BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
L R. H	)	OAH No. 12-0094-TRS
	)	Div. R&B No. 2012-005

DECISION

I. Introduction

L R. H retired as a member of the Teachers' Retirement System (TRS) in 2010. More than a year later, he realized that he had not been provided credited service for his unused sick leave at the time of his retirement. He applied for the credit, but his application was denied because it was received more than one year after the date of his retirement.

Mr. H appeals, arguing that TRS is estopped to apply the one-year deadline for applying for the credit. He argues that a Division of Retirement and Benefits counselor informed him that he did not need to do anything further, and did not mention the process for claiming the credit. The administrator responds that it is not estopped, because the division provided Mr. H with a form to claim the credit and provided written instructions informing him of the procedure to follow.

This decision finds that the division's counselor failed to provide information regarding the process for applying for the unused sick leave credit, and informed Mr. H that he did not need to do anything further. Mr. H failed to apply for the unused sick leave credit in reliance on the counselor's silence as to the application process and his statement regarding taking additional actions. In light of the counselor's role, Mr. H's reliance was reasonable. Therefore, the administrator is estopped to deny Mr. H's late application for unused sick leave credit.

II. Facts[1]

L R. H worked as a school teacher for thirty-six years, including more than twenty-eight years as a member of the Teachers' Retirement System.[2] In late 2008, he and his wife, N, began to make arrangements for his retirement.[3] They consulted a counselor with the Division of Retirement and Benefits and their financial advisor, and decided that Mr. H would retire in

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1 This matter was submitted on cross-motions for summary adjudication. The material facts as stated are undisputed, except whether Mr. H reasonably relied on the counselor's assertion. The parties agreed to submit that issue for decision on the written record.

2 Affidavit of L R. H [hereinafter, "Aff."], p. 1; R. 282.

3 Aff., p. 2. *See* R. 294-298.

2010.[4] In the fall of 2009, they attended a retirement seminar, in order to continue to educate themselves about the retirement process.[5]

Early in 2010 they again consulted with one of the division's retirement counselors and picked up a retirement application package.[6] Mr. H was provided a ten-page application form, consisting of an informational page, a blank page, and two pages of instructions followed by a six page application to be filled out be the applicant.[7] He was also given a separate forty-six page instruction booklet.[8] Mr. H, who is a musician, found the paperwork "intimidating."[9]

During the 2010 spring break, Mr. H spent a couple of days reading the instruction booklet and filling out the application form.[10]

The instruction booklet addresses unused sick leave at pages 33-34. The booklet does not state the procedure for claiming credit for unused sick leave. It states:

> When you retire, you may receive additional TRS credit by claiming your unused sick leave. To be eligible:
> • you must have been an active TRS member after June 30, 1977; and
> • your claim for unused sick leave, as verified by your last employer, must be received by the TRS no later than one year after you are appointed to retirement.[11]

The two pages of instructions to the application form include the following statement in a separate numbered paragraph entitled "Unused Sick Leave Credit":

> Be sure to send the Supplemental Claim form to your employer for verification. (Form is located in the Appendix.) **It is your responsibility to ensure your employer completes the form and submits it to the division within one year of**

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4 Aff., p. 2.

5 Aff., p. 2.

6 Aff., p. 2.

7 R. 87-96. The administrator identified this as the form provided to Mr. H. Memorandum and Points of Authority in Support of the Division's Motion for Summary Adjudication [hereinafter, "Motion"] at p. 4, note 12. Mr. H's completed application is also in the record. *Id.;* R. 17-22. The administrator characterizes the latter as Mr. H's "entire application." Motion at 4, note 12.

8 *See* R. 41-86. The table of contents to the booklet does not indicate it includes the application form, and the application form itself includes instructions. For these reasons, only reasonable inference from the evidence is that the application form and the instruction booklet are two completely different and separate documents.

The administrator did not specifically assert that the booklet was provided to Mr. H at this meeting. However, Mr. H's affidavit states that he was give "a whole book of written instructions", and that the instructions were "voluminous." Aff., p. 3. More fundamentally, the administrator's motion is premised on the assertion that it provided Mr. H with the form claiming service credits, which was part of the booklet, "as part of his application." *See* Motion at 4, note 12, at 5, note 14. Elsewhere, the administrator refers to an application "package." *See* Motion at 5 ("The instructions set forth in Mr. H's application package [R. 89] were reiterated on page vi, Section VI of his actual application [R. 18].").

9 Aff., p. 2.

10 Aff., p. 3.

11 R. 77.

> **your retirement date.** Alaska Statute prohibits the crediting of unused sick leave claims received more than one year after your retirement date.[12]

The application form has spaces for an applicant to indicate a choice between various options available at the time of retirement, including substantive elections (survivor options; indebtedness payment; Alaska cost-of-living allowance; health care coverage options; life insurance),[13] payment options (electronic deposit; tax withholding), and designations of dependents and beneficiaries, but it does not include any space in which an applicant may elect to apply for credit for unused sick leave. Rather, the form states:

> To claim your unused sick leave, submit the "Claim and Verification of Unused Sick Leave" form found at the back of this instruction booklet to your last TRS employer for verification.
>
> To receive additional credit the completed verification form must be received by the TRS with one year of your retirement effective date. It is your responsibility to ensure this form is completed and returned to the Division of Retirement and Benefits.[14]

Contrary to the wording in the instructions and in the application form, the instruction booklet was a separate document from the application form, although the booklet and the application form and instructions were provided to Mr. H at the same time as part of a packet.[15] One of the appendices to the forty-six page instruction booklet is a set of six Supplemental Forms, including one entitled "Claim and Verification of Unused Sick Leave Credit."[16] The claim form consists of a formal claim to be executed by the applicant, with space for verification by the employer.[17]

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12 R. 89 (bold in original).

