BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
B. M.	)	OAH No. 20-0794-TRS
	)	Agency No. 2020-010

FINAL DECISION[1]

I. INTRODUCTION

The Alaska Department of Administration, Division of Retirement and Benefits ("Division") made a mistake: it took a single rollover request for B. M.'s State Teachers' Retirement System ("TRS") and deposited the amount into his account twice. This mistake left B. M.'s account balance considerably higher than it should have been. B. M. did not notice the mistake. Neither did the Division until it conducted an audit in 2019. The Division then waited more than a year to correct the mistake.

The State may correct its mistakes or the mistakes of others. State agencies and instrumentalities do this all the time, such as by auditing oil and gas royalties to determine over- or underpayments, reassessing the value of taxable property, seeking reimbursement of overpaid public benefits, or imposing penalties for failure to provide workers' compensation insurance. But there is a limit to how long the State can wait to fix mistakes. Absent a specific statute, that limit is the six-year statute of limitations for State actions. B. M. urged a shorter limitations period here, and the Division argued for no limitations period at all. But the Alaska Supreme Court has held that the six-year period applies to state actions and that those state actions include administrative actions outside the courtroom.

Applying the six-year period here, the Division discovered its error with ample time to correct it, but by waiting more than a year to do so, the statute of limitations had run. The action the Division took here — correcting B. M.'s TRS account — is time barred. Accordingly, the Division's decision to make that correction is reversed.

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[1] As noted herein, this decision has been modified from an earlier proposed decision in response to a proposal for action submitted by the Division pursuant to AS 44.64.060(e). Quotations from the oral argument have also been added where the Division questioned citations to the oral argument.

II. FACTS

B. M. worked as a school counselor in City A and City B from August 2006 until his retirement in May 2020.[2] This employment enrolled him in the State's TRS Defined Contribution Retirement Plan.[3]

TRS Defined Contribution participants have the option to rollover funds from other retirement plans.[4] B. M. rolled over $77,876.13 in August 2013.[5] The Division deposited $77,876.13 in B. M.'s TRS account on August 26, 2013, but then purported to reverse the deposit the same day "due to errors during processing."[6] The Division then deposited $77,876.13 in B. M.'s account again on August 28, 2013.[7]

The Division provides TRS participants with quarterly account statements.[8] B. M.'s 11-page statement for third quarter 2013 lists a deposit of "155,752.26" on page 4.[9] That number is twice the value of the $77,876.13 B. M. rolled over into his account, indicating the Division deposited the funds twice. Nowhere in the account statements submitted by the parties does it list two deposits of $77,876.13, nor does "155,752.26" appear anywhere else.[10] B. M. does not recall reviewing his third quarter 2013 statement and was not aware of the error.[11] The parties, however, concede that B. M. and the Division both had constructive notice of the error around the time it was made in 2013.[12]

During a spring 2019 audit, the Division discovered that it had credited B. M.'s account with $77,976.13 twice, on August 26 and August 28, 2013, and that B. M.'s account balance and interest accrual were based on duplicate deposits of $77,976.13.[13] The exact date the Division discovered this error is unclear, but the record includes May 15, 2019 internal emails discussing the error, so it appears to have been around that date.[14]

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2 Joint Stipulation of Facts ("Stip. Facts") ¶ 7, 17; Affidavit of B. M. ¶¶ 5, 8, 27.
3 Stip. Facts ¶ 7.
4 Stip. Facts ¶ 6.
5 Stip. Facts ¶ 8.
6 Stip. Facts ¶ 9; Agency Record ("R.") at IV. References to the Division in this decision include any contractors acting on the Division's behalf.
7 Stip. Facts ¶ 10; Agency Record ("R.") at IV.
8 Ex. C.
9 Ex. C at 50.
10 Ex. C.
11 Stip. Facts ¶ 14; Affidavit of B. M. ¶ 14.
12 Stip. Facts ¶ 13.
13 Stip. Facts ¶ 15; Ex. C; Affidavit of Kevin Worley ¶ 15.
14 Ex. E.

Beginning in fall 2018 and through the end of the 2019-2020 school year, B. M. spoke with the Division representatives about his potential retirement benefits and retirement paperwork.[15] The Division did not inform B. M. of the error with his account during these discussions.[16] Based on his account balance and the retirement information provided by the Division, B. M. chose to retire in May 2020.[17]

On June 16, 2020, the Division sent B. M. notice that it had discovered the error and was removing $114,797.20 from his account — $77,876.13 for the duplicate deposit and $36,921.07 interest accrued on those funds.[18] The Division followed up with an August 11, 2021 letter advising B. M. of his appeal rights.[19] B. M. timely appealed.[20] The parties requested the matter be heard on the briefs with oral argument.

