BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
M W	)	OAH No. 16-1236-TRS
	)	Agency No. 2016-013

DECISION

I. Introduction

M W retired in 2007 and began collecting retirement benefits. In 2010, Ms. W moved to Vermont. Although she notified the teachers' retirement system (TRS) of her change of address, TRS continued to pay Ms. W the Alaska cost-of-living allowance (COLA). When it discovered the error, the Division of Retirement and Benefits sought to recover the $14,683.02 in COLA that had been overpaid to Ms. W. Ms. W requested a waiver of this adjustment to her account. The division denied the request for a waiver, and Ms. W appealed.

Although the overpayment of the COLA was apparently due to a communication failure within the division, Ms. W had reasonable grounds to know that the division had erroneously failed to stop the COLA payments. Accordingly, the division's decision to deny the request for a waiver of the overpayment adjustment is affirmed.

II. Facts

M W taught school in Alaska between 1981 and 2007. She specialized in elementary education. She retired in 2007, and began receiving benefits from TRS, including a cost of living allowance.[1] In 2010, Ms. W moved from Alaska to Vermont. She called the division and notified them of her new address.[2] Although the division noted Ms. W's new mailing address in No Name City, Vermont, the division did not discontinue Ms. W's Alaska COLA.[3] The division concedes that this was an error on its part.[4]

Ms. W called the division again in January 2016 to notify them of a change in her address after she moved to No Name City, Vermont. The technician who took this change of address request noted that Ms. W had left Alaska in 2010.[5] Shortly thereafter, the division notified Ms. W by letter that she was no longer eligible for COLA, that her eligibility had ended in November

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1 Testimony of W.
2 Record at 23.
3 Record at 15.
4 Division's Prehearing Brief at 13.
5 Record at 21.

2010 but the COLA was not removed from her retirement benefit until January 2016, and that her retirement benefits had been overpaid by $14,683.02. The division requested that Ms. W send a check for the full amount within 60 days, or accept a lifetime actuarial adjustment to her benefit, a reduction of approximately $126.64 a month.[6]

Ms. W requested a waiver of the adjustment, arguing that the adjustment would cause hardship to her and her daughter, that overpayment was not the result of erroneous information supplied by her, that she had been receiving communications from the division indicating clear knowledge of where she had re-located, and that she had no reasonable grounds to believe the TRS records of her account were incorrect until the division's January 2016 letter.[7]

In August 2016, the division denied Ms. W's waiver request, based on its determination that Ms. W had reason to know that her benefit check was in error "when the amount did not change as expected with cessation of COLA after your notification of address change."[8]

Ms. W then filed this appeal.[9] She reiterated that she had not provided erroneous information to the division, and that a reduction in her benefit would create hardship. She also explained that she received her benefits by direct deposit, and had simply trusted that the division's record keeping was correct and that the division had automatically removed the COLA when she notified them of the change in her address from Alaska to Vermont. She specifically took issue with the division's reason for denying her waiver request, arguing that the division "expected that I had reason to know my benefit check was in error when the amount did not change after I notified you of my address change and move to Vermont. You expected that I noticed the lack of change -- I did not. I had 'no reasonable grounds to believe the records were incorrect.'"[10]

The hearing in this matter was held on April 24, 2017.[11] Ms. W represented herself, with assistance from a friend who did not testify. Assistant Attorney General Kevin Dilg represented the division. Marla Christenson, Benefits Processing Manager for the division, testified.

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6 Record at 17 - 18.
7 Record at 9.
8 Record at 6.
9 Record at 2 - 3.
10 Record at 3.
11 At the hearing, after Ms. W had presented her case, the division moved for involuntary dismissal of the case under 2 AAC 64.270(b)(2), arguing that Ms. W had failed to prove that she was entitled to retain the COLA overpayment. Rather than consider Ms. W's presentation in isolation, the motion was taken under advisement and the hearing continued. The motion is denied.

III. Discussion

A. Legal Framework

When a change or error is made in the TRS plan records, and a plan member's retirement benefits are overpaid as a result, the TRS is generally required to adjust future payments so that the "the actuarial equivalent of the pension or benefit to which the teacher or member or beneficiary was correctly entitled will be paid."[12]

The administrator is prohibited from making an adjustment that requires the recovery of benefits if the incorrect benefit was first paid two years or more before the beneficiary was notified of the error, the error was not the result of erroneous information supplied by the member or beneficiary, and the member or beneficiary "did not have reasonable grounds to believe that the amount of the benefit was in error."[13] The administrator has discretion to waive an adjustment if, in the opinion of the commissioner of administration, four criteria are met:

> (1) the adjustment or portion of the adjustment will cause undue hardship to the member or beneficiary;
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> (2) the adjustment was not the result of erroneous information supplied by the member or beneficiary;
>
> (3) before the adjustment was made, the member or beneficiary received confirmation from the administrator that the member's or beneficiary's records were correct; and
>
> (4) the member or beneficiary had no reasonable grounds to believe the records were incorrect before the adjustment was made.[14]

Ms. W applied to the commissioner for a waiver, and was notified of the commissioner's denial in the division's August 22, 2016 letter.[15] A member or beneficiary may appeal a ruling of the commissioner denying a waiver of adjustment to the Office of Administrative Hearings.[16] This is Ms. W's appeal of the commissioner's denial of her application for a waiver of adjustment.

