**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

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| In the Matter of: | ) | |
| | ) | |
| C. J. B. | ) | |
| | ) | OAH No. 10-0460-TRS |
| | ) | Div. R & B No. 2010-010 |

**CORRECTED DECISION**

## I. Introduction

### *A. Summary*

C. B. is a Teachers' Retirement System (TRS) employee who is preparing to retire. To augment her retirement income, she attempted some years ago to purchase five years of credited service under a program available to some TRS members. The payment her financial institution transferred to TRS was insufficient to purchase that many years, however. Having learned of the insufficiency, she wishes to complete the purchase but asks that interest on the unpaid balance be waived. The TRS Administrator refused to waive the interest, and this appeal followed.

Because the applicable statutes do not allow discretion in the charging of interest, the single potential basis for Ms. B.'s claim to an interest adjustment is the doctrine of equitable estoppel. The administrative law judge has determined that Ms. B.'s situation does not meet the criteria for estoppel against the TRS system. The evidence shows that the initial error was made by a financial institution, not the system. Delay in discovering and correcting the error was due primarily to Ms. B.'s lack of detailed attention to her financial affairs. Fortunately, the harm to her is comparatively small, amounting to a potential reduction to her retirement benefit of less than one percent.

### *B. Evidence Considered*

This case was heard in Anchorage on November 10, 2010. Ms. B. offered testimony from herself, her husband, her financial advisor, Division of Retirement & Benefits Regional Counselor Paul Carlson, and Retirement & Benefits Specialist Anthony Brakes. The Administrator offered testimony from Retirement Supervisor Kathleen Lea. The agency record, with pages numbered 1 to 237, was admitted without objection, as was Exhibit 1. Exhibit 2, a retirement projection requested by the administrative law judge near the end of the hearing, is now admitted.

## II. Facts (including undisputed legal background)

C. B. hopes to retire in 2011. She began her TRS service in 1986. Prior to entering the TRS system she had more than ten years of teaching service of a kind that qualifies for credited service in the system.[1] This has given her an option to purchase up to a maximum of ten years of additional service by paying into the system the actuarial cost of providing benefits for that service.[2] In Ms. B.'s situation, any purchase of service has to be in full-year increments.[3] She cannot purchase partial years.

There are two ways to purchase claimed service in TRS. It can be purchased by a lump sum payment, or it can be purchased by having one's retirement benefit actuarially reduced to generate the value needed to make the purchase.[4] So long as the purchase cost remains unpaid, the law provides for it to accrue interest.[5]

Purchasing by the second method—actuarial reduction of the benefit—involves balancing the increase in benefit that comes from having more years of service against the reduction in benefit needed to buy the extra years. By law, the employee is given the best net outcome available from either using or not using the extra service years.[6] For this reason, it makes sense to *claim* all the years of service one has available, because an employee can never be hurt by claiming extra years. Claiming extra years simply increases the options that may be available to design an optimal retirement later on.

In keeping with this principle, on December 22, 2003 Ms. B. claimed ten years of outside service.[7] The actuarial cost of purchasing ten years was established at that time at $190,170.62.[8]

A TRS member does not have to go through with purchasing the full amount of claimed service. In early 2004, Ms. B. decided to purchase five years of service using lump sum payments made by pretax direct transfer. On March 22 of that year she authorized the transfer of $83,250.08 from a Lincoln Life MultiFund 403(b) account.[9] The same day she authorized the

1 *See* Agency Record (A.R.) 215-218.
2 *See* AS 14.25.060.
3 This is because she is claiming "outside service." A.R. 22; *see* AS 14.25.220(28).
4 *See* AS 14.25.063(b).
5 AS 14.25.060(b)(1); 2 AAC 36.800(a).
6 AS 14.25.063(c).
7 A.R. 213.
8 A.R. 23.
9 A.R. 15-16.

transfer of the entire balance, about $12,327.59,[10] of a Lincoln Life MultiFund conduit IRA account.[11] These transfers would have added up to half the balance then owing on her 10-year claim, and thus would have consummated the purchase of five years.

Lincoln Life completed the first transfer, and the payment was processed by the Division of Retirement and Benefits on April 5, 2004.[12] Lincoln Life never made the second transfer.[13]

Ms. B. did not notice that the second transfer never occurred.[14] The Division notified her on April 13 that it had received a payment of $83,250.08 from Lincoln Financial Group, leaving an outstanding balance on her 10-year claim of $109,035.86.[15] There is no evidence that the Division would have had any way of knowing at that time that a second payment should have been coming.[16]

As noted above, the second transfer should have closed out Ms. B.'s conduit IRA. Since the transfer did not occur, the account remained open, and Ms. B. continued to receive statements.[17] Plainly, these statements could have alerted her that the transfer never occurred, but she apparently did not pay close enough attention to her affairs to make the connection. The conduit IRA continued to grow, reaching a current balance of $16,049.93.[18]

Ms. B. received a variety of retirement projections over the ensuing years. Each set of projections, if reviewed very carefully as a set, was consistent with her having completed the purchase of only four years and still owing a balance on the fifth year.[19] In fairness, however, Ms. B. probably would have needed the help of a trained financial advisor to fully understand the projections, and she did not employ one.[20] Ms. B. also had conversations with Division counselors during this period. There is no evidence that any counselor actually told her, in error,

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[10] Firsthand evidence of the exact figure is not in the record, but Ms. B. at one time seems to have had a document providing the number and she wrote a letter quoting this figure. A.R. 2. The number makes sense because it would be just enough, when joined with the other transfer, to complete the purchase of five years.