13 *See* AS 14.25.142, 2 AAC 36.210(a) ("The Alaska cost-of-living allowance…accrues from the first day of the month after written application from the member, in a form prescribed by the administrator, is either hand-delivered to the division of retirement and benefits, or is mailed to the division…."); AS 14.25.162(a) ("Application for the survivor's allowance must be made in writing to the administrator."); AS 14.25.168(e) ("A member who has requested appointment to retirement shall indicate in writing on a form provided by the administrator…whether the member has chosen to receive optional health insurance coverage."), AS 39.30.090(10, (11); AS 39.30.090(7) ("A person receiving benefits under AS 14.25.110…may continue the life insurance that was in effect under this section at the time of termination of employment with the state or participating governmental unit.").

14 R. 92.

15 *See* note 8, *supra*.

16 R. 44 (table of contents), 79 (claim form).

17 There was some initial confusion on Mr. H's part as to whether he had received the claim form. He initially asserted that he had not received this form. *See* R. 36-37 (Email, K. H to M. Michaud, 2/17/2012 @ 2:03 p.m.). However, he has acknowledged receiving "a whole book of written instructions and forms to fill out." Aff., p. 3. The claim form is part of that booklet.

Neither Mr. H nor his wife, having reviewed the materials, realized that in addition to filing an application for retirement with the division, he also had to submit to his employer a claim for unused sick leave credit.[18]

On March 22, 2010, with his wife, Mr. H took the completed application form in to the Division of Retirement and Benefits, where they met with a retirement counselor.[19] The counselor spent an hour or so going through the application form and discussing it with Mr. H and his wife.[20] During that meeting, there was no mention by either the Hs or the counselor of the process to claim unused sick leave credit.[21]

At the end of the conference, Mr. H asked the counselor "whether there was anything else that I had to do."[22] The counselor replied, "You are finished! Just be patient, because this takes time."[23] Ms. H asked, "Are you sure?", and the counselor replied in the affirmative.[24]

Mr. H did not submit the claim form for unused sick leave credit to either the division or to his employer. He was appointed to retirement status effective July 1, 2010. On July 29, 2010, the division sent a three page letter to Mr. H confirming his status as a retiree.[25] The letter included this statement:

> Your *Claim and Verification of Unused Sick Leave* has not been received. If you wish to receive credit for your unused sick leave, your claim must be verified and received by us within one year from your retirement appointment date. For more information, please read the insert, *Minimum Requirements for Retirement and Service Credits*.[26]

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[18] Aff. p. 4 ("No one ever mentioned a second application in all our discussions, and I failed to pick up on it in my review of all the material….I had assumed that all my retirement information would automatically be transmitted from the School District to the Division including unused sick leave data."); Affidavit of N J. H [hereinafter, "M. Aff."], p. 2.

[19] Aff., p. 3.

[20] Aff., p. 3.

[21] Aff., pp. 4, 5 ("No one ever mentioned a second application [for unused sick leave credit] in all our discussions"; "No one ever said that was required of me"); M. Aff., p. 2 ("I do not remember any such discussion…no mention was made of the separate application for sick leave credits…Again the counselor made no mention of a separate process for obtaining sick leave credit).")

[22] Aff. p. 3; M. Aff, p. 2.

[23] Aff. p. 3; M. Aff., p. 2.

[24] Aff. p. 3.

[25] R. 28-30. Mr. H initially suggested that perhaps he had not received the July 29, 2010, appointment letter (which Ms. Michaud had mistakenly identified as a July 20 letter). *See* R. 38 (Emails, 2/16/2012, M. Michaud to K. H @2:19 p.m., K. H to M. Michaud @ 4:09 p.m.). However, Mr. H subsequently acknowledged receiving and reviewing that letter. *See* Aff. at 4.

[26] R. 8-10, at 9. It does not appear that the reference to an "insert" was to a document included with the letter. According to the letter itself, the only insert provided with the letter was a document entitled "Insurance Benefits." R. 10. That document appears to be unrelated to service credits. The administrative law judge has not found a document in the record entitled *Minimum Requirements for Retirement and Service Credits*.

Because Mr. H had more than one full year (working days) of unused sick leave credits, he did not anticipate beginning to receive an enhanced retirement benefit reflecting the additional service credit for his unused sick leave until after a period of time equal to the accumulated sick leave had expired.[27] After he retired, Mr. H began doing some part-time substituting for the school district. His paystubs showed accumulated sick leave amounting to over 2,100 hours.[28] When, in February, 2012, Ms. H noticed the number of hours shown, she contacted the school district and was informed that it had never received a form to claim credit for the unused sick leave.[29] Mr. H executed a claim for the credit on February 20, 2012; the school district verified it on February 21, and it was received by the division on February 22.[30] Mr. H wrote to the administrator, asking that the claim be accepted and the service credits applied.[31] The administrator denied the request on March 6, 2012.[32]

III. Discussion

An eligible member of the Teachers' Retirement System is entitled to a monthly pension benefit that increases as the member's credited service increases, pursuant to a formula set out in AS 14.245.110(d).[33] "Credited service" means all membership service for which no indebtedness is owed.[34] "Membership service" includes full or part time service as a teacher.[35]

A school district is required to provide each teacher with one and one-third days of sick leave per month, with unlimited accumulation.[36] Upon a change of employment from one

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[27] Aff., p. 4 (2,100 hours ÷ 8 = 262.5 work days). *See* AS 14.25.115(c)(3) (benefits payable after "a period of time has elapsed since the date of appointment to retirement equal to the amount of verified unused sick leave.").

