BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
B L. J	)	OAH No. 13-1141-PER
	)	Agency No. PERS2013-0806

DECISION ON SUMMARY ADJUDICATION

This is an appeal of a decision by the Administrator of the Public Employees Retirement System (PERS). In the decision under appeal, the Administrator denied Mr. J a refund of the cost of health insurance he purchased between 2007 and 2010, prior to the effective date of a 2010 regulation designed to prevent employees in Mr. J's position from having to purchase their own insurance.

The parties have agreed on the material facts in this case.[1] The Administrator has moved for summary adjudication, and Mr. J has responded with what is, in effect, a cross-motion. Both parties agree that the outcome depends on a purely legal issue. For the reasons discussed below, the Administrator is entitled to prevail.

A. Background

B J began working for the State of Alaska as a peace officer in September of 1986.[2] In May of 2006, shortly before reaching 20 years of peace officer service, he suffered a physical injury on the job.[3] This led to surgery later that month, during which he suffered an anoxic brain injury.[4] He was unable to return to duty, and, upon the exhaustion of all his leave, his employment terminated on May 10, 2007 with approximately 20.6 years of peace officer service.[5] Because a peace officer is eligible for normal retirement with 20 years of peace officer service, Mr. J was not permitted to draw occupational disability benefits; instead, he took normal retirement as of June 1, 2007.[6]

Upon retirement, Mr. J did not receive system-paid health coverage. He had to pay for his own insurance costs until 2012, at a cost of more than $57,000.[7]

---

1 Appellant's Answer and Argument at 1.
2 *J I*; R. 96.
3 R. 96-97.
4 *Id*.
5 *Id.* He had an additional five years of PERS-credited military service that is not relevant to the matters at issue in this case. R. 93.
6 R. 68.
7 R. 20-60.

Mr. J fell into what might be characterized as a hole in the PERS statutes, whereby a peace officer disabled in the line of duty in the first 20 years of service could receive system-paid health coverage seamlessly from the time of disability to retirement and also through retirement, whereas a peace officer disabled in the 20th through 25th year of service could retire, but would not have system-paid health benefits for the initial period of his or her retirement. This situation was believed by some to be an "oversight."[8] No corrective legislation was passed, however.

On July 9, 2010, a PERS regulation went into effect that has been interpreted to expressly authorize system-paid medical benefits for individuals in Mr. J's position.[9] Based on that regulation, a retirement and benefits specialist told Mr. J in early 2012 that he would be approved for system-paid health insurance benefits effective June 1, 2007.[10] The immediate effect of this letter seems to have been that Mr. J was enrolled in system-paid health benefits on a going-forward basis. The Administrator subsequently specifically addressed the question of how to handle the earlier period, when Mr. J had been denied coverage, and concluded that Mr. J had not been eligible as of 2007, notwithstanding what the benefits specialist had said. Mr. J was instead reimbursed the health benefit premiums, totaling about $18,000, that he had paid *since the effective date of the regulation.*[11] The Administrator declined to reimburse health benefit premiums paid prior to July of 2010.[12] Mr. J perfected an appeal to the Office of Administrative Hearings regarding the refusal to reimburse the health benefit premiums from prior to July of 2010.[13]

Mr. J has pursued one prior appeal in the PERS system that establishes certain parameters for this case. He brought the prior appeal in 2007, when the Administrator had initially refused to allow him to apply for occupational disability. The prior appeal decision, which is unquestionably *res judicata* as to Mr. J, establishes two matters relevant to this decision: (1) that Mr. J failed to demonstrate that he met the PERS criteria for occupational disability prior to his 20-year eligibility for retirement;[14] and (2) that the law, prior to the regulatory amendment in July of 2010, did not permit system-paid medical benefits for Mr. J on the basis of his disability.[15] The prior decision will be referred to as "*J I.*"

---

8 Sponsor Statement of Sen. Lesil McGuire, 26th Legislature, SB 79 (2009).
9 Alaska Admin. Code, Reg. 195 (amending 2 AAC 39.300).
10 R. 90.
11 R. 9, 14-15.
12 *Id*.
13 R. 2.
14 *In re J*, No. 07-0392-PER (Office of Administrative Hearings 2007), at 8.
15 *Id.* at 5-6.

B. Retroactivity of the 2010 Regulation

The primary legal issue on which the outcome of this case depends is whether the 2010 regulation, 2 AAC 39.300(d), had retroactive effect. Mr. J contends it is an interpretive regulation and is retroactive; the Administrator contends it is a legislative regulation and is purely prospective.

As a first step in the analysis, the Administrator is clearly correct that the 2010 regulation was legislative—that it created new legal rights, rather than merely recording the correct interpretation of law that already existed. *J I* established that the applicable laws that existed at the time of that decision—the PERS statutes, specifically AS 39.35.535(c)(2) and 39.35.410—did not permit system-paid health benefits for someone in Mr. J's position.

