BEFORE THE EXECUTIVE DIRECTOR
FOR THE INDIANA STATE TEACHERS" RETIREMENT FUND

IN THE MATTER OF JEANETTA YOUNG, Petitioner, V. INDIANA STATE TEACHERS' RETIREMENT FUND, Respondent,	))))))))))	THE INDIANA STATE TEACHERS' RETIREMENT FUND

FINAL ORDER

By Resolution No. 2009-03-01 of the Board of Trustees of the Indiana State Teachers' Retirement Fund as the ultimate authority in this administrative review and pursuant to and in accordance with IC 4-21.5-3-28, the Board has directed the Executive Director to act as the Board's delegee and conduct final authority proceedings to issue a final order with respect to review and appeals of administrative action taken by the Fund and received by the Fund.

1. The Administrative Law Judge issued a Decision and Order in this matter on October 13, 2009 denying Respondent's motion for summary judgment, granting summary judgment filed by Petitioner, and denying Petitioner's motion for partial summary judgment as moot.

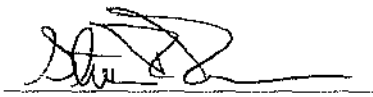
2. It has been more than fifteen (15) days since having received the Decision and Order of the Administrative Law Judge.

3. Copies of the Decision and Order have been served to the parties.

4. No objection to the Decision and Order of the Administrative Law Judge has been received.

NOW THEREFORE the Decision and Order of the Administrative Law Judge is affirmed.

DATED November 5, 2009



Steve Russo, Executive Director
Indiana State Teachers' Retirement Fund
150 West Market Street, #300
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 5th day of November, 2009, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

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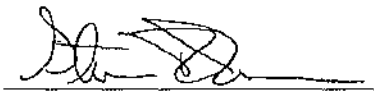

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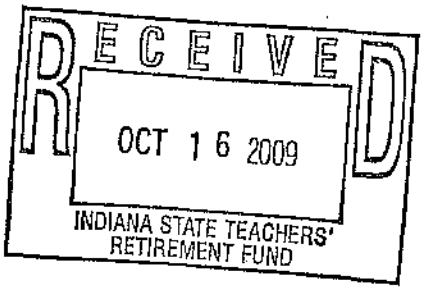
BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA STATE TEACHERS' RETIREMENT FUND

JEANETTA YOUNG, Petitioner, v. INDIANA STATE TEACHERS' RETIREMENT FUND, Respondent.	))))))))



DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Jeanetta Young seeks administrative review from an initial determination of the Teachers' Retirement Fund (TRF) that she is not entitled to service credit for an academic year when she was on leave to care for her mother.

TRF moved for summary judgment asking that its initial determination be affirmed, which Young opposes. Young moved for partial summary judgment that even if her leave did not qualify for a full year of service credit, she is entitled to a half-year of service credit because she remained employed by her school employer for the first six months of the sick leave. A hearing was held on July 27, 2009. By agreement of the parties, and pursuant to the Order on Motion for Entry of Default (7/27/09), supplemental briefs and evidence were filed and the motions are now ready for ruling.

Findings of Fact

1. Jeanetta Young has been employed as a teacher by Carmel Clay Schools (CCS) since 1995. (Pet. Partial MSJ Ex. B.) She worked the academic year 2005-2006 at Cherry Tree Elementary School. (Young PMSJ Aff. ¶ 4.) [1]

[1] Young has submitted three affidavits, two of which are marked as Exhibit A. The affidavit attached to her response to TRF's summary judgment motion will be referred to as "Young Resp. Aff.," the one in support of her own motion for partial summary judgment will be referred to as "Young PMSJ Aff.," and the supplementary affidavit in support of her reply to TRF's response to her motion for partial summary judgment will be referred to as "Young Supp. Aff."

2. In 2006, Young learned that her mother, a resident of Evansville, was quite ill and would require heart bypass surgery. (Young Resp. Aff. ¶ 3.)

3. Young approached CCS about taking leave to care for her mother. [2]

4. CCS grants its professional staff two types of paid leave benefits that might be used to care for an ill family member (including the staff member's mother). (Pet. Reply Ex. B.)

a. Paid "personal/family illness leave" is available due to "personal illness or family illness." This leave is granted at a rate of 10 days the first year and eight days per year thereafter, and unused days accumulate without limit. But only 10 days of family illness days may be used annually unless an exception is granted for "catastrophic illness of a family member." (*Id.* at 26-27.)

b. Each teacher is entitled to four days per year of paid "personal business" leave, which may also be used for "family illness." One unused day can be carried over to the next year. (*Id.* at 28-29.)

