

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

IN THE MATTER OF: )  
 )  
 P. B. ) OAH No. 10-0103-PER  
 ) Div. R & B No. 2010-002  
\_\_\_\_\_)

**I. Introduction**

P. B. has requested a waiver of the 90-day deadline to file an application for occupational disability benefits under the Public Employees Retirement System (PERS). Based on the information the Division of Retirement and Benefits had before it, it was determined that Mr. B. had not met the statutory requirement for a waiver, which is that extraordinary circumstances resulted in his inability to meet the filing requirement.

Additional information and arguments were presented through an evidentiary hearing. Despite the additional materials, based on the prior precedents from cases decided by the former PERS Board and by the Commissioner, Mr. B. was not able to demonstrate that extraordinary circumstances prevented him from filing before the deadline. Instead, the evidence shows that more likely than not Mr. B. could have filed an application on time had he not disregarded the information that had been mailed to him by PERS over the years. Lack of information or neglect is not an adequate basis upon which to grant a waiver. His request for a waiver of the deadline, therefore, is denied.

**II. Facts**

Mr. B. enrolled in PERS in January 1994, when the City of S. took over the operations of the S. Sports Center from a private contractor, O. Enterprises.<sup>1</sup> Mr. B. remained a city employee until September 15, 2006 when he was terminated because of physical restrictions which interfered with his ability to perform the essential functions of his position.<sup>2</sup>

The division offered witnesses who explained that when an employee enrolls in PERS, the new member is mailed a PERS handbook at the mailing address he or she has provided. If the handbook is returned to PERS, the division makes a note that it was returned, copies the cover and places it in the member's file. The division will then give the handbook to the

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<sup>1</sup> B. Testimony; Div. Exh. A.  
<sup>2</sup> AR at 14.

employer to deliver to the employee. When an employee is terminated, PERS is only notified that the member is no longer employed by a PERS employer. The division is not given the reason for termination.<sup>3</sup>

As explained by division witness Kathy Lea, Mr. B. would have been sent the 1993 edition of the PERS handbook when he enrolled. After a member receives the first handbook, the division will send replacement versions when there is a legislative change. That is sent by a contractor via a mass mailing. The division prepares the label data which is then given to a contractor who prints the labels and mails the handbooks to the members. When a member is sent a handbook via mass mailing, unlike their initial handbook, the division does not keep track of whether the handbook is returned to the division. The division provided testimony that Mr. B.'s file was reviewed prior to hearing and there was nothing to indicate the 1993 edition was returned as undeliverable.<sup>4</sup>

Mr. B. testified that he has never received any PERS handbook, be it the 1993 edition or the four subsequent editions: 1997, January 2000, August 2003, and January 2005.<sup>5</sup> Mr. B. claimed that he had spoken to other city employees who had not received a PERS handbook. He corroborated his testimony with the testimony of Andrew C. Mr. C. is presently the Parks and Recreation Director. He was hired by the city shortly before Mr. B. Mr. C. confirmed that he had never received a PERS Handbook and when shown copies of the front and selected pages from the various handbooks, Mr. C. stated that they did not look familiar.<sup>6</sup>

Although he claimed he did not receive a PERS handbook, Mr. B. admitted receiving other PERS communications. He received the *PERS Newsbreaks* and statements at his mailing address.<sup>7</sup> He does not dispute that some of the *PERS Newsbreaks* had articles addressing the 90

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<sup>3</sup> Mr. B. presented evidence that the City did not provide him with a handbook or other PERS information. At the hearing Mr. B. accepted the division's explanation that it was neither the employer's role nor responsibility to distribute information or give advice about PERS. The division has consistently taken that position in waiver of timeliness cases. *See, e.g., In re S.L.C.*, OAH No. 06-0583 (March 2007) at 9 ("[The division] cannot control the individual employer-employee relationships or rely on employers to provide up-to-date and correct information to employees. As a result, the division does not counsel employers regarding specific benefits, it simply asks each employer to refer its employees to the Division for counseling regarding specific benefits.")

<sup>4</sup> Lea Testimony.

