

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)
)
 K N. J) OAH No. 15-0639-PER
) Agency No. 2015-005
_____)

FINAL DECISION

I. Introduction

When K J left state employment in 2007, he requested a full refund of the balance in his Public Employees’ Retirement System employee contribution account. At that time, Mr. J initialed an acknowledgement that he would be unable to rejoin his then-current retirement plan tier, Tier III, unless he again became an active member of the Plan before July 1, 2010. Upon rejoining state employment in November 2014, Mr. J requested to return to Tier III status. The Division of Retirement and Benefits (DRB) denied his request, and Mr. J now appeals. Because Mr. J’s December 2007 refund election made him a former member of the Plan, and he did not then become an active member before July 1, 2010, the Division’s decision is affirmed.¹

II. Facts

A. PERS Background and Legislative Changes

The State of Alaska operates the Public Employees’ Retirement System (PERS). The PERS retirement plan consists of four tiers. Tiers I, II and III are all defined benefit plans;² Tier IV is a “defined contribution” plan.³ Under all four tiers, employees make mandatory contributions into the Plan, which are matched by the employer pursuant to a statutory framework.⁴

Alaska Statute 39.35.200 allows an employee who has separated from state service to request a refund of the employee’s retirement contributions. Under current law, however, an employee who requests such a refund “forfeits corresponding credited service” for purposes of PERS eligibility and tier membership.⁵ Prior to July 1, 2010, AS 39.35.350 allowed employees who had previously left state service and received refunds of their employee contribution

¹ Mr. J’s request for reconsideration of the September 9, 2015 Proposed Decision in this matter is denied for reasons described below.

² AS 39.35.095-39.35.680. Tier I is comprised of employees who held PERS-eligible positions between January 1, 1961 and June 30, 1986. Tier II is comprised of employees who held such positions after June 30, 1986 but before July 1, 1996. Tier III is comprised of employees who held such positions between July 1, 1996 and June 30, 2006. See <http://doa.alaska.gov/drb/pdf/pers/perstieri-ivchart.pdf> (last visited September 2, 2015).

³ See AS 39.35.710-39.35.720. Tier IV is comprised of employees who have held PERS-eligible positions since July 1, 2006. See <http://doa.alaska.gov/drb/pdf/pers/perstieri-ivchart.pdf>.

⁴ See generally, <http://doa.alaska.gov/drb/pdf/pers/perstieri-ivchart.pdf>.

⁵ See AS 39.35.350(a) (repealed eff. June 30, 2010); AS 39.25.200(d) (eff. June 30, 2010).

account to reinstate credited service associated with that refund upon rejoining state service by repaying the amount that had been refunded.⁶ In 2005, however, the Alaska Legislature passed Senate Bill 141, which created Tier IV and significantly overhauled the PERS system, including repealing AS 39.35.350.⁷

The repeal of AS 39.35.350 had a delayed effective date, June 30, 2010.⁸ After the passage of SB 141 in 2005, former employees who had withdrawn retirement contributions were eligible for reinstatement into their former PERS tier if they rejoined state service on or before June 30, 2010. After that date, employees who had either “received a total refund of the balance of the employee contribution account” or who had “requested in writing a refund of the balance in the employee contribution account” no longer had reinstatement rights.⁹

B. Mr. J’s Employment Chronology and Associated PERS Activity

K J has been employed by the State of Alaska Department of No Name since November 2014, when he rejoined state employment after a seven-year hiatus.¹⁰

Mr. J has had several prior periods of public employment within Alaska, beginning in December 2000, when he began working for the No Name.¹¹ At that time, he enrolled in the Public Employees’ Retirement System as a Tier III employee.¹² Mr. J left the No Name in 2002 and began working for the No Name 2.¹³ In September 2005, Mr. J left public employment.¹⁴ At that time, he requested a refund of his PERS account balance.¹⁵ On November 9, 2005, the Division refunded to Mr. J his PERS balance of \$22,652.65.¹⁶

In 2007, Mr. J briefly rejoined public employment, working for the State of Alaska from June 6, 2007 through December 2007.¹⁷ Upon leaving State service in December 2007, Mr. J again requested a full refund of his PERS account balance.¹⁸ This request and its consequences form the basis of the parties’ dispute.

