BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
T L	)	OAH No. 22-0900-PER
	)	Agency No. 2022-001

CORRECTED DECISION

I. Introduction

The Division of Retirement and Benefits denied T L's application for retirement benefits from the Public Employees' Retirement System because Ms. L was still employed by the same employer for whom she worked when she vested in PERS. In all other respects, however, Ms. L was eligible for normal retirement.

Whether Ms. L's application should have been granted depends on whether the facts and circumstances show that her termination from her PERS job was *bona fide.* The facts and circumstances of Ms. L's case show that she was participating in a different retirement system, she had no prearrangement for rehire when she left her PERS job, considerable time had passed since she left her PERS job, and she had not requested any benefit not customarily provided in a pension system. These facts and circumstances establish that her termination from her PERS job was *bona fide*. Accordingly, the Division's decision is reversed.

II. Facts and proceedings

A. Facts

This is the second time that this office has heard T L's appeal of the Division's denial of her application for retirement benefits from the Public Employees' Retirement System. The facts and the legal issues are fully described in the first Office of Administrative Hearings decision, issued in August 2021 (*L I*).[1] Accordingly, this decision will give only a brief synopsis of the facts and the unusual process that has led to this appeal being before OAH a second time. We will then address whether the Division erred by denying the application.

Ms. L enrolled in PERS in May 2002 when she began work for the Employer A as a paraprofessional.[2] The aide job did not require a teaching certificate. She terminated from that job on May 23, 2012.[3] She has not worked in a PERS-eligible job since 2012.[4]

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1 R. 35-39. This decision will refer to the decision, record, and briefing in the first OAH proceeding as *L I.* The superior court appeal will be called *L II.* This decision is *L III.*

2 Joint Stipulation of Fact (*L I*) ¶ 9 (Dec. 31, 2020).

3 *Id.* ¶ 10.

4 *Id.* ¶ 15.

Ms. L, who had a teaching certificate, applied for a teaching position with the district. She was not promised a teaching job at the time she terminated her job as an aide.[5] The district offered Ms. L a teaching position. She accepted and was enrolled in the Teachers' Retirement System (TRS) on August 16, 2012, about three months after leaving her aide job.

In July 2019, when she turned 60 and was therefore eligible for normal retirement, Ms. L applied for her PERS retirement benefits based on her job as an aide.[6] She was still working as a teacher for the district.[7]

On May 26, 2020, the Division denied her application.[8] It noted that she was still employed by the same employer for whom she had worked while accruing her PERS benefits. It explained that, "[t]he IRS deems this as one continuous employment even though you have participated in two separate retirement plans."[9] In support, it cited both 2 AAC 35.227 (a 2017 regulation adopted by the Department of Administration) and "Internal Revenue Service and Treasury Department (IRS) regulations."[10]

Compliance with IRS rules is important because it allows PERS to maintain its status as a qualified pension plan under 26 U.S.C. § 401(a).[11] As the Division has repeatedly made clear throughout these proceedings, "[m]aintaining the tax qualified status of PERS has always been the top priority of the Division because loss of the PERS tax-qualified status may result in the assessment of back taxes, interest, and penalties against the Plan and its members."[12]

B. Proceedings

Ms. L appealed the Division's denial to the Office of Administrative Hearings. The parties agreed that no hearing was necessary and that OAH could issue a decision based on stipulated facts and briefing.

In their briefing in *L I*, both parties discussed the applicability of 2 AAC 35.227, which set rules for how long a separation of service had to be in order to be considered "*bona fide*" for purposes of retirement.[13] Both parties also discussed whether IRS rules required that the Division

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5 *Id.* ¶ 14.
6 *Id.* ¶ 16.
7 *Id.* ¶ 15.
8 *L I* R. 8.
9 *Id.*
10 *Id.*
11 Joint Stipulation ¶¶ 3, 4.
12 Division Opening Brief (*L III*) at 6.
13 L Initial Brief (*L I*) (March 26, 2021); Division's Opposition to Brief by T L (*L I*) at 2 (April 26, 2021).

deny Ms. L's application because she had reemployed with the same employer for whom she had earned her retirement benefits.[14]

Ms. L's brief also argued that she had a constitutional right to a pension that met the terms promised to her when she began her public service.[15] She agreed, however, that "PERS compliance with IRC and IRS guidelines is essential."[16]

L I held that 2 AAC 25.227 could not be applied retrospectively to Ms. L. In addition, *L I* considered the Division's alternative argument that under IRS rules, Ms. L's termination from her PERS job in 2012 was not a bona fide termination. *L I* agreed with the Division that Ms. L's application must meet IRS requirements for a *bona fide* termination of employment. It found, however, that the IRS rules required a facts-and-circumstances test for determining whether a termination was *bona fide.* It determined that the absence of a prearrangement for reemployment, Ms. L's membership in TRS, and her being prohibited from participation in PERS for her teaching job meant that her termination from her PERS job was bona fide for the purposes of her later retirement from her PERS job.[17]

The Division appealed *L I* to the superior court. Although the court agreed that 2 AAC 25.227 did not apply, it reversed *L I*.[18] It remanded the case to the Division for further consideration of whether Ms. L's application should have been granted.[19]

On remand, the Division again denied Ms. L's application.[20] It explained that AS 39.35.370 allows an award of pension benefits only after "the member terminates employment." It stated that "the plain and ordinary meaning of the phrase appears clear: the member must separate from service and cease performing services for their employer."[21] In the Division's view, Ms. L did not meet this requirement because "at the time of your effective

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14 L Initial Brief (*L I*) at 22; Division's Opposition (*L I*) at 2 (April 26, 2021) (arguing that Division was "entitled to prevail" because, in its view, "[Ms. L] did not have a bona-fide separation of service from Employer A that would allow distribution of her PERS pension."); *see also id.* at Ex. 1 (affidavit from Division's outside counsel arguing that "even if the regulation was not applicable to this member, she still could not commence her PERS benefit because she was still employed by the same employer at the time she applied for her PERS benefit."). Because this affidavit was attached to a brief, was not admitted as testimony, and advocated a particular interpretation of law (which is not a proper subject for expert testimony), it is treated as argument, not evidence.