5. Unpaid leave is available under several circumstances. The following apply to all unpaid leave:

a. All unpaid leave is taken "without jeopardy to re-employment, retirement, salary and accrued fringe benefits, tenure, length of service or prior place on the salary schedule." (*Id.* at 31.)

b. A teacher on unpaid leave has the option to continue insurance coverage at his/her own expense, paying 100% of the cost, "except those who qualify under FMLA." (*Id.* at 31.)

c. A teacher returning from unpaid leave is entitled to his/her original position or a comparable position. (*Id.* at 32.)

6. Under the category of "Other Unpaid Leaves," the CCS Board of Education may grant a teacher an unpaid leave for up to one year for "illness or disability, eldercare, extended or family illness." (*Id.* at 32.)

7. In a separate policy, CCS provides that its practice is to comply with the Family and Medical Leave Act (FMLA) as it applies to employees. The specific terms of the FMLA are not incorporated into CCS policy, but copies of the FMLA are available in the human resources office. (Pet. Reply Ex. C.)

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[2] If there was a written application for the leave, it has not been submitted here.

8. In a memorandum dated July 18, 2006, CCS's assistant administrator for human resources reported to the Board of Education that Young would be taking one year of leave (8/14/06 – 6/1/07), stating the reason for the leave as "personal." (TRF Ex. 1.)

9. In a memorandum prepared long after the fact, on June 26, 2009, a CCS official states that Young "requested a leave due to a family illness, therefore, Jan was granted a Family Medical Leave under FMLA and chose to continue her health insurance." (Pet. PMSJ Ex. B.)

10. During the first part of her leave, Young paid the employee's portion of health insurance premiums for September, October and November 2006, and CCS paid the employer share. (Young Aff. ¶ 4; Pet. Ex. B.)

11. Young states that on February 23, 2007, she met with TRF employee George Shields to discuss whether she should retire at the end of her leave. (Young Resp. Aff. ¶ 4.) She disclosed during this conversation that her leave was to care for her mother. (Young Supp. Aff. ¶ 4.)

12. Young states that Shields advised "that if I returned to teach another year, that I would receive a year of service credit for my sick leave year, which combined with the additional year of teaching, would increase my pension by approximately $2,000 per year for the balance of my life." (Young Resp. Aff. ¶ 5.)

13. Shields agrees that he spoke to Young sometime during 2007, that she initially said her leave was for illness, but she also disclosed that the leave was to care for her ill mother. (Shields Aff. ¶ 5.) Shields states that he did not promise Young that she would receive service credit for the leave, because all such requests must be reviewed and verified, but he did say that she should apply. (*Id.* ¶ 6.)

14. Based on the conversation with Shields, Young decided to teach for the 2007-2008 school year. (Young Resp. Aff. ¶ 6.)

15. On April 19, 2007, CCS submitted to TRF a Leave of Absence Verification form. The form stated that the leave was from August 14, 2006 to June 1, 2007. (TRF Ex. 2.)

16. The verification form contained a listing of different types of leave and requested that the appropriate type be checked. Under the general category of "Military Service," the box labeled "Family and Medical Leave Act (FMLA)" was checked. Under the general area of "Sickness or Disability" none of the boxes was checked, including a box labeled "Sick leave." (TRF Ex. 2.)

17. Later in 2007, Young contacted TRF to discuss her service credit. (Young Resp. Aff. ¶ 7.)

18. Kevin Marshall of TRF recalls speaking to Young by telephone a couple of months after he began his employment on July 30, 2007. During the call, Young initially said the leave was sick leave, but during the call she said it was for FMLA. When Marshall heard this, he explained "the limitations on receiving service credit for FMLA and suggested that she have the school state that the purpose of the FMLA leave was for sickness." (Marshall Aff. ¶¶ 4-5.) Marshall later learned, either during the phone call or at a later time, that the leave was to care for Young's mother. (*Id.* ¶ 6.)

19. Marshall did not promise Young that she would get the service credit, because all leave requests must be reviewed and verified. (Marshall Aff. ¶ 7.)

