BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
L P E	)	OAH No. 20-0933-TRS
	)	Agency No. 2020-011

DECISION

I. Introduction

L P E signed a contract to teach in the City A School District during the 2020-21 school year. She changed her mind, however, and decided to retire, when the district planned for in-person schooling with limited measures for protecting teachers from Covid-19. The new school year began on July 1st, but the district did not finalize its Covid plan until August. Because of this delay, Ms. P E submitted her application for retirement to the Teachers' Retirement System in August 2020. This meant that her retirement did not begin until the next month, September.

The district charged her for the cost of her health insurance premiums that it had paid for July and August 2020 on the assumption she would teach in the 2020-21 school year. Ms. P E asked the retirement system to change the date of her retirement application so that her retirement could be backdated and made effective on July 1st—thus giving her retiree health care status for those two months. The system refused, and Ms. P E appealed.

The law requires that a system member must apply for retirement before the system can appoint the member to retirement. Although the legislature adopted Covid-19 emergency relief measures, those measures did not authorize the system to waive that requirement. Without legal authority to waive or toll a statute, the system must enforce the law. It cannot waive or ignore a legal requirement. Furthermore, to the extent that Ms. P E is arguing that the system should take steps to right a wrong committed by the district, the retirement system is not responsible for the acts of the employer. Therefore, the decision of the Teachers' Retirement System is affirmed.

II. Facts

Although L P E did not contract the disease, she nevertheless is one among many whose life and plans have been turned topsy-turvy by the Covid-19 pandemic. In this appeal, she asks the Retirement System to make some adjustments to its records, in acknowledgment that we are in unchartered waters with this national crisis. In her view, the adjustments she requests can be justified under the circumstances. If made, they will save her from incurring significant out-of-pocket expenses that were caused by Covid-19. As is frequently the case with legal matters, however, the matter is, unfortunately, not that easy.

The facts that led to Ms. P E's dilemma are as follows. Ms. P E worked as a teacher for the City A School District for 30 years. At the end of the 2019-20 school year, she intended to continue teaching third grade in City A for another year. Accordingly, she signed a contract to teach in the 2020-21 school year. The contract included a penalty clause for a teacher who terminated early.[1]

In July, Ms. P E engaged with the school district on mitigation efforts for the Covid-19 pandemic. At the end of July, however, the district began to plan to have students attend class in person. Ms. P E considered that option to be a health risk—possibly a fatal risk for a person, such as herself, who was over 60. She sought options for keeping herself safe. She volunteered to work in the distance learning program. The district responded that very few children were pursuing that option, so it had no position for her. In mid-August, she requested that at a minimum, the children in her classroom wear masks. The district refused, citing public pressure.[2]

Ms. P E knew that the school district's superintendent had made a verbal promise to the Associated Teachers of City A, an affiliate of the National Education Association, that teachers who chose to resign their contracts because of the pandemic would not be penalized. Working through the association, Ms. P E was granted the opportunity to resign without penalty, as long as she submitted her resignation the next day, Saturday, August 15th by noon.[3] She did so, making clear that she was resigning solely because the district was not taking adequate measures to protect her health.[4]

Although her resignation was dated August 15, 2020, the district treated it as if it had been tendered on May 29, 2020. Because the school year ended on June 30, 2020, this meant that Ms. P E was not an employee as of July 1, 2020. The district did not assess a penalty for early termination of Ms. P E's 2020-21 school year contract. The district did, however, charge Ms. P E $3,388.98—the amount of the health insurance premium that the district had paid on behalf of Ms. P E for July and August. For these two months, the district now no longer considered her an employee. To the district, this meant that it could demand that Ms. P E pay back the premiums it had paid on her behalf.[5]

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1 R. 9.
2 R. 8-9.
3 R. 9.
4 R.29.
5 R. 31.

Ms. P E protested to the district that this charge was unfair.[6] The district refused to budge.[7]

Ms. P E submitted her retirement application to the Teachers' Retirement System on August 16, 2020.[8] Ms. P E asked the Division of Retirement and Benefits to backdate her retirement to match the district's act of backdating her resignation, thus making her retirement effective on July 1st. In Ms. P E's view, this would mean that she would not have to pay the cost of her insurance premiums for July and August.[9]

The Division denied Ms. P E's request. Her retirement became effective on September 1st.[10] The deputy director of the Division confirmed the effective date.[11]

Ms. P E appealed the denial to the Office of Administrative Hearings. The parties agreed that they did not need an evidentiary hearing to resolve factual disputes. Instead, they submitted briefs laying out their legal arguments, based on the facts that were established in the record. Those legal arguments are discussed below.

