BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
F W. T	)	OAH No. 11-0108-PER
	)	Div. R & B No. 2011-007

DECISION

I. Introduction

A. Summary

This appeal relates to whether F T may now designate his same-sex partner to receive survivor benefits from the Public Employees Retirement System (PERS). Mr. T retired from state service in 1999, but he was not at that time given the option to elect survivor benefits for a same-sex partner. A number of years later, an Alaska Supreme Court ruling established that retiring employees should be able to designate a same-sex partner to receive survivor benefits. Based on that decision, Mr. T sought to revisit his 1999 benefit selection, but the Administrator of PERS (acting through a delegee) denied his request.

This decision affirms the Administrator's decision on the ground that neither the Administrator nor the Office of Administrative Hearings may grant Mr. T the option he seeks at this time, unless ordered to do so by a court.

B. Evidence Considered

The record on which this decision is based consists of (1) the testimony received at the hearing on July 21, 2011; (2) the numbered agency record, as supplemented, consisting of 93 pages; (3) Administrator's Exhibits A through O, which were admitted without objection pursuant to the procedure set out in the Scheduling Order of May 18, 2011; and (4) Mr. T's exhibits submitted with his letter of June 21, 2011, likewise admitted without objection.

II. Facts

F T and L S have been in a continuous, committed same-sex relationship since 1981. They were married in California in 2008, although that marriage cannot be recognized in Alaska because of Article I, Section 25 of the Alaska Constitution. Both have been Anchorage residents for several decades and have contributed substantially to the community.[1]

[1] Testimony of F T.

Mr. T entered the PERS system in 1984. An accountant by training, he rose to the position of chief financial officer for the No Name business. He retired on June 1, 1999.[2]

At the time they retire, some retirees are eligible to select one of three survivor options, whereby the retiree elects to receive a reduced benefit while alive in return for a continuing benefit to a designated survivor after the retiree dies. One way to be eligible for these options is to be married. At the time of his retirement, Mr. T and Mr. S could not marry under Alaska law, nor could any marriage they entered into elsewhere be recognized in Alaska.[3]

The retirement forms in use in 1999 were not designed to give a retiree in Mr. T's situation an option to elect a survivor option.[4] If he had attempted to do so, his attempt would have been denied by the executive branch agency administering the system,[5] and he could only have pursued the matter via a court challenge. Mr. T did not attempt to make the election.[6] There is no evidence as to whether Mr. T would have made the election in 1999 had it been offered to him on the retirement forms.

Beginning in 1999 and continuing to the present, Mr. T received a full retirement benefit. His retirement benefit was not reduced actuarially to fund a potential survivor benefit.[7]

On October 27, 1999, shortly after Mr. T's retirement, the Alaska Civil Liberties Union and nine same-sex couples filed a suit in Superior Court[8] which will referred to in this decision as "*ACLU v. State*."[9] The plaintiffs, who were active or retired employees in public employee benefit programs, alleged that the Municipality of Anchorage and the State of Alaska were denying them benefits, including joint and survivor annuities, in violation of the equal protection clause of the Alaska Constitution.[10] Mr. T was not among the plaintiffs in that suit.[11]

The merits of the *ACLU v. State* case were resolved in October of 2005, when the Alaska Supreme Court released an opinion declaring that "[p]rograms allowing the governments to give married workers substantially greater compensation than they give, for identical work, to

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2 *Id.*

3 Alaska Const., art. I, § 25 (effective Jan. 3, 1999).

4 See R. 60-63.

5 Cross-examination of Kathleen Lea, Deputy Director, Division of Retirement and Benefits.

6 R. 60.

7 *See, e.g.*, R. 65, Administrator's Exhibit L.

8 Exhibit FT-1 at 2.

9 The case was finally decided in *Alaska Civil Liberties Union v. State*, 122 P.2d 781 (Alaska 2005).

10 *Id.* The fact that the original complaint encompassed joint and survivor annuities can be gleaned from the reference on page 784 of the decision to "these benefit programs" as the topic of the 1999 complaint; the quoted phrase refers back to a list of programs that appears in footnote 4 of the decision and that mentions the survivor annuities.