<sup>5</sup> Ms. Lea testified that there were four editions after the 1993 edition. The Agency record did not contain the 1997 edition but did contain excerpts from the 1993, January 2000, August 2003, and January 2005 editions. *See* AR at 43 – 72.

<sup>6</sup> Mr. C. was shown AR 43 – 72.

<sup>7</sup> Mr. B.'s 2003 Annual Benefit Statement, Div. Exh. B; Mr. B.'s 2004 Annual Benefit Statement, Div. Exh. C; Mr. B.'s 2005 Annual Benefit Statement, Div. Exh. D.

day filing requirement but he could not state with certainty whether he had received those issues. Mr. B. admitted that he treated the *PERS Newsbreaks* as junk mail, comparing them to flyers that accompanied his utility bills. He said he may glance at them, but was unlikely to read them.

Mr. B. receives workers' compensation benefits and is presently undergoing vocational rehabilitation, hoping to rejoin the workforce. In the 90 days following his termination in 2006, Mr. B. was in physical pain and was suffering distress from the loss of his job.<sup>8</sup> He is not claiming that he was mentally incapacitated or hospitalized.<sup>9</sup> As to the importance of PERS, Mr. B. explained it was "just kind of put on the back burner." He admitted that he was on notice about the occupational disability benefits because he had received statements that contained information regarding the benefits, even though he did not read them.

It was not until the spring and summer of 2009 that Mr. B. began to think about PERS. His physical limitations required him to hire people to take care of things he would have done in the past such as chopping wood.<sup>10</sup> This meant he needed additional income.<sup>11</sup> In June 2009 Mr. B. applied for early retirement. He was appointed to early retirement effective July 1, 2009.<sup>12</sup> Shortly after applying for early retirement, Mr. B. was organizing his paperwork and he came across his 2005 PERS Annual Benefit Statement. That statement contained the following paragraph under the heading "Disability Benefits":

If you become totally and presumably permanently disabled while employed by a PERS employer, you may be eligible to receive monthly disability benefits from the PERS. There are two types of PERS disability benefits - occupational and nonoccupational.

Occupational disability benefits are payable as a result of a work-related illness or injury.

Nonoccupational disability is available for members who have five paid-up years of PERS service, are totally and presumably permanently disabled for any reason, and are unable to perform their usual duties or the duties of another job. Benefits typically end when you recover or become eligible for normal retirement.

Medical coverage is provided for you and your eligible dependents while you are receiving disability benefits. While you are employed by a PERS employer, you may receive the following estimated monthly benefit:

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<sup>8</sup> B. Testimony.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Div. Exh. K.

- Occupational Disability: 40% of your most recent monthly compensation before you became disabled.
- Nonoccupational Disability: \$636.15<sup>13</sup>

The statement made no mention of the 90 day filing requirement. Mr. B. testified that he first became aware of the 90 day filing requirement when he called PERS to inquire about disability benefits. Notes taken by Linda Weed when she was employed by PERS as a retirement specialist reflect that Mr. B. first contacted PERS regarding disability benefits on August 11, 2009 and that he was aware of the 90 filing requirement. Ms. Weed read her notes into the record:

He claims he did not know there were disability benefits he could apply for. I explained the 90 day termination rule. He said he had heard of it but claims no one told him he should apply when he terminated employment in 2006. He claims he never received a PERS booklet and no one ever told him of benefits he could be receiving while disabled. He wants waiver of timeliness information and would like to present his case. /s/ August 11, 2009.<sup>14</sup>

On August 13, 2009, the division sent Mr. B. a letter explaining the waiver of timeliness process and the proper forms.<sup>15</sup> Mr. B.'s Request for Waiver of Timeliness was received on September 14, 2009.

In support of his request Mr. B. wrote that he did not timely file because he did not receive a PERS handbook and he was unaware of the 90 day requirement. He attached his 2005 Annual Benefit Statement, indicating that he had received them bi-annually and emphasizing there was no mention of the filing deadline.<sup>16</sup> He also wrote that based on his conversation with former co-workers and present city employees, not everyone was receiving the same information from PERS.

On September 22, 2009, the division sent Mr. B. a letter suggesting he provide a letter addressed to the Commissioner requesting a waiver of the 90 day filing requirement.<sup>17</sup> Mr. B.

