PUBLIC EMPLOYEES
RETIREMENT ASSOCIATION

To: PERA Board of Trustees **PERA Board Meeting:** December 9. 2021

From: Julie A. Leppink, General Counsel

Re: **In the Matter of the PERA Coordinated Retirement Plan Annuity of Diane Edwards**

This appeal was referred by the Executive Director to the Office of Administrative Hearings (OAH) for a fact-finding conference. The parties agreed to submit the case to the Administrative Law Judge (ALJ) on cross motions for summary disposition because it involves a question of law and there are no genuine issues of material fact. The parties' motions, supporting affidavits, and legal memoranda are included in the OAH record provided to the Board of Trustees, along with the ALJ's Recommendation. Ms. Edwards ("Petitioner") has the burden of proving that she is entitled to augmentation of her Coordinated Plan retirement annuity.[1]

ISSUE

Whether Petitioner is eligible for augmentation of her PERA Coordinated Plan retirement annuity.

The ALJ recommended that Petitioner's request for augmenation be denied.

FACTS

The ALJ accurately summarized the undisputed facts of the appeal as follows[2]:

> Petitioner worked for Intermediate District 287 at Hennepin Technical College from November 24, 1980 to June 30, 1997. In this position, Petitioner was a coordinated member of PERA's general employee retirement plan (Coordinated Plan). Petitioner was laid off from her position in 1997. Upon her termination, Petitioner had earned 16 years and eight months of service credit in the Coordinated Plan. Petitioner chose not to receive a refund of her PERA contributions, so her Coordinated Plan annuity was deferred.
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> Under Minn. Stat. § 353.34, subd. 3(a), Petitioner was entitled to augmentation, or interest, on her deferred annuity through December 31, 2018. Petitioner's retirement estimates over the years included amounts attributable to augmentation. For example, in 2014 and 2015, Petitioner's estimated monthly retirement benefit at age 65 was $1,301. The estimates identified Petitioner's contributions as including both payments Petitioner made into the retirement system during employment, in the amount of $16,535.74, and augmentation of that amount. In 2014, the augmentation figure was $45,682.57, while in 2015, it had increased to $48,302.85. In 2019, after augmentation was eliminated, Petitioner's retirement benefit at 65 was adjusted downward to $1,261.
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> Petitioner received regular pension benefit statements and retirement estimates from PERA. Petitioner also accessed the "myPERA" online account system and received online estimates.

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[1] *Matter of Ret. Benefits of Yetka*, 554 N.W.2d 85, 88 (Minn. Ct. App. 1996) (citations omitted).

[2] ALJ Rec. at 2-3 (citations omitted); OAH 000005-000006.

On June 27, 2018, PERA posted a 2018 Legislative Update on its website, and mailed the update along with members' annual Personal Benefits Statements. The update provided information on deferred benefits with the following statement:

Beginning January 1, 2019, interest applied to deferred benefits for all members will be zero percent prospectively. Any deferred member who terminated public service prior to January 1, 2012, will continue to receive deferred interest through December 31, 2018. *Beginning June 30, 2018, if a deferred member returns to the same PERA plan, deferred interest will no longer apply to the entire benefit calculation*.

PERA also added the following message to myPERA in June 2019:

> "Attention members who terminated prior to January 1, 2012: If you terminated your public service prior to Jan. 1, 2012, *your benefit may be reduced if you return to public employment*. Members should contact PERA prior to returning to public employment to discuss their options."

After leaving public service in 1997, Petitioner worked in the private sector until 2020, when she was laid off due to the COVID-19 pandemic. On October 5, 2020, Petitioner began working in a nine-month clerical job with the Anoka-Hennepin School District (Anoka-Hennepin), making $14.65 per hour. Though not lucrative, this position fulfilled Petitioner's "life-long passion to work with disabled young adults." As an Anoka-Hennepin employee, Petitioner has again become a member of the Coordinated Plan and is currently accruing service credit.

