IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS Appellant, vs. B. M., Appellee.	)	Case No. 3AN-21-00000 CI

DECISION AND ORDER

I. INTRODUCTION

The State of Alaska, Department of Administration, Division of Retirement and Benefits (the Division), appeals the decision of the Office of Administrative Hearings (OAH) finding that the Division was subject to the six-year statute of limitations under AS. 09.10.120, therefore prohibiting the Division from correcting an accounting error discovered in B. M.'s Teacher Retirement System (TRS) account.

For the reasons that follow, the Court **AFFIRMS** the OAH decision reversing the Division's decision to make the correction.

II. BACKGROUND

i. Facts

B. M. worked as a school counselor for the State of Alaska from August 2006 until his retirement in May 2020. B. M. was first enrolled in the Teacher's Retirement System (TRS)[1] in 2006. The Division is responsible for managing the TRS program.

In August 2013, B. M. requested a rollover of funders from his TIAA-CREF[2] retirement account into his TRS Defined Contribution Retirement Plan (DCR)[3] account in the amount of $77,876.13.[4] The initial rollover amount was deposited into B. M. account on August 26, 2013. Due to a processing error, a second identical rollover deposit of $77,876.13 was posted to B. M.'s TRS DCR account on August 28, 2013.

In 2013, both the Division and B. M. received documentation of the duplicate deposits and both parties concede they had constructive notice of the

[1] The TRS account is available to certain teachers and administrators employed in a public school of the State of Alaska. The plan is designed to provide members with the basis for financial security upon retirement. The system works by both the employer and the employee making matching contributions during employment to cover the cost of the retirement benefits.
[2] Teachers Insurance and Annuity Association College Retirement Equities Fund.
[3] The Alaska PERS and TRS Defined Contribution Retirement plan (DCR plan) is a defined contribution plan governed by Section 401(a) of the Internal Revenue Code.
[4] Agency R. at 000649 (*In the matter of* B. M., OAH No. 20-0794-TRS (October 4, 2021)).

error at this time.[5] Despite this fact, the Division did not reverse the duplicate deposit. B. M. did not notice the mistake and does not recall reviewing the first account statement following the duplicate deposit.

In July 2015, the Division began using a new accounting system, Empower Retirement, and began to develop a process to reconcile the data from the previous system. By 2017, the Division believed they had sufficient data to begin a reconciliation process.

By spring 2019, the Division had begun to review the retirement accounts and discovered the error in B. M.'s account. The exact date the error was discovered is unclear, but there are internal emails discussing the error on May 19, 2019. Again, B. M. was not notified of the error in his account balance.

Beginning in fall of 2018 and through the end of the 2019-2020 school year, B. M. consulted with a financial planner from Empower about his retirement options. The Division did not inform B. M. of the error in his account during these discussions. It was determined that B. M. could be expected to receive an annuity payment of approximately $3000 per month based upon his TRS account balance. B. M. then began to prepare for retirement based upon these discussions.

In March 2020 B. M. sent in his letter of resignation, effective June 30, 2020.

[5] The Division provides TRS participants with quarterly account statements.

On June 16, 2020, the Division sent B. M. notice that it had discovered the error and was removing the duplicate deposit and accrued interest from the account. However, B. M. had left Alaska on May 30, 2020 and had left instructions with the postal office to forward his mail to his daughter's address in Arkansas where they were moving. B. M. did not receive the forwarded letter until June 28, 2020.

On August 4, 2020, B. M. sent an email to the Division requesting he be allowed to retain the erroneously deposited funds. The Division followed up with a letter dated August 11, 2020, denying B. M. request and advising B. M. of his appeal rights.

ii. Procedural History

On September 8, 2020, B. M. appealed the Division's decision to remove the duplicate deposit to the OAH. The Administrative Law Judge (ALJ) found that the Division was subject to the six-year statute of limitations under AS 09.10.120, therefore prohibiting the Division from correcting an accounting error discovered in B. M.'s TRS DCR account. The Division then appealed the decision to this Court.

