

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:)
)
R. D. C.)
_____)

OAH No. 09-0682-TRS
Div. R & B No. 2009-010

DECISION

I. Introduction

This is R. D. C.'s appeal of the Division of Retirement and Benefits' ("division") decision that he failed to timely claim service credit for 102 unused days of sick leave under the Teachers Retirement System (TRS). Mr. C. did not deny that his claim was untimely; however, he argued that the division should be estopped from denying his claim.

Mr. C. did not establish by a preponderance of the evidence that the division asserted a position upon which he reasonably relied to his detriment. Therefore, because his claim was untimely, the division's decision is affirmed.

II. Facts

A. Service Credit for Unused Sick Leave

The majority of TRS members retire with some amount of unused sick leave and seldom fail to meet the one year deadline.¹ Because the division has no way of knowing how much unused sick leave a member has accumulated it requires that the employer verify the amount of unused sick leave claimed.² The division provides the member with a claim form.³ The claim form has the TRS logo in the upper left corner. At the top center it identifies the Division of Retirement and Benefits, the division's address, phone and fax numbers.

The top portion of the form is to be completed by the member. It is written in the first person and provides "I understand that I must claim the sick leave within one year of my retirement."⁴ The portion designated "For Employer Use Only" requests minimal information: employee name, number of unused sick leave days, dates of employment, school district and the

¹ Testimony of Kathy Lea.
² Testimony of Kathy Lea.
³ Rec. at p. 12.
⁴ Rec. at p. 12.

dated signature of the certifying officer.⁵ The completed form may be submitted to the division by either the member or the employer. More often than not, it is the employer who submits the completed form.⁶

When a member is appointed to retirement the member receives an “appointment letter” confirming the retirement benefits selected, the cost of those benefits, and the members monthly retirement benefit.⁷ The first and last paragraphs of the letter inform the member that if there is an error they should immediately contact the division.

The appointment letter also contains a paragraph informing the member whether their claim for unused sick leave has been received. If it has not been received the letter advises the member that the claim must be verified and received by the division no later than one year from the date of retirement.

The one year requirement window in which to claim credit for unused sick leave is for actuarial certainty.⁸ The division asserted that if the one year requirement were not enforced, it would result in an unplanned and unfunded liability.⁹

B. R. D. C.’s testimony regarding his application to receive credit for unused sick leave

Mr. C. is a vested member of TRS with 25 years of credited service. As of his retirement date, he had accumulated 102 days of unused sick leave. Prior to retiring Mr. C. met with a division field counselor and obtained a retirement package that contained several forms including the Claim and Verification of Unused Sick Leave Credit form (Claim). Mr. C. testified that he knew the claim had to be received by the division within a year of retirement for him to receive the sick leave credit. He also knew that his employer, the North Slope Borough (NSB), was required to verify the amount of unused sick leave he was claiming. Mr. C. explained that because he needed employer verification, he did not know he could submit the form directly to the division. During the time in question, the NSB out-sourced its payroll accounting function to Alaska Education and Business Services, Inc., (AEBS), whose office was located in Anchorage.

⁵ Rec. at p. 12.

⁶ Testimony of Kathy Lea, Retirement Benefits Manager.

⁷ Rec. at p. 14; Testimony of Kathy Lea.

⁸ Testimony of Kathy Lea.

⁹ Testimony of Kathy Lea.

Mr. C. testified that he completed the Claim form in April 2008 and mailed it to AEBS, who he believed would then forward it to the division.¹⁰

Mr. C.'s letter appointing him to retirement was dated July 19, 2008. His appointment letter informed him that he had been appointed to retirement effective July 1, 2008 and cautioned that if any information was incorrect to contact the division. It also informed Mr. C. that it did not have a claim from him for unused sick leave and if "you wish to receive credit for your unused sick leave, your claim must be verified and received by us no later than one year from your retirement date. For more information please read the insert *Minimum Requirements for Retirement and Service Credit*."¹¹

Mr. C. testified that he was "astonished" to find out the division had not received his claim form. Mr. C. did not call the division as directed in the letter, rather, he called AEBS and testified that AEBS assured him that they had faxed the form and the matter would be taken care of. When he heard nothing further from the division or AEBS he assumed the matter had been taken care of. Mr. C. explained that he did not follow up with AEBS because he trusts people to do as they say and he was distracted by the death of his brother. It was only after there was no increase in his November 2009 benefit check that Mr. C. followed up with the division and discovered the division had no record of receiving his claim for unused sick leave.

