards that would warrant peace officer status, and she might be prepared to offer more such evidence at a hearing. But Ms. M. does not dispute that under the law and under decisions properly made by ADFG, if she had in fact quit her job in 1984 and then later been rehired, as the administrator asserts based on information provided by ADFG, then none of her service credit from that time forward would properly be regarded as peace officer credit. She does not dispute that if another new hire to the state had been chosen for the Juneau position in 1984, that person would not be entitled to peace officer service credit. The essence of Ms. M.'s argument is that her employer improperly characterized a transfer of duty location as a break in service. This alleged error, if it occurred, occurred in 1984, and Ms.

[22] *In the Matter of the Appeal of R. M. S.*, Decision 03-18 (PERS Board February 18, 1992).

M. has been aware from that time, or shortly thereafter, that all service credit she would be accruing in the future would be characterized as All Others credit. The time for Ms. M. to seek correction of the error, and the beginning of the time for measuring laches, was at the single occurrence in 1984, and not repeatedly as credit accrued.

It appears that Ms. M. began consulting with a union representative in 2007, but it was not until June of 2009 that she arranged a meeting with the union representative and officials from the Division of Retirement and Benefits to discuss her claim. At this point Ms. M. was advised that she could initiate a claim by writing a demand letter to the administrator and then appealing the anticipated denial. Ms. M. did so, resulting in this appeal.

Ms. M. asserts that she has been trying to appeal the change in her status for years, indeed decades, and has never been able to get a straight answer as to how she can go about getting her service credit changed: "In fact, I initiated my attempts at a claim approximately 5y from the time of the disputed event."[23] It appears that many of the people Ms. M. talked to did not, in fact, know the answer to her questions, or how to resolve them. Ms. M.'s feeling of frustration at what must have seemed a bureaucratic "runaround" is evident. But when an employee requests a change or a benefit, and the employer fails to give a straight answer or any answer at all, the lack of an answer can at some point be fairly regarded as a final answer in the negative, at which point the next step is an appeal to the Superior Court. Ms. M. believes that she was eligible for retirement over five years ago. Had she applied to retire in 2004, she also would have had an opportunity to force the issue.

Her employer might not have directly answered her inquiries, but neither did it appear inclined to change the kind of service credit it was awarding to Ms. M., as she desired. Had Ms. M. taken her claim to the Superior Court in 1984 or 1985, she would have received a final answer on the matter, or at the least an explanation of how to exhaust her administrative remedies. Talking to people, sending letters of inquiry or even letters specifically stating that the employee is accepting a certain kind of PERS credit under protest, does not constitute initiation of a claim that can result in a final administrative decision. Regardless of efforts she made to discuss the matter with her employer or the administrator, it cannot be said that Ms. M. initiated a claim for peace officer credit that would lead to a final administrative decision until the action in 2009 leading to this appeal.

[23] Ms. M.'s response of March 13, 2010, to the administrator's motion, page 4. As discussed below, it is arguable that even a five-year delay would be properly dismissed under the doctrine of laches.

The action now being appealed occurred in 1984, and Ms. M. filed the demand resulting in this appeal at some time in 2009. The period of delay, for purposes of a laches argument, was therefore in excess of twenty-five years. This is the period to which the elements of laches must be applied to determine whether the appeal is untimely.

The first step of analysis in considering a laches argument is determining whether the period of delay was unreasonable. In determining whether a 25-year period of delay is unreasonable, the first step should be, as it was in the *B.A.* case and in the *R.M.S.* case relied on by the *B.A.* case, comparison with the applicable statute of limitation. Statutes of limitation require court actions to be filed within a certain time of the occurrence that gives rise to the action.[24] Actions on many liabilities created by statute must be brought within two years.[25] Before 1997, actions on contracts were required to be brought within six years of the time the cause accrued.[26] After 1997, contract claims were required to be brought within three years of the time that the cause accrued.[27]

This case is similar to the *B.A.* and the *R.M.S.* cases in that one could debate which statutory period should be used as a comparison. It is also similar in that the period so far exceeds any statutory period that might be used for comparison that it is unnecessary to make a decision as to which statutory period is the correct comparison. In the *R.M.S.* case the period of delay had been at least ten years, and in the *B.A.* case it had been at least fifteen years. In both of those cases, the period of delay had been so far in excess of any comparable statutory period as to be deemed unreasonable in comparison. In this case, with a period of delay that would constitute the sum of the delays in both cases combined, the same must be said to be true.

There are no circumstances in this case that excuse the period of delay beyond any of the comparable statutory periods. Ms. M. argues that she has not delayed, or that to the extent she has delayed it has been the result of the state's failure to provide her with the information she needed to perfect an appeal:

> My previous testimony included identifying that I attempted many times to bring my claim to the administrator's attention; my testimony may not have sufficiently made the point that 'I attempted this on many occasions and on these occasions I did not receive the information from State personnel necessary to advance my claim'. Obviously I never received sufficient information to advance my claim until my meeting with Kathy Lea on June 29, 2009. For example, in 2007 I approached an Administrative Operations

[24] AS 09.10.010.
[25] AS 09.10.070(a).
[26] Former AS 09.10.050, amended effective August 1, 1997.
[27] AS 09.10.053.