20. By letter dated October 16, 2007, Marshall acknowledged receipt of the Leave of Absence Verification form. The letter then stated:

> Unfortunately, we are unable to grant service credit at this time. To be credited for a Family and Medical leave, you must return to a covered position for the same amount of time that was granted for the leave. Please contact our office after you have earned one (1) additional year of Indiana service credit. Please be advised, one (1) year of creditable service is earned for every 120 days taught during a fiscal year (July 1 through June 30). Sixty (60) to one hundred and nineteen 119 [*sic*] days of teaching constitutes one-half year of credible [*sic*] service.

(TRF Ex. 3.)

21. Young returned to work for the 2007-2008 school year. She continued to work in the subsequent years, 2008-2009 and 2009-2010.

22. Young spoke to Marshall by telephone on August 1, 2008, to confirm the year of service credit. According to Young, Marshall confirmed that TRF records showed that she had completed her additional year of teaching, and he told her that she would be receiving a written confirmation in two to three weeks. (Young Resp. Aff. ¶ 9.) She made the following handwritten notation:

> Talked with Kevin Marshall on 8/1/08.
> "OK"ed 1 yr. leave of absence.
> Changed address
> letter confirming approval coming in 2-3 wks.

(TRF Ex. 3.)

23. By letter dated August 7, 2008, TRF notified Young that service credit for her year on leave would not be granted because the leave was granted under the

FMLA, for which credit is disallowed unless it is needed for vesting purposes or is required in order to receive a benefit, citing IC 20-6.1-6-1 and -3. (TRF Ex. 4.)

24. On October 8, 2008, Young wrote a letter to the TRF Board requesting reconsideration of the denial of service credit. (TRF Ex. 5.)

25. TRF's initial denial of service credit was confirmed by letter dated October 23, 2008. (TRF Ex. 7.)

26. On November 13, 2008, Young orally notified TRF of her desire to appeal to the Board of Trustees. (TRF Ex. 8.)

27. Neither of the notices gave Young notice of her appeal rights and requirements, including the statutory requirement that the petition for review be in writing and be filed within 15 days after notice of the order. IC 4-21.5-3-7.

28. The case was assigned to the undersigned ALJ on March 9, 2009. In the Notice of Prehearing Conference, the ALJ noted the lack of proper notice and ruled that Young's written request for reconsideration of October 8, 2008, and her oral request for review, would be taken as timely assertion of her right to review. TRF has not challenged this or otherwise argued that review was not timely sought.

29. Any finding of fact that is included in the Conclusions of Law section below is incorporated by reference.

Conclusions of Law

Legal standard

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." IC 4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

When the parties have filed cross-motions for summary judgment, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law, construing the facts most favorably to the non-moving party in each instance. *Keaton and Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

Evidence and Genuine Issues of Material Fact

Neither party objects to the admissibility of the evidence submitted by the other.

Neither party specifically argues that there are disputes of material fact, although Young points out generally that such disputes prevent summary judgment. One clear dispute exists. Young says that Shields told her that if she returned to teach another year, she would receive a year of service credit for the year she was on sick leave. (Young Resp. Aff. ¶ 5.) Shields denies making a promise that service credit would be granted. (Shields Aff. ¶ 6.) [3]

Because of the resolution reached below, this discrepancy in testimony is not material.

Issues

1. Is Young entitled to service credit for the 2006-2007 school year, when she was on leave to care for her mother, under IC 5-10.4-4-7?

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[3] Young stops just short of testifying that Marshall made as firm a promise—instead, in his letter, Marshall said that in order to receive the service credit for sick leave, she would first have to return for a year, and he later confirmed that the additional year was on TRF's records. (Young Resp. Aff. ¶¶ 7-9; Marshall Aff. ¶ 6; TRF Ex. 3.)

2. If Young was not entitled to service credit for her leave of absence, did promises of TRF employees that Young would receive service credit bind TRF to grant the credit under the doctrine of equitable estoppel?

3. Was Young entitled to a half-year of service credit because she remained employed by CCS during the months when she purchased health insurance?