11 Exhibit FT-2.

workers with same-sex partners" violate the right to equal protection of the law.[12] Mr. T was aware of this decision no later than May of 2006.[13] The court subsequently gave general approval to regulations designed to rectify the equal protection violation.[14] The regulations, including one making same-sex partners eligible to be designated for survivor benefits became effective in November of 2006.[15] The Division of Retirement and Benefits (division) then sent enrollment packets to all unmarried PERS members for the purpose of enrolling same-sex partners in various benefit programs.[16] These enrollment materials did not offer retirees an option to change their survivor election.[17]

In May of 2010, Mr. T asked whether he could change his retirement status to designate a survivor and provide for a survivor benefit. He was told that he could not.[18] On September 3, 2010 Mr. T actually requested to change his retirement status to designate a survivor and provide for a survivor benefit.[19] The PERS Administrator, acting through his deputy, formally denied Mr. T's request on February 4, 2011, with the following explanation:

> If a member selects a survivor benefit their benefit is reduced to cover the cost of the on-going survivor benefit. You have been receiving your full benefit. There are no provisions in the statute to allow you to select a survivor benefit at this time. The court ruling regarding qualified same sex partners did not address the issue of those members who have already retired.[20]

This appeal ensued.

III. Discussion

Mr. T asks that he now be given the opportunity that he was not given in 1999: the option to select one of the survivor options so that his life partner would receive a monetary benefit and health benefits should Mr. T be the first of them to die.[21] He does not rule out that he

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12 *ACLU v. State,* 122 P.3d at 794.

13 Exhibit FT-6.

14 *State v. Alaska Civil Liberties Union,* 159 P.3d 513, 514-5 (Alaska 2006) (testing the regulations against a standard that they must "attempt to offer the benefits mandated by our opinion in a rational and non-arbitrary manner," and finding that they passed that test).

15 2 AAC 38.

16 R. 30-58; T Exhibit FT-4.

17 R. 30-58.

18 T Exhibit I-2, I-3.

19 T Exhibit I-1.

20 R. 4.

21 These options are the "75% Joint Survivor Option," the "50% Joint Survivor Option," and the "66-2/3 Last Survivor Option." *See* R. 60. Because none of the options has been made available to him, it does not appear that Mr. T has been counseled about them and thus, understandably, he has not yet indicated which one he would choose.

might be willing to repay some of the benefits he has already received in order to qualify for the changed benefit structure.[22]

The division contends that, regardless of the merits of Mr. T's claim, he is barred from pursuing it because he waited so long to raise the issue. In making this argument, the division is raising the equitable defense of laches. The division further contends that, even if the claim is not barred by untimeliness, it must fail because there is nothing in *ACLU v. State*, nor anywhere else in the law, that provides a basis to make the requested change.

A. 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.[23] The division's argument is that by waiting to press his claim for a survivor option until 2010, all the while accepting the higher cash benefit paid to someone who has not selected a survivor option, Mr. T delayed unreasonably and created a situation that will damage the retirement system financially if he is allowed to be successful.

The division's claim that F T delayed unreasonably is problematic. The division has consistently, and deliberately, declined to offer retirees in Mr. T's position the survivor options. The forms it provided to Mr. T in 1999 did not offer him those options. The forms it provided him in 2006, after the Supreme Court had ruled, likewise did not offer him the survivor options. When he inquired in the spring of 2010, the division again told him, politely but firmly, that he did not have those options. The division may have been correct in taking this position—that question remains to be answered—but if it was not correct, it is difficult to fault Mr. T for following the instructions of the entity that is supposed to explain his retirement options to him. While there may be circumstances in which delay in taking issue with the instructions he was being given would be unreasonable, the division has not shown such circumstances in this case.

The division's claim of undue harm or prejudice is also unproven. The division offered proof of two kinds of potential harm at the hearing.

The first kind of potential harm is overpayment of benefits. Survivor options are designed to be elected at or before the time of retirement, before benefits are paid. If a survivor

[22] ALJ questioning of Mr. T. Because he has not been counseled on the financial ramifications of changing his benefit election, he is not in a position to say whether he would go through with such a transaction. *Id*.

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

option is chosen, the retiree's benefit from the outset is to be "reduced."[24] The law requires that "the aggregate of the pension payments expected to be paid" must be "actuarial[ly] equivalent," regardless of which option is chosen.[25] If there is a possibility that a survivor must be paid continuing benefits after the retiree dies, the plan faces a larger potential liability than if its obligations will certainly end with the retiree's death, and thus the retiree's own income stream must be set lower. Since Mr. T's benefits were set on the premise that no survivor would need to be paid, if he is switched to a survivor option his benefit over the last 12 years will have been too high.[26] The system has been deprived of the extra money it has paid him, coupled with the investment returns it would have earned on that money.