The Division argues that no statute of limitations should be applied because the TRS DCR statute does not include one and the Division is legally required to keep these accounts in compliance with both state and federal regulations.

B. M. argues that the 3-year contract statute of limitations should be applied because there is a constitutional provision stating that membership in public employee's retirement system shall constitute a contractual relationship. In the alternative, B. M. argues that collateral estoppel should be applied.

III. STANDARD OF REVIEW

The superior court has jurisdiction to act as an intermediate appellate court and review appeals from administrative agencies pursuant to AS 22.10.020(d) and Appellate Rule 601 *et seq*. When the superior court acts as an intermediate appellate court, it reviews: "(1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion."[6] Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.[7]

In an appeal from an agency decision, there are four principal standards of review: (1) questions of fact are subject to the "substantial evidence" test; (2) questions of law involving agency expertise are subject to the "reasonable basis" test; (3) questions of law where no agency expertise is involved are subject to the

[6] AS § 44.62.570(b).
[7] *Id*.

"substitution of judgment" test; and (4) review of administrative regulations is subject to the "reasonable and not arbitrary" test.[8]

Here, both parties have stipulated to a set of facts. During oral arguments, the parties discussed some disagreement over how the facts were being presented, however the only issues left for this Court to resolve is a question of law as to whether the State was time barred from correcting the error in B. M. account, either by a statute of limitations or by collateral estoppel. The parties disagree as to whether this a question of law involving agency expertise.

When a question of law involves agency expertise, the court applies the reasonable basis standard. In doing so, the court seeks to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if the court may not agree with the agency's ultimate determination.

When a question of law does not involve agency expertise, the court exercises its independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy.[9] Application of this standard permits a reviewing court to substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law.[10] "Although we ordinarily review an agency's regulatory decision under the 'reasonable but not

[8] *State v. Public Safety Employees Ass'n*, 93 P.3d 409, 413 (Alaska 2004).
[9] *Levi v. State*, 433 P.3d 1137, 1140 (Alaska 2018).
[10] *Tesoro v. Kenai Pipe Line Co*., 746 P.2d 896, 903 (Alaska 1987).

arbitrary' standard, 'when the decision raises a question of statutory interpretation involving legislative intent rather than agency expertise, we review that question independently, applying the substitution-of-judgment standard.'"[11]

The Alaska Supreme Court has explained that there are two circumstances that generally call for reasonable basis review: (1) "where the agency is making law by creating standards to be used in evaluating the case before it and future cases," and (2) "when a case requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision."[12]

The Division argues that the reasonable basis standard should be applied because the decision to correct a tax qualification failure and the methods used to remedy that failure are policy questions which lie within the Division's area of expertise as the TRS plan administrator. However, the Division then conversely argues that the independent judgment standard should be used to review the OAH's decision to impose the 6-year statute of limitations and give no deference to the OAH decision.

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[11] *State, Public Employees' Retirement Bd. v. Morton*, 123 P.3d 986, 988 (Alaska 2005) (citing *Alaska Ctr. for the Env't v. Rue*, 95 P.3d 924, 926 (Alaska 2004)); see also *Greenpeace*, 96 P.3d at 1061 n. 10 (de novo standard applies if the case concerns "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience") (quoting *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971))).

[12] *Alaska Police Standards Council v. Parcell*, 348 P.3d 882, 886 (Alaska 2015).

B. M. argues that the independent judgment standard is the applicable standard because the Division does not have expertise in statute of limitations.