Discussion

A. Service Credit for Leave of Absence

1. Statutory provisions

The general rule is that a member of TRF earns one year of service credit for service of at least 120 days in a year, or at least 60 days in each of two years. IC 5-10.4-4-2. Service credit may also be earned for leaves of absence under IC 5-10.4-4-7, which provides in its entirety:

> **Leaves of absence**
>
> Sec. 7. (a) Except as provided in section 8 of this chapter, a member may be given credit for leaves of absence for study, professional improvement, and temporary disability if the leave credit does not exceed one-seventh (1/7) of the total years of service claimed for retirement (referred to as the one-seventh rule). A member granted a leave in these instances for exchange teaching and for other educational employment approved individually by the board is considered a teacher and is entitled to the benefits of the fund if for or during the leave the member pays into the fund the member's contributions. A leave for other educational employment is not subject to the one-seventh rule.
>
> (b) In each case of a teacher requesting a leave of absence to work in a federally supported educational project, the board must determine that the project is educational in nature and serves state citizens who might otherwise be served by the public schools or state educational institutions. The board shall make this determination for a one (1) year period, which is later subject to review and reapproval.
>
> (c) Subject to this chapter, *leaves of absence specified in IC 20-28-10-1, IC 20-28-10-2, IC 20-28-10-3, or IC 20-28-10-4 and adoption leave of not more than one (1) year must be credited to retirement.*
>
> (d) Notwithstanding any law, this section must be administered in a manner consistent with the federal Family and Medical Leave Act of

> 1993 (29 U.S.C. 2601 et seq.). *A member on a leave of absence that qualifies for the benefits and protections afforded by the Family and Medical Leave Act is entitled to receive credit for vesting and eligibility purposes to the extent required by the Family and Medical Leave Act but is not entitled to receive credit for service for benefit purposes unless the leave is described in subsection (a), (b), or (c).*

(Emphases added.) Young argues that her leave qualified for service credit under subsection (c), because it was a leave of absence specified in IC 20-28-10-1:

> (a) A school corporation may grant a teacher a leave of absence not to exceed one (1) year for:
>
> (1) a sabbatical;
>
> (2) a disability leave; or
>
> (3) *a sick leave.*

(Emphasis added.) TRF responds that "sick leave" under this statute refers only to leave taken for the illness of the teacher, not a family member.

The General Assembly has, over the years, authorized or required various types of paid and unpaid leaves for teachers because of disability or illness.

Paid leave must be granted to teachers who are absent "on account of illness or quarantine" for 10 days the first year and seven days in succeeding years (called "sick days"), and for death in the teacher's immediate family for no more than five days. IC 20-28-9-9(a). Teachers must be allowed to accumulate up to 90 unused paid "sick days." IC 20-28-9-9(b).

School corporations are also authorized to set rules and pay teachers who are absent "because of sickness," attending school conventions, visiting other schools, or a death in the immediate family. IC 20-28-9-12.

A school corporation may establish a voluntary "sick day bank" to which a teacher can contribute "sick days" for use by other contributing teachers when their accumulated sick days are exhausted. IC 20-28-9-13.

In addition to paid leave, the school corporation may grant a leave of absence of up to one year for "a disability leave" or "a sick leave." IC 20-28-10-1(a). If granted, partial compensation may be paid, IC 20-28-10-1(c), and the teacher may choose to charge all or part of the leave for "sickness or disability" to available "sick days," IC 20-28-10-2(b). If leave is granted, the teacher has the right to return to a teaching position for which the teacher is certified and qualified. IC 20-28-10-1(f). The teacher retains status and seniority rights. IC 20-28-10-2(a). The teacher can maintain coverage in a group insurance program by paying the full premium, or the

school corporation may elect to pay all or part of that cost. IC 20-28-10-2(b). If the leave extends into part of a school year, the teacher is entitled to accumulate "sick leave" at a proportional rate. IC 20-28-10-2(b).

If the teacher takes a sabbatical leave, the teacher must then return for a length of time equal to the sabbatical leave. IC 20-28-10-3(b). No similar requirement applies to leave for sickness or disability.

Finally, a school corporation may place a teacher on "disability or sick leave," with or without a request, for a period not to exceed one year, and if the teacher did not request the leave, the teacher is entitled to a hearing. IC 20-28-10-4.

The question, therefore, is whether the leave taken by Young to care for her ill mother was "a sick leave" under IC 20-28-10-1(a). If so, she is entitled to service credit under IC 5-10.4-4-7(c).

2. "Sick leave" in IC 20-28-10-1(a) is ambiguous

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 term "sick leave" as used in IC 20-28-10-1(a) is ambiguous because it is not clear whether it is limited to leave for the sickness of the employee, or encompasses the sickness of family members. The statute and its cousins provide for paid and unpaid leave for illness, quarantine or sickness, but do not say *whose* illness justifies the leave.

