

**BEFORE AN ADMINISTRATIVE LAW JUDGE OF THE
PUBLIC EMPLOYEES' RETIREMENT FUND**

IN THE MATTER OF)	EXCISE POLICE AND CONSERVATION
KENNETH J. LIVINGSTON,)	ENFORCEMENT OFFICERS'
)	RETIREMENT PLAN
Petitioner.)	

DECISION ON MOTION FOR SUMMARY JUDGMENT

Introduction

This matter was assigned to me for review of Sergeant Kenneth J. Livingston's appeal from a preliminary determination of the PERF Board, dated May 27, 2005, that he cannot transfer prior service credit from the Public Employees' Retirement Fund (PERF) to the Excise Police and Conservation Enforcement Officers' Retirement Plan (E & C Plan). Sergeant Livingston filed a motion for summary judgment. The PERF Board responded and cross-moved for summary judgment. See Ind. Trial Rule 56(B). Sergeant Livingston filed a response. The matter was heard on March 1, 2006.

Evidentiary Matters

The PERF Board objects to the Affidavit of Kenneth Livingston on the ground that it does not contain an affirmation that it was made under penalty of perjury. In fact, the affidavit begins: "I, Kenneth J. Livingston, after first being put on my oath and under penalty of perjury, state . . ." This substantially complies with Ind. T.R. 11(B). The objection to the Livingston affidavit is overruled.

The PERF Board objects to the Affidavit of John D. Copeland because his affirmation under penalty of perjury is not at the end of the recitations. The affidavit adopts an attached unsworn statement under penalty of perjury. Trial Rule 11(B) does not require that the affirmation under penalty of perjury be placed at the end. There is no prohibition against adopting a prior, unsworn writing as the sworn testimony of the affiant. The objection to the Copeland affidavit is overruled.

The PERF Board objects to Sergeant Livingston's Exhibits 5, 6 and 10, on the ground that they are hearsay. Exhibit 5 consists of two pages of anonymous handwritten notes. Exhibit 6 is a handwritten letter to Ken Livingston signed by Shirley Kirby, Payroll Clerk. Kirby has submitted an affidavit with exhibits, but this is not one of the exhibits she authenticates in her affidavit. Exhibit 10 is a handwritten letter and some handwritten notes purportedly written by Patti Fleck to "Ken." Fleck has submitted an affidavit but it does not authenticate these notes.

Hearsay is admissible in administrative proceedings, but if objected to, cannot form the sole basis for an order. Ind. Code § 4-21.5-3-26(a). The PERF Board's objection on this basis must therefore be overruled, but it is noted that these documents cannot form the sole basis for the decision.

The problem with Exhibits 5, 6 and 10 is that they are not authenticated or identified by sworn testimony. See Ind. Rule Evid. 901. In an administrative hearing, the parties and witnesses must be sworn. Ind. Code § 4-21.5-3-26(b). Oral or written statements of nonparties are admissible, apparently even if unsworn, but a party can move that the statement be given under oath or affirmation. Ind. Code §§ 4-21.5-3-25(f) and -26(c).

A motion for summary judgment, however, must be supported by “affidavits or other evidence permitted under this section.” Ind. Code § 4-21.5-3-23(a). The same section refers to “opposing affidavits” as well as “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any . . .” Ind. Code § 4-21.5-3-23(b) and (e). Supporting affidavits must be made on personal knowledge, set forth facts that are admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Ind. Code § 4-21.5-3-23(d).

Based on these standards, Exhibits 5, 6 and 10 are inadmissible and will not be considered on summary judgment.

The PERF Board objects to handwritten notes attached to the Affidavit of Patricia Ann Fleck on the ground that they are hearsay. There are no handwritten notes attached to the Fleck affidavit. The only attachment is her Membership Record which appears to be an official PERF record. This objection is overruled.

Finally, Exhibit 9 to Sergeant Livingston’s motion is an unverified letter from Lieutenant Thomas G. Newgent to Tom Parker of PERF dated February 12, 2002. Lieutenant Newgent recounts telephone conversations in which Parker stated that Newgent’s prior service as a dispatcher for the Indiana State Police, under the State Police Pension Plan, would be transferred to the E & C Plan. The letter requested written confirmation. A cryptic handwritten note on the letter states: “6/18/02 Tom Parker advised SPD would not count, but he would calculate ISP time & payment due.”

