

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE DEPARTMENT OF ADMINISTRATION**

IN THE MATTER OF:

D.E.W.

OAHNo. 07-0142-TRS
Div. R & B No. 2007-007

DECISION AND ORDER

I. INTRODUCTION

D.E.W., a member of the Teachers' Retirement System ("TRS"), seeks to overturn the February 9, 2007, decision by the acting plan Administrator that Ms. W. failed to enroll her husband in the Gold Long Term Care ("LTC") plan when she retired from TRS employment.

Ms. W. appealed the decision to the Office of Administrative Hearings. A hearing was held on July 11-12, 2007. Ms. W. was represented by Don Clocksin. The Division was represented by Toby N. Steinberger, Assistant Attorney General.

The parties presented documentary evidence and called as witnesses Ms. W., C.W., and representatives of the Division of Retirement and Benefits: Bernadette Blankenship (Retirement Supervisor), Carol Savlick (Retirement Technician), Peter Fisher and Kathy Carson (Retirement Specialists), Kathy Lea (Retirement Manager) and Freda Miller (Benefits Manager).

Based on the record as a whole, and after due deliberation, the Administrator's decision is reversed. Ms. W. enrolled her husband in LTC when she retired in 2004 and the Division is estopped from denying LTC coverage to Mr. W. Upon her payment of the premiums that have accrued since her retirement, the Division shall provide that benefit to Mr. W., retroactive to the date of Ms. W.'s retirement.

II. FINDINGS OF FACT

Ms. W. bears the burden of proof by a preponderance of the evidence.¹ In order to prove a fact by a preponderance of evidence, she must show that the fact more likely than not is true.²

A. Division of Retirement and Benefits

The Division of Retirement and Benefits administers several retirement programs, among them the Teachers' Retirement System.³ One of the benefits available to TRS members is long term care insurance, which is self-funded from premiums paid by members.⁴ The LTC plan is intended to be a qualified long term care plan under section 7702(B) of the Internal Revenue Code of 1986 as amended.⁵ Deviations from the plan could affect the tax qualification of the plan.⁶

Under 2 A A C 39.020(a), a member must apply for long term care on a form provided by the Administrator and the application must be made before the member's effective date of retirement. Under 2 A A C 39.020(e), a member's failure to make a timely application for LTC will result in the loss of all rights to apply for or obtain long term care insurance. The regulation provides that the Administrator may waive this requirement if extraordinary circumstances are demonstrated to the satisfaction of the Administrator.⁷

The Division prepared a Long Term Care Handbook in April 2002 which provides information about the LTC program.⁸ The LTC Handbook explains the process and application deadline for applying for long term care coverage for the member and the member's spouse or partner when the member retires.⁹ The member must first elect LTC for him or herself, then may select LTC for the member's spouse or partner.¹⁰ The LTC Handbook reads in part:

¹ 2 A A C 64.290(e).

² *Id*

³ Testimony of Kathy Lea and Bernadette Blankenship.

⁴ Exh. C at 4 and Testimony of Freda Miller.

⁵ Exh. C at 3.

⁶ Testimony of Freda Miller.

⁷ The regulation specifically states that the need for long term care insurance that arises after the application period has ended does not constitute an extraordinary circumstance. 2 A A C 39.020(e).

⁸ Exh. C.

⁹ Exh. C at 4-8.

¹⁰ Exh. C at 4.

HOW TO APPLY FOR COVERAGE

You must apply for this coverage before appointment to your first benefit from any retirement system.

To meet this deadline, your *Retiree Health Benefits Enrollment/Waiver* form (available from the Division or download from our web site at www.state.ak.us) must be postmarked or received by the deadline. **If you do not apply for coverage at this time, you waive your right to apply for this coverage at a later date.**¹¹

The Retiree Health Benefits Enrollment/Waiver form is the Division's Form BEN051.¹² A similar form is BEN064, "Long-Term Care Enrollment/Increase."¹³

The long term care benefit has three options that a member may elect: the Silver, Gold and Platinum levels of coverage.¹⁴ The Division publishes a premium rate sheet that provides the premiums for each optional plan based on the person's age at the time of enrollment.¹⁵

When a TRS member requests an application for retirement, the Division provides the member with a retirement package. The package consists of a number of documents including a TRS Retirement Instructions and Application Booklet, plus the LTC Handbook and LTC Monthly Premium Rates sheet.¹⁶

Prior to July 2003, the TRS retirement application consisted of a number of loose sheets, so applicants often failed to submit all of the necessary forms, which delayed application processing. The Division determined that only about 35% of the applications were complete and could be processed.¹⁷ In an effort to make the application process easier the Division published a bound TRS Retirement Application Instruction Booklet in July 2003. It was 42 pages long and consisted of a four-page application and 38 pages of instructions and miscellaneous information.¹⁸ After switching to the booklet format, the percentage of applications that were initially complete and able to be processed increased from 35% to 80%.¹⁹

¹¹ Exh. C at 45 (italics and bold in original).

¹² Exh. 6.

¹³ Exh. 7.

¹⁴ Exh. C at 9.

¹⁵ Exh. D.

¹⁶ Testimony of Kathy Lea.

¹⁷ Id.

¹⁸ A focus group of teachers in Juneau tested the new TRS booklet and made no complaints about that portion of the application dealing with LTC, but it is not clear whether they were asked specifically about it.

¹⁹ Testimony of Kathy Lea.