15 L Initial Brief (*L I*) at 2-25.

16 L Reply Brief (*L I*) at 11. *L I* explained that because both parties agreed that Ms. L had a constitutional right to her vested pension benefits, and both agreed that compliance with IRS rules was essential, this case could be decided without implicating any constitutional right. R. 39-41 (*L I* at 5-7).

17 R. 48-49 (*L I* at 14-15).

18 R. 27-30 (*L II* at 13-16).

19 R. 31 (*L II* at 17).

20 R. 9.

21 R. 10.

retirement date of October 1, 2019, you were not separated from service with Employer A."[22] The Division further explained that it denied the application under IRS rules "in order to avoid potential early distribution tax penalties for PERS member and to avoid a risk of disqualification for the PERS pension plan."[23]

Ms. L appealed this decision to OAH. The parties agreed that the issue could be decided on the record.[24]

III. Discussion

Under AS 39.35.370, retirement benefits are payable and accrue "from the first day of the month after which all of the following requirements are met: (1) the member meets the eligibility requirements of this section; (2) the member terminates employment; and (3) the member applies for retirement."[25] The parties agree that Ms. L is vested in PERS, has applied for retirement, is no longer employed in a PERS-eligible position, and has reached the age required for a regular retirement from PERS. The only issue on the table here is whether she meets the requirement that she must have "terminate[d] employment."

Although the discussion that follows is long, the actual analysis is straightforward. Reaching a decision involves three steps. First, as will be explained, we defer to, and adopt, the Division's interpretation that AS 39.35.370(e) implicitly "require[s] a *bona fide* termination of employment in order to comply with the requirements of IRC § 401(a)."[26]

Turning next to the IRS regulations, we learn that determining whether a retirement was *bona fide* requires application of a "facts and circumstances test."[27] That tells us that we cannot apply a hard-and-fast rule to determine eligibility. Instead, we must put all relevant facts into the hopper, and identify those that favor eligibility and those that disfavor eligibility. Determining which factors are included in the analysis, and how to weight the various factors in reaching a decision, requires digging into IRS rulings and advice.

The final step in the analysis is to apply the factors to Ms. L's facts and circumstances. In applying IRS guidance, the Division found that because Ms. L had reemployed with the same employer without a sufficient break in service, her termination was not *bona fide*. As will be

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22 R. 12.
23 R. 11.
24 Scheduling Order, *L III* (Dec. 8, 2022). Having the case set for decision on the record means that the parties did not have to file motions for summary adjudication. Therefore, if there were a dispute of fact, the issue could be resolved on the record.
25 AS 39.35.370(e).
26 Division Opening Brief at 19 (*L III*).
27 26 C.F.R. § 1.409A-1(h)(1)(ii).

explained, although the Division is correct that Ms. L's reemployment does, indeed, tend to disfavor her eligibility, other facts in this record must also be given appropriate weight. These factors include her enrollment in a different retirement system upon reemployment, the absence of a prearrangement for reemployment, the length of time between reemployment and application for retirement benefits, and her eligibility for retirement benefits in all other respects.

Before applying the three steps described above to reach a decision, however, we must first discuss the Division's preliminary argument regarding the standard of review. The Division argues that the only issue is whether it had a rational basis for its approach to all three of the steps. As will be seen, this deferential standard applies only to the first step.[28] The other steps will be given greater scrutiny, using an independent judgment standard.

C. Is the Division's interpretation of AS 39.35.370(e) to require consistency with IRS requirements entitled to deference?

The Division asserts that it interprets AS 39.35.370(e) to "require[] a *bona fide* termination of employment in order to comply with the requirements of IRC § 401(a)."[29] It asks that its interpretation be given deference and adopted as a reasonable application of its expertise in interpreting retirement laws.

Where no facts are in dispute, the Alaska Supreme Court has explained that there are "two standards" for the "review [of] agency interpretation of statutory terms (i.e., questions of law)."[30] The first is "the rational basis standard, under which we defer to the agency's determination so long as it is reasonable. The other is the independent judgment standard under which the court makes its own interpretation of the statute involved."[31] The court further explained that "[t]he

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[28] Because OAH serves as the final decisionmaker in PERS and TRS cases, it often will apply the same standards of review that a judicial court would apply. This is in contrast to the more common situation where OAH is drafting a decision on behalf of an agency decisionmaker who has policymaking authority. *Cf., e.g., In re TNS, Order Denying Motion to Dismiss,* OAH No. 09-0025-PER (OAH 2009), *available at* https://aws.state.ak.us/OAH/Decision/Display?rec=4946. Certainly, OAH is not a policymaking body, and, when it is the final administrative decisionmaker, it will defer to policy matters if they have been adopted by an official or body with policy-making authority. There are, however, differences between OAH's administrative role and the court's judicial role. First, when conducting an administrative appeal, the court is most often reviewing a final administrative decision that has been issued after an adversarial process that comports with due process. OAH, on the other hand, is reviewing what is essentially an *ex parte* decision, issued without giving the aggrieved member an opportunity to argue the facts and law before a neutral decisionmaker. Second, the doctrine of separation of powers may cause a court to defer in some situations. That doctrine does not apply to OAH when reviewing executive branch decisions. Therefore, OAH would not be required to apply the types of deference that arise from separation of powers concerns.

[29] Division Opening Brief at 19 (*L III)*.

[30] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 903 (Alaska 1987).

[31] *Id.* (citations omitted).

reasonable basis standard permits the court to consider factors of agency expertise, policy, and efficiency in reviewing discretionary decisions."[32]

When an agency interprets commonly-used terms, however, the usual rule is that no deference will be given to the agency's interpretation. As the Alaska Supreme Court has advised, "we review the agency's interpretation of such non-technical statutory terms under the substitution of judgment standard."[33]

In this case, we are being asked to review the Division's interpretation of the phrase "terminates employment." That phrase uses terms that are not esoteric or technical.[34] In most circumstances, therefore, the Division's interpretation would be reviewed using independent judgment.

The Division is correct, however, that there is a line of cases that would support granting deference to an agency's interpretation of common terms in certain circumstances. The court has also advised that "the rational basis test may be appropriate even when interpreting commonly used words, if there are technical and policy reasons to defer to the administrative agency, and especially if the legislature has granted the agency broad discretion."[35]

Neither the words "*bona fide*" nor the cross-reference to the IRC are found in the statute. Although the *bona fide* requirement can be read as a subtext of any statute, the cross-reference to the IRC to define what is meant by *bona fide* is neither common nor obvious.