A current law dictionary defines "sick leave" as "[a]n employment benefit allowing a worker time off *for sickness*, either with or without pay, but without loss of seniority or other benefits." *Black's Law Dictionary* (8th ed. 2004) (emphasis added). This definition is ambiguous, because it does not say for *whose* sickness the time off is allowed. TRF cites an earlier edition defining "sick leave" to mean, "Period allowed by an employer to an employee for *the employee's sickness* either with or without pay but with no loss of seniority or other benefits." *Black's Law*

Dictionary (6th ed. 1990) (emphasis added). This earlier definition predated the FMLA.[4]

Even long before the FMLA, the term "sick leave" was susceptible to different meanings. In *Nelson v. Dean*, 27 Cal.2d 873, 168 P.2d 16 (1946), a state employee was denied sick pay for three days taken to care for his wife. He sued, relying on an administrative rule defining sick leave to include care for ill members of the employee's immediate family. The state responded that a statute authorizing "sick leave" for state employees limited such leave to what the state asserted was the common, well-known understanding of the term, *i.e.*, leave only for the illness of the employee. The court found little help from dictionaries or case law, but noted that the term "actually has two widely known meanings," the more limited common meaning and the broader "technical" meaning in the civil service context. As evidence that "sick leave" had come to include leave to care for family members, the court pointed to laws or rules in 16 other states. Ultimately, the court found that the California legislature, when authorizing "sick leave," was aware of and did not limit the prior practice of the state civil service board to grant such leave for care of family members.

Paid leave to care for an ill family member was not unheard of even in the 1920s. In *Averell v. City of Newburyport*, 241 Mass. 333, 135 N.E. 463 (1922), a school committee approved pay for 12 teachers who were absent due to illness, one of them to care for an ill family member, under a rule that authorized paid leave for "personal illness or as the result of a death in the immediate family." The city refused to pay the salary, but the appellate court held that the school committee was empowered to adopt the rule so the city must honor it.

Elsewhere, our General Assembly has used the general term "sick leave" without specifically defining whether it benefits employees who care for ill family members. For example, the legislative body of a political subdivision "may" grant "sick leave" to its employees. IC 5-10-6-1.

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[4] The change in the wording of the definition of "sick leave" occurred with the publication of the Seventh Edition (1999), six years after the FMLA was enacted. The Eighth Edition quoted in the text is the current edition on Westlaw (the ALJ does not have ready access to the most recently published Ninth Edition). The term "sick leave" had not yet appeared in the Fourth Edition of 1951, the edition that would have been on the shelf when "sick leave" first appeared in the statutes (*infra*).

The Seventh and Eighth editions have a separate entry for "family leave" defined as an "unpaid leave of absence from work taken to have or care for a baby or to care for a sick family member." This new term was obviously a result of the FMLA. A dictionary is not a statute, so principles of statutory construction will not be applied to infer that the editor of the dictionary thought that " sick leave" is exclusive of "family leave."

3. "Sick leave" includes leave to care for ill family member

Having found that the term "sick leave" is ambiguous, the intent of the legislature must be determined. Because the statute being construed is an employment benefit law, not a pension law, construction is not subject to the principle that pension statutes are liberally construed in favor of intended beneficiaries. *Schock v. Chappell*, 231 Ind. 480, 484, 109 N.E.2d 423, 424 (1952), citing *State ex rel. Clemens v. Kern*, 215 Ind. 515, 523, 20 N.E.2d 514 (1939). Nor is this a situation in which "great weight" is given to the interpretation by the agency charged with the duty of enforcing the statute, *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000), because TRF is not charged with enforcing the teacher sick leave statutes.

The history of the statutes may shed light on the question.

The first mention of leave for a teacher came in the original TRF law, 1915 Ind. Pub. Acts ch. 182. Section 18—the progenitor of IC 5-10.4-4-7(a)—provided that a teacher could be given a leave of absence for "study, professional improvement, or temporary disability, not exceeding one year in seven," and would be entitled to the benefits of the teacher pension law. Relevant to this case, this provision remained largely unchanged until 1976.

Meanwhile, the advent of *paid* sick leave for teachers came in 1921, when the legislature first authorized school corporations to pay teachers "who may be absent because of sickness or because of attending school conventions or meetings, or because of visiting schools, or because of a death in the immediate family." 1921 Ind. Pub. Acts ch. 91, § 3.