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<sup>13</sup> Div. Exh. D at 2.

<sup>14</sup> Weed Testimony.

<sup>15</sup> AR 36- 39.

<sup>16</sup> AR 6. The member statement of request for waiver was submitted along with a disability benefits application, statements from his employer and physicians. AR 6 – 24. All documents in this range were stamped as received by the division on September 14, 2009. Thus it is reasonable to conclude that they were submitted as a package. At hearing, Mr. B. objected to the job description for sports center labor, AR 15-17, because he did not believe it accurately reflected his actual job duties. AR 15 – 17 remain in the record as part of the agency record showing, showing the items he submitted on September 14, 2009, but is not admitted for purpose of establishing what were Mr. B.'s actual job duties at the time of termination.

<sup>17</sup> AR at 32-34.

responded, requesting that the documents previously submitted be substituted for the letter. The information was forwarded as requested. On February 16, 2010, Mr. B. received notice that his request for waiver was denied because he failed to meet the statutory requirement.<sup>18</sup> Mr. B. sought to challenge the denial and the matter was referred to the Office of Administrative Hearings.<sup>19</sup>

### III. Discussion

To receive occupational disability benefits, a PERS member has to file the member's application for benefits within 90 days after terminating employment, unless the Commissioner of Administration waives the deadline.<sup>20</sup> The legislature has limited the Commissioner's authority to waive the deadline to those cases where the Commissioner finds that the member was *unable* to file due to *extraordinary circumstance*.<sup>21</sup> Therefore, to prevail, Mr. B. must establish that it is more likely than not that there were extraordinary circumstances that resulted in his inability to timely file. He can do this by pointing to evidence already in the file or adding evidence that supports his request for a waiver.

The phrase "extraordinary circumstances" is not defined in statute or regulation. However, the Department has adopted a regulation that provides guidance: "Extraordinary circumstances may include being judged as incompetent or confined to a hospital, but do not

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<sup>18</sup> AR at 26-27.

<sup>19</sup> The final decisionmaker at the executive branch level for this PERS waiver of timeliness appeal is the Commissioner of Administration. The case referral form indicated that the Office of Administrative Hearings' (OAH's) administrative law judge would be the final decisionmaker. The issue of who is final decisionmaker under the law was discussed at the hearing. Subsequent research confirms that the most reasonable reading of AS 39.35.410(f) is that waivers of timeliness are decided by the Commissioner of Administration acting as commissioner, not as PERS administrator. As such, this appeal of the waiver denial does not fall under OAH's AS 39.35.006 jurisdiction. Rather, OAH has, in effect, heard this appeal as a voluntary referral from the commissioner under OAH's authority in AS 44.64.030(b).

<sup>20</sup> AS 39.35.410(f), which states:

An employee is not entitled to an occupational disability benefit unless the employee files an application for it with the administrator within 90 days of the date of terminating employment. If the employee is unable to meet a filing requirement of this subsection, it may be waived by the commissioner if there are extraordinary circumstances that resulted in the employee's inability to meet the filing requirement.

<sup>21</sup> *Id.*

include lack of information or mere neglect.”<sup>22</sup> An agency is bound by its own regulations and must act in accordance therewith.<sup>23</sup>

The essence of Mr. B.’s appeal is that he could not file for that which he never knew existed. The failure to provide information, Mr. B. argues, is an extraordinary circumstance and he was unable to file because he did not know there was a filing requirement. Mr. B. suggests that had the division taken the affirmative step to contact him or provide him with an exit packet that contained this information, this whole process could likely have been avoided.

The division acknowledges that the PERS statements do not contain information on the 90 day filing requirement, but maintains that the information is available in the PERS handbook, *PERS Newsbreaks*, and on line. The division also acknowledges that after the initial handbook mailing, it would not know if any of the four subsequent handbooks sent by mass mailing were returned. It did confirm that Mr. B.’s address was on the 2003 mailing list. Even if Mr. B. failed to receive a PERS handbook, he received information regarding benefits and filing requirements through *PERS Newsbreaks* and annual statements, so he was on notice of the existence of PERS disability benefits. The division asserts that Mr. B.’s failure to timely file is due to lack of information or neglect, which by regulation may not be grounds for a waiver.