The Division has provided ample evidence that being consistent with IRS rules in awarding retirement benefits is an important policy. PERS is able to accrue retirement assets on behalf of eligible employees on a tax-free basis because it has been certified by the IRS as a

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[32] *Matanuska-Susitna Borough v. Hammond,* 726 P.2d 166, 176 (Alaska 1986) (quoting *Jager v. State,* 537 P.2d 1100, 1107-08 (Alaska 1975)).

[33] *Northern Alaska Env. Ctr. v. State, Dep't of Nat. Res.,* 2 P.3d629, 633 (Alaska 2000). *See also* AS 01.10.040(a) ("Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.").

[34] *Cf. Northern Alaska Env. Ctr.,* 2 P.3d at 634 n.12 ("where the agency interprets technical or esoteric terminology, we have applied reasonable basis review.").

[35] *Western States Fire Prot. Co. v. Municipality of Anchorage*, 146 P.3d 986, 989 (Alaska 2006) (holding that deference to expertise of administrative board was appropriate in interpretation of fire codes that "contain common terms like 'continuous' and 'noncontinuous,' [but] also contain open-ended terms whose interpretation requires technical expertise" and legislative authority "has granted broad discretion to the board"). *See also, e.g., Matanuska-Susitna Borough,* 726 P.2d at 175 (Alaska 1986) (using rational basis test for interpretation of "population" because "determining population is an inexact science, with agency expertise implicated at each step of the determination process" and because of "the expertise involved, as well as the statutory grant of discretion"). Note, however, that the decision to defer to the Division's interpretation of "terminates employment" to include a cross-reference to IRS rules does not mean that the Division has been granted discretion to deny Ms. L's application.

qualified pension plan. A retirement system that fails to abide by IRS requirements could lose its certification. Further, the Division has identified IRS regulations, rulings, and advice that make clear that a particular area of concern for the IRS is whether a system allows employees to receive benefits when the separation from service is not genuine.[36] It is, therefore, a reasonable exercise of the Division's expertise and policymaking prerogative to cross-reference IRS rules when interpreting the phrase "terminates employment." Giving deference to the Division's inclusion of IRS requirements in its eligibility decisions is consistent with the advice from *Western Fire* and *Matanuska-Susitna* that deference is appropriate when "there are technical and policy reasons to defer to the administrative agency" even when the agency is applying common terms used in a statute.[37]

D. Is the Division's overall decision to deny Ms. L's application entitled to deference?

Above, this decision has explained that the Division's decision can be divided into component parts. The first part is its conclusion that it must determine whether a termination of employment was *bona fide* as that term is used by the IRS. That decision is entitled to deference. The Division also requests, however, that this decision defer to its action on the second and third steps—the determination of factors to apply, and then the application of those factors to reach a conclusion regarding eligibility. This request is discussed below.

(1) Is the Division's decision to interpret AS 39.35.370 to prohibit reemployment with the same employer entitled to deference?

To the extent that the Division is arguing that it is interpreting the plain language of AS 39.35.370(e) to exclude reemployment with the same employer, and that this interpretation is entitled to deference, that argument is not persuasive. First, as already explained, this decision adopts the Division's other argument—that the statute must be interpreted to be consistent with the IRS requirements for a qualified pension plan. This means that whether Ms. L's termination was *bona fide* must be determined based on facts and circumstances. This is inconsistent with a holding that the plain language of the statute did not permit reemployment with the same employer in any circumstances. Thus, the Division's plain-language approach is rejected because

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[36] *See, e.g.,* Jt. Stip. ¶¶ 3, 4; Division's Opening Brief (*L III*) at 6-7, 13, Division's Opposition at Ex. 1 (*L I*) and the authorities cited at these pages.

[37] *Western States Fire*, 146 P.3d at 989; *Matanuska-Susitna Borough,* 726 P.2d at 175. If, however, an appellate court determines that this issue requires application of independent judgment, I would nevertheless affirm the Division's decision that the statute requires a *bona fide* termination consistent with IRS requirements. Applying independent judgment, I would find that the Division has made a compelling argument that this interpretation is consistent with legislative intent.

it would foreclose a consideration of the facts and circumstances of the member's termination from employment.

Moreover, the "plain language" argument is inherently flawed. Here, the Division says that the phrase means that "the member must separate from service and cease performing services for their employer."[38] Yet, the Division would allow reemployment with a different employer.[39] It even would allow reemployment with the same employer it if the applicant was over 59½ and became reemployed with the same employer after a six-month break in service or was age 62 and had a 60-day break in service.[40] We cannot derive all of these permutations from the plain language of the statute.

Furthermore, here, Ms. L did separate from service and cease performing services for the school district in 2012. Thus, Ms. L has at least as good a "plain-language" argument as the Division.

In sum, although the plain meaning of "terminate" could mean "terminate all employment with the same employer," it could also mean "terminate the employment covered by the pension plan" or "terminate all employment with any employer." As this discussion shows, the question here is not the definition of the plain language of the word "terminate." The question is whether Ms. L's termination was *bona fide* under IRS rules. Answering that question requires an analysis of the facts and circumstances, which, as explained above, is a very different approach than trying to adopt a bright-line definition.

(2) Does the Division's familiarity with the application of retirement laws mean its decision to deny Ms. L's application should be given deference?

The Division argues that its decision denying Ms. L's application should be reviewed under the reasonable basis standard because it has special expertise, "[b]ased on its knowledge of the PERS and IRS requirements."[41] As explained above, this argument was persuasive when applied to interpreting AS 39.35.370 with reference to IRS rules because that conclusion involved an interpretation of a retirement statute that invokes a nonobvious cross-reference. This does not mean, however, that the Division's *application* of the IRS rules is entitled to deference.

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38 R. 10.

39 R. 117 (current plan booklet advising that a member cannot retire from PERS while working in TRS with the PERS employer).

40 2 AAC 64.250. This regulation is discussed more extensively below in subsection E.(a)(1)*viii*.