[28] The division asserts that Mr. H had notice from his pay stubs, before the deadline to claim unused sick leave credit, that his service credits were still being carried on the school district's records. Administrator's Reply, at 6. However, the record does not establish when Mr. H began working, and thus whether he received any paystubs before the deadline expired on June 30, 2011, is unknown. Mr. H's affidavit, dated May 25, 2012, states that "for the past year I have taught music part time within the No Name School System." Aff., p. 2. Mr. H's reference to "the past year" could mean "the past school year" (August, 2011-May, 2012), "the past twelve months" (May, 2011-May, 2012) or "the past calendar year" (2011). Also, there is evidence suggesting that Mr. H returned to work part time in the 2010-2011 school year. *See* R. 34 (noting call to Division staff on June 17, 2010, inquiring about returning to work "next school year"). Taking all inferences in favor of the division, the evidence supports a finding that Mr. H returned to work in the 2010-2011 school year and received paystubs showing his unused sick leave balance before the application period had expired.

[29] M. Aff., p. 3. *See* R. 34.

[30] R. 15.

[31] Mr. H's letter, dated February 20, was received on February 22. R. 13-14.

[32] R. 6-7.

[33] *See* AS 14.24.110(d).

[34] AS 14.25.220(11).

[35] AS 14.25.220(23)(A).

[36] AS 14.14.107(a).

district to another, accumulated unused sick leave may be transferred to the new district in an amount designated by the employee.[37] A teacher's accumulated unused sick leave is not reimbursable,[38] but may be counted as credited service for purposes of calculating the pension benefit pursuant to AS 14.25.115, which provides:

> (a) A teacher…who is appointed to retirement…may elect to apply unused sick leave credit in computing the total number of years of credited service under AS 14.25.110(d)….To obtain service credit for unused sick leave, a teacher must apply to the administrator not later than one year after appointment to retirement.
> …
> (c) Benefits under this section accrue…after…all the following requirements are met: (1) the teacher meets the eligibility requirements of this section; (2) the teacher's written application for unused sick leave credit 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 amount of verified unused sick leave. …

The division promulgated a regulation,[39] 2 AAC 36.290, to implement AS 14.25.115. The regulation states:

> (a) A member may apply to the administrator to have unused sick leave credit toward the member's retirement. The application must be in a form approved by the administrator. The application must present the member's full and entire claim for accrued unused sick leave credit as reflected in the member's last employer preceding appointment to retirement…
> …
> (c) An application to credit unused sick leave toward appointment to retirement must contain, or be accompanied by, a certified statement by the employer that confirms the amount of the member's unused sick leave.

In this case, Mr. H did not submit an application for unused sick leave credit within one year of the date of his appointment to retirement, but he argues that the agency may not enforce the one year application deadline established in AS 14.24.115(a). An agency may be estopped to enforce an application deadline when: (1) the agency asserts a position; (2) the applicant acts in reasonable reliance on the assertion; (3) the applicant suffers prejudice as a result of reliance on the assertion; and (4) estoppel serves the interest of justice so as to limit public injury.[40] Mr. H argues that the administrator is estopped to enforce the one year deadline because he reasonably

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[37] AS 14.14.107(b).

[38] 4 AAC 15.040(a)(5).

[39] This regulation was initially adopted by the Teachers' Retirement Board. Following abolition of the board, it was readopted by the Department of Administration. Register 179 (July 20, 2006).

[40] *See, e.g.*, Crum v. Stalnaker, 936 P.2d 1254, 1256 (Alaska 1997); Mortvedt v. State, Department of Natural Resources, 858 P.2d 1140, 1142-1143 (Alaska 1993).

relied on a retirement counselor's confirmation that he did not need to do anything further[41] and the counselor's silence regarding the process for claiming the credit for unused sick leave.[42] The administrator argues that because the division provided Mr. H with a form to claim the unused sick leave credit,[43] and the counselor did not make any statement specifically referencing unused sick leave credit,[44] it is not estopped to enforce the deadline. Moreover, the administrator contends, to the extent that Mr. H failed to submit an application for unused sick leave credits in reliance on the counselor's statements to him, his reliance on those statements was unreasonable in light of the written information provided to him.[45]

The parties' arguments must be considered in light of a prior Alaska Supreme Court case involving the same statutory deadline, Crum v. Stalnaker.[46] Mr. Crum was a school district employee who retired with about 183 days of accumulated sick leave. Prior to his retirement, he spoke with a school district representative who provided him with various forms, had Mr. Crum complete the portions of the forms applicable to him, and "that was the end of…the process there at [the school district]."[47] Subsequently the division sent Mr. Crum "a form letter containing several inserts and enclosures."[48] The form letter included this statement:

> If you wish to receive credit for your unused sick leave, your claim must be verified and received by us before July 1, 1993. Please read the insert, 'Minimum Requirements for Retirement and Service Credit' for more information.[49]

The insert referenced in the form letter stated:

> You may receive additional credit by claiming your unused sick leave when you retire if you were in TRS membership services after June 30, 1977…
> Your unused sick leave claim must be verified by your last employer and received by the TRS no later than one year after you are appointed to retirement.[50]

Neither the school district nor the division ever provided Mr. Crum with a form for claiming the sick leave credit. Mr. Crum did not discover that he had failed to claim the credit until after the

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41 Memorandum in Opposition to Division's Motion and In Support of Appellant's Motion for Dispositive Order [hereinafter, "Cross Motion"] at 4.