When the Division decided to no longer use BEN051, the Retiree Benefits Enrollment/Waiver form, it did not amend the LTC handbook accordingly. The Division continued to distribute the LTC handbook and did not inform members that the requirement to complete the Retiree Benefits Enrollment/Waiver form was no longer the proper procedure.

The TRS Retirement Application Instruction Booklet provides information on the LTC plan. The application instructions inform members that they must enroll in the LTC plan prior to retirement. The instructions provide that (1) the member can choose from three different optional plans, each having a different premium per person based on age; (2) if the member enrolls in the LTC plan, the member may also enroll the member's spouse in the LTC plan, and (3) if the member enrolls in the LTC plan and marries after retirement, the member can enroll the member's new spouse if certain conditions are met. The instructions read in pertinent part:

Long-Term Care (LTC)

The LTC plan is optional and premiums are deducted from your retirement check. You have a one time opportunity to enroll in the LTC. **If you do not enroll in the plan prior to your retirement, you waive your right to elect this coverage permanently.**

You may elect coverage for retiree only or retiree and spouse; you must elect coverage for yourself to elect coverage for your spouse. There are three plans available; see page 17 for a summary of the plans. You may elect the same plan for yourself and your spouse or you may elect different plans for each of you.

You may decrease the level of coverage at any time. However, you may only increase coverage at marriage to include a new spouse. Increases in coverage are allowed only if the division receives your written request within 120 days of the marriage. Your new spouse must complete a health questionnaire and be approved for coverage.²⁰

The instructions outline the maximum benefits of the three optional plans: Silver, Gold, and Platinum, and provide additional information about long term care coverage.²¹

In the actual TRS application, Section VII allows members to elect medical benefits, dental-vision-audio benefits, and LTC benefits. In the portion allowing a member to elect LTC

²⁰ Exh. E at 16 (bold in the original).

²¹ Exh. E at 21, 18 and 23.

benefits, the application provides a line entitled "Retiree coverage." On that line, the member may enroll in LTC insurance by selecting the Silver option, the Gold option, or the Platinum option. The member checks the box next to the selected plan. The next line is titled "Spouse coverage." This is where the member may elect LTC for the member's spouse. The member may check a box for the Silver option, the Gold option, or the Platinum option. Near the boxes, there are blanks to fill in the spouse's identifying information.²²

In addition to using the TRS Retirement Application Instruction Booklet, a member may elect LTC coverage using a form titled *Retiree Health Benefits Enrollment/Waiver*, which is mentioned in the LTC Handbook and is available on the Internet for electing LTC coverage. The Division will accept the form in lieu of the member filling in section VII of the TRS retirement application, but the form is used primarily by members who are already retired and are either adding a new spouse or reducing the level of their coverage to a lower plan.²³

Section XIII of the TRS retirement application is titled "Certification" which provides in pertinent part:

I acknowledge that I have been offered all three health plans available: medical, dental-vision-audio (DVA), and long-term care (LTC). I further understand that this is my only opportunity to enroll in the long-term care plan and that by not electing long-term care at this time, I waive my right to future participation in the LTC plan.^[24]

The retiree applicant must sign below the certification, certifying that he or she understands that this is the member's only opportunity to enroll in LTC.²⁵ Additionally a retirement checklist instructs the applicant that "some of the benefit options you elect are irrevocable."²⁶ During seminars and individual counseling, retirement counselors advise members about LTC insurance available upon their retirement.

The Division processes retirement applications throughout the year, but the busiest time for this activity is from April through July.²⁷ PERS members predominantly retire on May 1, and teachers retire at the end of the school year. The Division must wait until a member terminates

²² Exh. 28 at 3.

²³ Exh. 6. Testimony of Kathy Lea and Bernadette Blankenship.

²⁴ Exh. 28 and Exh. E at 37-41.

²⁵ *Id.*

²⁶ Exh. E at 36.

²⁷ Testimony of Kathy Carson and Bernadette Blankenship.

employment in order to calculate his or her pension since it must have the member's employer verify credited service and payroll information at the time of termination.²⁸

Once the member terminates employment, the Division processes the application, which includes determining the member's pension and enrolling the member and his or her dependents into plans which the member has selected. The Division then issues a letter appointing the member to retirement. The letter explains which benefits the member will receive, based on the member's application, and any deductions that the member has authorized.²⁹ The letter allows the member to identify any errors that the Division has made in processing the member's elections and to contact the Division if the member has any questions regarding the letter of appointment.³⁰ The Division assumes a member will review his or her appointment letter to determine if the Division has made any errors and also that the member will notify the Division immediately if there is an error.³¹

After issuing a member's appointment letter, the Division will correct errors made in the member's elected benefits, including LTC coverage, if the member contacts the Division within approximately 30 days after receiving the appointment letter or the member's first pension check.³² The Division considers this period part of the application processing time. However, the member cannot make new elections.

Occasionally, the Division cannot process an application because it is not legally complete. This occurs, for example, in the case of a married member who does not select a survivor benefit for his or her spouse, but also does not provide the spouse's waiver of survivor benefits.³³ In that type of situation, the Division contacts the member to verify which election is correct and arranges for the appropriate forms to be submitted, if necessary, then proceeds with processing the application. The Division is not prevented from processing the application of a member who does not exercise an optional benefit such as LTC or dental and vision coverage.³⁴

Based on the Division's experience, it is not uncommon for applicants to fill in the blanks on retirement forms with unnecessary information. In Section VII of the TRS retirement application, for example, members who have not elected LTC coverage for a spouse and thus do

²⁸ AS 14.25.110(i); testimony of Kathy Lea.