41 Division Opening Brief at 14.

First, although the Division asserts that its experience in and responsibilities for applying retirement statutes give it the requisite standing for deference, the court has rejected that argument: "The terms of [the statute] are not technical, and mere familiarity in their application by the [agency] does not render that agency any better able to discern the intent of the legislature than the courts."[42]

Second, here, we are not discussing the Division's interpretation and application of Alaska's retirement laws. Here, we are discussing its interpretation and application of the Internal Revenue Code. The Division's jurisdiction and expertise is in running retirement systems. It does not have jurisdiction over or expertise in federal tax law. Further, even if had such expertise, as the Alaska Supreme Court has advised, in general, a reviewing tribunal should not defer to a state agency's interpretation of the Internal Revenue Code.[43]

Finally, as discussed earlier, the issue here turns ultimately on an in-depth review of the "facts and circumstances" of Ms. L's case. This inquiry is well-suited to a decision in an adversarial proceeding such as this one, made on an independent basis without deference to the argument of either party.

(3) Is the Division's interpretation longstanding?

The Division cites to a retirement case in which the Alaska Supreme Court advised that "an agency's interpretation of a law within its area of jurisdiction can help resolve lingering ambiguity, particularly when the agency's interpretation is longstanding."[44] This quotation is not helpful to the Division for two reasons. First, as just explained, the issue here is not an interpretation of law within the agency's area of jurisdiction. The issue is the application of a

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42 *Northern Alaska Env. Ctr.,* 2 P.3d at 634. *See also City of Valdez v. State,* 372 P.3d 240, 247 (Alaska 2016).

43 *See, e.g., State of Alaska, Dep't of Rev., v. Dyncorp and Subs.,* 14 P.3d 981 (Alaska 2000) (holding that where case involves "the body of federal law interpreting the Internal Revenue Code[]" and "rests solely on the application of established federal law to undisputed facts" the administrative tribunal owed "no special deference to the decision reached by the department").

44 Division's Opening Brief at 18 (*L III*) (quoting *Bartley v. State, Dep't of Admn., Teacher's Ret. Bd.,* 110 P.3d 1254, 1261 (Alaska 2005)). *Bartley* is entirely consistent with this decision. *Bartley* involved two issues. First, the court had to determine which statutory formula to use for calculation of the retirees' arrearage indebtedness (so that they could buy into TRS for their teaching service in the BIA and outside of Alaska). *Id.* at 1256-60; 1264-66. The court applied independent judgment to this question and reversed the agency. *Id.* at 1256-60. The second issue involved the retirees' eligibility for normal (instead of early) retirement. The court adopted in full the superior court's decision on this question, which had applied independent judgment to the issue. *Id.* at 1260-61; 1263. As quoted above, the court also commented that the Division's longstanding published interpretation meant that the court would need "weighty reasons" to substitute its judgment for the agency's. *Id.* at 1261. Here, the Division's interpretation that the statute outright prohibits reemployment with the same employer is not longstanding and will not be given deference.

facts and circumstances test as it would be applied by the IRS. Second, here, the Division's interpretation of the rules for reemployment with the same employer is not longstanding.[45]

Although the Division cites the "longstanding" doctrine, is does not assert that its current approach to the reemployment issue is longstanding.[46] Indeed, when evaluating whether 2 AAC 35.227 was substantive law, not procedural or interpretative, the superior court found that it was a substantive regulation in part because "there is no evidence of pre-existing conduct by the agency."[47] Accordingly, there is no reason for this decision to defer based on this doctrine—in the absence of a claim that the approach is longstanding, the doctrine does not apply.

Moreover, in response to the Division's implied assertion that its approach is longstanding, Ms. L submitted an affidavit averring that she had knowledge of a case of a teacher in her district who had previous PERS service with the district and was allowed to retire from PERS while remaining in his TRS teaching position.[48] The Division did not refute this claim. It did not request oral argument or otherwise respond. In sum, although the Division's interpretation of AS 39.35.370 to require compliance with IRS rules may be longstanding, on this record, the approach applied by the Division in this case regarding reemployment is not longstanding.[49]

(4) Should this office defer to the Division's decision based on the risk of an adverse ruling by the IRS?

In its briefing, the Division has consistently identified the policy that it employed in reaching its decision: "It is the Division's policy to administer the PERS in compliance with the requirements of the IRC and its governing regulations."[50] This decision agrees that this is a reasonable fundamental policy of the agency. In adherence to this policy, if this decision determines that granting Ms. L her requested PERS retirement benefits while she is employed by the same employer under whom she accrued the benefits *would* violate the requirements of the

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[45] To be clear, if the Division had a longstanding history of applying the facts and circumstances test consistently, I would consider whether this practice merited "some deference." What I am rejecting here is the Division's assertion that the deference issue is controlled by *Bartley* because this case involves lingering ambiguity in an area within the Division's expertise. It does not.

[46] *See* Division's Opening Brief (*L III*); Division's Reply Brief (*L III*); Division's Opposition (*L I*).

[47] R. 30 (*L II* at 16 n. 74).

[48] Affidavit of T E. L ⁋ 9 (attached to L Reply Brief); *see also* Exhibit to Affidavit of T E. L (screen shot of "Retiree Return to Work Policy FAQs" from Alaska Dep't of Admin, Div. of Ret. and Ben. (undated)) (describing new policy for members who retire or rehire after January 1, 2018, on termination of employment and rehire by same employer; explaining that "[a] valid termination has always been a requirement for retirement benefits" but that new rules for length of break in service were to conform to new IRS guidelines).

[49] This decision does not make a factual finding regarding the past practice of the Division. The finding here is that no evidence supports that the Division's current approach to the issue of reemployment is longstanding.

[50] Division's Opening Brief at 6.

IRC and its governing regulations, then this decision will affirm the denial of her application. This is true even though, as the Division acknowledges, Ms. L is otherwise qualified for retirement.

The issue in this proceeding, however, is not whether the IRS law *might* prohibit Ms. L's eligibility. The issue is whether it *does* prohibit her eligibility. Avoiding risk is reasonable, but it is not a ground for deferring to a decision that might be incorrect. If Ms. L is to be denied her pension benefits, it must be because the law does not permit the system to award her benefits. It cannot be because there is a risk that the law might not permit it. "[A]n adjudicated decision cannot ignore the law."[51]

To be clear, this decision is not discussing whether the *Division* had an obligation to make a call on whether the IRS law in fact does not permit it to award Ms. L a pension, rather than deny the benefits based on risk. The role of the Division is much different than the role of this office. The Division must deal with the IRS. This involves uncertainty and the consequences could be significant. No criticism of the Division for having taken a cautious approach (and thereby setting the wheels in motion for authoritative adjudicated decisions on what the IRS laws mean) is intended or implied. This process, although burdensome for Ms. L, will reduce uncertainty.