On November 6, 2009 Mr. C. wrote to the division explaining that he had timely given the form to his employer but he was distracted by work and family illness "so I didn't keep track of what was taking place...I did find a copy of the form dated April 15, 2008 and sent it to [the NSB business office] ... I...hope that your office and the North Slope business office can work this out."¹² At hearing Mr. C. contradicted his November 6, 2009 correspondence when he testified that because he was in West Virginia and could not locate the original form he had his wife (who was in Barrow) complete a new form, sign his name, back date the form to April 15, 2008, and submit it to the NSB business office for verification.¹³ The NSB¹⁴ verified Mr. C. had

¹⁰ Rec. at p. 14 – 15.

¹¹ Rec. at p. 14 (emphasis in original).

¹² Rec. at 10.

¹³ The form is located at page 12 of the record. Mr. C. testified that he prepared and signed the November 6, 2009 letter and that his wife signed and completed the claim form. It is reasonable to conclude his wife completed the claim form in November 2009 when Mr. C. became aware of the situation.

¹⁴ At this time the NSB was performing the payroll accounting function in-house. The record does not reveal why NSB no longer uses AEBS. Nor does it reveal when the payroll services were brought in house.

102 days of unused sick leave on November 5, 2009, and the form was received by the division November 13, 2009.¹⁵ The division denied Mr. C.'s request as untimely by letter dated November 18, 2009.

Mr. C. testified that his complaint is not with the division's employees but the process of communication between the employer and the division. He believes that had the employer and the division communicated with each other they would have discovered that the division had not timely received the form. When asked how the division asserted a position upon which he relied to his detriment, Mr. C. responded that there was a "promise" that under the terms of the plan he could receive service credit for unused sick leave.

C. G. H.' and M. G.'s testimony

At the hearing Mr. C. presented the testimony of G. H. and M. G. Ms. H. is presently employed by AEBS. She has been with AEBS for four years and was assigned to the NSB contract. One of Ms. H.' duties included faxing claims for unused sick leave. She could not recall whether she had faxed Mr. C.'s claim form nor could she recall talking to him about "resubmitting" his claim form in July 2008. Mr. C.'s claim is the only one that she is aware of that if it had been faxed, had not been received

Mr. C. questioned Ms. H. regarding her experience with submitting forms to the division by fax. She explained that AEBS would fax documents to the division but had no way of knowing if the document was received by the intended recipient. If there was an error in transmission, AEBS's fax machine would generate an error report. However, if the division's fax machine ran out of paper AEBS would not receive an error report. In response to questioning by Mr. C., Ms. H. confirmed that AEBS had encountered difficulty faxing summary contribution reports to Juneau and that they were now emailed, but that she is unaware of any unused sick leave claim form having been faxed by AEBS to Juneau that was not received by the division.

Mr. G. is a TRS retiree. Mr. G. testified regarding the difficulty his wife, also a TRS retiree whose last employer was the NSB, encountered getting her claim for unused sick leave to the division. In the G.s' case, the NSB was no longer outsourcing their payroll services to AEBS. The G.s worked with both the NSB and the division to resolve the problem. Mr. G.'s

¹⁵ Rec. at p. 12.

complaints were with the NSB business office, not the division and the matter was eventually resolved when the division timely received Ms. G.'s claim form.

III. Discussion

To receive service credit a TRS member must be eligible.¹⁶ One of the eligibility requirements is that the member must apply for the credit "to the administrator no later than one year after appointment to retirement."¹⁷ Benefits payable for unused sick leave credit will accrue from the first day of the month after which 1) the member meets all eligibility requirements, 2) the member's written application is received and verified by the administrator, and 3) a period of time has elapsed since the date of appointment to retirement equal to the verified unused sick leave.¹⁸ Unused sick leave is not reported to the division by a member's employer and the division, by regulation, requires that the member's application must include or be accompanied by the employer's verification of the member's unused sick leave.¹⁹ The administrator rejected Mr. C.'s application because it was received by the division 16 months after his appointment to retirement.

The crux of Mr. C.'s appeal is that the division should be estopped from denying his claim because he was promised service credit if he saved his sick leave and in reliance on that promise he did not use his sick leave. He also believes he should not be penalized for what he characterizes as a flaw in the process, namely, that once a verified claim form is sent by an employer there is no communication between the division and the employer to ensure the form was received. Mr. C. emphasized that he is not asking for anything he did not earn. However, under the facts presented, Mr. C. has failed to establish grounds for estoppel.

In a 1997 case, *Crum v. Stalnacker*,²⁰ the Alaska Supreme Court ruled that under the doctrine of equitable estoppel, a division may be barred from rejecting a late claim when:

- (1) the division asserting a position by conduct or words;
- (2) the member acted in reasonable reliance thereon;
- (3) the member suffered prejudice as a result of their reasonable reliance on the division's position; and

¹⁶ AS 14.25.115(c)(1).