The Division administers and manages the State of Alaska's retirement, healthcare and benefit plans. The Division's scope of work includes serving as the point of contact for administrative, legal, legislative, and procedural issues regarding the management of the retirement systems and explaining benefits to members. As provided in Alaska Statutes, the duties of the Division amount to three primary directives: 1) manage the plans 2) report plan status and 3) recommend policy.[13]

This case does not require resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision. While the Division is mandated by both state and federal law to correct errors in these plans, the TRS DCR statutes do not include a specific limitations period for when corrections for an overpayment can be performed. The Division's method for correcting accounting errors and the authority to correct tax qualification failures is not the issue in dispute in this appeal. The Court can determine if and what statute of limitation should be applied and when a cause of

[13] AK DRB, *About Us*, https://drb.alaska.gov/help/about.html; *see also* AS 39.35.001-39.35.090.

action accrued without the Division's specialized knowledge or technical expertise.

Further, the statute of limitations and cause of action issues in this appeal invoke questions concerning constitutional law, as there is an open issue as to whether the contract statute of limitations should be applied because the employee pension plan is designated as contractual relationship under the Alaska Constitution. The Supreme Court of Alaska has repeatedly applied independent judgment to both statute of limitations and constitutional law issues when determining their correct application.[14] Additionally, the applicability of the doctrine of collateral estoppel is a question of law subject to independent review.[15]

In conclusion, whether the Division was time barred from correcting the error in B. M.'s account involves a question of law that does not require agency expertise. The Court will review this appeal under the independent judgment standard.

IV. DISCUSSION

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[14] *See Kim v. Alyeska Seafoods, Inc*., 197 P.3d 193, 195 (Alaska 2008) (where the Alaska Supreme Court applied independent judgment to determine proper application of a statute of limitations). *See also Bailey v. Tex. Instruments, Inc*., 111 P.3d 321, 322 (Alaska 2005) (where the Alaska Supreme Court applied independent judgement to determine the constitutionality of a statute and the meaning of statutory terms involve questions of law to which a reviewing court applies its independent judgment)).

[15] *Lane v. Ballot*, 330 P.3d 338, 340 (Alaska 2014).

i. Statute of Limitations Generally

Statutes of limitations serve as a safeguard to ensure fairness and prevent indefinite exposure to liability or harm. All civil claims are governed by statutes of limitations.[16] As the ALJ stated in their opinion "without a statute of limitations, the State could go back and demand payments on any matter — taxes, oil and gas royalties, child support, unemployment benefits — in perpetuity."[17]

The State's argument hinges on the notion that because there was no cause of action, no statute of limitations should be applied. However, in determining which statute of limitations applies, a court looks to the nature of the injury alleged, rather than to the technical cause of action.[18]

Here, the nature of the injury alleged is unique. This case involves a windfall to B. M. due to the erroneous deposit made by the Division on August 28, 2013. The fact that the deposit was made erroneously is not contested; B. M. was not entitled to that money at the time the deposit was made, however, the State waited over 6 years to correct the deposit.

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[16] *Smith v. State*, 282 P.3d 300, 304 (Alaska 2012).
[17] Agency R. at 000620 (*In the matter of* B. M., OAH No. 20-0794-TRS (October 4, 2021)).
[18] *Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co*., 299 P.3d 148, 152 (Alaska 2012); *McDowell v. State*, 957 P.2d 965, 968 (Alaska 1998).

In sum, the injury giving rise to the technical cause of action was the Division making an erroneous overpayment into B. M.'s account because it was the Division that then needed to seek reimbursement. As the ALJ articulated, "in the context of administrative agency seeking reimbursement or payment, the statute of limitations runs from when the under-or overpayment occurred."[19] The issue here is not whether B. M. was entitled to the funds, but rather how long the Division had to correct their action that caused them injury.

ii. Relevant Legal Policy

To find that the Division was not subject to some form of time bar would contravene precedent, reason, and policy. The legislative history of the Alaska retirement system, IRS procedural guidance, and Alaska case law all support finding that the Division was time barred from reversing the erroneous deposit it made into B. M.'s account over six years after it occurred.

a. Employee Retirement Systems Constitutional Designation

Art. XII, sec. 7 of the Alaska Constitution states that "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. An employee's rights to retirement benefits vest on