There is no evidence in the record to suggest that Mr. B. would have reviewed any material provided to him at termination other than Mr. B.’s after-the-fact statement. To the contrary, the evidence establishes that, more likely than not, Mr. B. would have disregarded any information provided to him. The genesis of his request for disability benefits was a document he had in his possession since 2005, but did not review until 2009. Had he timely read it, he would have inquired about the benefit. He did not because he admits he placed PERS “on the back burner” and he regularly disregarded PERS informational mailings. The division is not charged with affirmatively monitoring Mr. B.’s needs or circumstances. It is the employee’s responsibility to request an application for or to inquire about eligibility for disability benefits.

Mr. B. and Mr. C. testified credibly regarding their unfamiliarity with the PERS handbook. Mr. C.’s testimony corroborated Mr. B.’s. However when their testimony is weighed against the evidence that Mr. B. has had the same mailing address since he became a PERS

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<sup>22</sup> 2 AAC 35.290(d).

<sup>23</sup> “An agency is bound by the regulations it promulgates. See 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:21 at 98 (2d Ed.1979). An agency has not acted in the manner required by law if its actions are not in compliance with its own regulations.” *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1244 (Alaska 1992).

member and that he has received PERS communications at that address, it is insufficient to tip the scales in favor of Mr. B. While it is possible that one of the PERS handbooks (perhaps even the initial handbook) was not delivered to Mr. B., it is more likely than not that at least one of the four subsequent PERS handbooks was successfully delivered and he simply overlooked them.

Even if Mr. B. did not receive any of the PERS handbooks, several of the *PERS Newsbreaks*, which Mr. B. received, discussed the 90 day filing requirement, and these placed him on notice regarding the existence of disability benefits. Whether Mr. B. did or did not receive a PERS handbook is not the determinative factor in his appeal. The issue to be resolved is whether there were extraordinary circumstances that prevented him from timely filing.

When determining whether Mr. B.'s circumstances were extraordinary and prevented him from filing, it is helpful to compare Mr. B.'s circumstances with those of other PERS members who have requested waivers based on a lack of information or knowledge. Some of these decisions were issued by the PERS Board (PERB) before that board was superseded.<sup>24</sup>

In PERB Decision No. 93-5 (February 28, 1993), the member persuasively established that he was not provided a scintilla of advice regarding his retirement rights at the time of termination and did not recall having seen the PERS handbook or the *PERS Newsbreak*. The board granted the waiver.<sup>25</sup> Because Mr. B. did receive the *PERS Newsbreak* and statements PERB 93-5 is of little guidance.

In two more recent board decisions, PERB Decision Nos. 02-10 (August 2002) and 02-15 (November 2002), the board denied the members' requests for waivers where the requests were filed 15 months and 39 months, respectively, after termination. In PERB Decision No. 02-10, the member admitted that the reason her application was untimely was because "I was uninformed concerning the disability programs offered through PERS."<sup>26</sup> In PERB Decision No. 02-015, the member argued that he was never given any advice by his employer, the division

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<sup>24</sup> Prior to 2005, the former PERS board made final waiver decisions. The Commissioner of Administration was substituted for the board in AS 39.35.410(f) as the decisionmaker, and the provision giving the board authority to delegate such decisions to the division was repealed. 2005 Sess. Laws of Alaska (First Special Session), ch. 9, §111. Regardless of who the decisionmaker was, since 2000 the standard for granting a waiver of timeliness has been "extraordinary circumstances." Before 2000, the controlling statute required an application for benefits within 30 days of termination, and a waiver upon a finding of "good cause." Because the board applied what was essentially an extraordinary circumstances" standard, contrary to the division's assertion at footnote 3 of their brief, there has not been a significant change in the standard and even pre-2000 board decisions are instructive. *In re J.W.*, OAH No. 07-0530-PER at 7-8 (January 2009); *In re B.B.*, OAH No. 06-0456 at 4 (June 2007).

<sup>25</sup> PERB No. 93-5 at 3 (February 1993).