Furthermore, nothing in this discussion is at odds with the superior court's directive that the Division "is in the best position to make such a determination based on its knowledge and agency expertise regarding management of the PERS, and this court will only reverse such a decision for an abuse of agency discretion, lack of substantial evidence, or for incorrect legal reasoning."[52] Here, the agency is the proper entity to make the initial decision. That decision, however, is *ex parte.* The adjudicated administrative decision before a neutral decisionmaker in which Ms. L has an opportunity to be heard occurs before the OAH. As will be explained, this process leads to the conclusion that the Division employed incorrect legal reasoning in its approach.

In sum, in this adversary proceeding, a decision must be made on whether Ms. L is entitled to retirement benefits. If I determine that the IRS regulations do, as a matter of law, forbid a qualified retirement system from awarding pension benefits here, then I will affirm the Division's denial of Ms. L's application. If not, given that the Division has not argued that Ms. L

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[51] *Alborn Constr., Inc. v. Dep't of Lab. & Workforce Dev., Lab. Stnds. & Safety Div.*, 507 P.3d 468, 482 (Alaska 2022).

[52] R. 32 (*L II* at 18).

is otherwise ineligible, I will reverse. Because this is a question of law that does not require deference to a Division policy, I will apply independent judgment to determine whether IRS rules prohibit an award of pension benefits to Ms. L.

E. Do the facts and circumstances of Ms. L's retirement application show that awarding her retirement benefits would violate IRS rules?

(1) What factors are important in determining whether a retirement application is *bona fide*?

To evaluate the Division's decision, we must first determine what factors are important in determining whether a termination from employment was *bona fide.* The analysis that follows will first discuss the authorities from the IRS and the Division that the parties have cited in their briefing. It will then list the factors to be considered.

(a) What issues are discussed in IRS and Division authorities and publications regarding when a termination is *bona fide*?

Below is a survey of various IRS authorities or publications that provide some guidance on the factors to be considered in determining whether a retirement is *bona fide.* Some of these, such as the IRS statutes and regulations, are authoritative. Some, such as the excerpt from a question and answer forum, are not authoritative.[53] Others, such as revenue or private letter rulings, are somewhere in-between.[54]

No authority has been identified, however, that discusses an applicant for retirement who meets all statutory requirements for a normal retirement except for the fact that she has reemployed with the same employer in a job that required enrollment in a different pension plan. Thus, no authority directs the outcome here. Therefore, in this exercise, we are not looking for binding precedent. Instead, we are mining various authorities and publications cited by the parties to identify the principles that underlie the facts and circumstances test for determining whether a separation from service is *bona fide*.[55] This analysis will consider any publications of

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[53] For a thorough discussion of why the Q&A is not authoritative, see *L I* at 12 (R. 46).

[54] *See, e.g., Telecom USA, Inc. v. United States,* 192 F.3d 1068, 1072 (D.C. Cir. 1999) ("Although a revenue ruling does not have the force and effect of Treasury Department Regulations, *see* 26 C.F.R. § 601.601(d)(2)(v)(*d*), it does constitute 'an official interpretation by the Service' *id.* § 601.601(d)(2)(i)(*a*).").

[55] Identifying the underlying principle behind a rule is often necessary for decisionmakers who must interpret a statute or regulation in order to apply the law to a set of facts. The Alaska Supreme Court, for example, has explained that one factor it will consider when construing statutes is the legislative "purpose" or "objective" behind the statute, regulation, or standard. *See, e.g., Valdez v. State*, 372 P.3d at 248 ("[w]hen construing statutes de novo, we consider three factors: 'the language of the statute, the legislative history, and the legislative purpose behind the statute'" (citation omitted)); *Western States Fire*,146 P.3d at 990 ("The 'overall objective' of NFPA 13 'is to ensure that a sufficient amount of water from the sprinkL reaches the hazard.'" (citation omitted)). This is exactly the same process followed by ALJ Sullivan in *L I* when construing the IRS requirements that had been cited by the Division in support of its decision. *L I* at 7-13 (R. 41-47) (discussing "essential elements" of *bona fide* separation under IRS

the IRS and the Division that provide guidance, without regard to whether they are authoritative or precedential.

i. 26 U.S.C. § 401(36)(A)

Under 26 U.S.C. § 401(36)(A), "[a] trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 59½ and who is not separated from employment at the time of such distribution."[56] This decision accepts the Division's representation that this statute is not directly applicable here because AS 39.35.370 requires that an applicant is not eligible for retirement until the applicant terminates employment, meaning that a working retirement from PERS while still employed in a PERS position is not permitted.[57] Yet, two observations are applicable. First, as thoroughly discussed in *L I,* working while legitimately retired, including, in some circumstances, working for the same employer, is not something that the IRS is seeking to prevent.[58] Second, a very important factor for the IRS is the age of the retiree—under this statute, the retiree must be at least age 59½ for the working retirement to be *bona fide.*

ii. Treasury Regulation 26 C.F.R. § 1.401-1(b)(1)(i)

Treasury Regulation 26 C.F.R. § 1.401-1(b)(1)(i) first defines what a pension plan is: "A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement." It then tells us that "a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan."[59]

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rules and requirements). The Superior Court, however, was critical of the approach in *L I,* and questioned whether OAH may have "exceeded its scope of review" in trying to distill the underlying principles behind the IRS requirement that a retirement be *bona fide. L II* at 11 (R. 25). In reviewing the Division's decision on remand, this decision must comply with the law of the case as established by a higher court. Because I do not read *L II* to hold that OAH is prohibited from identifying the principles underlying the IRS rules, and because I do not know how else I can evaluate whether the Division erred in its application of the IRS rules, I will follow the same process that was employed in *L I.* I stress, however, that I am not making policy for either the IRS or the Division. I am simply trying to identify the underlying purpose and objective of those agencies so that I can analyze the facts and circumstances in light of that purpose and then issue a final administrative decision on whether Ms. L's application should be granted.

[56] 26 U.S.C. § 401(36)(A) (2023). At the time of Ms. L's application, the applicable age in this statute was 62. 26 U.S.C. § 401(36)(A) (2019).