Paid sick leave became mandatory in 1945, in a teacher salary law which required that "each teacher shall be entitled to be absent from work on account of *personal illness* for a total of five days in each year without loss of compensation." 1945 Ind. Pub. Acts ch. 231, § 1 (emphasis added). This is the only reference in any statute, before or after, to the illness being "personal." But the word "personal" was dropped in 1965, when the legislature first enacted what is now IC 20-28-9-9, providing that a teacher may be absent from work "on account of illness or quarantine" for 10 days the first year and seven days in each succeeding year without loss of compensation. 1965 Ind. Pub. Acts ch. 215, § 2. This section also referred for the first time to "sick leave" in connection with such leave accumulated with another school corporation.

Extended *unpaid* leaves were first authorized in 1927, as part of a comprehensive teacher tenure act. One provision of that act authorized a school corporation to grant leaves of absence of up to one year "for study or professional improvement or because of physical disability or sickness . . .." 1927 Ind. Pub. Acts ch. 97, § 5. In the same section, school corporations were authorized to

involuntarily place a teacher on leave of absence "because of physical or other disability or sickness," granting the teacher a right to a hearing to contest the decision.

In 1976, all of the above laws were reworked and recodified.

In one section, a new statute combined the1965 provision for 10/7 days of paid leave "on account of illness or quarantine" with the 1921 provision that school corporations could pay teachers who are absent because of "sickness . . . or a death in the immediate family." 1976 Ind. Pub. Acts P.L. 100, § 1 (adding IC 20-6.1-5-6).

The same 1976 law codified the 1927 provision on unpaid leaves of absence but with important changes: "A school corporation may grant a teacher a leave of absence, for at most one (1) year, for a sabbatical or for disability or *sick leave*. The length of this leave shall be credited to the teacher's tenure *and retirement*." 1976 Ind. Pub. Acts P.L. 100, § 1 (adding IC 20-6.1-6-1) (emphases added). So the phrase "physical disability or sickness" was replaced with "disability or sick leave," and it was made clear that the teacher would receive retirement credit for the leave. Another section recodified the authority to involuntarily place a teacher on "a disability or sick leave for at most one (1) year." *Id.* (adding IC 20-6.1-6-3). Again, the legislature replaced "physical or other disability or sickness" with "disability or sick leave." These provisions are now IC 20-28-10-1 and -3.

The same year, the TRF law was amended and recodified. 1976 Ind. Pub. Acts P.L. 111, § 1. This law retained the original 1915 provision of service credit for leaves of absence "for study, professional improvement and temporary disability" (now IC 5-10.4-4-7(a)), and added service credit for leave to work on a federally supported project (now IC 5-10.4-4-7(b)). Most important, the act added what is now IC 5-10.4-4-7(c): "Leaves of absence, specified in IC 20-6-12-5, must be credited to retirement." At the time, the cited section was the codification of the original 1927 authorization for unpaid leaves of absence, still including leave "because of physical disability or sickness." But as seen above, P.L. 100 replaced that language with "disability or sick leave."

In 1995, the legislature added what is now IC 5-10.4-4-14, which provides that creditable service for unpaid leave must be directly related to a governmental unit under the Internal Revenue Code, and requires that the TRF board assess an actuarially determined employer share amount against the appropriate entity to be paid to the state general fund. 1995 Ind. Pub. Acts, P.L. 214-1995, § 2.

Finally, in 1997, the legislature added what is now IC 5-10.4-4-7(d), assuring that service credit must be consistent with the FMLA, and specifically that a member on a leave of absence that qualifies for FMLA protection must receive credit for "vesting and eligibility purposes to the extent required by" the FMLA,

"but is not required to receive credit for service for benefit purposes unless the leave is described in subsection (a), (b), or (c)." 2007 Ind. Pub. Acts P.L. 5-1997, § 9.

This review of legislative history reveals that since 1921 through today, with one exception, the legislature has used the terms illness, sickness, sick leave, and quarantine without limiting them to the teacher's illness. The one exception is the 20-year period when the state mandated paid leave for "personal illness." Significantly, the 1965 amendment dropped the word "personal" and reverted to "illness or quarantine." This change suggests that the legislature understood the difference between leave for personal illness and leave for sickness of a family member, and intentionally dropped the word "personal." Also significant is the 1976 change in unpaid leaves of absence from "physical disability or sickness" to the more generic "disability or sick leave," which by 1976 was increasingly understood to encompass leave to care for an ill family member.