[19] Agency R. at 000625 (*In the matter of* B. M., OAH No. 20-0794-TRS (October 4, 2021)).

employment and enrollment in a retirement system like the TRS. The vested rights protected by Alaska Const. art. XII, §7 necessarily include the dollar amount of the benefits payable.[20]

b. Legislative History of the Alaska Retirement System

Beginning in the 1960's, the State of Alaska developed and offered the PERS retirement system to all political subdivisions for their employees.[21] Over the next several decades, members were enrolled in a defined benefit plan under the PERS and TRS.[22]

In 2005, the Alaska Legislature created the defined contribution plan for employees who were first hired after July 1, 2006, due to the prohibitive costs of the defined benefits plan.[23] This includes B. M., who was hired in August 2006.

Currently, AS Chapter 35, Art. 1—11, governs the Public Employee's Retirement System of Alaska, including both the defined benefits plan and the defined contribution plan.

The defined benefits plan is governed under AS §§ 39.35.095 — 39.35.680 and applies only to employees first hired before July 1, 2006. AS §§ 39.35.700-39.35.990 governs the defined contribution plan and applies only to employees

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[20] *Flisock v. Div. of Ret. & Benefit*, 818 P.2d 640, 641 (Alaska 1991).
[21] AK DRB, *About Us*, https://drb.alaska.gov/help/about.html.
[22] *Id*.
[23] *Id*.

hired on or after July 1, 2006. This makes Art. 2 – Art. 8 applicable to employees first hired before July 1, 2006, leaving only Art. 1, Art. 10, and Art. 11 applicable to employees hired on or after July 1, 2006.

Under AS 39.35.520(b), which applies to employees first hired before July 1, 2006, when an erroneous contribution is made into an employee account that they are not entitled to, an adjustment that requires the recovery of benefits may not be made under this section if (1) the incorrect benefit was first paid two years or more before the member or beneficiary was notified of the error; (2) the error was not the result of erroneous information supplied by the member or beneficiary; and (3) the member or beneficiary did not have reasonable grounds to believe that the amount of the benefit was in error.

In contrast, AS §§ 39.35.700 — 39.35.990, which applies to employees hired on or after July 1, 2006 enrolled in the defined contribution plan, do not provide for any specific time limitations for correcting mistakes such as overpayments.

The legislative history of the Alaska employee retirement plans indicates that when the new statutes governing the defined contribution plan were first enacted, the legislature identified a number of corrections and clarifications that

were still needed.[24] However, legislation to address the issues failed to pass the next year.[25] It is unclear as to whether a clear time restriction on corrections for overpayments was one of the clarifications the legislature intended to add. To date, the statute has still not been amended to include explicit language that provides instruction for this type of error. However, there is nothing in the legislative history that indicates an intent on the part of the legislature to impose no statute of limitations and allow for indefinite time to correct mistakes, particular given that different sections of the chapter provide limitations for correcting other types of errors.

AS 39.35.895 governs amendments and termination of defined contribution plans. Under AS 39.35.895(d), any contribution made by an employer to the plan because of a mistake of fact must be returned to the employer by the administrator within one year after the contribution or discovery, whichever is later.

The double rollover contribution to B. M.'s account was undoubtably a mistake. However, correcting it was likely not an amendment under this section because the Division was not actually amending the terms of the plan itself and the language does not indicate this section was meant to expand to corrections outside of amendments and termination.

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[24] *See* 2007 Senate Journal 567 — 570.
[25] *Id.*

While neither AS 39.35.520 nor AS 39.35.895 are directly applicable here, they further demonstrate that mistakes in retirement plans are meant to be corrected in a timely manner. Additionally, the fact that Empower informed the Division that some of the issues for incorrect account balances, including B. M., were too old to be corrected, further supports the notion that even Empower believed they had an obligation to make a timely correction.[26]

In early 2019, the Division audited 45,000 TRS and PERS accounts for reconciliation errors. There is nothing in the record to indicate that an audit was performed on B. M.'s account until 2019 when the error was discovered. After the discovery, the Division took no action to correct the error for over one year.