¹⁷ AS 14.25.115(a).

¹⁸ AS 14.25.115(c).

¹⁹ 2 AAC 36.290.

²⁰ 936 P.2d 1254, 1256 (Alaska 1997) (applying test for estoppel against the government in a Teachers' Retirement System case).

(4) the estoppel serves the interest of justice so as to limit public injury.²¹

To prevail all four elements must be present.

In *Crum*, the division denied a retired teacher the opportunity to convert his accumulated sick leave to credited retirement service because he had missed the statutory deadline for filing such a request. The court found that the division had induced reasonable reliance by Crum when the division failed to provide him the necessary form to claim his unused sick leave, and provided him with retirement claim paperwork which, taken as a whole, indicated that it would not be necessary for him to take any additional steps to convert his leave. The division's actions prejudiced Crum because he missed the statutory deadline. The court concluded that the division had induced Crum's reliance that he was not required to take any further action and thus the division was equitably estopped from enforcing the deadline to file the additional paperwork.

Here, unlike *Crum*, the division provided Mr. C. with the claim form which expressly states that to claim credit for unused sick leave the claim form must be submitted to the division. Mr. C. does not assert that anyone from the division represented to him that he had nothing further to do to obtain credit for unused sick leave. Rather, when asked what facts he relied upon to establish the first element of estoppel, Mr. C. responded that the division compensated teachers for unused sick leave days and that it had always done so, he assumed the division would do so this time. Mr. C. disregards that to obtain service credit the member must apply for the credit within one year of appointment to retirement.²² Mr. C. admits he was aware of the requirement that a member must apply for the credit within one year. There is no persuasive evidence that the claim form was ever actually sent, let alone received by the division.

Mr. C. asserts that he did submit an application twice, once in April or May 2008 and again in July, both times through his employer. He also asserts that when he checked with his employer, he was told that the matter would be taken care of. Ms. H. testified that she did not recall whether he had submitted a claim form for verification and she is unaware of any conversation Mr. C. may have had with an AESB employee in July 2008. The only evidence that a claim form was timely submitted to the division is Mr. C.'s testimony which I find is not credible for two reasons.

²¹ *Crum*, 936 P.2d at 1256.

²² AS 14.25.125(a)

The first reason is the contradiction between the November 6, 2009 letter and Mr. C.'s testimony. In the letter he represents that he has a copy of the claim form when he did not. Then in an attempt to make it seem as though he had timely completed the form he had his wife obtain a form and back date it to April 15, 2008. It was not until he was questioned at hearing that he admitted the form was not completed until 2009. There is no form corroborating Mr. C.'s testimony that he completed a claim form in April 2008. Because Mr. C. falsely claimed, in 2009, to be submitting a copy of a form that had been previously submitted in April of 2008, when in fact the document submitted in 2009 was generated after-the-fact, his current testimony is not persuasive.

The second reason is - Mr. C. testified that he had no reason to believe the form had not been submitted until November 2009 when the expected increase in retirement benefit did not appear on his retirement check.²³ Had Mr. C.'s claim form been "resubmitted" as he believes it was in July 2008, his increase in retirement pay should have occurred in November 2008, not November 2009. Because the date Mr. C. stated he realized his benefit had not increased is inconsistent with the date he asserts that he was told the claim had been resubmitted, his testimony that he was told the claim had been resubmitted is not persuasive.

Mr. C. argues that he did not know that he could have submitted the verified form directly to the division. Assuming that there was an implied representation that submitting the claim form to the employer was sufficient, it was no longer reasonable for Mr. C. to rely upon an implied representation once he received his appointment letter.

The appointment letter is sent to the member, not the employer. The letter informed Mr. C. that the division did not have his claim for unused sick leave service credit. Mr. C.'s letter instructed him that if thought there was an error he was to contact the division immediately. He did not do so at his own peril.

Mr. C. has failed to present evidence sufficient to establish that the division made any representation or asserted a position by conduct or words that somehow would convey to him the idea that he did not need to submit the claim form within one year, or upon receipt of the appointment letter that there continued to be an implied representation that he was to deal with his employer and not the division.

²³ C. Testimony.

IV. Conclusion

Mr. C. has failed to establish, on a more likely than not basis, that the division asserted a position or made a representation upon which he relied to his detriment. Accordingly, the decision of the division that R. D. C. did not timely file his request for service credit for unused sick leave and therefore is not eligible to receive service credit for his unused sick leave is affirmed. R. D. C.'s appeal of the division's decision is denied.

DATED this 2nd day of April, 2010.

By: Signed
Rebecca L. Pauli
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 30th day of April, 2010.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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