[57] R. 12.

[58] R. 41-44 (*L I* at 7-10).

[59] 26 C.F.R. § 1.401-1(b)(1)(i).

This regulation identifies clearly and distinctly the crux of the matter at issue here. In evaluating Ms. L's application for retirement, we must ensure that granting it would not provide a benefit that is not customarily included in a retirement plan.

iii. Treasury Regulation 26 C.F.R. § 1.409A-1

Treasury regulation 26 C.F.R. § 1409A-1(h)(1)(ii) addresses the termination of employment issue as follows: "[w]hether a termination of employment has occurred is determined based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date." It then discusses that reemployment for part-time work of 20 percent time or less would create a presumption of a valid separation of service and reemployment at more than 50 percent time create a presumption that the separation was not valid.[60] The regulation does allow for flexibility and exercise of judgment. As an example of a situation that would rebut the presumption of an invalid separation, it discusses the situation of a retiree who temporarily returned to more than 50 percent time work because the retiree's replacement left employment.[61] The regulation goes on to explain that

> [f]acts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business.[62]

The key takeaways here are that the facts and circumstances test is not limited to any one fact, that determining whether a separation is valid requires the exercise of judgment, and that the retiree's continued participation in employee benefit programs is an important fact to consider.

iv. Private Letter Ruling 201147038

In Private Letter Ruling 201147038, the IRS discussed a complicated situation regarding a proposed change in pension benefits for a multiemployer pension plan in critical status requiring rehabilitation. The pension plan had included an opportunity for early retirement with full pension benefits for employees with 20 years of service. The taxpayer sought to eliminate this benefit, which would mean that employees could receive full retirement only at age 65. The taxpayer wanted to offer the union members an opportunity to preserve their opportunity for full early retirement by retiring within a 60-day window and then returning to work with retirement

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60 26 C.F.R. § 1409A-1(h)(1)(ii).
61 *Id.*
62 *Id.*

benefits suspended. Later, those employees could then return to retirement status even if they were not 65. The IRS rejected this proposal, explaining that

> because a qualified pension plan is generally not permitted to pay benefits before retirement, an employee who 'retires' with the explicit understanding between the employer and employee that upon retirement the employee will immediately return to service with the employer has not legitimately retired and may not qualify for an early retirement benefit under the Plan.[63]

This ruling stands for the proposition that a prearrangement for a return to full employment in the same job with the same employer after retirement means that the retirement is not legitimate.

v. Revenue Ruling 56-693; Revenue Ruling 60-323; General Counsel Memorandum, GCM 39824

In 1956, the IRS issued a revenue ruling regarding a "money purchase pension plan" that allowed vested participants to withdraw money before retirement based on "a financial need." The IRS advised that

> although an employees' qualified pension plan may provide benefits prior to normal retirement, such as disability and death benefits, which are only incidental to the main purpose of the plan, an employees' pension plan which permits the participants, prior to any severance of their employment or the termination of the plan, to withdraw all or a part of the funds accumulated on their behalf, in times of a financial need or otherwise, will fail to meet the requirements of section 401(a) of the Code.[64]

This revenue ruling affirms the underlying principle that benefits are to be awarded only for a *bona fide* termination—awarding benefits early to working employees means that the plan is not a qualified plan. Subsequent revenue rulings and General Counsel Advice Memorandum have clarified that

> [o]ne of the principles that underlies the definition of pension plan in Reg. section 1.401-1(b)(1)(i) and thus is relevant in construing the term 'severance from employment' as used in Rev. Rul. 56-693 is that only employees (within the meaning of section 401) of the employer maintaining a pension plan may benefit under the plan. Treas. Reg. section 1.401-1(b)(1)(i) provides that a pension plan is a plan maintained by AN EMPLOYER to provide benefits to HIS EMPLOYEES. Consequently, when the employment relationship between an employee and the employer maintaining a pension plan is severed before the employee retires, a distribution of benefits to the employee from that pension plan after severance of the employment relationship with that employer is not

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63 PLR 201147038, 2011 WL 5893533.

64 Rev. Rul. 56-693 (IRS RRU), 1956-2 C.B. 282, 1956 WL 11311, *as modified by* Rev. Rul. 60-323, 1960-2 C.B. 148 (1960) (clarifying that qualified plan may permit employees to withdraw voluntary contributions before retirement).

> inconsistent with the concept of a pension plan that meets all of the requirements of section 401(a).[65]

Although these authorities do not identify any principles that have not already been discussed here, they help provide some context for the strict IRS rules. An issue in these authorities is concerns about *early* distribution of pension benefits. An important fact to consider, then, is whether the applicant has waited until normal retirement age to request benefits.

vi. Revenue Ruling 74-254

Revenue Ruling 74-254 involved whether a qualified plan could allow benefits to be paid to vested employees who involuntarily were transferred to job locations where the pension plan was not available. The employees were not eligible for normal retirement and never terminated employment. The ruling held that "this plan does not qualify as a pension plan under section 401(a) of the Code since it permits distributions to be made to participants prior to normal retirement and prior to their termination of employment or the termination of the plan."[66]

This ruling means that loss of coverage alone is not a sufficient basis to pay pension benefits when there has been no termination and no normal retirement. This revenue ruling is consistent with the concern obvious in the other authorities discussed above—that payment of early benefits is not customarily allowed in a pension plan, and that loss of coverage under the plan is not a *sufficient* reason to award benefits.

vii. Transcript from American Bar Association Section of Taxation May Meeting 2006

During a question-and-answer session between an American Bar Association committee and representatives of the IRS, the IRS was asked a hypothetical question about a 60-year-old participant in an employer-sponsored defined-contribution retirement plan called a "401(k)" plan.[67] Under the hypothetical, the individual terminated employment from the company where the individual had accrued the 401(k) benefits, went to work for a different company, and then, just under two years later, returned to service at the first company. In the hypothetical, it was understood that neither the participant nor the companies expected that the participant would return to first company. The IRS was asked whether the individual had a "separation from service." The IRS stated that "if there was no distribution before rehire, then once the individual

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65 *Gen. Couns. Memorandum,* GCM 39824 (I.R.S. Aug. 15, 1990).