²⁹ Testimony of Kathy Lea.

³⁰ Testimony of Kathy Lea, Bernadette Blankenship and Kathy Carson.

³¹ Testimony of Kathy Lea and Bernadette Blankenship.

³² *Id.*

³³ *See* AS 14.25.167; testimony of Bernadette Blankenship and Kathy Carson.

³⁴ Testimony of Bernadette Blankenship and Kathy Carson.

not need to provide any information about the spouse on the form still occasionally write the spouse's birth date and social security number in the blank areas of the form dedicated to LTC coverage.³⁵

The Division does not regularly contact members who provide extraneous information on their retirement applications. Doing so before processing an application with unnecessary information might delay the member's retirement for a short period of time.³⁶

B. Ms. W.'s application for Retirement

Ms. W. taught fourth grade in the Anchorage School District from 1979 until she terminated her employment on June 30, 2004, in anticipation of retiring from teaching effective July 1st. On July 1, 2004, Ms. W. was 64 years of age and her husband was 67 years old.³⁷

Prior to filing her application for retirement, Ms. W. planned her retirement very carefully. Ms. W. attended at least two TRS retirement seminars, one of which was held in November 2001. Among the documents that she saved from that seminar was a brochure on the LTC plans and the premium sheet containing a breakdown of the cost of the different plans.³⁸ Mr. and Mrs. W. inquired about LTC plans available through insurance companies and determined that an insurance company would not provide LTC coverage to Mr. W. at a reasonable cost because he had pre-existing conditions.³⁹

In addition to attending seminars, Ms. W. and her husband also met with Retirement and Benefits Specialist Peter Fisher at his office and spoke with him by telephone on other occasions.⁴⁰ On August 22, 2003, Mr. Fisher prepared a projection of Ms. W.'s retirement benefits for her.⁴¹ Mr. Fisher encouraged her to purchase LTC benefits both for her and her spouse and she told him they were both going to get LTC coverage.

³⁵ Testimony of Bernadette Blankenship and Kathy Carson.

³⁶ *Id.*

³⁷ Exh. 28 at 7-10.

³⁸ Exh. Q at 16-20.

³⁹ Mr. W. had heart bypass surgery in 1999 and prostate surgery in 2003. His doctors discovered an abdominal aortic aneurysm during a CAT scan following the diagnosis of his prostate cancer. He subsequently had surgery in April 2007. Testimony of D.W. and C.W.

⁴⁰ Testimony of D.W.

⁴¹ Exh. G.

Ms. W. received a retirement packet from the Division and filled out the retirement application contained in it.⁴² They also had a copy of the LTC Handbook. Both Ms. W. and Mr. W. understood that this was her only opportunity to apply for LTC coverage for them both. They understood that each could be covered under a separate LTC plan and that each would have a separate premium for LTC based on their different ages at the time of enrollment and the cost of the particular plan Ms. W. selected for each of them. They also had a copy of the Long Term Care Monthly Premium Rates which provided that at 64 years of age, Ms. W. would pay \$231 per month in premiums for the Gold LTC plan and at 67 years of age, Mr. W.'s premium would be \$288 per month for the Gold plan upon her retirement.⁴³ The total premium they would have to pay for LTC would be approximately \$519 if Ms. W. elected the Gold option for each of them.⁴⁴

Ms. W. filled out most of the application, but waited to complete the LTC portion until she and her husband were able to ask Mr. Fisher a follow-up question about the plan.⁴⁵ Specifically, she filled in her husband's date of birth and Social Security number in the LTC benefits portion of the application and waited to select a specific option plan until she had talked with the retirement counselor. Once she had spoken with him, she checked the box next to "Gold" on the line entitled "Retiree coverage."⁴⁶ For unknown reasons, she did not check a box for "Spouse coverage,"⁴⁷ although she believed she had selected the LTC Gold plan for both her and her husband.⁴⁸

Section VII of the retirement application is confusing, difficult to read and ambiguous, especially when compared to Form BEN051, which the Division is no longer actively using. Section VII of the retirement application has a space only one inch tall within which are found eight separate boxes for retirees to make their LTC selections and also to write a spouse's date of birth and Social Security number, if necessary.⁴⁹ There are no lines separating any of the selections and the three boxes for choosing the spouse's level of LTC coverage are run together

⁴² Exh. 28.

⁴³ Exh. 6 at 2.

⁴⁴ Testimony of C.W. and D.W.

⁴⁵ Testimony of D.W.

⁴⁶ Exh. 28 at 3.

⁴⁷ *Id.*

⁴⁸ Testimony of D.W., In an unrelated matter, Mr. and Ms. W. subsequently informed an attorney that they both had long term care insurance. *See* Exh. 21.