III. Discussion

In a sense, each party is arguing that its approach is simply the "normal" approach to teacher retirement. The Division points out that under statute it cannot appoint a teacher to retirement until (a) the teacher is eligible (based on years of employment or age); (b) the teacher terminates employment; and (c) the teacher applies for retirement.[12] Under the normal administrative process established in regulation, once all three of those prerequisites are in place, the teacher's retirement would be effective on the first day of the next month. Because Ms. P E did not apply for retirement until August 17th, the Division was required to make her retirement effective on September 1st.

Ms. P E does not dispute the Division's interpretation of the statutes. She points out, however, that if this were a normal teacher retirement in a normal (non-Covid) year, she would have retired at the end of her school year and her retirement status would have begun on July 1st.

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6 R. 32-33.

7 R. 34.

8 R. 61-62. The Retirement System received the application on August 17th. R. 61.

9 In declining Ms. P E's request, and in defending its action in this appeal, the Division does not address Ms. P E's assumption that her insurance premiums could be refunded to her if the Retirement System were to backdate her retirement start date. No evidence on this issue has been received. This decision will operate as if that assumption is true, but it does not hold or affirm that a backdated retirement date would solve Ms. P E's insurance premium dilemma.

10 R. 53, 54.

11 R. 38.

12 Division Brief at 7 (citing AS 14.25.110(i)).

Indeed, the application for retirement states "if you have worked 172 days in this school year, your retirement effective date is July 1."[13] To Ms. P E, reverting back to this normal date for retirement based on a public health crisis is not a stretch or a perversion of the statutory scheme. It simply is a reversion to the usual course of business in recognition of the importance of being flexible to protect public health.

A. Did the retirement system have authority to suspend AS 14.25.110?

Ms. P E is correct that public health is a significant matter. Indeed, Alaska is one of a handful of states that includes the protection of public health as a duty in its constitution.[14]

The problem for Ms. P E, however, is that state officials who implement state programs must follow the law.[15] Being concerned about the consequences to an individual caused by a public health crisis does not give the Division the authority to waive a requirement of law. Only officials with authority to exercise emergency powers to suspend the law are able to do so.

Ms. P E cites to provisions in state law that recognize that certain provisions of state law can be suspended due to "Acts of God."[16] For example, AS 16.30.017 provides that a person does not commit the crime of failure to salvage or possess edible meat if the failure "was due to circumstances beyond the control of the person charged, including . . . "unanticipated weather conditions or other acts of God." There is, however, no similar *force majeure* clause that permits the administrator of the retirement system to suspend or waive the requirement that a person must first apply for retirement before being appointed to retirement status. The very fact that some statutes include a *force majeure* or "act of god" clause tells us that there is no general law or practice that allows state officials to suspend laws whenever enforcement of the law causes an unforeseen hardship. Instead, we must look to each statute, or to a valid emergency provision issued by an official or entity with authority to suspend laws, to see if we can temporarily suspend AS 14.25.110 due to the Covid-19 pandemic.

Here, the legislature responded to the public health emergency of the Covid-19 pandemic by adopting a declaration of a public health emergency.[17] The Covid-19 Act, called FCCS SB

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13 R. 61.

14 Alaska Const. art VII § 4 ("The legislature shall provide for the promotion and protection of the public health.").

15 *E.g., Brady v. State*, 965 P.2d 1, 17 (Alaska 1998) (rejecting "request that we enjoin the State to follow the Constitution and forestry laws" because the "State is already obliged to do so.").

16 P E brief at 4 (citing "Title 9, Title 29, and Title 46 as well as Alaska Administrative Code Title 3, Title 11, Title 15, Title 17, Title 18" as examples of laws containing "acts of god" clauses). None of the provisions cited by Ms. P E, however, applies to TRS.

17 § 2, Chapter 10 SLA 20; *available at* http://www.akleg.gov/PDF/31/Bills/SB0241Z.PDF.

241, did extend or toll deadlines, and did authorize commissioners to waive certain requirements of law. For example, it authorized the commissioner of commerce and economic development to waive the requirement for continuing education for licensed professionals.[18] It extended the deadlines for filing taxes and for municipal government deadlines under Title 29.[19] It tolled the deadlines for action by the Regulatory Commission of Alaska.[20] It tolled the deadlines for issuance of administrative decisions by this office.[21] If this legislation also tolled or extended the requirement of an application under AS 14.25.110, or provided the administrator of TRS the authority to waive deadlines that were affected by the pandemic, then Ms. P E would have solid grounds to argue that the Division erred by declining to waive her application requirement.

The legislature did not, however, toll the requirement that a member must apply for retirement before the member may be appointed to retirement. It did not grant the retirement system the authority to waive the requirement. It did not grant the system general authority to provide relief to a person who was forced into retirement or otherwise adversely affected by the pandemic.