[11] A.R. 4; direct testimony of Clayton C. "Bill" Hueners.

[12] A.R. 15-16.

[13] Direct testimony of Hueners.

[14] Testimony of Ms. B.

[15] A.R. 20.

[16] It can be perfectly logical, from a financial standpoint, for a member to make a partial payment toward a purchase, deferring the rest of the purchase until more funds are available or until the balance can be handled by actuarial adjustment.

[17] Cross-exam of Hueners.

[18] Direct exam of Hueners.

[19] *See* A.R. 43-63 (2005), 64-105 (2007). Among these, only the projection letters would have been seen by Ms. B.; internal printouts such as A.R. 59 would not.

[20] Because she proposed a variety of retirement dates, because the actuarial cost of purchasing additional service credit changed from month to month and year to year, and because the range of options available to her was large and complex, Ms. B. assembled a collection of alternative projections that most members would find baffling.

that she had already completed the purchase of five years. Ms. B. and the counselors do not seem to have understood each other perfectly, however. It appears that counselors may have assumed, for purposes of making projections, that she would complete additional year purchases, or on other occasions may have assumed she was correct when she told them she had already purchased five years.[21]

In late April of 2010 Ms. B. learned through specific correspondence with the Division that she had paid for only four years of service and part of a fifth year, not five full years.[22] At first, she contended that her $83,250.08 payment in 2004 was a specific figure that Division had quoted her for the purchase of five full years, and she demanded credit for five years without any additional payment.[23] She has since realized that this number was not the five-year purchase figure the Division supplied, and that her own financial institution failed to make the second transfer that would have been required to complete the purchase in 2004 for the price named at that time.

Had the 2004 purchase been completed as she planned it, Ms. B. would presently be in the following situation with respect to a July 2011 retirement:

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|---|---|
| Number of years credited service: | 29 (24 regular, 5 purchased) |
| Projected monthly benefit: | $4,799.66[24] |
| Conduit IRA balance: | $0 |
| Cash refund due: | $0 |

Instead, she is in a situation whereby she has one fewer years of credited service than she hoped to have, but she still has a balance in her conduit IRA. Further, because she has paid more than the amount needed to purchase a whole number of years, she is due a refund of the excess paid in 2004 above the cost of four years, plus accrued interest.[25] The current situation can be summarized as follows:

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|---|---|
| Number of years credited service: | 28 (24 regular, 4 purchased) |
| Projected monthly benefit: | $ 4,600.00[26] |

21 An example is her account of a conversation with counselor Pete Fisher sometime between 2005 and 2007: she testified that *she* told *him* she had purchased five years.

22 A.R. 179-180.

23 A.R. 178.

24 Testimony of Kathleen Lea on recall; Ex. 2, first page. This is the regular benefit, with no survivor benefit.

25 The excess of her 2004 payment above the amount needed to purchase *four* years was about $6000; the remaining $3000 is interest that has accrued under 2 AAC 36.800(b). The principal can be refunded directly to a tax-deferred account. The interest may be taxable. Testimony of Lea

26 Testimony of Lea; A.R. 228. Again, this is the regular benefit, with no survivor benefit.

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|---|---|
| Conduit IRA balance: | $16,049.93 |
| Cash refund due: | $ 9,010.03 |

If she wishes, Ms. B. can forego the refund and purchase the remainder of her fifth year. She can use either of the two purchase methods discussed earlier in this section. If she uses the lump sum purchase method, the cost to do so now is $20,315.13.[27] Of course, she can apply the present contents of her conduit IRA to this cost; indeed, she had intended to liquidate that account as part of a fifth-year purchase in 2004. If that account is applied to the purchase, the *new* money Ms. B. would need to complete the purchase of the fifth year is $4,265.13. By bringing that amount of money to the table, she could restore herself to precisely the same situation she would have had if the 2004 purchase had gone according to plan:

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|---|---|
| Number of years credited service: | 29 (24 regular, 5 purchased) |
| Projected monthly benefit: | $4,799.66 |
| Conduit IRA balance: | $0 |
| Cash refund due: | $0 |

Accordingly, $4,265.13 is the net damages Ms. B. has suffered from the 2004 error.