<sup>26</sup> PERB Decision No. 02-10 at 3(August 2002).

or the workers' compensation board, and therefore he was unable to file because he lacked the knowledge and assistance to do so. The member also claimed that after he eventually requested an application and did not promptly return it, the division should have contacted him. The PERB concluded that the member failed to demonstrate an extraordinary circumstance to justify the delay in filing. In reaching this conclusion the PERB found that the division was "not legally or logically charged with affirmatively monitoring [the member's] needs or circumstances."<sup>27</sup> The failure to timely file was not due to an extraordinary circumstance.

In a recent Commissioner decision, *In re S.L.C.*, OAH No. 06-0583-PER (March 2007), the request for waiver was denied where the member regularly received PERS publications, even though she was never given an exit interview or counseled about the availability of occupational disability benefits despite the fact that she was terminated due to a work-related injury, she applied for workers' compensation benefits, and she claimed that she was mistakenly told she was ineligible for occupational disability benefits. The decision focused on whether the circumstances rendered the member unable to file the application. It was concluded that the member "was, in fact able to file the application on time, she just failed to do so because she did not know she could apply for occupational disability benefits" and the waiver was denied.<sup>28</sup>

In a more recent Commissioner decision, *In re L.M.*,<sup>29</sup> it was concluded that where the member had received the *PERS Newsbreak*, had access to the PERS handbook, spoke with a division representative about his benefits more than a year after termination, and was mailed an occupational disability packet which he disregarded, it was through his own neglect that he lacked the information necessary to timely file.<sup>30</sup>

At first blush it would appear that Mr. B.'s case is dissimilar to *In re S.L.C.* and *In re L.M.* *In re S.L.C.*, the member affirmatively knew that the occupational disability benefits existed but believed she was ineligible for the benefit. Mr. B. testified he was unaware of the disability benefit until the summer of 2009, therefore he was unable to timely apply because he did not know there was a benefit to apply for. Unlike the member *In re L.M.*, Mr. B. did not speak to a division representative and he never received an occupational disability packet.

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<sup>27</sup> PERB Decision No. 02-15 at 5 (November 2002) (Member met with PERS representative and received an application well after the filing period, but waited over a year to file the application).

<sup>28</sup> *In re S.L.C.*, OAH No. 06-0583 PER at 10 (March 2007).

<sup>29</sup> *In re L.M.*, OAH No. 07-0153-PER (March 2008).

<sup>30</sup> *Id.*



However, upon closer look it becomes apparent that any dissimilarities are distinctions without a difference. Mr. B., like the member *In re S.L.C.*, would have been able to file an application on time; he simply did not know he could. The member *In re L.M.* eventually made contact with PERS but not until well after the initial 90 day filing deadline and he initially failed to timely file because he lacked the information to timely file, the same as Mr. B.

These decisions consistently apply the applicable statute and regulation and hold that a member's lack of knowledge is not an extraordinary circumstance. If Mr. B. had looked at the information mailed to him over the years prior to the summer of 2009, he would have filed. Mr. B.'s failure to file was not due to an inability but rather due to lack of knowledge.

The controlling statute allows the Commissioner to waive the deadline only if she finds extraordinary circumstances resulted in Mr. B.'s inability to meet the filing requirement. The applicable regulation expressly precludes a finding of extraordinary circumstances where the failure to timely file is the result of a lack of information or neglect. Therefore, Mr. B.'s application for waiver must be denied.

#### **IV. Conclusion**

Mr. B. has not met his burden of proving that extraordinary circumstances justified a three year delay in filing for PERS disability benefits. His delay in filing was caused by his lack of knowledge. Under the applicable regulation, a lack of information does not constitute extraordinary circumstances for purposes of waiving the deadline. Mr. B.'s request for a waiver, therefore, is denied.

DATED this 22<sup>nd</sup> day of July, 2010.

By: *Signed* \_\_\_\_\_  
Rebecca L. Pauli  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 44.64.030(b). 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 28<sup>th</sup> day of August, 2010.

By: Signed  
Signature  
Annette Kreitzer  
Name  
Commissioner  
Title

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