⁴⁹ *See* Exh. 28 at 3.

in the middle of the line and almost disappear in the rest of the text. In contrast, Form BEN051⁵⁰ is a separate form that addresses only LTC and dental-vision-audio benefits. It has larger print, with more space between the lines of print. And unlike the LTC section of the retirement application, there are lines on the printed form that clearly separate the different plan level choices for member and spouse.⁵¹

On April 22, 2004, Ms. W. submitted her application to retire effective July 1, 2004.⁵² The Division processed Ms. W.'s retirement application beginning on July 8, 2007, after the effective date of her retirement.⁵³ Several employees were involved in the process of verifying Ms. W. was eligible for retirement, entering her information into the Division's Combined Information Retirement System ("CRS") and checking it for accuracy.⁵⁴ All of the four individuals apparently assumed Ms. W. had not selected LTC for her husband. Significantly, none of them contacted her to verify whether her husband's date of birth and Social Security number entered into the LTC section of her application indicated she wanted that benefit for him.⁵⁵ The Division determined that Ms. W. had selected the Gold LTC plan for herself and had not chosen an LTC plan for her husband.⁵⁶

The Division has no objective guidelines to determine whether a person has applied for or selected long term care for a spouse. There is nothing in the application that guides Division employees in determining whether a member has "applied" for LTC benefits. Neither is there any statute, regulation, policy, desk manual or standard operating procedure that dictates what specific action constitutes an application for LTC coverage. There is also nothing that states the failure to check a coverage option for the member's spouse in the LTC section voids spousal coverage, even if the spouse's identifying information is written in that section where indicated.

When Ms. W. filled out her TRS retirement application, she enrolled herself in the LTC plan. She also enrolled Mr. W. in the LTC plan by providing his date of birth

⁵⁰ Exh. 6.

⁵¹ The Division argues that had she wanted to, Ms. W. could have filled out Form BEN051 because it is available on the Internet, which she uses at work and at home. This is an unconvincing argument. Ms. W. would have had no reason to believe she needed a different form for applying for LTC benefits when the Division supplied her with a retirement booklet with four pages of application forms and 38 pages of instructions.

⁵² Exh. Hat 1.

⁵³ Exh. 8a.

⁵⁴ *Id.* The employees were an administrative clerk; Jennifer Chapman, Retirement and Benefits Technician II; Mindy Voigt, Retirement and Benefits Specialist I; and Kathy Carson, Retirement and Benefits Specialist II. Testimony of Kathy Carson and Bernadette Blankenship.

⁵⁵ Testimony of D.W.

⁵⁶ Testimony of Kathy Lea, Bernadette Blankenship, and Kathy Carson.

and Social Security number on the appropriate lines in the space provided for "Spouse coverage." Ms. W. provided the essential information required to choose a long term care plan benefit for her husband.

There would have been no reason for Ms. W. to put her husband's information in that section of the application in the absence of selecting LTC coverage for him. It was not necessary to provide his information in Section VII of the retirement application for general purposes. In addition to a copy of his birth certificate, Mr. W.'s date of birth and Social Security number are prominently located in at least four other places in the application, one of which is on the same page and is less than three inches below Section VII of the retirement application. Ms. W. put her husband's identifying information in Section VII for a reason. That reason was to enroll him in LTC coverage.

On July 9, 2004 the Division sent Ms. W. a letter appointing her to retirement.⁵⁷ The letter provided the amount of her normal monthly benefit, her COLA, her deductions as well as her coverage for optional dental-vision-audio and LTC coverage.⁵⁸ The letter stated that the Division determined Ms. W. had selected LTC Gold for herself and that \$231 would be deducted for the cost of the Gold plan. The letter provided "Since you enrolled in the optional gold LTC plan, LTC coverage for yourself is effective on July 1, 2004, the effective date of your retirement. \$231.00 will be deducted from each monthly retirement check."⁵⁹ The letter also indicated Ms. W. had selected "DVA coverage for "you and your spouse" and that "\$98.00 will be deducted from each monthly retirement check." The letter of appointment to retirement informed Ms. W. that if she had any questions, she should contact the Division.⁶⁰ The letter did not expressly note that, in the Division's view, she had elected not to provide LTC coverage for her husband.

Ms. W. did not contact the Division after receiving her retirement letter because she saw nothing that concerned her.⁶¹ Since she was the member, she believed the word

⁵⁷ Exh. I.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Testimony of DfMH1 W|tf9|MK.

"yourself in the paragraph regarding LTC coverage meant both her and Mr. W. ⁶² It did not occur to her that the Division had not included Mr. W. in the LTC plan.⁶³

On July 23, 2004, the Division sent Ms. W. her first retirement check. She endorsed it on July 28, 2004, but if she saw the deductions printout that showed the LTC deduction was \$231 for the member's Gold plan, she did not realize the deduction did not include her husband's coverage.⁶⁴ Before her retirement Ms. W. had looked at the chart with the costs of the LTC plan for her and Mr. W., but she did not recall those amounts and saw nothing of concern in her retirement checks or the direct deposit receipts.⁶⁵

Two years passed. In October 2006, Ms. W. was going through some of her paperwork and discovered a copy of the chart with the LTC premium amounts she received before she retired. On examining the form, she noticed the amount deducted from her direct deposit receipts did not match the amounts listed on the premiums chart.

As soon as she discovered the discrepancy between the LTC premium costs and the amount the Division was deducting from her check for LTC coverage, Ms. W. contacted the Division and spoke with Carol Savlick, a Retirement and Benefits Technician II.⁶⁶ Ms. W. informed Ms. Savlick that she wanted to include her husband in the LTC plan when she retired, but did not check the box for the Gold plan for him, assuming the box she checked was for both of them.⁶⁷ Ms. Savlick obtained the microfiche record of Ms. W.'s retirement application and observed that Ms. W. had provided her husband's birth date and Social Security number in the area for the spouse LTC selection.⁶⁸ Although reviewing retirement applications was not Ms. Savlick's primary duty and she was not a person with the authority to determine whether Ms. W. would be able to obtain LTC coverage for her husband, Ms. Savlick's opinion at the time was that the information Ms. W. provided in the LTC section of her retirement application "shows members (sic) intent to elect LTC for spouse."⁶⁹

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Testimony of Carol Savlick; Exh. 26.