The PERS statutes that were applied in *J I* required individuals to supply the premium payments if they elected retiree major medical coverage, except in four defined circumstances:

(1) the individual was a "disabled member";

(2) the individual was a "disabled member . . . appointed to normal retirement";

(3) the individual was over 60 and had 10 or more years of credited service; or

(4) the individual had 25 years of service as a peace officer or 30 years of other service.[16]

Mr. J did not fit the third category because he was under 60, and he did not fit the fourth category because he did not have the required amount of service. He did not fit either of the first two categories because he did not and does not fit the statutory definition of "disabled member." That definition requires the person to be "receiving" a disability benefit already.[17] Mr. J was not a "disabled member" when he was appointed to normal retirement because he was not receiving a disability benefit. In order to receive a disability benefit, he would have had to become "disabled" within the plan's definition prior to his eligibility date for normal retirement. People cannot start disability benefits once they pass the retirement eligibility date[18]—which had already occurred for Mr. J when he reached 20 years of peace officer service.

The 2010 regulation changed this legal landscape by changing the law. In essence, it allowed someone in Mr. J's position to be *treated* as "a disabled member who is appointed to

[16] AS 39.35.535(c)(2).
[17] AS 39.35.680(13).
[18] AS 39.35.410(a).

normal retirement" (the second of the four qualifying circumstances) even though he did not fit the statutory definition of "disabled member."[19]

Having established that the 2010 regulation was legislative, the Administrator argues that it cannot be retroactive. The Administrator's authority for this position is a provision of the Alaska Administrative Procedure Act (APA), AS 44.62.240, which stipulates: "If a regulation *adopted by an agency under this chapter* is primarily legislative, the regulation has prospective effect only."[20] However, that provision does not apply to PERS regulations, because the PERS statute expressly provides that their "adoption . . . is not subject to AS 44.62"[21]—and hence they are not regulations "adopted by an agency under" the APA.

That said, there is a broader legal principle that validates the Administrator's position. It is called the "clear statement" rule; summarized by the U.S. Supreme Court as follows:

> a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by [the legislative branch] in express terms.[22]

The authority under which the Administrator adopts regulations for the PERS system, found in AS 39.35.003 and 39.35.005, contains no authorization, express or otherwise, for retroactive rules. Since the Administrator did not have authority to adopt the 2010 regulation as a retroactive rule, it must be construed as being prospective only.

Mr. J argues that this construction is inconsistent with the language of the regulation, pointing out that the regulation actually contains a reference to "retroactive payment."[23] However, that reference, read in context, simply provides a mechanism for the Administrator to pay back benefits if the Administrator's determination of eligibility comes later than when "the benefit [is] due."[24] It does not suggest that the benefit could be "due" before the regulation creating a right to it became effective.

---

[19] The Administrator essentially asserted at oral argument that AS 39.35.003(b) and 39.35.005 empower him to override a statutory limitation by regulation. This decision expresses no opinion on that reasoning, but accepts the regulation as facially valid.

[20] Italics added.

[21] AS 39.35.005(a).

[22] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also, e.g., County of Clark v. LB Properties, Inc.*, 2013 WL 5230784, *2 (Nev. 2013) (discussing and applying same principle to state regulations).

[23] Appellant's Answer and Argument at 4 (quoting 2 AAC 39.300(e)(2)).

[24] 2 AAC 39.300(e)(2).

C. Effect of the Benefits Specialist's 2012 Letter

Mr. J asserts a further argument: he contends that the Administrator must honor the statement of the benefits specialist, in a 2012 letter, that seemed to suggest that he might receive a retroactive benefit from the regulation change. Quoted in full, the statement he rests his argument upon is the following:

> Your benefit will be effective the first of the month following your termination from employment due to disability. Our records show you terminated employment on May 10, 2007. If your employer verifies this date you and your qualified dependents will be eligible for health insurance benefits effective June 1, 2007.[25]

Mr. J does not contend that he acted in reliance on this recent statement in a way that might create an estoppel against PERS.[26] Instead, his argument is simply that the letter establishes "the rule of law for my case."[27] A statement by an agency staff person does not, by itself, establish the law for the agency head or for reviewing tribunals.[28]

D. Conclusion

Because the 2010 regulation cannot be applied to Mr. J's situation before the regulation came into existence, the Administrator's decision of July 2, 2013, denying reimbursement of health insurance premiums prior to July 1, 2010, is affirmed.

DATED this 4th day of December, 2013.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

---

[25] R. 90.

[26] *Cf., e.g., In re C.B.*, No. 05-0633-PER (Office of Admin. Hearings 2008) (http://aws.state.ak.us/officeofadminhearings/Documents/PER/PER050663.pdf) (describing the elements for estoppel against the system). One can easily imagine reliance on a statement like this had it been made in 2007, but in this case the statement was not made until five years later, after Mr. J had already purchased insurance for the intervening period. This may be why Mr. J has not asserted reliance.

[27] Appellant's Answer and Argument at 3.

[28] *Cf. Beal v. Beal*, 209 P.3d 1012 (Alaska 2009) (explaining that the law of the case doctrine is top-down rule of hierarchy, not a bottom-up rule); *Flisock v. State, Div. of Retirement and Benefits*, 818 P.2d 640, 643 n.5 (Alaska 1991) (indicating that there is no vested right in a misinterpretation, outside the context of estoppel).

Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 3rd day of January, 2014.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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