Another indicator of legislative intent is the policy of the statute under review. Because Indiana does not record legislative history beyond the bills that are introduced and action on them, and the ALJ does not have historical materials that might shed light, we are left to speculate as to possible policy reasons for optional provision of up to a year of unpaid "sick leave."

Policy reasons for extending sick leave to teachers would include improving the lot of public school teachers by protecting them from losing their jobs due to illness, and providing uniform benefits across the state. Another reason could have been to make Indiana uniformly attractive to teachers from other states, or to prevent Indiana teachers from seeking better paid leave benefits elsewhere. If paid sick leave was becoming a more common benefit for private employees, the legislature may have wanted to make sure that public employees, and especially teachers, would receive comparable benefits. As with the FMLA, the legislature may have been concerned that the overwhelmingly female profession of public school teachers would bear the traditionally heavier burden that fell upon women to care for ill family members. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (FMLA was justifiable exercise of Congress's power to remedy sex discrimination, based on discriminatory effect of gender stereotype that caring for family members is women's work)

All of these policies would be served by a more expansive understanding of "sick leave" to include leave to care for an ill family member. Although Indiana did not have a version of the FMLA, many states were passing them before the federal version was enacted. *Hibbs, supra.* Indiana had an interest in at least guaranteeing public employees job and benefit protection from illness of a family member.

Contextual clues do not provide strong evidence one way or the other. TRF distinguishes the statute from employer policies which specify that sick leave includes family care, such as the policy at issue in *Shorter v. City of Sullivan*, 701 N.E.2d 890 (Ind. App. 1998) (or, for that matter, CCS's policy). In other words, TRF suggests that if the legislature had intended the broader meaning, it would have defined it that way. But this argument begs the question of whether the legislature believed that the common understanding of the term "sick leave," when it first appeared in 1965 and 1976, required no elaboration.

The parties attempt to find significance in the FMLA provision of IC 5-10.4-4-7(d), but that subsection has no bearing on the interpretive question. Subsection (d) was obviously added solely to assure that a denial of service credit would not risk violating the FMLA. Furthermore, the drafters of subsection (d) probably felt that a specific reference to "vesting and eligibility" was required. While the FMLA itself says nothing about whether service credit must be granted for an FMLA-required leave, the implementing rules provide (and provided in 1997):

> With respect to pension and other retirement plans, any period of unpaid FMLA leave *shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate.* Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, *unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.*

29 CFR § 825.215(d)(4) (emphases added). So subsection (d) merely incorporated the FMLA rule in stating that the member is not entitled to service credit for benefit accrual—with the important statement, "unless the leave is described in subsection (a), (b), or (c) [of IC 5-10.4-4-7].

For all of these reasons, the more convincing interpretation is that the "sick leave" permitted by IC 20-28-10-1(a) includes leave to care for a family member. Therefore, IC 5-10.4-4-7(c) requires that service credit be granted.

4. Young's leave of absence was "sick leave" under IC 20-28-10-1(a)

TRF argues that the leave granted by CCS was not the same type of "sick leave" that is authorized by IC 20-28-10-1. TRF points out that in one memo the leave was referred to as "personal" leave (TRF Ex. 1), and in the leave of absence verification CCS checked "FMLA" and not "sick leave" (TRF Ex. 2). A CCS document submitted by Young also refers to the leave as FMLA leave. (Pet. Supp. Ex. B.)

The leave granted to Young bears all the hallmarks of the unpaid leave of absence for sick leave authorized by IC 20-28-10-1(a). It was approved under CCS's "other unpaid leave" policy, which is grantable for up to one year for "illness or disability, eldercare, extended or family illness." (Pet. Rep. Ex. B at 32.) That policy clearly has roots in the statutory requirement, and almost certainly was originally adopted in order to comply with state law.

Furthermore, notwithstanding references to the FMLA in the documents, CCS does not have a separate category of "FMLA" leave. Instead, CCS simply states that it will comply with the FMLA. (Pet. Rep. Ex. C.) Apparently CCS believes that its other personal and sick leave policies, when followed, will assure FMLA compliance, without adopting a separate set of policies that mirror the FMLA.

Certainly it would not be accurate to call Young's leave an "FMLA leave." The FMLA requires an employer to provide only up to 12 workweeks of leave during any 12-month period for reasons including to care for a seriously ill parent. 29 U.S.C. § 2602(a)(1)(C). The leave extended to Young was at least twice the 12 weeks of leave required by the FMLA. At most, the first 12 weeks (August 14 through November 3, 2006, could be classified as FMLA leave, and then only because the FMLA would have required it, not because CCS classified the leave as FMLA leave.