There is simply no justification for the Division's failure to promptly correct the error when it was discovered. The failure to correct the error for so long is even more egregious given that the Division had constructive notice of the error around the same time it occurred and actual notice of the error before the 6-year statute of limitations expired. The Division had an obligation to fix the error in a timely manner and not wait almost seven years to fix the mistake.

c. The IRS Employee Plans Compliance Resolution System (EPCRS)

[26] Agency R. at 000435 (Exhibit E).

The Division argues that it worked to correct the error using the procedures mandated by the IRS's EPCRS procedures and that excess allocations should be corrected in accordance with the EPCRS's "Reduction of Account Balance Correction Method" §6.06(2), allowing the Division to make the correction *at any time*.

B. M. counters that the Division is not citing to the application section of the EPCRS and that the EPCRS does not supplant Alaska state law.

The EPCRS provides procedures for which the Division can correct mistakes to keep it in compliance with federal law. Revenue procedures, like the EPCRS, are official statements of procedures that affect the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge.[27] According to the IRS, rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents.[28]

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[27] IRS, *Understanding IRS Guidance- A Brief Primer*, https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer.
[28] IRS, *General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQS*, https://www.irs.gov/newsroom/general-overview-of-taxpayer-reliance-on-guidance-published-in-the-internal-revenue-bulletin-and-faqs#:~:text=Rulings%20and%20procedures%20reported%20in,the%20disposition%20of%20other%20cases.

The Court finds it unnecessary to determine what section of the EPCRS is applicable to correcting an overpayment. The EPCRS is not a federal statute or regulation, therefore it does not preempt state law in this case.[29] While the EPCRS procedures may be required for the Division to remain compliant with federal law, it is not controlling here. Whether or not the Division remains IRS compliant after making the error is outside the scope of the issue before this Court. However, it demonstrates how imperative it is for the Division to fix mistakes in a timely manner.[30]

iii. Applicability of the 6-year and 3-year statutes of limitations

Alaska courts have determined that when there are "doubts as to which of two statutes is applicable in a given case should be resolved in favor of applying

[29] *See Interior Reg'l Hous. Auth. v. James*, 989 P.2d 145 (Alaska 1999) (citing *In re J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986)) (finding that federal law preempts state law if Congress expressly or implicitly declares the state law preempted or "if the state law conflicts with the federal law to the extent that (a) it is impossible to comply simultaneously with both or (b) the state regulation obstructs the execution of the purpose of the federal regulation"))); *see also Boulds v. Nielsen*, 323 P.3d 58, 61 n.10 (Alaska 2014)(citing *Clauson v. Clauson*, 831 P.2d 1257, 1262-63 (Alaska 1992) (cautioning that the U.S. Supreme Court refuses to override state law unless preemption is positively required by direct federal enactment or the particular law does major damage to clear and substantial federal interests))).

[30] The Court notes that the Division likely did not make the correction in a timely manner that complies with the EPCRS. However, as the Court is not deciding the issue based on EPCRS grounds, it is unnecessary to provide further analysis here.

the statute containing the longer limitations period."[31] This standard has been construed to mean when two statutes might *reasonably* apply.[32]

The ALJ found that two possible statutes of limitations that could reasonably apply, a 6-year statute of limitations for actions arise from state action,[33] and a 3-year statute of limitations for actions arising under contract.[34] Since the 6-year statute is the longest, the ALJ chose to only examine the applicability of the 6-year statute applicably and declined to analyze whether the 3-year statute applied.

This Court agrees with the ALJ's finding that because the 6-year statute of limitations is the longer of the two statutes reasonably applicable, it is the applicable one if both reasonably apply. However, because the Alaska Constitution designates members of state employee retirements plans to be in a contractual relationship with the State, the Court finds it pertinent to discuss the merits of applicability of both possible statute of limitations due to the potential constitutional implications.