66 Rev. Rul. 74-254, 1974-1 C.B. 91 (1974).

67 Exhibit A, Division's Opening Brief, at 3, American Bar Association Section of Taxation May Meeting 2006, Committee on Employee Benefits, Joint Committee on Employee Benefits, Internal Revenue Service, Questions and Answers (May 4-6, 2006) (2006 Q&A).

is rehired he is treated as though there was no separation from service or termination of employment."[68]

This answer tells us that reemployment with the same employer is a fact that must be considered when determining whether a *bona fide* termination of employment has occurred. Treating this answer as authoritative, we now know that reemployment, with continued participation in the pension plan, and with no intervening event to change the participant's retirement status, means that the participant should be treated the same as other employees who never left service. If, however, there was an intervening event that makes the returnee different from other employees, such as a distribution from the 401(k) during the time that the returnee was not employed by the plan sponsor, then that additional fact must also be considered.

viii. 2 AAC 35.227

The Division's regulation, 2 AAC 35.227, explicitly addresses the issue of reemployment. As *L I* held, and *L II* affirmed, the regulation is not enforceable against a person whose break in service occurred before the regulation was adopted.[69] It is, however, informative here because it tells us what factors the Division considers important in determining whether a retirement is *bona fide.* Under this regulation, reemployment is not permitted if there is a "prearrangement between the member and the employer for continued employment in any capacity after the retirement effective date."[70] A member over age 62 at the time of retirement, however, can reemploy with the same employer 60 days after the retirement date.[71] A member under 62 must wait six months before reemploying with the same employer.[72] A member over 59½ but under 62 who reemploys with the same employer without waiting six months will not receive benefits during the period of reemployment.[73] A member under 59½ who reemploys with the same employer without waiting six months will not only not receive benefits during the period of reemployment, any benefits received before benefits were stopped will be reported to the IRS as an early distribution with no known exception (likely meaning a tax penalty).[74] Under this regulation, age of the applicant, and length of time of separation of service are important factors. The regulation does not adopt a bright-line rule that prohibits reemployment with the same employer.

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68 *Id.*
69 R. 51-54 (*L I* at 17-20); R. 27-30 (*L II* at 13-16).
70 2 AAC 25.227(a).
71 2 AAC 25.227(b).
72 *Id.*
73 2 AAC 25.227(d).
74 2 AAC 25.227(c).

ix. Division Plan Booklet

The Division included its current version of the plan booklet in the record and quotes from it in its brief. Although Ms. L's retirement is governed by the terms of the booklet in effect at the time she enrolled in PERS, this booklet is nevertheless informative. The current booklet states "[y]ou cannot retire from the PERS if you are actively working in the TRS with your PERS employer."[75] The corollary to this statement is that, even under the Division's current restrictive interpretation, a member could retire from a PERS job if currently enrolled in TRS and employed by a different employer. Because the situations are similar, we will be looking for a clear principle or reason why retiring from PERS while still employed in TRS in one situation is more *bona fide* than retiring from PERS in the other.

(b) What are the factors to be applied in determining whether a termination is *bona fide?*

In short, review of IRS Division authorities, rulings, and advice leads to the conclusion that a qualified retirement system should consider the following factors when determining whether a retirement is bona fide:

1. Age of the applicant, particularly whether the applicant has reached normal retirement age.
2. Length of separation of service.
3. Whether the applicant is currently working for the same employer from whom the applicant is seeking retirement benefits.
4. Whether the applicant had a prearrangement to return to work for the same employer after the separation from service that the applicant claims for retirement eligibility.
5. Whether the applicant is continuing to participate in employee benefit programs.
6. A general consideration of whether the applicant is seeking pension benefits not customarily included in a pension plan.

[75] R. 117.

(c) Did the Division consider Ms. L's facts and circumstances?

The Division has explained that "When making determinations under AS 39.35.370(e), the Division applies the same factors used by the IRS to determine the occurrence of a 'termination of employment.'"[76] As explained above, this decision defers to, and agrees with, this aspect of the Division's approach.

Where this decision parts company with the Division's approach is in the distillation of factors to consider in determining whether a retirement application is *bona fide.* According to the Division, the test here "involves an analysis of the facts and circumstances relating to the level of services being provided by the employee to their employer at the time of retirement."[77] The problem with this approach, however, is that, although the "level of services to the employer" is a factor, it is only one factor. As explained above, the analysis of IRS authorities and guidance reveals many factors. If the IRS wanted retirement systems to focus on only one factor, it could have identified that factor in its regulations, and never required that retirement systems determine whether a retirement is *bona fide* based on an analysis of all facts and circumstances.

Ms. L argues that Ms. L's participation in TRS, and membership in a different union, are important facts that must be considered. The Division, however, did not give any weight to the fact that Ms. L is not eligible for continued participation in PERS or that she is enrolled in and making contributions to TRS. It elided over these facts to conclude that because she still works for Employer A she has not terminated her employment with the district. Accordingly, the Division's application of the facts-and-circumstances test was in error. Therefore, this decision must undertake the facts-and-circumstances test anew.[78]

(2) Is Ms. L's termination from her PERS job *bona fide?*

We now apply the six factors described above to determine whether Ms. L's termination was *bona fide* for purposes of her retirement.

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[76] Division's Response Brief (*L III*) at 1-2.

[77] *Id.*

[78] I reach this decision by applying independent judgment to the Division's application of the facts-and-circumstances test. If I were reviewing the Division's application of the test under the rational basis test, however, I would find that because the Division failed to take a hard look at the facts and ignored important factors, its approach was not rational. *Cf., e.g., State v. Alaska State Emps. Ass'n/AFSCME Loc. 52,* 923 P.2d 18, 25 (Alaska 1996) ("We must ensure that the agency 'has taken a 'hard look' at the salient problems and has genuinely engaged in reasoned decision making.' If the decision fails to consider an important factor, it will be regarded as arbitrary." (citations omitted)).

(a) Age of the applicant, particularly whether the applicant has reached normal retirement age

At the time of her application, Ms. L had reached normal retirement age. This factor weighs in favor of finding that her retirement is *bona fide.*

(b) Length of separation of service

There are two ways of looking at the issue of length of separation of service. One is to consider the length of time after she left her PERS job but before she began her TRS job—about three months. In some circumstances, the Division considers a 60-day window sufficient to demonstrate that the separation is *bona fide,* although in other cases it requires six months.[79] Looking at the time of separation before rejoining her employer in this way is neutral—two months can be enough, but it is not compelling evidence that her separation was *bona fide*.