⁶ AS 39.35.350(b) (repealed eff. June 30, 2010). *See also*, R. 57-58, 61 (2005 PERS Handbook); R. 66-67, 69 (2003 PERS Handbook); R. 74, 76-77 (2000 PERS Handbook).

⁷ Ex. A, p. 60 (Enrolled SB 141, Sec. 133).

⁸ Ex. A, p. 63 (Enrolled SB 141, Sec. 149).

⁹ AS 39.35.680 (20).

¹⁰ R. 22.

¹¹ *See* R. 26-27.

¹² *See* AS 39.35.120(a).

¹³ R. 26.

¹⁴ *See* R. 22-23.

¹⁵ R. 41-42; 52-54.

¹⁶ R. 21.

¹⁷ *See* R. 22.

¹⁸ R. 37-38.

C. Mr. J's December 2007 Refund Request

In order to obtain the refund of his PERS employee contribution account balance upon leaving State employment in December 2007, Mr. J filled out a Refund Election Form.¹⁹ Section B of the Refund Election Form allows a participant to specify either the dollar amount or the percentage of the account balance to be refunded.²⁰ Mr. J requested a payout of 100% of his balance.²¹ Mr. J then initialed Section E of the form, labeled "REINSTATEMENT OF SERVICE/SB 141," which reads:

With this election I fully understand that if I do not become an active member of this plan prior to July 10, 2010, Senate Bill 141 prohibits me from reinstating this service which forfeits my benefit rights under my current PERS/TRS tier.²²

Mr. J's signed and initialed Refund Election Form was dated December 28, 2007.²³ On February 27, 2008, DRB refunded Mr. J \$1,444.81, the full balance of his employee contribution account at that time.²⁴ Enclosed with the refund check was a full-page notice that read:

Attention: PERS Tier I, II & III and/or TRS Tier I & II MEMBERS:

The effects of *this* refund under Senate Bill 141 (SB141)

With this refund, please note that if you do not become an active member of this plan prior to July 1, 2010, SB141 prohibits you from reinstating this service which forfeits your benefit rights under your current retirement tier.²⁵

The notice further instructed members to contact DRB "prior to cashing this check" if they had any remaining questions, and provided phone numbers for those contacts.²⁶

D. Post-Refund Activity

1. Retroactive 2007 Pay Increases Authorized by SB 256

Several months after the Division refunded Mr. J's full account balance, the Alaska State Legislature approved retroactive pay increases for certain state employees pursuant to a 2007-2010 collective bargaining agreement.²⁷ Funding for these raises was approved by the legislature in an April 2008 appropriations bill, Senate Bill 256.²⁸

¹⁹ R. 37-38.

²⁰ See R. 37.

²¹ R. 37.

²² R. 38 (emphasis in original).

²³ R. 37-38.

²⁴ R. 21, 29.

²⁵ Affidavit of Larry Davis, Para. 6 and Ex. C (emphasis in original).

²⁶ *Id.*

²⁷ Davis Affidavit, Para. 4.

²⁸ *Id.*

When those retroactive increases were paid in August 2008, correspondingly increased PERS contributions were paid as well.²⁹ Accordingly, on August 2, 2008, a contribution of \$53.88 was made to Mr. J's PERS account. The \$53.88 represented the increase in PERS contributions associated with the retroactive pay increase for Mr. J's employment between July 1, 2007 and December 28, 2007, as authorized by Senate Bill 256.³⁰ The \$53.88 has remained in Mr. J's PERS account from the time of its deposit in August 2008.

2. February 2010 Warning Letter

In early 2010, the Division sent all former members a letter advising them that they would be prohibited from reinstating their PERS service and former tier status unless they reemployed in an eligible position on or before June 30, 2010.³¹ The Division sent Mr. J this letter on February 5, 2010.³² Mr. J did not rejoin State employment prior to the June 30, 2010 deadline.