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[31] *McDowell v. State*, 957 P.2d 965, 971 (Alaska 1998) (citing *Lee Hous. & Assocs. v. Racine*, 806 P.2d 848, 855 (Alaska 1991)).
[32] *Fernandes v. Portwine*, 56 P.3d 1, 6 (Alaska 2002).
[33] AS 09.10.120(a).
[34] AS 09.10.053.

a. AS 09.10.120(a): 6-year state action statute of limitations

Under AS 09.10.120(a), except as provided in AS 09.10.075, an action brought in the name of or for the benefit of the state, any political subdivision, or public corporation may be commenced only within six years after the date of accrual of the cause of action. However, if the action is for relief on the ground of fraud, the limitation commences from the time of discovery by the aggrieved party of the facts constituting the fraud.

The State argues that because no formal civil action was taken to correct the mistake, no cause of action accrued, therefore the Division was not subject to a statute of limitations.

B. M. argues that the ALJ was correct in their assessment that the Division's action was similar to a state agency "auditing benefits or taxes or royalties and making an adjustment for over-or-under-payment."

The Court agrees with the ALJ's analysis that it is well settled law that State action is not limited to civil lawsuits and finds the 6-year statute applicable here on the same grounds. The administrative powers and the duties of the State are far-reaching. To find that a formal civil lawsuit was required every time the State wanted to take action would gridlock the Sate's ability to function. As the ALJ articulated:

> "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. The Court further held that the six-year statute of limitations for actions by the State and its political subdivisions and public corporations applies, regardless of whether the subject matter of the action would otherwise fall under a shorter statute of limitations. 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. 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.
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> 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. 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."[35]

The Court agrees the correction was akin to a state action of auditing public benefits or taxes or royalties and making an adjustment for over- or under-payment. A cause of action accrues when the essential elements of the claim have accrued. Here, this happened on August 28, 2013 when the overpayment was made. The action to benefit the State that needed to be commenced within 6 years was the correction of the overpayment. The correction occurred in June 2020, six

[35] Agency R. 000623-624 (*In the matter of* B. M., OAH No. 20-0794-TRS (October 4, 2021)).

years and 10 months after the mistake was made. Therefore, the Division corrected the mistake 10 months after they were authorized to do so under AS 09.10.120(a).

b. AS 09.10.053: 3-year contract statute of limitations

Under AS 09.10.053, unless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, except as provided in AS 09.10.040, or as otherwise provided by law, or, except if the provisions of this section are waived by contract.

The analysis for AS 09.10.053 varies slightly from the analysis of AS 09.10.120(a), due to a more specific designation of what constitutes accrual.

The statute of limitations begins to run in contract causes of action from the time the right of action accrues.[36] This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as a consequence of the breach.[37]

A contract action actually accrues or arises when there is an existing right to sue for breach of the contract.[38] Ordinarily, a cause of action for breach of contract accrues as soon as the promisor fails to do the thing contracted for, and

[36] *Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alaska 1975).
[37] *Id*.
[38] *Id*.

the statute of limitations begins to run at such time.[39] It is not material that the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action.[40]

A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract.[41] Under Alaska law, every contract has an implied covenant of good faith and fair dealing requiring that neither party do anything which will injure the right of the other to receive the benefits of the agreement.[42] The covenant arises out of an effort to further the expectations of the contracting parties that promises will be executed in good faith. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.[43]

As the Division was responsible for accurately maintaining the retirement accounts, the most reasonable determination for when the breach occurred was when the erroneous deposit was made coupled with the Division's subsequent inaction. However, the Court finds that the breach could also be construed to have occurred 91 days after the erroneous deposit, based upon the language of the monthly statements.