Alternatively, Ms. B. can purchase the balance of the fifth year by using a combination of (1) the contents of the conduit IRA that was supposed to have been liquidated and (2) an actuarial reduction in her benefit to cover the roughly $4,000 shortfall between those contents and the purchase cost. The net result of this approach—which requires no cash infusion from Ms. B. apart from the account she had always intended to liquidate—is the following:

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|---|---|
| Number of years credited service: | 29 (24 regular, 5 purchased) |
| Projected monthly benefit: | $4,760.11[28] |
| Conduit IRA balance: | $0 |
| Cash refund due: | $0 |

Handled this way, the net cost to Ms. B. of the mistake in 2004 is a reduction in her lifelong benefit by $39.55 per month, or about eight tenths of one percent.

## III. Discussion

In calculating the $20,315.13 cost—mentioned above—of completing the purchase of a fifth year of outside service, the Division included nearly $8000 in interest that had accrued on

[27] Testimony of Lea. This figure will increase slightly, due to interest, if the purchase is deferred until the time of retirement.

[28] Testimony of Lea on recall; Ex. 2. Again, this is the regular benefit, with no survivor benefit.

the unpaid balance since 2004. The subject matter of this appeal is Ms. B.'s request that interest be waived on the remaining balance she needs to pay to complete the purchase of five years.[29] Ms. B. first proposed that waiver to the TRS Administrator on the basis that the 2004 "payment . . . error was not intentional.[30] The TRS Administrator refused to waive the interest.

The basis for charging interest on unpaid balances to purchase TRS service credit is Alaska Statute 14.25.060(b)(1), which provides, in relevant part: "Compound interest at the rate prescribed by regulation shall be added to the arrearage indebtedness beginning the date the actuarial cost is established to the date of payment or the date of retirement, whichever occurs first." A regulation, 2 AAC 36.800(a), sets the rate at seven percent, compounded annually. In requiring interest under AS 14.25.060(b)(1), the legislature did not provide any discretion; it mandated that interest "shall" be charged.

The legislature provided one safety valve from the literal requirements of the plan where they would work an injustice. That safety valve is found in AS 14.25.173 - 175, and it allows the Commissioner of Administration to "waive an adjustment" to "future payments or benefit entitlement" when certain criteria are met. However, this statute does not apply to the present situation, for two reasons.

First, the Administrator has made no "adjustment" that he could waive. Fundamentally, the waiver of adjustment statute is about adjustments the Administrator may make to correct recordkeeping errors or calculation errors by the plan or by a contributing employer. Here, the records and the calculations of the applicable balances and contributions have always been correct, and nothing has been adjusted.

Second, the AS 14.25.173 – 175 procedures are triggered only

- "[w]hen a change or error is made in the records maintained by the plan;"
- "[w]hen a change or error is made in the . . . contributions made on behalf of an employee;" or
- "[w]hen . . . an error is made in computing a benefit."[31]

None of these triggers has occurred here. No error was made in the records maintained by the plan. No error was made in computing a benefit. And no error was made in the contributions

[29] Ms. B. also asked in her appeal request that certain questions be answered about her retirement options. A.R. 3. These questions have been answered through the hearing process.

[30] A.R. 7.

[31] A.S. 14.25.173(a).

made *on behalf of* an employee (*i.e.*, by the employer); the error was made in a contribution made *by* the employee.

Independent of the legislature's safety valve, there is an equitable doctrine under which the legislature's mandate to charge interest might not be enforced. This is the doctrine of equitable estoppel, which can come into play when an employee has reasonably acted in reliance on misinformation provided by the Division of Retirement and Benefits. To be able to recover under this doctrine, Ms. B. would have to prove each of the following elements:

> (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.[32]

If these four elements were present, the Division would be estopped to deny—that is, precluded by equity from denying—that the position it asserted was true, and it would have to live by that position. In this case, however, the first two elements are entirely missing.

First, the Division never asserted that five full years of service were fully paid for. Ms. B.'s misunderstanding in that regard stemmed from her financial institution's failure to follow her instructions, and from her own failure to notice that her conduit IRA was never emptied.

Second, in making this error, Ms. B. did not "rely" on anything the Division told her. Thus there was no reliance, reasonable or otherwise, on an assertion by the government.

Ms. B., to her credit, does not shrink from acknowledging that she bears some blame for her situation. However, she faults the Division for giving her projections and advice that did not clearly identify the problem for her until 2010. There is no basis, in law or equity, to relieve her from paying interest on this basis.

## IV. Conclusion

The TRS Administrator had no discretion to waive the interest that has accrued on the unpaid balance of Ms. B.'s indebtedness to purchase her fifth year of outside credited service,

[32] *Crum v. Stalnacker*, 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government test in a Teachers' Retirement System case).

and the Administrator is not estopped to impose the charges that are legally required. The Administrator's decision of August 5, 2010, rejecting Ms. B.'s request for an interest waiver, is affirmed.

DATED this 26th day of November, 2010.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

## Adoption

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

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

DATED this 12th day of December, 2010.

By: *Signed*
Signature
Christopher Kennedy
Name
Deputy Chief ALJ
Title

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