The PERF Board did not object to Exhibit 9, but it will not be considered because it has no relevance or evidentiary value. It is unverified and contains double hearsay. Furthermore, if Parker made the statement set forth in the typewritten body of the letter, he appears to have retracted it four months later, and there is no evidence that Lieutenant Newgent received the written confirmation he requested. Moreover, it appears that he was attempting to transfer service credit from the State Police Pension Plan, not PERF.

Findings of Undisputed Fact

1. Sergeant Livingston began employment with the State of Indiana as a civilian employee of the Indiana State Police (ISP) on November 28, 1973.
2. A Certificate of Membership in PERF issued on February 24, 1975, reports “Date of Membership” of January 1, 1975, and “Past Service” of one year and one month.

3. A Certificate of Membership in PERF issued on February 15, 1979, reports "Service" of five years and one month, calculated through January 1, 1979.

4. Sergeant Livingston was hired by what was then called the Indiana Alcoholic Beverage Commission (ABC) as a state excise police officer.

5. His ISP employment ended on Friday, January 5, 1979, and his ABC employment began on Monday, January 8, 1979.

6. Shortly after beginning employment as an excise police officer, Sergeant Livingston submitted a "Membership Record" for the E & C Plan. On this document he was asked to list all prior service as a conservation officer, excise policeman, and "any other employment with the State of Indiana or any employment covered by the Public Employees' Retirement Fund." He listed his prior service with ISP.

7. At the time he began employment by the ABC, Sergeant Livingston asked Nettie Waggoner or Wagner, an ABC payroll clerk, whether his prior service with ISP would transfer to his new position. She told him that his PERF service, vacation time and sick time would transfer.

8. In July 1993, Sergeant Livingston received a PERF account statement that did not include his years of service with ISP. He asked Shirley Kirby, an ABC payroll clerk, to inquire about this on his behalf.

9. Kirby spoke to Thomas Williams, a PERF representative. Williams told Kirby that Sergeant Livingston's ISP service would not be credited toward his retirement. Williams also stated that because Sergeant Livingston had not withdrawn his member contribution after departing ISP, he had forfeited the contribution, and that Sergeant Livingston's prior member contributions would earn interest for only 10 years after he separated from ISP.

10. Kirby then prepared, and Sergeant Livingston approved, a memorandum dated July 14, 1993, requesting the refund of all member contributions he made to PERF while employed by ISP. Sergeant Livingston would have preferred to receive credit for his prior service, but requested the refund as that seemed to be the only choice at the time. The request for refund was never acted upon.

11. In March 2005, Sergeant Livingston asked payroll clerk Kirby about his retirement benefits, as he expected to retire in June 2005.

12. On March 9, 2005, Kirby spoke to Tom Parker of PERF. Parker told her that Sergeant Livingston's contributions could not be refunded to him until his separation from service with the State, but that his service with ISP is supposed to count as creditable service. According to Kirby, Parker also said that if Sergeant Livingston had withdrawn his contributions at the time he left ISP and joined ABC, he could pay back the contributions and receive credit for his ISP service, and that such an arrangement had been "offered" to another officer. However, Parker later referred the matter to PERF staff attorney Linda Villegas.

13. Attorney Villegas told Kirby that Sergeant Livingston could not receive a refund of his member contributions until separation from service with the State because of Internal Revenue Service rules, and that he could not transfer his ISP service. Kirby asked attorney Villegas why other officers had received refunds when they separated from one State agency but continued to work for another State agency. Attorney Villegas said that she would respond via email, which she did. However, that email is not of record.

14. Sergeant Livingston remains employed by the renamed Alcohol and Tobacco Commission (ATC) as an enforcement officer, having attained the rank of sergeant.

15. Two other ATC enforcement officers have submitted affidavits describing their experience with the same issue.

16. Officer Patricia Ann Fleck testifies that she had PERF service with Vincennes University before she began employment with the ABC as an excise police officer in October 1979. Officer Fleck submitted a Membership Record in 1980 reporting her prior service, just as Sergeant Livingston had done. In 2002, she became concerned that her prior service had not been credited. She spoke to Tom Parker, who told her that her prior service had been transferred to her current account. Neither party has submitted evidence that this was correct or confirmed in writing.

17. Lieutenant John D. Copeland testifies that he had PERF service with the Department of Administration (DOA) beginning in October 1977 before he began employment with the ABC in October 1979. At that time, he was told by State Excise Police Captain John Lautzenhiser that his prior service would transfer and be applied to his eligibility for retirement. This advice was repeated by other ABC employees during recruit training. In 1993, clerk Kirby told Lieutenant Copeland that he could choose to receive a refund of his member contributions from his prior service with DOA or to have his prior service credited toward his retirement. He chose the latter. His ABC/ATC payroll stubs have always shown his hire date as October 1977. He learned from Sergeant Livingston in April 2005 that PERF was not counting pre-ABC service.