42 Memorandum in Response to Division's Reply to Appellant's Opposition and Cross-Motion [hereinafter, "Response"] at 3-4.

43 Motion at 4, note 12.

44 Division's Reply to Appellant's Opposition and Cross Motion for Summary Adjudication [hereinafter, "Reply"] at 1 ("Because the Division did not make any representation regarding Mr. H's application for unused sick leave…the Division is not estopped…"), 3-4 ("The Division Never Made a Statement About Unused Sick Leave Credit.").

45 Motion at 7-8; Reply at 5-7.

46 Crum v. Stalnaker, 936 P.2d 1254 (Alaska 1997) (hereinafter, Crum).

47 Crum, 936 P.2d at 1255.

48 *Id.*

49 *Id.* The date had been inserted into a blank provided for that purpose.

50 *Id.*

one-year deadline. The administrator denied his claim on the ground that it was barred. On appeal, the Alaska Supreme Court held otherwise.

The court concluded that the division "had an obligation to provide Crum with the proper form to claim the credit," referencing 2 AAC 36.290(a) and the division's own information handbook,[51] and that "[i]n light of the Division's obligation, its 'omission' in failing to provide a form or clear notice of the claims procedure" satisfied the first element of the test for equitable estoppel.[52] Reliance was reasonable, the court concluded, because:

> [t]he Division's statements, written in the passive tense and emphasizing the verification of the claim rather than the initial application, gave the definite impression that the employer, not the employee, bears the burden of completing and filing the necessary forms.[53]

The supreme court in a cursory fashion found the last two elements also satisfied, noting, in particular, that the harm to the individual outweighed any harm to the public at large.[54]

A. The Division Asserted A Position

The first element of the doctrine of equitable estoppel is that the agency must assert a position. In Crum, the Public Employees' Retirement Board rejected Mr. Crum's argument regarding estoppel because the division had not, "by action or inaction, asserted a position (*i.e.*, that Mr. Crum did not need to make a claim for unused sick leave within one year from the date of his termination)…".[55] The Alaska Supreme Court rejected that analysis. The court concluded that the division's inaction (failure to provide a form or clear notice of the claims procedure) in the face of an obligation to act (by regulation and by policy as expressed in the division's handbook) "satisfies the first element of the four-part test…for applying estoppel against the government."[56]

In this case, the administrator argues that because the division provided a form for claiming unused sick leave credit, Crum is distinguishable and Mr. H has not satisfied the first element of the test for estoppel.[57] But Mr. H's argument is not based on the division's failure to provide a form or the contents of the written instructions.[58] Rather, Mr. H's argument is based

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51 Crum, 936 P.2d at 1257.
52 Crum, 936 P.2d at 1258.
53 Crum, 936 P.2d at 1258.
54 Crum, 936 P.2d at 1258.
55 Crum, 936 P.2d at 1256.
56 Crum, 936 P.2d at 1258.
57 Motion at 4. *See* R. 79.
58 In Crum, the court held that the division "had an obligation to provide Crum with the proper form to claim the credit." 936 P. 2d at 1257. The "proper form" is the form specified by the administrator. *See* 2 AAC 36.290(a)

on the counselor's confirmation that no further action was needed, and his silence regarding the procedure for applying for the unused sick leave credit. Mr. Crum never spoke with a retirement counselor, and nothing in the court's decision suggests that a retirement counselor's statements or silence cannot be the basis for estoppel against the division. That the division provided Mr. H with a form for claiming the credit does not mean that it cannot be estopped from enforcing the deadline, based on statements made by its retirement counselor.[59]

In fact, the administrator has not argued that the statements of a retirement counselor cannot be the basis of an estoppel. Rather, the administrator argues that the counselor did not make an assertion that related to credit for unused sick leave, characterizing Mr. H's question as to whether there was anything left to do as "a general question regarding the completeness of his application," rather than as a question about any further actions that Mr. H might need to take.[60] But Mr. H's question was "Is there anything left for me to do?" This is an open-ended question that on its face is not limited to whether the application to retire was complete. The counselor's response, viewed objectively, was an assertion that Mr. H did not need to do anything further, rather than merely an assertion that the application form was complete. A teacher who applies for retirement and who wants to obtain credit for unused sick leave but does not concurrently

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("The application must be in a form approved by the administrator."). Because in Crum no form was provided at all, it was not necessary for the court to consider what the contents of a "proper form" might be. In particular it did not need to consider whether the form must be one that is to be submitted to and verified by the administrator. *See* AS 14.25.115(a), (c)(2) (teacher "must apply to the administrator" within one year; benefits accrue after "written application…is received and verified by the administrator) (emphasis added). The "Claim and Verification of Unused Sick Leave Credit" provided to Mr. H (1) was not expressly identified as an "application" for unused sick leave credit, (2) was not part of the retirement application form, (3) was to be submitted by the employee to the employer, verified by the employer, and then submitted by the employer to the division within one year of appointment to retirement, and (4) did not provide for credit for unused sick leave from any employer prior to the last one. 2 AAC 36.290(c)(2); *see* R. 89.

Mr. H pointed out that the form provided by the division contributed to "what has become an overly obscure process," and that it would be more efficacious to provide a space on the retirement application form for applicants to claim the credit. Response at 4-5. However, Mr. H did not specifically argue that the form is inadequate to fulfill the division's obligation to provide a "proper form", that that the procedure required by the division is inconsistent with the statutory requirements in 14 AAC 25.115(a) that application for the credit be made to the administrator and in 14 AAC 25.115(c)(2) that the amount of the credit be verified by the administrator (without limiting the time for verification to one year from the date of retirement), or that he had unused sick leave from an employer prior to his last one. In the absence of a specific argument on these points by Mr. H, 2 AAC 36.290 and the forms implementing it are presumed to be consistent with AS 14.25.115.