Therefore, the "other unpaid leave" taken by Young closely corresponds to the leave of absence for "sick leave" authorized by IC 20-28-10-1. For this reason, TRF must grant service credit for it.

B. Other issues

Because of the finding that Young is entitled to service credit for the one year during which she was on sick leave, the second issue of whether TRF is equitably estopped by promises or statements of its employees need not be addressed. However, the ALJ is unable to find statutory or regulatory authority for the advice given by TRF staff that Young would be required to return to work for a year in order to get service credit for the leave (although the ALJ certainly could have missed it). The ALJ recommends that this requirement be reviewed.

There is also no need to rule on the question of whether, in the alternative, Young would have been entitled to service credit for the half-year that she remained on CCS's health insurance plan.

C. Effect of Young's limited cross-motion for summary judgment

TRF moved for summary judgment arguing that it had correctly denied any service credit. Young responded in opposition, but simply asked that TRF's motion for summary judgment be denied. (Pet. Resp. at 10.) Separately, Young moved for partial summary judgment on the issue of whether she is entitled to a half-year of service credit. (Pet. Mem. Supp. Partial SJ at 5.) Young has not moved for summary judgment on the question of whether she is entitled to a full year of service credit.

The Administrative Orders and Procedures Act permits any party to move for summary judgment. IC 4-21.5-3-23(a). An adverse party may serve opposing evidence, and the "judgment sought" shall be rendered if the evidence shows no genuine issue of material fact and "the *moving party* is entitled to judgment as a matter of law." IC 4-21.5-3-23(b) (emphasis added). This language does not authorize the grant of summary judgment to a party who does not move for it.

Trial Rule 56(B) does: "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." *See Transcontinental Technical Services, Inc. v. Allen*, 642 N.E.2d 981, 983 (Ind. App. 1994), *trans. denied* (Ind. 1995), *abrogated on other grounds*, *Beam v. Wausau Insurance Co.*, 765 N.E.2d 524 (Ind. 2002). The Trial Rules are not applicable to administrative proceedings where there is a controlling statute, but the Trial Rules may provide the rule of decision where the administrative agency's statute is silent on the question. *State ex rel. Goodman v. Review Bd. of Indiana Dept. of Employment and Training Services*, 536 N.E.2d 1023, (Ind. 1989); *State Bd. of Tax Comm'rs v. LeSea Broadcasting Corp.*, 511 N.E.2d 1009 (Ind. 1987).[5] This begs the question, of course, whether IC 4-21.5-3-23 is silent on the question, or whether it implicitly forbids summary judgment for a nonmovant by omitting to authorize it.

The federal rule, Fed. R. Civ. P. 56, does not expressly authorize summary judgment for a nonmovant, but the greater weight of authority approves the practice as consistent with the policy behind summary judgment, so long as the moving party has had an adequate opportunity to address the question. 10A C. Wright *et al.*, *Federal Practice and Procedure* § 2720 (3rd ed. 1998) (text accompanying n. 22 *et seq.*).

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[5] Trial Rule 28(F) expressly applies T.R. 26–37 to discovery in administrative proceedings.

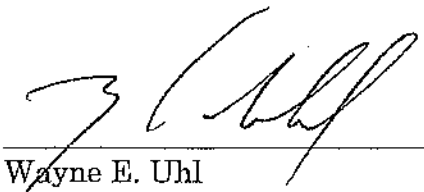
It is risky to grant summary judgment for a party who has not moved for it where conflicting evidence has to be resolved in favor of one party or the other. Here, however, the question of whether the service credit should be granted is a pure question of law based on material facts that are not disputed by either party. Therefore, it is appropriate to grant summary judgment for Young as to the full year of service credit even though she has not technically moved for it, rather than requiring her to file a *pro forma* motion to obtain that relief.

Recommended Order

TRF's motion for summary judgment is DENIED. Summary judgment is GRANTED in favor of petitioner Young. Young's motion for partial summary judgment is DENIED AS MOOT.

The initial determination of TRF to deny service credit to Young for the year when she was on unpaid leave of absence due to the illness of her mother is reversed, and TRF shall grant Young service credit of one year for the 2006-2007 school year.

DATED: October 13, 2009.



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