⁶⁸ Exh. 26.

⁶⁹ Testimony of Carol Savlick; Exh. 26.

Ms. Savlick checked with Missouri Smyth, her supervisor, regarding whether Ms. W. could now obtain LTC coverage for her husband. Ms. Smyth asked her to inquire whether Ms. W. could pay the back premiums for her husband's LTC coverage.⁷⁰ In a conversation on November 8, 2006, Ms. W. indicated she could pay the amount. Ms. Savlick prepared and submitted an "action sheet" that summarized the issue and inquired of her supervisors whether the Division would be able to activate Mr. W.'s LTC Gold coverage and if so, the date it would be effective.⁷¹ On December 6, 2006, Ms. Savlick was asked to call Ms. W. and inform her that the back premiums, calculated at \$288 per month for 30 months would total \$8640.⁷² Ms. W. confirmed she would pay that amount.⁷³ Ms. Savlick did not promise Ms. W. she could obtain LTC coverage for her husband.

Sometime between December 6, 2006, and January 4, 2007, Ms. Savlick's supervisor asked her to prepare a summary of her contacts with Ms. W., so she prepared the typed report marked as Exhibit 26. Ms. W. continued to contact Ms. Savlick to inquire whether her husband could be covered under the Gold LTC plan.⁷⁴ On January 1st or 2nd, 2007, Ms. Savlick was informed by Freda Miller, the Benefits Manager, that the Division would not be able to provide LTC coverage for Mr. W.⁷⁵ Ms. Savlick telephoned Ms. W. on January 4, 2007, to give her the news.⁷⁶ Ms. W. requested a written determination of the decision and also contacted Mr. Fisher, who agreed that she could not get LTC for her husband.⁷⁷

Freda Miller sent Ms. W. a letter dated January 11, 2007, that confirmed LTC coverage was not available for Mr. W.⁷⁸ On January 16, 2007, Ms. W. sent a letter to Melanie Millhorn, Deputy Commissioner of the Department of Administration, requesting her assistance in obtaining LTC benefits for her husband.⁷⁹ Ms. Millhorn responded on February 9, 2007, with the Administrator's final decision that informed Ms. W. that

⁷⁰ Testimony of Carol Savlick.

⁷¹ Exh. 26.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Exh. 26.

⁷⁵ Testimony of Carol Savlick; Exh. 26.

⁷⁶ *Id.*

⁷⁷ Testimony of D.W. and Peter Fisher; Exh. 26

⁷⁸ Exh. L.

⁷⁹ Exh. N.

she "may not elect L T C Insurance for your husband at this time or at any time in the future . . ." and giving her 30 days to file an appeal.⁸⁰ Ms. W. initiated a series of emails with the Division regarding authorship of the decision⁸¹ and subsequently filed this appeal.

III. DISCUSSION

Ms. W. asserts on appeal that she elected the Gold L T C plan for her husband on her retirement application and those benefits should be provided to him. She also claims that the Division did not fulfill its fiduciary duty in two ways: 1) she was not provided with the proper form for applying for L T C benefits; and 2) none of the Division's employees who reviewed her retirement application informed her it was incomplete due to the unchecked box for spouse L T C coverage. As a result, she claims the Division should be equitably estopped from denying the Gold L T C plan to her husband.

The Division argues that Ms. W.'s claim for L T C benefits for her husband is barred by the statute of limitations. As to the merits of her case, the Division's position is that Ms. W. did not enroll her husband in the L T C plan because she did not place a check mark in any box next to a particular plan level in that section of the retirement application. Since she did not enroll him in the L T C plan at the time of her retirement, she may not enroll Mr. W. now because she cannot prove the existence of extraordinary circumstances that would warrant a waiver in the deadline. Finally, the Division asserts Ms. W. had not established the elements of equitable estoppel.

A. Ms. W.'s Claim is Not Barred by the Statute of Limitations

It must first be determined whether Ms. W.'s claim is time-barred by the statute of limitations. The Division asserts that Ms. W.'s claim arose when she received the letter of appointment on July 9, 2004, but because she did not contact the Division until October 2006, more than two years later, that she cannot pursue this appeal regarding L T C benefits for her husband.

The Division cites as its authority AS 09.10.070(a)(5), which states that a person may not bring an action "upon a liability created by statute . . . unless the action is commenced within two

⁸⁰ Exh. M.

⁸¹ At the time its February 9, 2007, decision was drafted, the Division of Retirement and Benefits ("Division") did not have a Director (the plan Administrator), so the decision was prepared under the signature of Melanie Millhorn, Deputy Commissioner of the Department of Administration, and actually signed by Kathy Lea, Division Retirement Manager. See Exh. M.

years of accrual of the cause of action." The Division also points to two prior Public Employees' Retirement Board decisions that found a non-occupational disability claim and a benefit computation claim barred under the statutes of limitations set out in AS 09.10.070(a)(5).⁸² The Division acknowledges that PERS statutes do not specify a time limit within which a member must initiate a claim to assert a particular benefit.

Notwithstanding AS 09.10.070(a)(5), Ms. W.'s claim is not time barred.⁸³ Alaska law specifically provides for LTC benefits to be provided to a member's spouse upon application at the time of retirement.⁸⁴ Ms. W. applied for LTC benefits for her husband when she retired and later, upon learning that the benefits were not available to him, made an administrative request that they be provided. The Administrator's decision made no mention that Ms. W.'s claim was untimely; rather, it denied her claim on the merits. Ms. W. had the right to appeal that denial.⁸⁵ Moreover, the Administrator's decision specifically informed Ms. W. of that right and provided her with instructions for filing an appeal.⁸⁶ The Division cannot now argue that Ms. W.'s claim is barred by the statute of limitations.