[59] *Compare* In Re R.D.C., OAH No. 09-0682-TRS (Office of Administrative Hearings 2010). In that case, the applicant was aware of the process and in fact submitted his claim to his employer, but the employer failed to return the verified claim to the division within the time allowed. The applicant did not assert that in failing to submit a timely claim, he had relied on an assertion to him by the division. Therefore, his appeal was denied.

[60] Reply at 3-4. Initially, the administrator asserted that the counselor said nothing more than that the application "was correctly filled out" and that based on that statement Mr. H "assumed there was nothing more to do." Motion at 6-7. However, the affidavits of Mr. H and Ms. H provide more specificity and, absent any contrary evidence from the counselor, establish that the division's initial assertion did not reflect the actual facts.

submit a claim for the credit has unfinished business to attend to. Because Mr. H wished to obtain the credit, to state that there was nothing left for him to do was an objectively false and misleading statement.

Moreover, the administrator's response altogether disregards Mr. H's argument that the first element is established by the counselor's silence regarding the entire matter of unused sick leave credit. It is well established that silence, when there is an obligation to speak, will satisfy the first element of the test for estoppel.[61] To establish the first element of the estoppel test based on the counselor's silence as to unused sick leave, Mr. H must first show that the counselor had an obligation to inform him of the option to claim that credit and of the process for doing so. In Crum, the Alaska Supreme Court found that the division had a duty to provide a claim form, or clear notice of the procedure for claiming the credit, based on 2 AAC 36.290 and the division's handbook. Whether the division's duty extends any further was not at issue in Crum and was therefore not addressed in the court's decision. But a duty to disclose is not limited to duties imposed by law or an informational handbook, as was found to exist in Crum.[62] A duty to disclose information may exist because the parties have a fiduciary or other special relationship, or for reasons of policy.[63] In the retirement context, the division has chosen to employ retirement counselors to provide information and specific guidance to individual retirees

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[61] In Re G.J.T, at 9, OAH No. 10-0415-PER (Office of Administrative Hearings 2011), *citing* Crum, 936 P.2d at 1258 ("The Division's failure to provide Crum with the proper form constitute 'silence' where the Division 'was under a duty to speak.'" [citation omitted]). *See, e.g.*, Stevenson v. Burgess, 570 P.2d 728 (Alaska 1977) (taxpayer who failed to notify state of modification of federal income tax return is estopped to claim benefit of statute of limitations, where statute required notice). The court has indicated that even in the absence of an obligation to act or speak, in some circumstances it may be appropriate to find an estoppel. *See* Ennen v. Integon Indemnity Corp., 268 P.3d 277, 288 (Alaska 2012), *quoting* Groseth v. Ness, 421 P.2d 624, 632 n. 23 (Alaska 1966).

[62] *See* In Re D.E.W., OAH No. 07-0142-TRS at 18 (Office of Administrative Hearings 2008) ("[O]bvious discrepancy" in application "gave rise to the Division's obligation to contact Ms. W… [T]he Division's silence in the face of that duty…satisfies the first element of equitable estoppel.").

[63] Courts in a number of states have recognized that an agency administering a public employees' retirement system may have special obligations to employees. *See* Eldredge v. Utah State Retirement Board, 795 P.2d 671, 676 (Utah App. 1996) ("The critical nature of the irrevocable, once-in-a-lifetime retirement decision of a public employee imposes a strict duty of certitude upon those charged with the supervision and implementation of the system."); Flannigan v. West Virginia Public Employees' Retirement System, 342 S.E.2d 414, 419 (W. Va. 1986), *quoting* Nevada Public Employees Retirement Board v. Byren, 607 P.2d 1351, 1353 (Nevada 1980) ("a governmental body, charged with as important a function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice."); Driscoll v. City of Los Angeles, 431 P.2d 245, 252 (Cal. 1967) ("it is significant if there is a confidential relationship between the public entity and the claimant, as in the case of an applicant for a pension and a board of fire a police pension commissioners."). Federal courts, applying common law principles to determine the obligations of a pension fund administrator under ERISA, have found a duty to disclose material facts in response to a direct question. *See* Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 93 F.3d 1292, 1300 (3rd Cir. 1993), *citing* Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990) ("once an ERSIA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance.").

upon request. To suggest that a retirement counselor has no obligation to counsel when consulted is untenable.[64]

In this case, a counselor spent over an hour with Mr. H, going over the application form after Mr. H had completed it, and Mr. H submitted his application for processing at that meeting. A counselor's obligation at such a meeting is not limited to answering questions, but rather includes confirming that the applicant is aware of the available options, and that the applicant's choice among those options has been exercised in conformity with the applicant's intent.[65] One available option is to apply for credit for unused sick leave at the same time the application for appointment to retirement is submitted. Alternatively, a teacher may apply for the credit up to one year after appointment to retirement.[66] In either event, under the procedure that the division has imposed by regulation, the applicant must either first obtain verification from the employer, or else rely on the employer to submit a verified claim to the division on the applicant's behalf.[67] Inherent in the counseling function at the time an application is submitted at a final meeting with a retirement counselor is confirming that the applicant is aware of those options and procedures.[68]

Because the retirement counselor confirmed, in response to a direct question, that there was nothing more to do, and was silent regarding the unused sick leave credit and the procedure for claiming it at a time when the counselor had an obligation to provide information on that topic, the first prong of the estoppel analysis is satisfied. The written documents provided by the division may be considered in connection with whether it was reasonable for Mr. H to rely on the counselor's confirmation that there was nothing more to do and silence regarding unused sick leave credits, but they do not change the fact that the counselor made an assertion and was silent when obliged to speak. The first element of the estoppel test is satisfied.