III. DISCUSSION

The parties raised a number of arguments in their briefs, but a threshold issue is whether the Division's correction of B. M.'s account is time barred.

A. The Division's Account Correction Was Subject to a Six-Year Statute of Limitations.

The parties both argued that the six-year statute of limitations does not apply, but for vastly different reasons. Those arguments, however, are contrary to Alaska Supreme Court precedent.

B. M. argued that because Article XII, Section 7 of the Alaska Constitution states that employee retirement systems "shall constitute a contractual relationship," the three-year statute of limitations for contract actions should apply here.[21] In advance of oral argument, the parties were advised to address the applicability of AS 09.10.120, the six-year statute of limitations for actions by the State.[22] At oral argument, B. M. maintained his position that the three-year contract statute of limitations applies.

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15 Stip. Facts ¶ 17; Affidavit of B. M. ¶¶ 18-21.
16 Stip. Facts ¶ 17; Affidavit of B. M. ¶¶ 21-26.
17 Stip. Facts ¶ 17; Affidavit of B. M. ¶¶ 18-25.
18 R. IV.
19 R. II.
20 R. I.
21 Alaska Const. Art. XII, Sec. 7; Appellant's Initial Brief at 5-7.
22 Order Granting Oral Argument. In its Proposal for Action, the Division takes issue with the fact that the parties did not brief the applicability of AS 09.10.120. But the parties did brief the issue of whether this matter is barred by the statute of limitations. They simply focused on the incorrect statute for an action by the State. The ALJ asked the parties to address the correct statute, AS 0910.120, at oral argument. Neither party at any point objected or requested additional briefing.

The Division argued that the contract statute of limitations should not apply because Article XII, Section 7 states that "[a]ccured benefits of these systems shall not be diminished or impaired" and B. M.'s retirement benefits had not accrued prior to his retirement.[23] This is more an argument about when a statute of limitations starts to run, not whether or which one applies. The Division's own sources also undermine this argument. The Division quotes *Hammond v. Hoffbeck*, which states that "benefits under PERS are in the nature of deferred compensation," to claim that B. M.'s benefits did not vest until his retirement, but omitted the rest of the sentence in which the Court held that "the right to such benefits vests immediately upon an employee's enrollment in that system."[24] That case also addresses a defined benefit plan, not a defined contribution plan like B. M.'s.

At oral argument, the Division took a wholly new tack, arguing that no State action that must be challenged by administrative appeal is subject to any statute of limitations.[25] The Division claims that because the limitations statutes refer to "civil action[s]," only lawsuits filed in superior court can be time barred.[26]

Contrary to the parties' arguments, it is well settled that the statute of limitations for State actions is not limited to civil lawsuits and that the applicable limitations period is six years.[27] For example, in *Alascom, Inc. v. North Slope Borough, Board of Equalization*, the Court held that municipal tax assessments — which are administrative actions subject to administrative appeal — are actions subject to a statute of limitations.[28] The Court further held that the six-year statute of limitations for actions by the State and its political subdivisions and public corporations applies,

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[23] Division's Responsive Brief at 3-5, 9-11. In the proposed decision, this sentence included the term "vested." The Division claimed in its Proposal for Action that it did not make the argument paraphrased in this sentence. But the Division stated in its brief that because B. M.'s benefit "was not an accrued benefit, the Division's removal of the duplicate $77,876.13 and its related gains from B. M.'s account was not a diminishment of B. M.'s accrued benefits. As such . . . there was no breach of contract, AS 09.10.053 does not apply, and the Division was not time barred from correcting its accounting error." *Id.* at 9. The Division further took the position the terms "vest" and "accrued" are synonymous in this context. *Id.* at 5, n.9. It appears the Division no longer takes that position. Thus the words "vested" was replaced here with "accrued."

[24] 627 P.2d 1052, 1057 (Alaska 1981); Division's Responsive Brief at 4.

[25] Oral Argument.

[26] Oral Argument; AS 09.10.010.

[27] In its Proposal for Action, the Division refers to application of this statute as a "policy decision" by the ALJ. Proposal for Action at 2. The administrative branch has an obligation to follow the statutes adopted by the legislative branch; doing so is hardly a matter of policy.