B. Ms. W. Applied for LTC Coverage For Her Husband

Under 2 A A C 39.020(a), if a member wants LTC for the member and the member's spouse, the member must enroll the member and the member's spouse in the LTC plan at the time of retirement on a form provided by the administrator.⁸⁷ 2 A A C 39.020(a) provides:

⁸² Administrator's Hearing Brief, attachments 3 & 4. In PERS Board Decision 03-18, the Board barred a claim for recalculation of benefits that was filed at least seven years after the Division's last action on the case. In Decision 92-1, the Board barred a claim for non-occupational disability that was filed nine years after the employee's termination from employment. Significantly, the Division in each case initially denied the member's claim on the basis that it was untimely, and since neither claimant attended her hearing, the Board affirmed each decision.

⁸³ At least one OAH interlocutory ruling has determined in another context that AS 09.10.070(a)(5) does not apply to proceedings before the OAH because they are administrative appeals, not civil actions filed in court. *See In re M. M.*, OAH No. 06-0802-PER, Decision on Motions for Summary Adjudication at 5. Yet there is some authority that general statutes of limitations apply to administrative proceedings, in the absence of a specifically applicable statute. *See 2 Am. Jur. 2d Administrative Law*, §272, at 289 (1994). *See also*, N. Harlow, Annotation, "Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine," 51 A.L.R. 4* 1147 (1987). The issue is resolved on different grounds here, so I decline to rule on the applicability of AS 09.10.070(a)(5) in this appeal.

⁸⁴ 2 A A C 39.010 -020.

⁸⁵ AS 14.25.006.

⁸⁶ Exh. Mat 2.

⁸⁷ However under 2 A A C 30.070(b), if the retiree marries after retirement, the retiree can request that the new spouse be enrolled in an LTC plan if certain conditions are satisfied.

(a) A benefit recipient who elects long-term care insurance shall apply for that insurance on a form provided by the administrator. Except as provided in (b) and (c) of this section, application for that insurance must be made *before the effective date of retirement*.

When Ms. W. filled out her TRS retirement application, she enrolled herself in the LTC plan when she selected the Gold option for herself as "retiree." She claims she also enrolled her husband in the LTC plan because she provided his date of birth and Social Security number on the appropriate lines in the space provided for "Spouse coverage." Ms. W. argues that since she provided her husband's identifying information in the space provided, she must have been enrolling him in LTC benefits at the same level she selected for herself as the retiree.

The Division objects to the concept that Ms. W. enrolled her husband in the long term care plan. The Division maintains that providing Mr. W.'s Social Security number and birth date was not the same thing as selecting a particular plan for him, which had to have been accomplished by placing a check in the appropriate box for spouse coverage. The Division asserts it cannot make LTC deductions for her husband because she did not authorize them.

The Division has no objective guidelines to determine whether a person has applied for or selected long term care for a spouse. There is no Division policy, regulation or standard operating procedure identifying the minimum effort needed to "apply for" long term care insurance for one's spouse. Nothing in the controlling law says that a member must check a particular box when applying for long term care coverage for a spouse. Likewise, nothing says that failure to check a particular box will void the retiree's selection of spousal coverage.

The long term care handbook directs the Division to use a particular form, BEN051, for an applicant to apply for long term care. However, the Division has essentially replaced this form and now relies primarily on the retirement application. Replacing a form is within the Division's authority, but Form BEN051 is clear and unambiguous in the way it separates the member and spouse elections and elicits information from an applicant. In contrast, the retirement application, in particular the way it is arranged on the page, is confusing and ambiguous and that confusion caused Ms. W. to overlook the separate box for her spouse's level of coverage. Regardless of whether that specific box was checked, Ms. W. provided the essential information for enrolling her husband in the long term care

plan by providing his name, date of birth and Social Security number in addition to marking the box for the member's Gold level plan.

The Division claims Mr. W.'s date of birth and Social Security number is extraneous information. There was testimony at the hearing that it is not uncommon for retiring members to unnecessarily fill in their spouse's information in this section of the application. Even so, there was no reason for Ms. W. to put her husband's information in that section of the application in the absence of selecting LTC coverage for him. It was not necessary to her to provide his identifying information for general purposes. In addition to a copy of his birth certificate, Mr. W.'s date of birth and Social Security number are prominently located in at least four other places in the application, one of them less than three inches below Section VII of Ms. W.'s retirement application. Clearly, Ms. W. put her husband's information there for a reason: to enroll him in the LTC plan.

Ms. W. testified that her intent was to enroll her husband in the LTC plan, but the testimony regarding her intent is subjective in nature and is not the basis of the finding of fact that she enrolled her husband in the LTC plan. The finding is based on the objective evidence in the record of this appeal,⁸⁸ including the confusing nature of Section VII of the retirement application, the identifying information for her husband that Ms. W. specifically wrote in that section, their subsequent statement to an attorney that they both had LTC coverage and the opinion of at least one Division employee that Ms. W. intended to enroll her husband in the long term care plan.