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64 That a retirement counselor may have an obligation to provide information when consulted does not mean that the division has a general obligation to identify potential applicants and provide them with application forms. *See* In Re A.H., OAH No. 07-0392 at 7 (Office of Administrative Hearings 2008). Moreover, nothing in this decision should be construed as imposing an obligation on a retirement counselor to provide advice, as compared with information regarding the options available and the procedure for exercising them.

65 *Cf.* In Re D.E.W., OAH No. 07-0142-TRS at 18 (Office of Administrative Hearings 2008), *supra*, note 62.

66 14 AAC 25.115(a).

67 2 AAC 36.290(c). In practice, "[m]ore often than not, it is the employer who submits the completed form." In Re R.D.C., at 6, OAH No. 09-0682-TRS (Office of Administrative Hearings 2010) (citing testimony of a Retirement Benefits Manager). As previously noted, under AS 14.25.115(a) application must be made to the administrator within one year, but there is no time limit regarding verification. *See supra*, note 58.

68 *Cf.* Eddy v. Colonial Life Ins. Co., *supra*, note 63, 919 F.2d at 751.

B. Mr. H Reasonably Relied on the Assertion

The second element of the doctrine of estoppel is that the applicant must reasonably rely on the agency assertion – in this case, on the retirement counselor's confirmation that there was "nothing more to do" and his silence as to unused sick leave credit.

The administrator argues that in light of the written information provided to him, it was not reasonable for Mr. H to rely on the counselor's assertion,[69] because, as the administrator characterizes it, the language in the various documents sent to Mr. H was "clear" and "plain."[70]

Mr. H's argument, put succinctly, is that if he could not reasonably rely on what the retirement counselor told him, then what is the point of having counseling?[71] He characterizes the language used in the written documents as "confusing, redundant, frequently in the passive voice and overly complicated."[72]

These arguments skip over the threshold issue, which is whether Mr. H relied on the counselor's assertion at all. By his own admission, Mr. H failed to "pick up on" the requirement (clearly stated in the written materials) that he needed to submit a claim form to his employer. Arguably, in that light, Mr. H did not rely on the counselor's express confirmation that there was nothing more for him to do: Mr. H would not have filed a timely claim even if the counselor had not made that statement. But Mr. H unquestionably did rely on the counselor's silence with respect to the process for filing a claim, and it is his reliance on the totality of the counselor's assertion (including an assertion by silence) that matters. Moreover, in considering whether it was reasonable for Mr. H to rely on the counselor's silence, what the counselor actually said is relevant. Thus, as a practical matter, in determining whether Mr. H reasonably relied on the counselor's assertion it makes no difference that Mr. H actually relied on the counselor's silence regarding the claims process, rather than on his express confirmation that there was nothing more for him to do.

Turning to the parties' differing characterizations of the clarity and informative value of the various documents sent to Mr. H, the court's decision in Crum is instructive. So far as that decision indicates, the only written information concerning the process for applying for unused sick leave credit that was sent to Mr. Crum was in a form letter including this statement:

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69 Motion at 7; Reply at 5-6.
70 Motion at 6, 7, 9.
71 *See* H Reply at 4.
72 H Reply at 5.

> If you wish to receive credit for your unused sick leave, your claim must be verified and received by us before July 1, 1993. Please read the insert, 'Minimum Requirements for Retirement and Service Credit' for more information.[73]

The insert referenced in the form letter stated:

> You may receive additional credit by claiming you unused sick leave when you retire if you were in TRS membership services after June 30, 1977…
> Your unused sick leave claim must be verified by your last employer and received by the TRS no later than one year after you are appointed to retirement.[74]

No other materials referencing the process were provided to Mr. Crum, so far as the decision indicates.

Compare the quoted language from Crum with the materials sent to Mr. H, beginning with the forty-six page instruction booklet, which included this statement:

> When you retire, you may receive additional TRS credit by claiming your unused sick leave. To be eligible:
> • you must have been an active TRS member after June 30, 1977; and
> • your claim for unused sick leave, as verified by your last employer, must be received by the TRS no later than one year after you are appointed to retirement.[75]

In addition, the two page application instruction sheet stated:

> Be sure to send the Supplemental Claim form to your employer for verification. (Form is located in the Appendix.) **It is your responsibility to ensure your employer completes the form and submits it to the division within one year of your retirement date.** Alaska Statute prohibits the crediting of unused sick leave claims received more than one year after your retirement date.[76]

Finally, on the application form, this statement:

> To claim your unused sick leave, submit the "Claim and Verification of Unused Sick Leave" form found at the back of this instruction booklet to your last TRS employer for verification.
> To receive additional credit the completed verification form must be received by the TRS with one year of your retirement effective date. It is your responsibility to ensure this form is completed and returned to the Division of Retirement and Benefits.[77]

The language used in the instruction booklet is substantially similar to the language that the court found misleading in Crum (because "written in the passive tense and emphasizing the verification of the claim rather than the initial application"). However the language used in the

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73 Crum, 936 P.2d at 1255.
74 *Id.*
75 R. 77.
76 R. 89 (bold in original).
77 R. 92.

other materials goes well beyond the instruction booklet. Both the application instructions and the application form expressly state that a claim form must be submitted by the employee to the employer (a statement not made in the Crum materials), and the instructions, in bold print, state that it is the applicant's responsibility to make sure the employer submits the information to the division in a timely manner. By contrast, the language in Crum makes no mention at all of a claim form, of the applicant's responsibility to submit it, or to whom it should be submitted. Crum does not support characterizing the written materials in this case, taken as a whole, as insufficient to fulfill the division's obligation to provide a written application form and clear notice of the application procedure.