After accepting the position with Anoka-Hennepin, Petitioner contacted PERA and was told that she could expect a reduction in benefits of approximately "$20-$40 per month." PERA subsequently notified Petitioner that it estimated her single life benefit at age 65 would be $867.11, an amount calculated without including augmentation. PERA staff determined that when Petitioner returned to public employment covered by the Coordinated Plan, augmentation no longer applied to her retirement annuity.

Petitioner appealed PERA staff's conclusion to the Executive Director, who affirmed that determination. Petitioner then appealed that determination to PERA's Board, and PERA referred this matter for a fact-finding conference.

ANALYSIS

I. PETITIONER DOES NOT MEET THE CRITERIA TO QUALIFY FOR AUGMENTATION UNDER MINN. STAT. § 353.34, SUBD. 3(C).

Members of the PERA Coordinated Plan are entitled to augmentation of their retirement annuities pursuant to Minn. Stat. § 353.34, subd. 3(c), which provides:

> The deferred annuity of any former member must be augmented from the first day of the month following the termination of active service, or July 1, 1971, whichever is later, to the effective date of retirement or, if earlier, December 31, 2018.

Under the statute, "Petitioner must meet three criteria to qualify for augmentation: 1) her annuity must be deferred; 2) she must be a former member of PERA; and 3) she must have terminated public employment."[3] The ALJ concluded that Petitioner does not meet these requirements.[4]

A. Petitioner's retirement annuity is no longer deferred.

The ALJ correctly determined that Petitioner's retirement annuity is no longer deferred and that she is not entitled to augmentation, stating:

> As an Anoka-Hennepin employee, [Petitioner] is an active member in PERA's Coordinated Plan; she makes contributions, earns service credit, and, depending on her compensation, may increase the "high five" salary used to calculate her pension benefit. Petitioner was terminated from public employment when she was laid off in 1997, but because she is currently working for another public employer, her "termination of public service" date is now in the future. Because Petitioner's annuity is no longer deferred, she is not eligible for augmentation.[5]

Petitioner asserts, however, that she has two termination dates—one in the past and one when she terminates service with Anoka-Hennepin.[6] She essentially requests that PERA calculate her annuity in two separate segments and grant augmentation on the first segment, which ended in 1997. PERA does not, however, have authority to pay a retirement annuity for the first segment of her PERA-covered service separate from her current service.[7] Although this calculation was permitted by Minn. Stat. § 353.71, subd. 2(e)(2016), in the past, this statute was repealed in 2018. Since the repeal, retirement annuities must be calculated and augmented based on all segments of service combined. As a result, members who left public service in the past but return to the same plan after June 30, 2018, when the repeal was effect, cannot receive the deferred segment alternative calculation.[8]

B. Petitioner is no longer a "former member" of the Coordinated Plan.

Augmentation is available only to a "former member" of the Coordinated Plan.[9] A "former member" is defined as someone who terminates public service.[10] Although Petitioner was a former member in 1997, when she terminated service with Hennepin Technical College, she is no longer a "former member" of the Coordinated Plan because she has returned to public service.[11] "[A]s an active member, she is, by definition, not entitled to augmentation. Petitioner "cannot simultaneously be both a former member [entitled to augmenation] and an active employee in covered service under the same plan."[12]

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[3] ALJ Rec. at 5; OAH 000007.
[4] *Id.*
[5] *Id. (citations omitted).*
[6] *Id.*
[7] *Id.* at 6; OAH 000008.
[88] *Id.*
[9] Minn. Stat. § 353.34, subd. 3(a).
[10] Minn. Stat. § 353.01, subd. 7a.
[11] *Id.*
[12] ALJ Rec. at 6; OAH 000008; *see Matter of Johnson*, No. A20-1037, 2021 WL 1605112, at fn. 2 (Minn. Ct. App. Apr. 26, 2021)(Allowing this "would provide an incentive for employees to quit and resume work repeatedly, in order to earn more benefits while accruing interest on those previously earned.")