Therefore, because Ms. W. did enroll her husband in the long term care plan Gold level in her retirement application, I conclude that Mr. W. is entitled to that coverage effective July 1, 2004, the date of Ms. W.'s retirement. Upon payment of his \$288 per month premiums that have accrued since July 1, 2004, the Division shall provide long term care coverage at the Gold level to Mr. W., retroactive to the effective date of Ms. W.'s retirement.⁸⁹

⁸⁸ See generally RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (adopting "external or objective standard for interpreting conduct" in order to determine parties' intentions).

⁸⁹ Because I find that more likely than not, Ms. W. enrolled her husband in the LTC plan at the time of her retirement, it is not necessary for me to address the question whether under 2 A A C 39.020(e), extraordinary circumstances exist to excuse Ms. W.'s late application. Her application was timely.

C. The Division Is Barred By The Doctrine Of Equitable Estoppel From Denying LTC to Mr. W.

Ms. W. claims that even in the absence of a finding she enrolled her husband in the LTC plan, the Division should be estopped from denying her husband LTC coverage. The elements of equitable estoppel are set forth in the case of *Crum v. Stalnak*.⁹⁰ In that case, the Division denied a claim by Mr. Crum for unused sick leave credit because he filed it after the statutory deadline. The denial was upheld by both the TRS Retirement Board and the Superior Court. On appeal, the Alaska Supreme Court held that the Division was estopped from denying his claim as late because the Division failed to provide Mr. Crum with the proper form to file his claim for unused sick leave credit and the instructions for doing so were poorly written.⁹¹

In *Crum v. Stalnak*, the court outlined the four elements of equitable estoppel: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.⁹²

Ms. W. argues that the Division asserted a position by not providing her with the correct form mentioned in the LTC Handbook and later, upon reviewing her retirement application, did not contact her to clarify whether she intended to elect LTC coverage for her husband. The Division responds that it provided Ms. W. with the proper form for electing LTC and it had proper instructions for completion.

The court in *Crum v. Stalnak* stated that failing to provide a form or clear notice of the necessary procedures to file a claim satisfies the first element of the four-part test for establishing estoppel against the government.⁹³ In discussing the actions that constitute the assertion of a position by conduct or words, the court cited with agreement a California case in which that state's Court of Appeal held that "when one is under a duty to speak, and has an opportunity to do so . . . an estoppel may arise from his silence."⁹⁴

Ms. W. had met the first element of equitable estoppel, both as to the confusing nature of the form the Division provided her to apply for LTC benefits, and in the Division's silence by failing to contact her and clarify whether she wanted LTC coverage for both her and

⁹⁰ 936 P.2d 1254 (Alaska 1997).

⁹¹ *Id.* at 1258.

⁹² *Id.* at 1256.

⁹³ *Id.* at 1258.

⁹⁴ *Id.*, citing *Hartway v. State, Bd. Of Control*, 69 Cal.App.3d 502, 137 Cal. Rptr. 199,200 (1976).

Mr. W. The Division's failure to contact Ms. W. during the review process was the more significant failure. No less than three Division employees reviewed Ms. W.'s retirement application. All of them had to have seen the apparent inconsistency: Ms. W. did not put a check mark in one of the boxes identifying a specific spouse LTC plan level, yet she provided her husband's date of birth and Social Security number on the lines specifically identified for a retiree choosing long term care coverage for his or her spouse. Indeed, when Division employee Carol Savlick later saw Ms. W.'s entries, she read them as showing an "intent to elect LTC for spouse." The employees reviewing the retirement application should at least have identified that ambiguity for clarification. But no one from the Division initiated contact with Ms. W. for the purpose of clarifying whether she wanted long term care coverage for her husband.

The obvious discrepancy between the presence of her husband's identifying information and the absence of a check mark in one of the boxes for a specific level of spousal LTC coverage gave rise to the Division's obligation to contact Ms. W. and to determine whether she intended to apply for long term care benefits for her husband. It is the Division's silence in the face of that duty that satisfies the first element of equitable estoppel.

The second element of equitable estoppel is that the party acts in reasonable reliance on the government's conduct.⁹⁵ Ms. W. asserts that her reliance on the Division's conduct was to fill out the only form that she was provided to apply for long term care benefits for her husband. The Division argues that any reliance Ms. W. may have had on its alleged failure was misplaced.

Ms. W. reasonably relied on the Division's staff to contact her in the event of a problem with her retirement application. In the Crum case, the Court held that when Mr. Crum failed to file a timely claim for unused sick leave, he did so "in reliance on the Division's omission [in failing to provide a form] and poorly written instructions."⁹⁶ The court concluded that Mr. Crum's reliance was reasonable because "the Division's statements... gave the definite impression that the employer, not the employee, bears the burden of completing and filing the necessary forms."⁹⁷

⁹⁵ *Id.* at 1256.

⁹⁶ *Id.* at 1258.

⁹⁷ *Id.*

Ms. W. filled out the only form she was provided - the Retirement Application. From the face of the application, her intent to enroll her husband in long term care coverage was obvious. If her application was incomplete, it was because the Division provided her with a form that was confusing and misleading, and she relied upon the staff's silence in believing that there was no problem with her application. Thus, the second element of equitable estoppel - reasonable reliance - has been satisfied.

The third element of a claim of equitable estoppel against the government is that the party must suffer prejudice as a result of his or her reliance.⁹⁸ Ms. W. claims her prejudice is potentially much greater than the \$160 per month loss suffered by Mr. Crum in that case. The long term care insurance provides monthly benefits for nursing care, assisted living and home health care and hospice benefits, up to a maximum of \$300,000 plus inflation protection of 5% per year.⁹⁹ Ms. W. determined before she retired that private long term care plans would cost more than that and would require Mr. W. to have a pre-enrollment physical. In the absence of long term care coverage for her husband, having to incur this potential cost constitutes prejudice.