However, in this case, unlike Crum, there was contact with a retirement counselor, and it is reliance on the counselor's statements, not the written materials, that is at issue. Mr. H did not rely on the written materials; he relied on the counselor. The question remains: notwithstanding that the division provided a claim form and clear written instructions regarding the application procedure, was it reasonable for Mr. H to rely on the counselor's confirmation that there was nothing more to do, and his silence regarding the claims procedure?

Mr. H's argument posits the retirement counselor as a "fail-safe" element in the retirement application process, such that a counselor's statements or silence in a final meeting at the time the completed application is submitted may be sufficient to relieve an applicant of responsibility for failing to follow the instructions provided in writing.[78] The administrator, by contrast, suggests that regardless of the counselor's statements or silence at such a meeting, an applicant remains responsible (as stated in the written instructions) for submitting a claim to the employer, and that it is unreasonable to rely on a counselor's statements or silence.

Whether a counselor's statements or silence are sufficient to relieve an applicant of responsibility for filing a claim is a highly fact-specific inquiry. Certainly, there are some things that a counselor might say or not say that would have that effect. For example, if at a pre-retirement meeting the applicant asks, "Do I need to send in the claim form in order to obtain credit, or will the division take care of that?", and the counselor responds, "We'll take care of it for you," the applicant might reasonably rely on the counselor's assurance. But that is not what happened in this case. The question is, was what the counselor said and failed to say in this particular case sufficient to relieve Mr. H of the responsibility that the division placed on him to

[78] Mr. H's characterization of the division's "fail-safe" obligation is consistent with In Re D.E.W., OAH No. 07-0142-TRS at 18 (Office of Administrative Hearings 2008), in which the division was estopped based on its failure to contact a retiree regarding an "obvious discrepancy" in application.

claim the credit? In answering that question, there are two threshold issues: first, whether an objective test or a subjective test should be used; and second, what is the standard of proof.

Applying a subjective test, one would look to the applicant's actual knowledge and understanding regarding the process for claiming the credit, and determine whether reliance was reasonable in that light. Using a subjective test, because at the time the counselor spoke with him, Mr. H was unaware of the requirement to submit a claim form to his employer (notwithstanding that he had previously been informed of it), one would conclude that his reliance was reasonable. Mr. H was unaware of the requirement that he submit a claim to his employer, and the counselor told him that he did not need to anything more, which a person unaware of the requirement would reasonably understand to mean what Mr. H understood it to mean: not just that the application was complete, but that he did not need to do anything further at all in connection with the retirement process.

But rather than using a subjective test, whether Mr. H's reliance was reasonable will be considered using an objective test.[79] Applying an objective test, the applicant's subjective awareness of the requirement is disregarded. One looks only to the information provided to the applicant, the counselor's statements or silence, and the surrounding circumstances. In effect, the applicant is charged with knowledge of the claims procedure as set out in the written materials. This does not mean, however, that if the division provided adequate instructions, under an objective test an applicant cannot reasonably rely on what the counselor says.[80] Rather, whether reliance was reasonable depends on the consideration of the information provided in light of the counselor's assertion and all the surrounding circumstances.

Turning to the standard of proof, the underlying facts relating to whether reliance is reasonable must be proved by a preponderance of the evidence. But whether, in light of those facts, reliance is "reasonable" might be said to be a mixed question of fact and law,[81] or a purely factual question, to be determined based on the preponderance of the evidence as a whole. The Alaska Supreme Court has not definitively established what standard the fact-finder should apply. It has addressed the issue from an appellate perspective only, noting that whether the

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[79] *Cf.* Sharrow v. Archer, 658 P.2d 1331, 1334 note 6 (Alaska 1983) (applying objective test to reliance question as to whether statute of limitations was tolled in case of fraudulent misrepresentation).

[80] One example would be the question and answer scenario described above.

[81] *See, e.g.* In Re Rovell, 194 F.3d 867, 870-872 (7th Cir. 1999) (reasonable reliance in negligent misrepresentation case "involves the application of a legal principle to a set of facts, also known as a mixed question of law and fact"); Harvey v. Dow, 962 A.2d 322 (Maine 2008) (reasonable reliance in promissory estoppel case is a legal conclusion reached on the basis of the facts).

determination is a question of fact, or is a mixed question of law and fact, it is reviewed in either event for clear error.[82] Absent a clear ruling as to which standard applies, both will be considered.

The material underlying facts are these: the division provided a form to claim the credit as an appendix to the informational booklet and provided accurate information regarding the application process in both the application instructions and in the application form, but at the time the retirement application was submitted, a counselor inaccurately (because Mr. H wished to claim the credit) asserted, by statements and silence, that Mr. H did not need to do anything more to complete the retirement process (which in this case included applying for the credit).

Turning to the surrounding circumstances, three facts stand out. First, the counselor was made available by the division for the purpose of providing advice and information to prospective retirees, who have widely varying degrees of sophistication and understanding of the retirement process. Second, Mr. H consulted the counselor as an expert in the retirement process. Third, the meeting at which the assertion was made was for the specific purpose of going over the completed application at the time it was submitted for processing. All three of these facts suggest that a person in Mr. H's position might reasonably have relied on the counselor's assertion notwithstanding the written materials previously provided.