[28] 689 P.2d 1175, 1179 (Alaska 1983); *see also Municipality of Anchorage v. Alaska Distributors Co.*, 725 P.2d 692, 693 (Alaska 1986) ("The six year statute of limitations for actions in the name of a political subdivision applies to the taxation of escaped property.").

regardless of whether the subject matter of the action would otherwise fall under a shorter statute of limitations.[29]

Similarly in *Agen v. State, Department of Revenue, Child Support Enforcement Division*, the Court held that an agency notice of responsibility to pay child support was an "action" for purposes of statute of limitations.[30] The Court also held that the six-year statute of limitations for State actions applies, and that it runs from the earliest period for which the State sought reimbursement of public assistance to pay for child support.[31]

Actions resulting from audits, like the one the Division conducted here, have also been held subject to the six-year statute of limitations. In *Williams v. BP Alaska Exploration, Inc.*, the Court discussed the applicability of the six-year statute of limitations to tax audits prior to adoption of a specific tax audit limitations statute.[32] And in *Levi v. Department of Labor & Workforce Development*, the agency sent a notice of unemployment overpayment following an audit. The Court treated the notice as an "action" and held that this action was subject to the six-year statute of limitations.[33]

Certainly not every act by an agency is an "action" for purposes of AS 09.10.120. The Division cited cases in its Proposal for Action where the Court determined agencies were acting in their enforcement capacity and not asserting an action — such as charging a routine fee[34] or enforcing a judgment.[35] Here, the Division's audit and June 16, 2020 notice to B. M. that it was removing funds from his TRS account is not like charging a fee or enforcing an existing judgment. It is far more akin to the State auditing public benefits or taxes or royalties and making

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29 *Id.*

30 945 P.2d 1215, 1219 (Alaska 1997).

31 *Id.*

32 677 P.2d 236, 239 (Alaska 1983).

33 433 P.3d 1137, 1145 (Alaska 2018).

34 *Bradshaw v. State, Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 122-23 (Alaska 2010) (imposing a routine reinstatement fee is not an "action" for purposes of statute of limitations because the agency is not asserting a cause of action or seeking a remedy).

35 *Koss v. Koss*, 981 P.2d 106, 107 (Alaska 1999) (noting holding in *Agen* and how AS 09.10.120 applies to administrative proceedings that commence a new action, as opposed to enforcement of an existing judgment, court held statute of limitations for an action to enforce a court's judgment does not apply to an administrative agency enforcement of a judgment). The Division also cited three OAH decisions in its Proposal for Action, but none of those decisions address the Supreme Court precedent discussed above. *See In re Linda S. Garrison*, OAH No. 09-0289-REC (Real Estate Commission 2010) at 13 (mentioning in passing that a statute of limitations argument had previously been disregarded and proceeding to address laches instead without addressing Supreme Court cases applying AS 09.10.120 to administrative proceedings); *In re H.J.W.*, OAH No. 07-0161-PER (2008) at 8 (concluding the word "action" in the limitations statutes refers to court proceedings because "the division has not cited any judicial decision for the proposition that the statutes of limitation applicable to civil actions also apply to administrative proceedings"); *In re B.A.*, OAH No. 06-0829-PER (Dep't of Administration 2007) at 2-4 (discussing PER Board's historic use of statutes of limitations as a guide when applying the doctrine of laches).

an adjustment for over- or under-payment. State agencies have long accepted that those types of actions are subject to the AS 09.10.120 limitations period, and in the cases discussed above, the Alaska Supreme Court has agreed. In keeping with that precedent, the Division's audit and resulting adjustment to B. M.'s account was an "action" in the name of the State. Like any action, it is subject to a statute of limitations.[36] And absent a more specific statute, it is subject to the general six-year statute of limitations for State actions.[37]

The TRS Defined Contribution statutes do not include a specific limitations period that would supplant AS 09.10.120.[38] The TRS Defined Benefit Plan, on the other hand, included restrictions on the Division recovering benefits because of an error made more than two years earlier and provided a procedure for the Commissioner to waive adjustments.[39] But when the legislature switched to a Defined Contribution Plan, it did so without these or similar procedures addressing account adjustment, waiver, or a limitations period.[40] The Division argued that it may nonetheless look to the Defined Benefit Plan statutes for procedures omitted from the Defined Contribution statutes, and cited a number of cases and statutes specific to the Defined Benefit Plans.[41] But the legislature was unequivocal in setting up separate statutory schemes for the Defined Benefit and Defined Contribution plans, with the Defined Benefit statutes "apply[ing] only to members first hired before July 1, 2006" — *i.e.*, members in the Defined Benefit plan.[42] Thus it would violate these statutes and contradict legislative intent to apply these Defined Benefit procedures to B. M.'s Defined Contribution plan.