The second kind of potential harm is the principle of adverse selection. Under a normal survivor option, Mr. T would have had to assess, with the knowledge he had in 1999, the financial pros and cons of making the election. In 2011, he has superior knowledge of his own and his partner's chances of surviving one another. A system that permits its members to make such a retroactive election will, in general, find that the election is made more often by people who will benefit from it in the long run than by people who will not, and the system will have liabilities that exceed the amount funded by the contributions for those members.[27]

Both of these harms are potentially real. The division has not, however, established that they are unavoidable. The overpayment issue could be addressed by requiring Mr. T, as a condition of making a survivor election, to repay the overpaid benefits with interest. The adverse selection issue could perhaps be addressed as well, by making the actuarial adjustment to account for the survivor option based on Mr. T and Mr. S's current ages and situations, rather than those of 1999. At least, the division has not established that there is no amount of money that, if paid by Mr. T or deducted from his future benefits, would make the system actuarially whole notwithstanding the late election of a survivor option. Mr. T has indicated a willingness to entertain an actuarial true-up of his benefits to support a survivor option (although, because he does not know what the figure would be, he is unable to say whether he would accept it). It is

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[24] AS 39.35.450(a).

[25] AS 39.35.450(b).

[26] Under one of the survivor options, the overpayment would work out to $61.55 per month (which is approximately four percent of Mr. T's benefit). Testimony of Brian Schmidt, Appeals Counselor, and Gary Bader, Chief Investment Officer.

[27] Testimony of David Slishinski, Consulting Actuary. To allow Mr. T to enter a survivor option on the actuarial basis that would have been available to him in 1999 would be somewhat like allowing him to purchase life insurance in 2011 by paying back premiums as the policy would have been rated in 1999. To sell such policies would be a losing "bet" for an insurance company.

possible that Mr. T could prevail and receive a remedy that would avoid all financial harm to PERS.

Because the laches defense is unpersuasive, it is necessary to reach the merits of Mr. T's claim.

B. The Merits

Mr. T's claim in this case is that the principle laid down in *ACLU v. State* compels the retirement system to offer him a survivor option. The starting point for this case, therefore, must be an analysis of that decision and of the way it was subsequently applied and interpreted by the Alaska Supreme Court.

As was noted in the Facts section above, *ACLU v. State* included both active and retired employees as plaintiffs, and it encompassed a claim that failing to offer "joint and survivor annuities" to retiring employees in same-sex relationships, while offering those benefits to married retiring employees, was a violation of equal protection guarantees.[28] The Supreme Court agreed with the plaintiffs that governments could not discriminate between married employees and employees in committed same-sex relationships in conferring employment benefits.[29] The court then proposed that a possible remedy would be "to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available" to the excluded PERS members.[30] The court invited the parties to brief it on the issue of remedies.[31] After briefing, the court selected the remedy it had proposed in its original opinion, giving the state seven months to provide benefits to same-sex partners.[32] The order provided for the existing benefit program to remain in effect until the new benefits were provided.

The state then promulgated five substantive regulations. One regulation provided for same-sex partner insurance coverage.[33] A companion regulation provided for a special enrollment period to bring same-sex partners and their eligible children into the insurance plans.[34] Yet another regulation, 2 AAC 38.070, provided for same-sex partner survivor benefits. That regulation did not create a special enrollment process and did not provide any mechanism

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28 *See supra* note 10.
29 *ACLU v. State,* 122 P.2d at 794.
30 *Id.* at 795.
31 *Id.*
32 *ACLU v. State,* No. S-10459, Order of June 1, 2006 (Att. A to Administrator's Pre-Hearing Brief).
33 2 AAC 38.010.
34 2 AAC 38.030.

for members who had already retired to designate a survivor, nor was there a companion regulation doing either of those things.