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12 AS 14.25.173(a).
13 AS 14.25.173(b).
14 AS 14.25.175(a).
15 Record at 6.
16 AS 14.25.175(c) and (d).

B. Reasonable Grounds: Limited Bar on Adjustment and Discretion to Waive Adjustment

The only disputed issue in this case is whether Ms. W had reasonable grounds to believe the division's records were incorrect before the adjustment was made to her account. The division argues that she did, Ms. W argues that she did not.

From the way Ms. W has phrased her arguments in this matter, it is not entirely clear whether she is simply challenging the denial of her request for a waiver, or if she is also challenging whether the division had the authority to make the adjustment, given that she did not, in her view, have reasonable grounds to believe that the amount of her benefit was in error. The confusion may stem from the January 14, 2016 letter from the division notifying Ms. W of the overpayment, which cited AS 14.25.175, but then quoted the three criteria found in AS 14.25.173(b), rather than the four listed in AS 14.25.175(a). The two tests are similar, but not identical. The former prohibits the division from making an adjustment where "the member or beneficiary did not have reasonable grounds to believe that the amount of the benefit was in error." The latter permits a waiver of an adjustment if "the member of beneficiary had no reasonable grounds to believe the records were incorrect before the adjustment was made."

However, the distinction does not make a difference in this case. Based on the evidence presented in the agency record and the testimony at the hearing, it is more likely than not that Ms. W had reasonable grounds to believe that the amount of her benefit was in error.[17] She also had reasonable grounds to believe the system's records were incorrect before the adjustment was made. Therefore, the division was not precluded from making an adjustment to Ms. W's account, and did not err in denying Ms. W's request for a waiver of adjustment.

C. Reasonable Grounds to Believe the Amount of the Benefit was in Error

Ms. W argued that she had no actual knowledge of the division's failure to adjust her benefit amount to subtract the COLA after she moved to Vermont. She testified that she did

[17] A previous decision interpreting AS 39.35.520(b), a provision in the PERS statutes with the same language as AS 14.25.173(b), held that the provision "prohibits the division from making adjustments to correct errors that would result in recovering overpaid benefits after two years, unless the member contributed to the error," and that a member "contributes to the error if the member ... should have known the amount of benefits being paid was in error and yet continued to collect excess benefits instead of calling the error to the division's attention." *In re K.H.*, OAH No. 07-0306-PER (Office of Administrative Hearings 2009), at 9 - 10 and n. 49. In other words, the division is not barred from adjusting an account, even after the two year window has passed, when the member should have known that the amount of benefits being paid was wrong.

not keep track of the amount of the deposits, and that she trusted that the division was fulfilling its responsibilities correctly.[18] She testified that she did not review her TRS benefit account statements.[19] She argued that she had spoken with other retirees, and found that many do not keep track of bank balances or the details of retirement benefit deposits.[20] Ms. W's statements that she was unaware of the division's failure to remove the COLA from her benefit were believable. But the issue here is not whether she actually knew that the division had not removed the COLA, the issue is whether she had reasonable grounds to know, or "should have known."[21]

As the administrator points out, Ms. W had reasonable grounds to know that she was receiving COLA in error, because her benefit amount did not decrease after she moved to Vermont, and because her monthly benefit statements specifically noted the amount of COLA in the monthly benefit and year-to-date benefit total.[22] If Ms. W had looked at any of her monthly benefit statements after she moved to Vermont, it would have been apparent that she was still receiving COLA.

Furthermore, when she applied for retirement, she specifically applied for Alaska COLA payments as part of her benefit. As part of the application, she checked a box next to the statement "I understand if I am gone for 91 days or more, COLA will not be paid for the entire absence. I understand I am required to repay any overpayments to the Division of Retirement and Benefits for COLA received during any ineligible periods."[23] The division's letter confirming Ms. W's retirement specifically stated that she would be receiving $222.47 a month in COLA, and the letter was accompanied by a brochure that explained COLA eligibility and the obligation to repay overpayments.[24] In addition, the division periodically sends newsletters to plan members explaining how COLA works, and that COLA is only available to those residing in Alaska.[25] All of these materials support the notion that a retiree receiving COLA has an obligation to keep the division informed if there is a break in eligibility for COLA, and also to repay an overpayment of COLA.