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[39] *Id*.
[40] *Id.*
[41] *Kimp v. Fire Lake Plaza II, LLC*, 484 P.3d, 80 (Alaska 2021).
[42] *Id*.
[43] *Id.*

In 2012, B. M.'s quarterly statements contained language stating that "corrections will be made only for errors which have been communicated within 90 calendar days of the last calendar quarter."[44] This statement is facially neutral and does not specifically indicate that only B. M. is meant to communicate errors within 90 days. If this statement was part of the contract and applicable to both parties, the right to sue for remedy, such as B. M. seeking injunctive relief to prevent the State from removing the funds, would not accrue until after the 90 days had elapsed.

Regardless of whether the accrual would be the date of the erroneous deposit or 90 days after it, this case presents a unique question of whether a breach under contract even occurred.

The Court has difficulty with this analysis because B. M. was not entitled to the erroneous deposit and the plan itself was not modified in way that impaired or

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[44] Please review this statement carefully to confirm that we have properly acted on your instructions. Corrections will be made only for errors which have been communicated within 90 calendar days of the last calendar quarter. Please direct all inquiries/complaints to the following:

Client Service Department
Attn - Enhanced Participant Services 8515 E. Orchard Rd.
Greenwood Village, CO 80111 1-800-232-0859

After this 90 days, this account information shall be deemed accurate and acceptable to you. If you notify the Company of an error after this 90 days the correction will only be processed from the date of notification forward and not on a retroactive basis.

diminished his benefits. There is a strong argument that no breach occurred because B. M. would not traditionally be entitled to sue for money that he was not supposed to have. However, B. M. and the State of Alaska were in a contractual relationship, and an error such an overpayment is an issue not uncommon to contracts. As bad faith may consist of inaction, it is not unreasonable to find that the Division's inaction of correcting the erroneous deposit after failing to accurately maintain B. M.'s account violated the covenant of good faith and fair dealing.

To the extent the 3-year contract statute of limitations applies, the Court finds that the Division was still barred because the 6-year statute of limitations could be reasonably applied.

iv. Collateral Estoppel

The Court further finds that even if no statute of limitations was applicable here, then the Division was still barred by the doctrine of collateral estoppel.

Estoppel is a legal doctrine applicable in instances where a statutory remedy may not be found. Alaska courts have held that statutes of limitations do not control the time limit for asserting equitable claims.[45] For actions not subject

[45] *E.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."); *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 385 (9th Cir. 1960); see also 30A C.J.S. Equity § 164 (2014) (citations omitted) ("Statutes of

to a statutory limit, equity doctrines can provide remedies to ensure just outcomes when a statute may not specially provide for it.[46]

To establish an estoppel claim against the government in favor of a private party, there is a required showing that:

> (1) the governmental body asserts a position by conduct or words;
> (2) the private party acts in reasonable reliance thereon;
> (3) the private party suffers resulting prejudice; and
> (4) the estoppel serves the interests of justice so as to limit public injury.[47]

In *Crum v. Stalnaker*, Crum was an Alaska public school teacher who had accumulated sufficient sick leave equivalent to one year of service before his retirement.[48] Before retiring, Crum spoke with a school district representative who provided him with various exit forms, but not the form to claim sick leave credit. As a result, Crum missed the deadline to file the form to receive sick leave credit.[49]

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limitations, . . . as ordinarily enacted, apply only to actions at law, and do not in terms apply to suits in equity").

[46] *See Lee v. Konrad*, 337 P.3d 510, 513 (Alaska 2014) (holding that equitable injunctive relief is an extraordinary remedy that is appropriate only where the party requesting relief is likely to otherwise suffer irreparable injury and lacks an adequate remedy at law).

[47] *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997) (citing *Wassink v. Hawkins,* 763 P.2d 971, 975 (Alaska 1988)).

[48] *Id.* at 1255-56.

[49] *Id*.