The new regulations were initially reviewed by the Superior Court, which sought to require the state to alter certain details of the insurance coverage regulation and to add certain statutory benefits not relevant to this case.[35] For example, the Superior Court sought to adjust the minimum length of a same-sex relationship to be treated as equivalent to marriage, reducing it from 12 months to six months.[36] Following a petition for review, the Supreme Court intervened and, in an order dated December 19, 2006, forbade the Superior Court giving advance constitutional scrutiny to "such details."[37] The high court did—on its own—evaluate the regulations against a standard that they must "attempt to offer the benefits mandated by our [2005] opinion in a rational and non-arbitrary manner," and it found that they met that standard.[38] It approved the regulations and deemed them to have become effective the month before it issued its order.[39]

From this sequence of events, one can glean the following:

1. Survivor benefits were an issue specifically before the Supreme Court in 2005-2006.

2. The issue of when the same-sex members should be entitled to the expanded benefits was considered by the court in both its June 1 and December 19 orders. Moreover, the court had before it in December a regulation providing a special, out-of-sequence enrollment opportunity for insurance benefits.

3. Although the court declined to review the new regulations in detail, it did conduct a broad review of the benefit structure and found the new regulations to be "rational and non-arbitrary."

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[35] *Alaska Civil Liberties Union v. State*, No. 3AN-99-11179 CI, Order dated Oct. 30, 2006 (Alaska Superior Court).

[36] *Id*. at 3-4.

[37] *State v. ACLU*, 159 P.3d at 514.

[38] *Id*. at 514-5.

[39] *Id*. at 515 & n.3. There was also an applicability provision (which is not the same as an effective date provision) in the regulations the court approved. This provision, 2 AAC 38.005, was never published in the Alaska Administrative Code, but is on file in the Lieutenant Governor's Office. It read: "For purposes of enrolling same-sex partners and eligible children of same-sex partners in retiree medical coverage, and designating same-sex partners as beneficiaries for survivor benefits identified in 2 AAC 38.070(c), the eligibility and documentation criteria of 2 AAC 38.010 are applicable to members of the state's retirement systems on December 22, 2006." This regulation was promulgated as an emergency regulation, and was subsequently permitted to expire by operation of law. No party has argued that it has any significance to the present case.

For two reasons, it would be inappropriate in light of this history for the Office of Administrative Hearings to grant Mr. T the relief he is requesting.

First, the Supreme Court has already evaluated the remedy the state offered to cure the constitutional infirmity identified in *ACLU v. State*, declining to address "details" but finding the overall regulatory framework to be "rational and non-arbitrary." The absence of a provision to create a new window to enroll people in survivor benefits who were already past the normal window for enrollment is not a detail. Indeed, one of the five regulations the court reviewed was entirely devoted to doing just that for insurance benefits. It would be presumptuous for this tribunal to find a constitutional deficiency in the regulatory structure where the Supreme Court saw none.

Second, an Alaska statute, AS 39.35.450, expressly makes an employee's designation regarding survivor options irrevocable after the date of retirement. To grant Mr. T the relief he requests would require this office to disregard that statute on grounds of constitutional infirmity. Arguably, it would also require this office to mandate that the division create a regulatory mechanism for Mr. T to elect a survivor option, just as the Supreme Court required a regulatory structure to accommodate same-sex couples when it addressed these issues in 2005-2006. Neither of these roles is available to an administrative tribunal.

There are some constitutional issues that can be addressed and remedied at the administrative level.[40] In general, administrative tribunals can evaluate whether the executive branch is "enforcing a constitutional mandate in an unconstitutional manner."[41] To determine that a legislative mandate or benefit structure is itself unconstitutional, however, is outside the purview of an executive branch agency or tribunal.[42] Moreover, an independent executive branch tribunal such as this one cannot order another agency to fashion a new benefit structure. The relief Mr. T is seeking—the creation of an opportunity to alter his benefit elections at retirement, in a manner wholly outside the existing statutory and regulatory structure—is relief that is available, if at all, only from the judicial branch.

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[40] *See, e.g., In re Holiday Alaska, Inc*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Econ. Dev. 2009)(http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=TOB), at 5-9 (Office of Administrative Hearings and Commissioner could not address facial constitutional challenge to a statute, but could address an as-applied equal protection challenge premised on the contention that the Commissioner's staff was engaging in selective enforcement).

[41] *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995) (footnote omitted).

[42] *See, e.g., Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612-13 (1838); *Perdue v. Baker*, 586 S.E.2d 606, 615-16 (Ga. 2003).

IV. Conclusion

Mr. T's claim that he should be allowed to elect a survivor option is not barred by laches. However, the relief he requests is not within the power of the Administrator or of this tribunal to grant. The Administrator's decision of February 4, 2011, denying Mr. T an opportunity to select a survivor option, is affirmed.

DATED this 4th day of October, 2011.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

This Decision and 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 31st day of October, 2011.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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