Analysis

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b). This mirrors T.R. 56(C). The well-established standard for summary judgment under that rule was recently restated as follows:

A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. . . .

A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.

McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. App. 2006).

In this case, both parties concede that the material facts are not in dispute, and I agree. Therefore, the case squarely presents the legal question of whether Sergeant Livingston should be given credit for his five years and one month of prior service with the ISP.

Before 1971, excise police officers were members of PERF. In Acts 1972, P.L. 1, Sec. 1, the General Assembly created the E & C Plan, now codified at Ind. Code §§ 5-10-5.5-1 et seq. With respect to officers in service when the plan was created, the General Assembly provided as follows:

IC 5-10-5.5-5 Participants; eligibility

(a) Every person who is an officer on September 2, 1971, shall become a participant, unless the officer files a written notice of his election not to participate with the board within twenty (20) days prior to September 2, 1971.

(b) Every person who becomes an officer after September 2, 1971 shall become a participant as a condition of his employment.

(c) Any officer who elects not to become a participant shall thereafter be forever ineligible to become a participant.

(Emphasis added.) In the next two sections, the General Assembly addressed the question of prior contributions and service:

IC 5-10-5.5-6 Transfer of funds to savings fund

(a) Upon election to become a participant by any officer who is a member of the public employees' retirement fund, the board shall transfer all funds standing to the credit of the electing officer in the public employees' retirement fund to the participants' savings fund created by this chapter.

(b) Except as otherwise provided in this chapter, a transfer of funds under the provisions of subsection (a) of this section constitutes a full and complete discharge of all of the rights of the electing officer under the public employees' retirement fund.

IC 5-10-5.5-7 Transfer of creditable service

Upon election to become a participant by any officer who is a member of the public employees' retirement fund, the board shall transfer all creditable service standing to the credit of the electing officer under the public employees' retirement fund to the credit of the electing officer under the retirement plan created by this chapter.

Creditable service under this chapter, including credit for military service, shall accrue and be computed and credited to participants in the same manner and in the same amount as creditable service accrues, is computed and credited under the public employees' retirement law.

(Emphasis added.)

The first step in interpreting a statute is to look to the plain and ordinary meaning of the language used. Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941, 947-48 (Ind. 2001). If statutes are ambiguous or facially inconsistent, they must be construed pursuant to several well established guidelines, with the ultimate goal of determining and implementing the intent of the General Assembly. Id.

The plain and ordinary meaning of the statutes quoted above is that only officers who were in service on September 2, 1971, as excise police officers (or conservation enforcement officers) could "elect" to become participants in the E & C Plan. Therefore, only the prior service credit of those officers could be transferred "[u]pon election to become a participant." Ind. Code § 5-10-5.5-6(a).

Sergeant Livingston, on the other hand, did not and could not "elect" to become a participant in the E & C Plan, because he automatically became a participant when he began service as an excise police officer in January 1979. Ind. Code § 5-10-5.5-5(b). Therefore, transfer of his prior service credit from PERF to the E & C Plan was not authorized, and by implication was prohibited.

Other retirement plan statutes confirm that the General Assembly acted intentionally in this regard. For example, local police officers and firefighters who were members of PERF waive prior service credit if they become covered by the 1977 Police Officers' and Firefighters' Disability and Pension Fund except under very specific circumstances. Ind. Code §§ 36-8-8-18 and -18.1. It also appears that a member of PERF or the Teachers' Retirement Fund (TRF) will be given credit for prior service that was not covered by one of those funds. Ind. Code § 5-10.2-3-1(c). However, a PERF or TRF member's service may be used in another governmental retirement plan "under the terms of that plan." Ind. Code § 5-10.2-3-1(i).

The PERF Board codified its interpretation of these statutes by promulgation of an administrative rule shortly after Sergeant Livingston became an excise police officer. On May 9, 1979, the following rule was filed:

35 IAC 4-2-2 Transfers with public employees retirement fund

Sec. 2. P.E.R.F. Service. Service as a Conservation Officer or Excise Officer can be transferred to P.E.R.F. Service in P.E.R.F. cannot be transferred to Conservation Officers or Excise Officers except as specifically authorized by Statute. Duplicate service cannot be granted.