The fourth and last element of a claim of equitable estoppel against the government is that the estoppel serves the interest of justice so as to limit public injury.¹⁰⁰ In other words, the *Crum v. Stalaker* case requires that the gravity of the injustice to the citizen be weighed against the injury to the commonwealth.¹⁰¹

Ms. W. claims that the harm to the Division and the State of Alaska is almost nonexistent. She has agreed to pay the back premiums as of the effective date of her retirement. In late 2006 when the issue arose in her conversations with the Division, the amount at that time was \$8640, which would have increased by approximately \$4608 from January 2007 through April 2008 (\$288 per month x 16 months).

The Division argues the public would suffer if Ms. W. were allowed now to purchase the Gold LTC plan for her husband. The LTC plan is federally approved so that its benefits are tax exempt. To retain its tax exempt status, the Division insists it must not deviate from the plan terms, which provides exactly when a member may enroll the member and the

⁹⁸ *Id.* at 1256.

⁹⁹ Exh. 3 at 9.

¹⁰⁰ *Crum* at 1256.

¹⁰¹ *Id.* at 1258, quoting *Municipality of Anchorage v. Schneider*, 658 P.2d 94, 97 (Alaska 1984).

member's spouse for LTC coverage. The Division speculates that allowing her to enroll now may jeopardize the tax exempt status of the plan. In addition, the Division claims it may encourage others to fill out the section on LTC in an ambiguous fashion and only seek enrollment and pay back premiums for LTC for their spouse when they expect that the spouse will require LTC.

The Division's arguments are without merit. Providing LTC to Mr. W. at this time will not jeopardize the tax exempt status of the plan. It requires that a retiree enroll in the plan at the time of retirement, which is what Ms. W. did. If the Division is seriously concerned that members may purposefully "fill out the section on LTC in an ambiguous fashion," it should make the form less confusing. Moreover, in the event a member's retirement application appears ambiguous, the Division could contact the member and clarify his or her benefit choices, as it should have done in Ms. W.'s case.

Any injuries suffered by the State could be measured by the loss of the investment value of Ms. W.'s premiums from the effective date of her retirement. When compared with the financial condition of the Retiree Health Fund, it would be an insignificant amount. A self-insured plan, the Fund realized favorable investment returns and lower than expected claims in 2006 that allowed the Fund to return \$50,000,000 to the various health plans.¹⁰² Mr. W. does not currently need long term care coverage and it is possible that any future benefits he requires will be covered by the premiums he pays. If not, the reserves and the Retiree Health Fund would more than compensate for any shortfall in his premiums and as a result there would be no financial risk to the public. Ms. W. has satisfied the fourth and final element of a claim of equitable estoppel.

Thus, Ms. W. has met all four of the elements of equitable estoppel and the Division is therefore estopped from denying LTC coverage to her husband. As stated above, upon payment of his \$288 per month premiums that have accrued since July 1, 2004, the Division shall provide long term care coverage at the Gold level to Mr. W., retroactive to the effective date of Ms. W.'s retirement.

¹⁰² Exh. 13 at 12&24.

D. Ms. W. Does Not Have "Unclean Hands"

Finally, the Division argues it has fully fulfilled its fiduciary duty to Ms. W. publishing numerous documents and presenting seminars regarding LTC and by writing her an appointment letter that thoroughly explains her benefits and selections. The Division claims that in actuality, under the facts of the instant case, if Ms. W. intended to elect LTC coverage for Mr. W. when she retired, her failure to do so was caused by her simple negligence. The Division asserts that if Ms. W. had been more careful, she would have discovered her error and tried to correct it.

The Division may also be referring to the equitable maxim of unclean hands, which states that "[h]e who comes into equity must come with clean hands."¹⁰³ In order to prove "unclean hands," a respondent must show that the plaintiff "perpetrated some wrongdoing" related to the matter being litigated.¹⁰⁴

Whether it be negligence or "unclean hands," the Division's claim is without foundation. Ms. W. thoroughly prepared for her retirement, going to seminars, consulting retirement counselors and becoming knowledgeable about the benefits available to her and her husband. She carefully filled out her retirement application to the best of her ability, submitting it to the Division well in advance of her targeted retirement date. The 2004 retirement letter and her first retirement check did not provide unmistakable notice that her wishes had not been followed. Upon learning, contrary to her belief and intention, that her husband was not going to have long term care benefits, she immediately approached the Division about the matter and was rejected. This appeal followed. Nothing in her conduct or manner supports the Division's contention.

IV. CONCLUSION

Ms. W. met her burden of proving by a preponderance of the evidence that she timely enrolled her husband in the LTC Gold level plan in her retirement application and that the Division is estopped from denying him that coverage. Mr. W. is thus entitled to that coverage effective July 1, 2004, the date of Ms. W.'s retirement. Upon payment of his \$288 per month premiums that have accrued since July 1, 2004, the Division shall provide long

¹⁰³ *Knaebel v. Heimer*, 663 P.2d 551, 554 (Alaska 1983).

¹⁰⁴ *Id.*

term care coverage at the Gold level to Mr. W., retroactive to the effective date of Ms. W.'s retirement.

DATED this 7th day of April, 2008.

By: Kay Howard
Administrative Law Judge

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 22nd day of May, 2008.

By: Kay L. Howard
Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties
5/22/08