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18 Record at 3.
19 Testimony of W.
20 Record at 3.
21 *See In re K.H.*, OAH No. 07-0306-PER at 9 - 10.
22 Testimony of Christenson; *see for example* Exhibit E at 10.
23 Exhibit C at 2.
24 Exhibit D; Exhibit B.
25 Record at 31, 50 - 51.

There is no question that as a single mother moving to a different state, Ms. W had many things competing for her attention besides TRS benefit statements and newsletters. More recently, Ms. W has been away from Vermont, caring for her ailing father.[26] Still, if she had checked her benefit amount after she moved, or if she had checked a benefit statement at any point between 2010 and the discovery of the error in 2016, it would have been apparent that the division had not discontinued her COLA.

D. Reasonable Grounds to Believe the System's Records Were Incorrect

Ms. W argued that it was the division's responsibility to remove the COLA from her benefit payments, that the division should have asked in 2010 whether her move to Vermont was permanent, and that she had no further responsibility once she notified the division of her change of address. Ms. W also argued that no teacher would call the division and say "you're paying me too much." However, the division repeatedly cautions retirees that an overpayment of COLA will result in a repayment obligation. So, although Ms. W may have been following the proverb that advises one not to look a gift horse in the mouth, the threat of a repayment obligation that will only grow larger over time might well cause a reasonable person to notify the division in order to keep the repayment obligation from growing further. It is certainly unfortunate that the division did not confirm in 2010 that Ms. W was no longer eligible for COLA and adjust her benefit accordingly. However, the responsibility for noticing the error did not fall solely on the division.

Ms. W's failure to notice and report the overpayment of her benefits after she moved to Vermont and was no longer eligible for COLA is understandable. However, Ms. W has not shown that she did not have reasonable grounds to believe that the amount of the benefit was in error. The division was not barred from making the adjustment to Ms. W's account. Furthermore, Ms. W did not demonstrate that she had no reasonable grounds to believe the records were incorrect before the adjustment was made, so it was not error for the commissioner to decline to waive the adjustment.

E. Estoppel

Finally, Ms. W argued that teachers are entitled to rely on the division to calculate benefits correctly. She trusted that the division was sending her the correct amount of benefits, and she spent the benefits. This amounts to an equitable estoppel argument.

[26] Testimony of W.

To assert the defense of equitable estoppel, Ms. W would need to prove four elements:

(1) the division, as TRS administrator, asserted a position by conduct or words;
(2) Ms. W acted in reasonable reliance on the TRS-asserted position;
(3) Ms. W suffered prejudice resulting from her reliance on that position;
(4) applying estoppel serves the interest of justice, so as to limit public injury.[27]

Arguably, the division asserted the position that Ms. W was entitled to COLA by continuing to include the COLA in her benefit payments after Ms. W moved to Vermont. Ms. W apparently relied on this assertion, but as discussed above, that reliance was not reasonable. Ms. W was prejudiced by her reliance on the division's assertion, because a substantial overpayment of COLA has now accrued and the division seeks to address this by reducing Ms. W's future benefits. In this case, unlike *Crum v. Stalnaker*, another case involving an estoppel claim by a TRS beneficiary, the equities do not favor application of estoppel. The gravity of the injustice to Ms. W is lessened by her admission that she should have paid attention to the amount of the benefit she was receiving but did not.[28] It is also lessened by the fact that, even after adjustment, she will have received every dollar of benefits to which she was entitled. The injury to the TRS system and other beneficiaries in the form of the reduction of available resources if the overpayment is not adjusted is real.

Ms. W's reliance on the division to ask whether she was still entitled to COLA and to adjust her benefit accordingly is understandable, but it is not enough to merit application of equitable estoppel to relieve her of her repayment obligation.

IV. Conclusion

The division erred in not ascertaining whether Ms. W's change of address was due to a permanent move out of Alaska, and in failing to consider in 2010 whether Ms. W still qualified for COLA. However, given the amount of information TRS provides to all retirees about COLA, and the information in the form of bank deposits and monthly benefit statements available to Ms. W about the specific amount of her benefit and the lack of change in that benefit following her move to Vermont, Ms. W had reasonable grounds to know that her benefit was being overpaid and that the division's records were incorrect.

[27] OAH No. 07-0306-PER at 12; *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997).
[28] Testimony of W.

The division is not barred from adjusting Ms. W's account, and the commissioner did not err in declining to exercise the discretion to waive the adjustment.

DATED: May 24, 2017.

Signed
Kathryn L. Kurtz
Administrative Law Judge

Adoption

I adopt this Decision under the authority of AS 44.64.060(e)(1) 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st day of June, 2017.

By: *Signed*
Signature
Kathryn Kurtz
Name
Administrative Law Judge
Title

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