A careful review of FCCS SB 241 reveals that the legislature was specific in the deadlines that it tolled or extended, in the grant of authority to waive requirements, and in the grant of general relief for harm caused by the pandemic. The absence of a valid grant of authority to waive a requirement of law means that I cannot require the Division to waive the legal requirement that a member must apply for retirement before being appointed to retirement. Simply put, an administrative law judge cannot grant special public-health authority to this office or an agency to waive a requirement of law. That authority must come from an executive order or legislation. In the absence of any such authority, the Division must enforce the law as written.

B. Can the Division waive a requirement of law to right a wrong the district may have committed?

In addition to requesting a waiver of the law based on the public health crisis, Ms. P E appears to have a theory for redress based on her view that the school district committed a wrongful act in charging her for the cost of her health insurance for July and August. For example, she implies that she was forced to leave her employment against her will because of

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18 *Id.* at § 6.
19 *Id.* at §§ 11, 13.
20 *Id.* at § 18.
21 *Id.* at § 31.

unsafe working conditions—perhaps alleging what might be called a "constructive discharge."[22] Under this view, *she* did not terminate her employment early—it was the district that terminated her, meaning that the district should not have required her to accept a retroactive termination date. She may also be arguing that the district wrongfully failed to live up to its promise that employees would not be penalized for early termination due to covid.[23] Although her theory is not completely clear, she implies that the retirement system should take action to conform to the district's action, whether to right the wrongs allegedly committed by the district, or because the district's act of redesignating the date of her termination means that the retirement system must do as the district has done.[24]

Changing her termination date and charging her for the cost of her health-insurance premiums, however, were *employment* measures taken by the district. The retirement system is not a party to the employment contract. Termination of employment is not the same as retirement. In taking these actions, the district was not acting as the system's agent.[25]

The situation here is similar to the dilemma faced by a retiring teacher in *In re F.D.*[26] In that case, the retiring teacher was promised by his district that the district would fill out a form needed for the retirement system to credit the teacher's sick leave toward his retirement. The deadline for the teacher to submit the form to the Division passed without the district taking any action. The Division denied teacher's request to have the Division waive the deadline based on the district's fault.

The denial was upheld on appeal because the Division "has no authority to waive the statutory one-year deadline"[27] The retirement system could not be held responsible for the district's errors because "the harm flows directly from the employer's failure to fulfill this promise."[28] Given that the Division had "no oversight or control over the conduct or assertions of school district employees" and that "[t]here is no privity between [the teacher's] former employer

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22 P E brief at 1, 4 (alleging that her "employer has created a workplace that potentially threatens health, well-being, and life"); *see also* R. at 9 (alleging that she in work status over the summer and that the district's act of giving her a retrospective retirement date nullified that work).

23 R. 9-11.

24 This decision does not address or decide any issue related to employment or conduct by the employer. The point here is that even if the district did do something wrong, it would not empower the Division to change the date of Ms. P E's application.

25 *Cf. In re F.D.,* OAH No 17-1040-TRS (Office of Admin. H'rgs 2018) at 9-10; *available at*: https://aws.state.ak.us/OAH/Decision/Display?rec=6390.

26 *Id.*

27 *Id.* at 1.

28 *Id.* at 10.

and the Division," it followed that "the Division cannot be held accountable for the miscommunication" and "is simply not responsible for the school district's unfulfilled promise."[29]

For these same reasons, even if the district's conduct here was wrongful, it does not give the Division the authority to waive a statutory requirement or change the actual date of Ms. P E's application to a fictitious date. If Ms. P E believes that the district's conduct was wrongful, she must seek relief from the district. The Division cannot provide the remedy she seeks.

IV. Conclusion

Because Ms. P E did not submit her retirement application to the Teachers' Retirement System until August 17, 2020, her retirement could not begin until September 1st. Although her delay in applying for retirement was due to the Covid-19 pandemic, the system does not have authority to ignore the law or change the actual date of her retirement to a different date. In addition, to the extent that Ms. P E is arguing that the system should take steps to right a wrong committed by the district, the retirement system is not responsible for the acts of the employer. The decision of the Teachers' Retirement System denying Ms. P E's request to predate her appointment to retirement to July 1, 2020, is affirmed.

DATED: March 22, 2021.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

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 19th day of April, 2021.

By: *Signed*
Lawrence A. Pederson
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[29] *Id.* A different outcome could arise where the conduct of Division personnel gave rise to an understanding that an application deadline had been satisfied. *Cf., e.g., In re. L.R.H.,* OAH No. 12-0094-TRS (Office of Admin. H'rgs 2012) (holding that Division is estopped from enforcing application deadline because retiree reasonably relied on statement by Division employee that deadline had been met) *available at*: https://aws.state.ak.us/OAH/Decision/Display?rec=6222.