3. Annual Benefit Statements

For some period of time, at least from 2010-2014, the Division mailed Mr. J an Annual Benefit Statement.³³ For each of those years, the Annual Benefit Statement mailed to Mr. J reported a PERS "account balance" of \$53.88, stated "you are not vested in PERS,"³⁴ and also stated that "[o]ur records indicate you are in Tier 3."³⁵

However, each Annual Benefit Statement also displayed the following disclaimer in its upper right-hand corner:

The account service information contained in this statement is based on data reported by your employer(s). Please contact your employer(s) about any discrepancies.... While every effort has been made to ensure the accuracy of your statement, please know it does not have the full force and effect of the law, rule, or regulations governing the payment of benefits. All benefits will be paid under the provisions of the applicable Alaska Statutes and Federal law.³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ Ex. D, p. 4.

³² Ex. D, p. 3. The Division also sent a similar letter to Mr. J in March 2006, after his 2005 refund and before he rejoined state service in 2007. Ex. D, pp. 1-2.

³³ The documents Mr. J submitted to the Division do not include any Annual Benefit Statements from prior to 2010, nor has Mr. J asserted that he received such statements prior to 2010. See R. 4, 11-15. The oldest account balance statement in the record indicates it was generated *after* June 30, 2010 – the date the repeal of AS 39.35.350 became effective. R. 11.

³⁴ R. 11-15.

³⁵ *Id.* As explained in the Affidavit of Larry Davis, Appeals and Risk Mitigation Manager for the Division of Retirement and Benefits, the "tier status" entry on Annual Statements and in the PERS "online system" is derived automatically based on original date of hire and the presence of contributions in the account. Davis Aff., Para. 5.

³⁶ R. 11-15.

The PERS Information Handbook likewise cautions that “it is the member’s responsibility to check their annual statement for accuracy,” and directs members to “contact your employer if you believe there is a discrepancy on your Annual Statement.”³⁷

4. *Mr. J’s December 2014 Request to Repay Indebtedness and Resume Tier III Status*

Mr. J rejoined State employment again in November 2014, nearly seven years after resigning and requesting a full refund of his employee contribution account balance.³⁸ In December 2014, he requested to be allowed to pay back his indebtedness and resume Tier III status.³⁹ Chief Pension Officer Kathleen Lea rejected this request in a letter dated March 23, 2015.⁴⁰ This appeal followed.

III. Procedural History

The Division received Mr. J’s appeal on April 28, 2015,⁴¹ and forwarded this matter to the Office of Administrative Hearings on May 29, 2015. At a case planning conference held on June 25, 2015, the parties agreed to submit the matter for decision on the written record and briefs,⁴² and agreed to a briefing schedule. An Order issued that day memorialized the briefing schedule agreed to by the parties.

On July 24, 2015, pursuant to the briefing schedule, the Division of Retirement and Benefits filed its motion for summary adjudication. Mr. J’s opposition to the State’s motion was due on or before August 14, 2015. Mr. J did not file a brief, nor did he contact the OAH either to request an extension or to show good cause for his failure to participate. Upon expiration of all briefing deadlines set out in the June 25 Order, the matter was deemed ripe and taken under advisement pursuant to 2 AAC 64.270.

A Proposed Decision was issued on September 9, 2015 granting the Division’s motion for summary adjudication.

On September 18, 2015, Mr. J submitted a Proposal for Action requesting the Administrative Law Judge reopen to the record to take additional evidence. Mr. J’s Proposal for

³⁷ See R. 60 (January 2005 Handbook).

³⁸ R. 21, 22.

³⁹ See R. 29. No copy of this request was provided in the record.

⁴⁰ R. 29-30. This letter indicates that it replaces an earlier letter, dated February 23, 2015, which the Division agreed to “void at [Mr. J’s] request.” R. 29.

⁴¹ R. 2. Mr. J filed an earlier appeal of the February 23 letter, which was then replaced by the March 23, 2015 letter. See R. 7.

⁴² See 2 AAC 64.260(a)(2).

Action appeared to indicate he had never received the Division’s motion. The Division opposed Mr. J’s request.

In light of Mr. J’s *pro se* status, and recognizing Alaska’s strong judicial policy favoring resolution of disputes on the merits, the Administrative Law Judge accepted Mr. J’s Proposal for Action and reopened the record to allow him to submit briefing on the Division’s motion. Due to the dispute over whether Mr. J had received the Division’s motion, the Office of Administrative Hearings mailed Mr. J a copy of the Division’s summary adjudication briefing along with the September 23, 2015 Order Permitting Additional Briefing. The Order Permitting Additional Briefing expressly required that Mr. J’s briefing must be received by the Office of Administrative Hearings by the close of business on October 5, 2015. However, that deadline passed without Mr. J filing any briefing with the Office of Administrative Hearings. Accordingly, Mr. J’s request for reconsideration of the September 9, 2015 Proposed Decision is denied, and this Final Decision now issues.