Because the meaning of the statutes is plain and not ambiguous, there is no need to determine whether the PERF Board's interpretation should be given any particular weight or deference. The rule's prohibition of transfers matches the plain and ordinary meaning of the statutory language. The rule does not fill a gap in the statutes. The rule is not arbitrary or capricious.

Likewise, Sergeant Livingston's public policy arguments, as valid as they might be, cannot be considered in light of unambiguous statutory language.

The parties have argued the subject of equitable estoppel. Sergeant Livingston "recognizes the general rule that governmental entities are not subject to equitable estoppel . . . and also recognizes that the exceptions to this general rule are extremely narrow." Livingston Brief in Support of Summary Judgment at 4, citing Fulton County Advisory Plan Commission v. Groninger, 810 N.E.2d 704 (Ind. 2004), and Equicor Development, Inc. v. Westfield-Washington Township Plan Commission, 758 N.E.2d 34 (Ind. 2001). Indeed, he does not appear to argue that the PERF Board is equitably estopped.

Equitable estoppel does not apply here. Estoppel "may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." Equicor, 758 N.E.2d at 39. On the other hand, estoppel is particularly inappropriate where a party claiming to be ignorant of the facts had access to the correct information or where government could be precluded from functioning if it were bound by employees' unauthorized representations. U.S. Outdoor Advertising Co., Inc. v. Indiana Department of Transportation, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999) (citing cases). Specifically, all persons are charged with knowledge of rights and remedies prescribed by statute, and statutory procedures cannot be circumvented by unauthorized acts and statements of officers, agents or staff. Id., citing Middleton Motors, Inc. v. Indiana Department of State Revenue, 380 N.E.2d 79, 81 (Ind. 1978).

Here, Sergeant Livingston has presented evidence of conflicting oral statements by PERF employees as to whether he and other excise police officers would be permitted to transfer PERF service credit to the E & C Plan.¹ Parker's alleged statements that prior service credit could be transferred would have been contrary to statutes available to all the officers. Therefore they do not estop the PERF Board from refusing to transfer the prior service credit.

¹ I agree with the PERF Board that statements of an ABC employee (such as Waggoner or Captain Lautzenhiser) could not estop the PERF Board under any circumstances. The only potentially estopping statements would be those attributed to PERF employees Williams and Parker, who reportedly gave conflicting opinions.

Alternatively, even if statements that are contrary to statute could be the basis for equitable estoppel, the evidence of Parker's alleged statements in this case would not be strong enough to estop the PERF Board. It not known whether he was given all the facts when expressing his view over the phone. For example, it may have been unclear whether the officers were excise police officers when the E & C Plan was created (in which case their prior service credit would have transferred under Ind. Code § 5-10-5.5-7). This is why opinions on such important matters should be sought in writing and after due consideration of the facts and law. The view that the officers' prior service credit could be transferred was never expressed in writing as an official opinion of the PERF Board. Nor is there evidence that the PERF Board has actually permitted such a transfer or given credit for such prior service. Thus there is no course of conduct inconsistent with the PERF Board's position in this case.

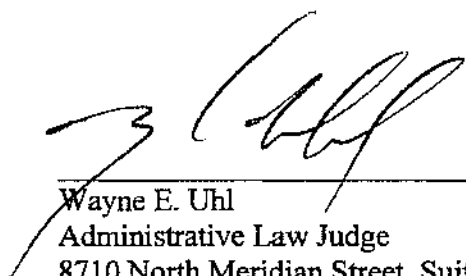
Finally, also in the alternative, there is no showing that Sergeant Livingston relied on the statements of PERF employees to his detriment. He reluctantly applied for a refund of his member contributions but the refund was never made.

Sergeant Livingston argues that the statements of PERF employees show a pattern analogous to a course of business dealing under the Uniform Commercial Code. However, as the PERF Board correctly points out, no contractual rights arise from a gratuitous pension in which participation is mandatory. Haverstock v. State Public Employees' Retirement Fund, 490 N.E.2d 357, 360-61 (Ind. App. 1986). Sergeant Livingston's participation in the E & C Plan is mandatory, so does not give rise to contractual rights.

Conclusion

There is no genuine dispute of material fact and the PERF Board is entitled to judgment as a matter of law. Sergeant Livingston's motion for summary judgment is DENIED and the PERF Board's cross-motion for summary judgment is GRANTED. The preliminary determination of the PERF Board denying Sergeant Livingston's request to receive transferred service credit for his five years and one month of service as a civilian employee of the Indiana State Police is AFFIRMED.

DATED: April 24, 2006.



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