The Alaska Supreme Court found that found that the "Division had an obligation to provide the teacher with the proper form to claim the credit, therefore, the Division's failure to provide a form or clear notice of the claims procedure to the teacher satisfied the first element of the four-part test of equitable estoppel.[50] The teacher's failure to file a timely claim form due to relying on the Division's omission satisfied the second element of the estoppel test because it was reasonable.[51] The teachers' reliance satisfied the third and fourth elements of the test because it resulted in prejudice therefore, the retirement division was estopped from denying the teacher's claim."[52]

B. M. argued before the OAH that the Division was subject to estoppel in this case, but the ALJ declined to reach the merits of whether estoppel was applicable. B. M. raised the issue again in his brief before this Court, arguing that all four required elements of estoppel have been met in this case.

The Division argues they were not estopped from correcting the error because the Division never asserted B. M. was entitled to the funds in error, B. M.'s inattention to his own financial matters is insufficient to find reasonable reliance, B. M. did not experience prejudice because the correction made his

[50] *Id*.
[51] *Id*.
[52] *Id*.

account IRS compliant, and that allowing B. M. to keep the funds is averse to public interest as the general public will have to cover the costs.

The Court disagrees with the Division's argument and finds that B. M. has met all four required elements.

First, the Division asserted the position that B. M.'s account was accurate through both its conduct and its words. Beginning in fall of 2018 and through the end of the 2019-2020 school year, B. M. consulted with a financial planner from Empower about his retirement options. It was determined that B. M. could be expected to receive an annuity payment of approximately $3000 per month based upon his TRS account balance. The Division did not inform B. M. of the error in his account during these discussions, however internal emails show that not only was the Division aware of the mistake in 2019, they were also aware that it was likely too late to correct the mistake. Like in *Crum*, where the Division's omission of failing to provide the needed form satisfied the first element, here, the Division's omission of failing to correct the error or inform B. M. of the error throughout these discussions asserted the position that the account was accurate.[53]

[53] While not persuasive or binding authority, the Court notes that estoppel has been applied against the Division before when a government employee has reasonably relied upon discussions with Division representatives. *In the matter of L.R.H.*, OAH No. 12-0094-TRS (September 18, 2012), the ALJ found that after an employee missed filing additional paperwork for a leave application after being

Second, B. M. acted in reasonable reliance upon these discussions because he began to prepare for retirement based upon these consultations with Empower. Like in *Crum*, where Crum consulted with a representative and was not given a required form, B. M. consulted with a financial planner from Empower multiple times, was not informed of the error. B. M. then chose to retire based upon his expected monthly retirement payments. Had B. M. known about the error during these meetings with Empower, he would have waited to retire knowing that it would be corrected.[54]

Third, this correction prejudiced B. M. because his retirement fund was reduced by $114,797.20, approximately 25% of his entire retirement savings.[55] $114, 797.20 is a substantial amount of money for a public teacher to have removed from their savings. B. M. had already left the State, purchased property, and was dependent on his savings to fund his cost of living. Regardless of whether B. M. was not originally entitled to the funds, the removal of these funds prejudiced B. M.

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told by a Division counselor that the employee did not need to do anything further, the Division was estopped from denying the application.

[54] Agency R. at 000062 (*Affidavit of* B. M.).

[55] Agency R. at 000063 (*Affidavit of* B. M.).

Fourth, in this case, estoppel serves the interests of justice so as to limit public injury because it incentivizes the Division to comply with its obligation to correctly manage and administer its thousands of retirement accounts.

Retirement accounts provide security and peace of mind for state employees seeking to eventually retire. It is generally assumed that the State of Alaska acts diligently to ensure that those who have worked for the State receive the benefits they were promised and keep their accounts IRS compliant. State employees cannot be expected to guarantee the accuracy of their retirement statements to the same degree the Division is able to. The Division has extensive resources and expertise dedicated to this very issue, including the ability to audit plans for accuracy. Allowing the Division to limitlessly correct their errors after their own failure to diligently manage their accounts would be averse to the public interest.

V. CONCLUSION

For the reasons set forth above, the court **AFFIRMS** the OAH decision reversing the Division's decision to make the correction.

Dated this 24th day of March, 2023, at Anchorage, Alaska.

Signed
ANDREW PETERSON
Superior Court Judge

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