IV. Discussion

Mr. J became a “former member” of the Plan upon electing a full refund of his account balance in December 2007. Nothing that happened after that time changed his status back to “active member” prior to July 1, 2010. Because former members who had refunded their PERS contributions and not returned to active status before July 1, 2010 forfeited their credited service and associated tier membership rights, Mr. J is not entitled to now rejoin Tier III.⁴³

A. As of July 1, 2010, Former PERS Members Who Had Refunded Their PERS Contributions Forfeited Their Corresponding Credited Service.

Prior to July 1, 2010, as discussed above, AS 39.35.350 permitted state employees who had previously refunded their PERS contributions to pay back their PERS indebtedness and resume their prior tier status. But SB 141 repealed AS 39.35.350 effective June 30, 2010.⁴⁴

As of July 1, 2010 – and thus, when Mr. J requested in 2014 to reinstate his Tier III status – the law no longer allowed former plan members to take this action. To the contrary, as of July

⁴³ In addition to the substantive issues raised in this appeal, Mr. J’s appeal request also raises a procedural argument that will be addressed briefly for clarity. Prior to this formal appeal, Mr. J sought an “informal conference” with the PERS Plan Administrator, but was through inadvertence not provided with one. R. 2; Davis Aff., Para. 2-3. Mr. J’s formal appeal request argues that the denial of an informal conference violated AS 44.64.060-44.64.070. R. 3. But this argument confuses the right to this formal appeal – as outlined in AS 44.64.060 - 44.64.070 – with the opportunity to meet informally with the Plan Administrator prior to the formal appeal. The “informal conference” referenced on the Division appeal form is not a required part of the administrative appeal process, and the lack of such a meeting in this case does not implicate or infringe on Mr. J’s formal hearings rights as set out in the statutes he cites.

⁴⁴ Ex. A, pp. 60, 63.

1, 2010, the applicable statute provided that “[a]n employee who receives a refund of contributions ... forfeits corresponding credited service under AS 39.35.095 - 39.35.680.”⁴⁵ In other words, if Mr. J had not reinstated his PERS service by the June 2010 deadline, he had forfeited his right to do so.

B. Mr. J’s December 2007 Refund Request Made Him a “Former Member” of the Plan Under AS 39.35.200.

Because the repeal of AS 39.35.350 prohibited former employees from reinstating their former PERS status after the repeal date, the relevant inquiry here is the nature of Mr. J’s PERS membership as of the date of the repeal. This question turns on the statutory definition of the various types of PERS membership statuses.

By statute, PERS membership is defined in terms of “active,”⁴⁶ “inactive,”⁴⁷ and “former” membership.⁴⁸ After requesting a full refund of his employee contribution account in December 2007, Mr. J was, as a matter of law, a “former member.”

‘[F]ormer member’ means an employee who is terminated and who has received a total refund of the balance of the employee contribution account *or who has requested in writing a refund of the balance in the employee contribution account.*⁴⁹

There is no dispute that on December 28, 2007, Mr. J “requested in writing a refund of the balance in the employee contribution account.” By operation of law, this request made him a “former member.”⁵⁰

C. Neither the August 2008 Residual Contribution of \$53.88 Nor the 2010-2014 Account Balance Statements Altered Mr. J’s Status as a “Former Member” of the Plan.

Mr. J became a former member upon terminating employment and requesting a total refund of his account balance.⁵¹ Mr. J’s December 2007 refund election form included an express warning – initialed by Mr. J – that the only way to reinstate his service and

⁴⁵ AS 39.35.200(d).

⁴⁶ “[A]ctive member’ means an employee who is employed by an employer, is receiving compensation for seasonal, permanent full-time, or permanent part-time services, and is making contributions to the plan.” AS 39.35.680(1)

⁴⁷ “[I]nactive member’ means an employee who is terminated and who has not received a refund from the plan or an employee on leave-without-pay status or layoff status.” AS 39.35.680(21).