C. Petitioner has not terminated public service.

Petitioner asserts that she is entitled to augmenation under Minn. Stat. § 353.34, subd. 3(d), which provides:

> For a person who became a public employee before July 1, 2006, and who has a termination of public service before January 1, 2012, the deferred annuity must be augmented at the following rate or rates, compounded annually . . .

The ALJ concluded that although Petitioner had a termination of service before January 1, 2012, and was entitled to augmenation in the past, "because [she] returned to public service, she is no longer eligible for the augmentation she earned prior to her return. As Petitioner's date of public service termination is in the future [and not prior to January 1, 2012], and it will occur after December 31, 2018, she is also ineligible to accrue augmenation going forward."[13]

II. PETITIONER CANNOT OBTAIN WHAT THE LAW PROHIBITS AS AN EQUITABLE REMEDY.

Petitioner asserts that she is entitled to relief on the grounds "that this result is unfair and that she is losing 23 years-worth of augmentation, a loss that reduces her monthly benefit by hundreds of dollars. She contends she was not aware that a return to public service could have this impact."[14] The ALJ considered whether equitable relief under the doctrines of estoppel is appropriate in this case and summarized the applicable law as follows:

> Promissory estoppel "implies a contract where the promisor makes a unilateral or otherwise unenforceable promise and the promisee relies on the promise to his or her detriment." However, "where an agency has no authority to act, agency action cannot be made effective by estoppel." Equitable estoppel may apply when a party can show wrongful conduct by a government actor, reasonable reliance, a unique expenditure in reliance, and that the balance of the equities weighs in favor of estoppel. Stated alternatively, the party seeking to estop the government must show the government made an intentional misrepresentation of material fact through which the government intended to induce reliance, where the other party did not know the true facts and that party relied on the government's misrepresentation to their detriment. Affirmative misconduct is required, and simple inadvertence, a mistake, or imperfect conduct is not enough.[15]

The ALJ correctly concluded that Petitioner is not entitled to equitable relief since there was no malfeasance or affirmative misconduct by PERA, stating:

> Assuming the truth of Petitioner's assertion that she called PERA and received inaccurate information, there is no evidence of malfeasance or affirmative misconduct on PERA's part. The record does not show anything other than a mistake occurred, and a mistake is not enough. Further, Petitioner did not contact PERA before re-entering public service; instead, she called after she began working at Anoka-Hennepin. At that time, her right to augmentation had already been lost, making the information provided to her irrelevant to the outcome here. Petitioner

[13] *Id.* at 7; OAH 000009.
[14] *Id.*
[15] Id. at 7-8 (citations omitted); OAH 000009-000010.

> contends that she did not know the consequence of her return to public service, but PERA posted information on its website and on myPERA, and sent plan participants a notice, indicating that augmentation could be lost if former members returned to public work. Finally, PERA may only pay an annuity calculated as allowed by law; it simply does not have the authority to pay Petitioner a different amount."[16]

The ALJ's conclusion reflects that "Minnesota courts have long held than estoppel cannot be applied against a public pension plan where the plan or its board of trustees lacks the authority to act outside the bounds of its authority."[17] Since PERA's governing laws do not authorize the PERA Board of Trustees to waive the mandatory provisions of the law regarding augmentation of retirement annuities, estoppel cannot be applied in this case.

CONCLUSION

The PERA staff respectfully requests that the PERA Board of Trustees affirm the Executive Director's determination that Petitioner's request for augmenation of her retirement annuity be denied, adopt the recommendation of the Administrative Law Judge in its entirety, and direct its attorney to draft an order reflecting the decision of the Board of Trustees.

[16] *Id.* at 8; OAH 000010.

[17] *In the Matter of the Application for PERA Retirement Benefits of Michael M. McGuire*, 756 N.W. 2d 517, 519-20 (Minn. Ct. App. 2008), rev. den. (Minn. Dec. 16, 2008); *Axelson v. Minneapolis Teachers Retirement Association*, 544 N.W. 2d 297, 302 (Minn. 1996).