In an arms-length commercial transaction, where a party has been provided clear written information, perhaps it would be unreasonable for that party to rely on another's inconsistent verbal advice.[83] And, certainly, a more prudent person who was aware of the requirement to claim the credit following the procedures stated in the instructions would not have relied on the counselor's open-ended statement as sufficient to warrant foregoing that procedure. But it is precisely to guard against the possibility that beneficiaries of the retirement trust fund may make imprudent decisions notwithstanding having been provided adequate informational materials that the division provides counselors. Moreover, to the extent that Mr. H is charged with knowledge of the written instructions, despite having actually failed to "pick up on" the procedure required of him, his specific inquiry to the counselor was, "Is there anything else I have to do?" Asking

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[82] Anchorage Chrysler Center, Inc. v. Daimlerchrysler Corporation, 129 P.3d 905, 914 (Alaska 2006). Subsequently, in *dictum*, the court noted that "whether reliance is justified is ordinarily a question of fact." Wasser & Winters Co. v. Ritchie Bros. Auctioneers (America), Inc., 185 P.3d 73, 81 (Alaska 2008).

[83] *See, e.g.*, Trifiro v. New York Life Insurance Company, 845 F.2d 30, 33-34 (1st Cir. 1988) ("Confronted by such a conflict [between written and verbal representations] a reasonable person investigates matters further; he receives assurances or clarification before relying.").

for guidance as to any further steps to be taken is exactly what a person charged with inquiry notice of relevant facts should do if reliance is to be deemed reasonable.[84]

Whether considered as a strictly factual issue, or as a mixed question of fact and law, in light of (1) the division's choice to provide counseling services upon request, (2) the timing and purpose of the meeting, (3) the direct, express request for guidance as to future actions, and (4) the counselor's expertise in the subject matter, Mr. H reasonably relied on the counselor's confirmation that no further action was necessary and his silence as to the procedure for claiming credit for unused sick leave.[85]

C. Mr. H Was Prejudiced

The division argues that Mr. H was not prejudiced, because he did not act reasonably.[86] This argument misconceives this element of the test for estoppel. In determining whether a person was prejudiced, reasonable reliance is presumed. In this case, the undisputed facts establish that Mr. H has been prejudiced as a result of his failure to file a timely application for unused sick leave credit, because his retirement benefit is less than it would be if the credit had been applied and he will not be otherwise compensated for that unused sick leave.

D. Estoppel Is Not Contrary To The Public Interest

The division argues, again, that the public interest would not be served by an estoppel, because Mr. H did not act reasonably.[87] But, again, reasonable reliance is a separate element of the test for estoppel, and in determining whether an estoppel serves the public interest, reasonable reliance must be presumed. Crum establishes that it is not contrary to the public interest to estop the division from enforcing the one-year time limit for applying for the unused sick leave credit when an applicant reasonably relies on the division's action or inaction in failing to file a timely application. As the court observed:

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84 *Id.*

85 The division argues that Mr. H did not reasonably rely on the counselor's assertion after he received the July 29, 2010, letter stating that no claim had been received by the division, or after he received paystubs showing that his unused sick leave was still listed on the school district's books. Reply at 6-7. But the credit did not need to be claimed for up to one full year after the date of retirement, and neither the July 29 letter nor the subsequent paystubs gave Mr. H any reason to believe that the necessary paperwork would not be submitted in a timely manner. Having been counseled to be patient, because the process "takes time", Mr. H could reasonably continue to rely on the counselor's assertion at the time he submitted his application, at least until the date on which his anticipated increased benefit failed to materialize. It appears that Mr. H filed an application within one year from that date (2,100 hours ÷ 8 hours/day = 262.5 days; July 1, 2010 + 262 days = March 21, 2011; application filed February 22, 2012).

86 Motion at 9.

87 Motion at 9.

> "courts should be encouraged to weigh in every case the gravity of the injustice to the citizen if the doctrine [of estoppel] is not applied against the injury to the commonwealth if the doctrine is applied."[88]

Providing Mr. H with the credit will not cause undue harm to the retirement system. It will simply place both Mr. H and the system in the same position they would have been in if he had timely claimed the credit.

E. It Is Not Necessary To Consider The Forfeiture Argument

In addition to arguing that the division should be estopped to enforce the one-year deadline, Mr. H argues that AS 14.25.115(a) should not be construed as a statute of limitations and a complete bar to recovery. So construed, he argues, the statute would cause a forfeiture, and forfeitures are disfavored.[89]

The division responds that the statute does not create a forfeiture, since an applicant's entitlement to the benefit depends on a timely application: all that exists prior to application is the right to apply for the benefit.[90] Allowing late applications would render the filing deadline meaningless, the division asserts.[91]

Because the division is estopped to apply the deadline, it is not necessary to consider this argument.[92]

IV. Conclusion

Mr. H reasonably relied on the retirement counselor's confirmation that he did not need to do anything further, and silence as to the process for claiming the unused sick leave credit. The division is therefore estopped to apply the one-year deadline for applications, and the administrator's decision to deny his application for the credit is therefore reversed.

DATED: August 22, 2012.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

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88 Crum, 936 P.2d at 1258 [citation omitted].

89 Cross-Motion at 5-8.

90 Response at 7.

91 Response at 8, *citing* United States v. Locke, 105 S.Ct. 1785 (195).

92 It is also not necessary to address other arguments, not raised by Mr. H. *See* Crum, 936 P.2d at 1257, note 3 (unnecessary to consider Mr. Crum's argument that governing statute is directory, rather than mandatory); *supra*, note 58 (regulation and forms presumed consistent with governing statute).

Adoption

This Decision is issued under the authority of AS 14.25.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision 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 18th day of September, 2012.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

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