⁴⁸ “[F]ormer member’ means an employee who is terminated and who has received a total refund of the balance of the employee contribution account or who has requested in writing a refund of the balance in the employee contribution account.” AS 39.35.680(20).

⁴⁹ AS 39.35.680(20).

⁵⁰ Mr. J likewise satisfied the second definition of former member under AS 39.35.680(20) when he “received a total refund of the balance in the employee contribution account” in February 2008.

⁵¹ AS 39.35.680(20).

corresponding benefit rights was to again become an “active member” of the plan prior to July 1, 2010.⁵² Neither the August 2008 deposit of \$53.88 in residual contributions nor the Account Balance statements had the effect of returning him to active membership status.

The August 2008 deposit of \$53.88 in residual contributions did not change Mr. J’s PERS membership status under AS 39.35.680. The deposit did not make Mr. J an “active member,” because that status is reserved for active employees,⁵³ and it is undisputed that Mr. J terminated employment in December 2007.

Nor did the deposit make Mr. J an “inactive member.” An inactive member is an employee who is terminated but has not received a refund from the plan.⁵⁴ But Mr. J *had* received a refund from the plan – the \$1,114.81 he received in February 2008. The receipt of that refund takes him outside the definition of “inactive member.” In any event, once Mr. J became a “former member” in December 2007, reinstatement of his tier status could only be accomplished by again becoming an *active* member of the plan, and doing so prior to July 1, 2010.⁵⁵ Having terminated employment and requesting a full refund of his account balance, subsequent adjustments to his account balance could not, and did not, make Mr. J an “active member.”⁵⁶

Nor did the annual account balance statements change Mr. J’s membership status. While the statements include the language that “our records indicate you are in Tier 3,” the statements also caution about possible inaccuracies in the statements and prominently warn that the statements do “not have the full force and effect of the law, rule or regulations governing the payment of benefits.”⁵⁷ Rather, the statements explain, “[a]ll benefits will be paid under the

⁵² R. 39.

⁵³ AS 39.35.680(1).

⁵⁴ AS 39.35.680(21).

⁵⁵ *See* R. 39.

⁵⁶ In the letter attached to his Notice of Appeal, Mr. J states he was offered and did not elect a refund of those funds, stating, “[i]n addition to this contribution I received correspondence from the Department of Administration detailing out the process for a refund election. I chose not to apply for my refund in order to maintain my account with the State.” R. 4. Of note, this claim is not supported by admissible evidence in the record. At the case planning conference in this matter, Mr. J indicated both that the record submitted by the Division was complete and that there was no additional correspondence between the parties. The record on appeal contains no correspondence relating to the August 2008 contribution. Mr. J’s statement in his appeal letter is an allegation only, and he has not provided any admissible evidence on this – or any – issue. However, any factual discrepancy on this issue is immaterial because, as explained above, the deposit of the \$53.88 in residual contributions could not change his status from former member to active member.

⁵⁷ R. 11-15. Further, as noted above, the record in this matter includes no Annual Benefit Statements dated prior to June 30, 2010, and Mr. J has neither asserted nor shown that he received any such statements prior to that time. *See* R. 4, 11-15. Any claim of reliance on these records would thus also fail factually based on the timing of the statements, as well as the lack of any admissible evidence of reliance. However, this claim fails in any event due to the statements’ plain and prominent disclaimer language.

provisions of the applicable Alaska Statutes and Federal law.”⁵⁸ In this case, for the reasons explained above, the applicable Alaska Statutes place Mr. J in Tier IV.

V. Conclusion

Mr. J was an active member in Tier III until terminating his state employment in December 2007, but became a former member when he requested a refund of his employee contribution account. As a matter of law, the only way he could then return to Tier III was to again become an active member of the Plan prior to July 1, 2010. He did not do so, and thus forfeited his service credits and associated Tier III status. Accordingly, the Division’s decision denying Mr. J’s request to reinstate him to Tier III is AFFIRMED.

This is a final order for purposes of appeal rights. Judicial review of the decision in this matter 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 order.

DATED: October 8, 2015.

By: Signed
Cheryl Mandala
Administrative Law Judge

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

⁵⁸ *Id.*