A statute of limitations is important for parties who are subject to State administrative actions the same way that appeal deadlines are important to State agencies. Parties need finality and an opportunity to pursue or defend claims while evidence is fresh.[43] Without a statute of

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36 *Smith v. State*, 282 P.3d 300, 304 (Alaska 2012) ("All civil claims are governed by statutes of limitations.").

37 AS 09.10.010 ("A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.").

38 *See* AS 14.25.310-590.

39 AS 14.25.173(b); AS 14.25.175.

40 *See* AS 14.25.310-590.

41 Division's Responsive Brief at 12; oral argument. This sentence was revised slightly to better reflect the Division's wording at oral argument. When discussing the adjustment and waiver procedures for the Defined Benefit statutes that the legislature did not include for Defined Contribution plans, Division counsel was asked "But you're not saying that I can go and rely on the defined benefit statutes. Because they have certain procedures in there that are no longer applicable." The Division responded "The statutes that apply to members hired after July 1, 2006 are silent about adjustments, but because it is the same type of plan under IRS standards and, you know, it's tax qualified status, looking at all the other State tax qualified plans would be informative."

42 AS 14.25.009.

43 *Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971) ("It is generally recognized that the purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result

limitations, the State could go back and demand payments on any matter — taxes, oil and gas royalties, child support, unemployment benefits — in perpetuity. The legislature, in adopting AS 09.10.120, provided finality after six years to the State and parties who deal with the State. That policy requiring the State to act within six years applies here.

B. The Division Failed to Act Within the Six-Year Statute of Limitations.

The six-year statute of limitations runs from when a cause of action accrued.[44] In their briefs and at oral argument, the parties focused on when B. M.'s retirement benefits accrued or vested.[45] But the issue here is not when the benefits accrued, it is when the potential cause of action accrued. And the cause of action at issue here is the Division's, not B. M.'s, as the Division argued.[46] This matter involves an action by the Division, so it is the Division that needs to have acted within six years of when its cause of action accrued.

A cause of action accrues when the essential elements of the claim have occurred.[47] In the context of an administrative agency seeking reimbursement or payment, the statute of limitations runs from when the under- or overpayment occurred.[48] For actions by the State, accrual is delayed only when "the action is for relief on the ground of fraud."[49]

The Division's cause of action here is for reimbursement of the erroneous deposit. All elements had occurred, and the Division could have taken action to correct the error, on the date the Division made the second deposit — August 28, 2013. The Division admits the error was readily apparent from B. M.'s account and account statement, so there is no allegation of fraud to extend the accrual period.[50]

With an August 28, 2013 accrual date, the Division had until August 28, 2019 to take action. The Division had every ability to do so. It uncovered the error in an audit around May 15,

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from the prosecution of stale claims. Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses.").

44 AS 09.10.120(a).

45 Division's Responsive Brief at 3-10; Oral Argument.

46 Division's Responsive Brief at 11.

47 *Lamoreux v. Langlotz*, 757 P.2d 584, 585 (Alaska 1988).

48 *See*, *e.g.*, *Agen v. State, Department of Revenue, Child Support Enforcement Division*, 945 P.2d at 1219 (date of accrual for statute of limitations was earliest period for which State sought reimbursement of public assistance); *Alascom, Inc. v. North Slope Borough, Board of Equalization*, 689 P.2d at 1180 (statute of limitations ran from when taxpayer underreported holdings; borough may not assess tax on property unreported more than six years prior). The Division argues in its Proposal for Action that the State's cause of action could not have accrued in 2013 because the State had not incurred a financial loss at that time. But accrual does not depend on a financial harm. For example, the State regularly audits taxes and royalties and makes adjustments for over- or under-payments or both for a given time period. The applicable statutes of limitation for conducting those audits does not distinguish between whether the State discovered a financial benefit or harm. *See*, *e.g.*, AS 09.10.120; AS 43.55.075.

49 AS 09.10.120(a).

50 Stip. Facts ¶ 13; Division's Responsive Brief at 13; Oral argument.

2019, more than three months before the end of the limitations period.[51] Yet, the Division did not act for more than a year when, on June 16, 2020, it sent B. M. notice that it was correcting his account.