> Manager for ADF&G and they then "did not know there was a formal process for employees to follow when appealing their retirement status."

Ms. M. also cites the pressure of her job and the requisite time commitment as reasons for unusual delay.

The record is clear that Ms. M. did bring to the administrator's attention the fact that she believed she was entitled to peace officer credit well before 2009, and the administrator referred her back to ADFG. Confusion about which agency to go to, referral back and forth between agencies, and an unwillingness on the part of any agency to deal with a good faith complaint could explain some period of delay, even months or possibly a year or two beyond the statutory periods. But even when combined with a high-pressure job that presented extraordinary demands on the employee's time, it does not explain a delay of twenty-five years.[28] Because Ms. M.'s delay of twenty-five years in challenging the nature of her 1984 job change was not reasonable, the first element of laches is met.

The second element of laches is met when the party not asserting a claim has suffered undue harm or prejudice from the delay. There is no dispute that the administrator has suffered prejudice from the delay. Because a peace officer retirement is more expensive, the employer makes a greater contribution each month to forward fund the retirement. A delay of months or even a few years might not make much of a difference to the system's budget, but twenty-five years of improperly funded service credit presents a significant financial burden that is not currently provided for. This burden was recognized as undue prejudice in the *B.A.* case, where the period of delay was no greater. While the PERS might ultimately be entitled able to seek reimbursement from the employer, an invoice for twenty-five years of accrued benefits that the employer does not believe it owes is worth less than an invoice for a short period of recent benefits, the legitimacy of which can be evaluated with fresh evidence.

The delay in this case also presents the problem of stale evidence. It would be very difficult if not impossible at this point to determine with any degree of certainty what happened with Ms. M.'s employment status back in 1984. Over twenty-five years, it is likely that witnesses have become unavailable, documents have been lost, and memories have faded. As Ms. M. herself points out,

> My pursuit to address the unfair loss of P commenced over 20 years ago, and the length of time it has taken me to bring my appeal to the OAH has compromised my access to

[28] While Ms. M. cites the time demands of her job as a reason for delay, the record shows that she was a seasonal employee in Leave Without Pay status during the winters until she started working for the University of Alaska in 1988. Exhibit 4, page 18.

> individuals "of the time" to address the "circumstances of the times". This may compromise the ability to achieve a level of fairness in addressing my request, which could result in a refusal to reinstate P (or its current equivalent, that is, to retire with full pension). I ask that you consider this "20y delay in achieving a hearing" as a significant reason for me being unable to provide relevant information to make this a more fair hearing.[29]

Ms. M. complains that the extraordinary delay in this case may prevent her from obtaining a fair hearing, but she does not recognize that the administrator suffers from the same problem.

While it might not be considered directly prejudicial to the administrator, allowing a claim of this age to proceed could raise troubling questions about the employer's ability to plan and budget when its retirement obligations cannot be predicted. The legislative history shows that in the 1970s and 1980s both the legislative and executive branches were considering which employee classifications merited the extra expense of peace officer retirements. After several adjustments to the law, the legislature ultimately concluded in 1983 that no Fish and Game employees should receive peace officer credit, regardless of the kind of work they were doing. As can be seen in the *B.A.* case, even the new job classification of Fish and Wildlife Enforcement officer, created within the Department of Public Safety in 1983, was an All Others position. It is apparent that the legislature was at that time limiting the number of employees eligible for peace officer retirement benefits. Had the legislature been aware in the 1980s that two decades in the future it might be discovered that there were still employees within ADFG who would receive a peace officer retirement, it could have considered options such as increased funding, eliminating positions, or laying off employees who declined to voluntarily relinquish their status as peace officers. Allowing appeals of employer actions affecting the PERS budget twenty-five years after the fact when there is not good cause for such delay could create a substantial threat to the ability of both PERS and the employers to prepare for future obligations.

The delay in this case has caused undue prejudice to the administrator. The second element of laches is therefore met.

IV. Conclusion

There are no issues of fact in dispute that are material to the administrator's motion for summary adjudication. The period of delay in this case was unreasonable. The delay has caused undue prejudice to the administrator. Because both elements of the doctrine of laches have been

[29] Letter from Ms. M. in support of her appeal dated February 9, 2010.

met, the claim in this case is barred for lack of timeliness. The administrator's motion for summary adjudication is granted and this case is dismissed.

DATED this 23rd day of April , 2010.

By: *Signed*
DALE WHITNEY
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 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 20th day of May, 2010.

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

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