Yet, a commonsense approach would acknowledge that Ms. L has definitely left behind her career as a paraprofessional. She has begun a new career as a teacher. Her separation from service as a paraprofessional was seven years. She has had a much longer separation of service from PERS employment than is required under 2 AAC 64.250. Under this approach, length of time of separation favors a finding that her retirement is *bona fide.*

(c) Whether the applicant is currently working for the same employer from whom the applicant is seeking retirement benefits

The Division is correct that a return to the same employer, even if pursuing a different career, can be a factor that could mean that the separation from service was not *bona fide.* If other factors indicated that Ms. L was seeking benefits not customarily provided under a pension plan, this factor would be given additional weight. None of the cited authorities, however, tell us how to analyze the situation of an employee who has changed careers and begun participation in a different pension plan upon reemployment with the same employer. Thus, although this factor would tend to disfavor eligibility, no regulation or other authority requires, or suggests, that this factor alone is sufficient to deny an otherwise *bona fide* normal retirement application from a pension plan in which the applicant is no longer participating.

(d) Whether the applicant had a prearrangement to return to work for the same employer after the separation from service

The parties agree that Ms. L had no prearrangement to return to work for the Employer A. This fact, together with the fact that Ms. L has not reemployed in a PERS job with the district

[79] 2 AAC 64.250.

since 2012, go a long way to answering the question posed by 26 C.F.R. § 1409A-1(h)(1)(ii)—whether "the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date."[80] Here, the absence of prearrangement, and the fact that she has not reemployed in PERS, strongly supports a conclusion that no further services were contemplated. This factor, although not sufficient standing alone, favors a finding that the separation was *bona fide.*

(e) Whether the applicant is continuing to participate in employee benefit programs

After obtaining her teaching job, Ms. L no longer participated in PERS. She has not made contributions to PERS and her employer had not made contributions on her behalf. We know that the fact of loss of coverage, standing alone, would also not be sufficient for her to prove that a separation was *bona fide*, if there were other factors, such as remaining employed or having a prearrangement to return to work for the same employer, or seeking benefits before normal retirement, that cut the other way. In Alaska, however, changing from PERS to TRS is a key factor. If the employer has changed, an eligible applicant who, like Ms. L, is still working in a TRS position can receive a pension under PERS. Merely changing employers, while still participating in PERS, on the other hand, would not be sufficient to begin retirement benefits (even if otherwise eligible). Thus, no longer participating in PERS is a factor that favors a finding that the separation was *bona fide.*

(f) Whether the applicant is seeking pension benefits not customarily included in a pension plan

In one sense, consideration of whether the requested benefit is customarily included in a pension plan is the most important factor. It tells us that the overarching concern is avoidance of distribution of pension benefits in a situation where a person would normally not receive pension benefits. This is precisely where *L I* came down—there, ALJ Sullivan determined that the IRS was seeking to prevent applicants from "flouting the rules." Because Ms. L was not flouting the rules—in other words, because she was seeking benefits customarily included in a pension plan, her termination, and her retirement, were *bona fide.*[81]

In another sense, however, this factor is a tautology. Asking whether an applicant is seeking customary benefits, or flouting the rules, is just another way of asking whether the

[80] 26 C.F.R. § 1409A-1(h)(1)(ii).
[81] R. 44 (*L I* at 10).

application is *bona fide*. We are really only saying that "a termination is *bona fide* if it is *bona fide*."

Yet, it is helpful to employ these synonyms for "*bona fide*" particularly because it brings focus to the difference between a normal retirement and distribution of benefits before normal retirement—which the IRS does allow in some circumstances (e.g., death, disability, or termination of the plan) but not in others (e.g., leaving the plan but not leaving the job, or having a prearrangement to return to work with the same employer).

Here, Ms. L has obeyed all the rules. She is in all respects eligible for normal retirement. Indeed, if she had only moved to a different school district at some point during her teaching career, her application would have been granted.[82]

In this light, the situation discussed in the 2006 Q&A is distinguishable from Ms. L's situation. In the Q&A, the hypothetical employee had returned to the employee's former job, without any intervening event that would differentiate the returnee from other similarly-situated employees of that employer. The returnee was able to participate in the 401K plan, so that the returnee's eventual retirement benefit would increase. Because the other employees are in the same situation as the returnee, it makes sense to treat the returnee the same as employees who had remained in service the entire time.

If there had been an intervening event, however, such as the returnee drawing pension benefits while gone, that would have made the returnee different from other employees who had remained in service for the employer. Because there was no intervening event, the returnee was treated the same as other employees who had not left service.

Turning to Ms. L, she is not standing in the same shoes as other PERS employees of the Employer A. She is not able to participate in PERS or have her PERS benefit increased based on her continued work for the district.[83] Her joining a different pension plan, and paying contributions to that plan for many years, is an intervening event that makes clear that her normal

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[82] The point here is not that Ms. L is identical to applicants who have accrued PERS benefits with a different employer from whom they have accrued TRS benefits. She is not—she has stayed with one employer. The point is that the Division has not explained why staying with one employer matters for an otherwise normal retirement with no prearrangement for rehire. Because the Division has not made a case that this distinction is fair (and on its face it appears to be unfair), the fact that Ms. L would be eligible if she had changed employers tends to favor a finding that her retirement is *bona fide* and will not run afoul of IRS rules.

[83] Loss of coverage would not be sufficient reason to grant early retirement benefits to a person who never terminated from a position. Revenue Ruling 74-254. It is, however, an important factor to consider when evaluating a normal retirement for a person who did terminate from the job where the pension benefits accrued and who had no prearrangement for reemployment.

retirement from PERS is *bona fide*. In short, consideration of all facts and circumstances demonstrates that Ms. L is eligible to receive retirement benefits from PERS.

IV. Conclusion

Based on the facts and circumstances in this record, T L's termination from her job as an aide with Employer A in 2012 was *bona fide.* Accordingly, the Division's decision denying her application for retirement with the Public Employees' Retirement System is reversed.

Date of Original Decision: April 19, 2023.

Date of Corrected Decision: May 15,2023.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

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 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 15th day of May 2023.

By: *Signed*
Signature
Stephen Slotnick
Name
Administrative Law Judge
Title

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