The Division raised valid points about B. M. receiving a windfall and the Division's need to keep the TRS plan compliant with federal law.[52] But these are reasons for the Division to be diligent and ensure it is acting within the applicable statute of limitations, not a reason to ignore the limitations period imposed on State action by the legislature.

C. Because the Division's Action is Time-Barred, a Shorter Contractual Period Need Not be Addressed.

B. M. argued the Division should be bound by language in his account statement that "[c]orrection will be made only for errors which have been communicated within 90 calendar days . . . . [and that] [a]fter this 90 days, this account information shall be deemed accurate and acceptable to you."[53] B. M. characterized this language as part of his contractual relationship with the Division.[54] That contractual relationship is captured in the Alaska constitution, which states:

> Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.[55]

The Division argued that the second sentence of the constitutional provisions limits the contractual relationship solely to the State's obligation not to diminish members' retirement accounts.[56] The Division further stated at oral argument that the 90-day language in its account statement is not based on law, agency policy, or contract, that the Division would never attempt to enforce the 90-day language, and that any public employee receiving an account statement with this 90-day language should know that the Division would never enforce it.[57]

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51 Ex. E.

52 Division's Responsive Brief at 19.

53 Appellant's Initial Brief at 6-7; Ex. C at 56.

54 Appellant's Initial Brief at 6-7; oral argument.

55 Alaska Const. Art. XII, Sec. 7.

56 Division's Responsive Brief at 4-5; Oral argument (Division: "The contract is that state employees are entitled to the benefits they accrue and that accrue while they are employed with the state and they are members of the retirement systems and those benefits should not be diminished"; ALJ: "Are you saying that the contract is only that the accrued benefits of the system shall not be diminished or impaired, only that second sentence, that's the extent of the contract?"; Division: "The contract between the state and its employees that are members of the retirement system is that the promise made to them while they're employed and the promises, by promises I mean the benefits promised at retirement, those will not be diminished, they won't be changed.").

57 Oral argument. (Division: "So, if we can get to this 90-day argument – I don't know. Because that's not a statute, that's not a regulation. I think it's a policy of Empowerment. I'm not sure who that applies to or where that comes from. . . . I guess, in the sense that we do look at the statutes, if the State has an ongoing duty to repay

The Alaska Supreme Court has taken a broad view of the contractual relationship created in Article XII, Section 7.[58] But the scope of that relationship and whether the 90-day language is enforceable against the Division as a matter of contract or on some other legal principle need not be addressed here because the Division's action is barred by the six-year statutory limitations period.[59] Similarly, the Division's position that public employees should somehow know to disregard a 90-day rule that the Division sets forth in its own account statements need not be addressed here.

IV. CONCLUSION

There is no question that the double deposit into B. M.'s TRS account was a mistake. But the State has a six-year deadline to correct its mistakes, and the Division failed to do so. Because the Division's action to correct B. M.'s account is time-barred, the action is reversed.

DATED: November 17, 2021.

By: *Signed*
Rebecca Kruse
Administrative Law Judge

underpayments when it discovers it later, it would be completely unfair, you know, if there, if a retiree came to the State and, like, if it was B. M. came to the State and said, hey, in 2013 this actually didn't happen. . . . In the interests of justice, I don't think that a 90 days at this point, if B. M., somehow something happened and we're years later and he didn't in that 90 days make the correction, I think it would be completely unjust for the State to not provide that money. I mean, if this was B. M. money, it was never the State's money, and you know, there would be no reason for the State to retain it, that 90 days — it's sentences on a statement and I don't think it is law that applies. . . ."; ALJ: "If you're telling me that there's no legal basis for that and that the State wouldn't be following that, how is someone supposed to know, when they're reading that statement, that it wouldn't apply?";
Division: "I'm not sure. This is not something that I've looked into very much. But I think in a situation like this where someone was very concerned that they missed the 90 day period, you know, there's always a chance that somebody can talk to the Division and work something out and if it doesn't work out, they can bring an action in court to recover it.").

[58] *See*, *e.g.*, *Metcalfe v. State*, 484 P.3d 93, (Alaska 2021) (statute prohibiting reinstatement for former employees violated Article XII, Section 7); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003) (health insurance benefits are protected by Article XII, Section 7).

[59] *Cf. City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d 1173, 1181 ("If two limitations statutes may reasonably apply, preference is given to the longer limitations period.").

Adoption

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

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

DATED: November 18, 2021.

By: *Signed*
Rebecca Kruse
Administrative Law Judge

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