

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDIA J. WHITSITT,

Petitioner-Appellee,

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT
SYSTEM and PUBLIC SCHOOL EMPLOYEES
RETIREMENT BOARD,

Respondents-Appellants.

UNPUBLISHED

July 25, 2013

No. 309190

Ingham Circuit Court

LC No. 11-000694-AA

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

This case involves a dispute over retirement benefits collected by petitioner. Respondents determined that petitioner returned to work less than 30 days after her effective retirement date, and ordered her to repay a year's worth of retirement benefits. The circuit court agreed that petitioner returned to work too early, but held that the remedy imposed by respondents was arbitrary and capricious, instead holding that petitioner need only repay the salary received for the four days she should not have worked. We affirm the circuit court's ruling because petitioner's retirement allowance effective date was August 1, 2007, and it was arbitrary and capricious to charge petitioner a years' worth of benefits for improperly working four half-days.

I. FACTS

Petitioner began her career as a teacher in 1975, and had more than 30 years of total earned and purchased years of service by 2007. The parties agree that petitioner therefore qualified for retirement benefits when she turned 55 on July 23, 2007.

In 2007 petitioner was working part-time with Saline Area Schools. On March 4, 2007, petitioner submitted her application for retirement. On her application, petitioner listed her termination date as June 30, 2007 and her retirement effective date as August 1, 2007. Petitioner tendered her letter of retirement to Saline Area Schools on June 20, 2007. On August 27, 2007, petitioner received formal acceptance of her retirement from Saline Area Schools with a listed effective date of July 24, 2007.

In June 2007, the principal of the school where petitioner worked approached petitioner and asked if she would return to work if a position opened up. At the hearing, petitioner indicated that no specific offer of employment was made and her intention in June 2007 was to retire. On June 10, 2007, petitioner contacted the Office of Retirements Services (ORS) and indicated that she planned to begin her retirement August 1, because her birthday was July 23. Petitioner's email went on to say, "My employer is interested in me remaining working part-time at a lower rate. My pay would be between \$22,000 and \$23,000 for part-time work as a special educator. Is this allowable under the present guidelines?" On June 11, 2007, an ORS customer service representative, "Marsha", responded that petitioner could respond to work under certain restrictions, including that she "may not work within the first month of [petitioner's] retirement effective date."

Petitioner once again contacted ORS on June 13, 2007. Petitioner's email consisted of the following:

Thank you for your response. I appreciate your time. I do have a couple of final questions. In discussing this with my employer, I am assuming my effective retirement date is June 30, 2007. So I would not be able to work for the month of July, is that correct? Then, when returning to work in the fall, does my employer need to continue to pay retirement benefits for me if I am collecting my pension?

That same day, an ORS customer service representative "Catherine" responded and indicated that petitioner was correct and she could not work during July but would be able to return to work August 1.

Also on June 13, 2007, petitioner sent an email to the school district indicating that she had communicated with ORS and was informed that she "could not work for 30 days after . . . retirement effective date." On August 23, 2007, petitioner received an offer from Saline Area Schools for part-time employment which petitioner accepted. Petitioner began to work again for Saline Area Schools on August 27, 2007.

In October 2007, petitioner began to receive retirement benefits retroactive to August 1, 2007. Petitioner received a salary of about \$22,000 from the school and her retirement benefits were about \$28,000.

Nearly two years later, in June 2009, petitioner received a letter from ORS informing her that she had not established a retirement allowance effective date of August 1, 2007 because she returned to work in August 2007. ORS stated that petitioner's actual retirement effective date would be adjusted to July 1, 2008, because petitioner did not work for any Michigan public school during that month. ORS concluded that because petitioner did not establish a retirement allowance effective date in August 2007, she was not entitled to start receiving benefits. ORS calculated that petitioner received \$28,587.83 between August 2007 and June 2008 to which she was not entitled.

Petitioner denied any obligation to repay respondents and requested a formal administrative hearing. A hearing was held before Administrative Law Judge (ALJ) William D. Bond on November 16, 2010. On January 25, 2011, the ALJ issued a proposal for decision in

which he determined that petitioner did not establish a retirement effective date until July 1, 2008 because June of 2008 was the first full 30 day period in which petitioner did not work for a Michigan public school. The ALJ found that petitioner never intended to retire, but always intended to continue working. The ALJ concluded that petitioner should repay all retirement benefits received between August 2007 and June 2008, and the retirement board adopted the proposed decision.

Petitioner appealed to the circuit court, which held that the retirement board's decision was not supported by sufficient evidence. The circuit court held that the entire record only supported a conclusion that petitioner intended to retire, and that she relied on statements made by respondents (through ORS) that she could return to work in August 2007 without penalty. The circuit court agreed that petitioner did not comply with the terms of 1985 AACRS, R 38.1128, which required that she not work at all in August 2007. Nonetheless, the court concluded that it was arbitrary and capricious to charge petitioner nearly a full year's benefits for working four half-days in August 2007. Instead, the court held that petitioner should repay the \$532.28 she improperly earned in salary during August 2007.

II. STANDARD OF REVIEW

This Court review's a trial court's decision on an administrative appeal

to determine whether the circuit court applied correct legal principles and whether the court misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings, which essentially constitutes a clearly erroneous standard of review. A finding is clearly erroneous when, after review of the record, the Court is left with a definite and firm conviction that a mistake was made. [*Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010), lv den 490 Mich 949 (2011).]

To the extent that the Court considers the proper interpretation of statutory and regulatory language, review is de novo. *Id.* When interpreting a statute or administrative rule effect must be given to the intent of the drafter. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003), lv den 471 Mich 870 (2004). This is achieved by reviewing the language used and giving the plain ordinary meaning to unambiguous language. *Id.*

III. ANALYSIS

MCL 38.1381 governs the eligibility of public school employees for retirement allowance. In pertinent part, MCL 38.1381 provides as follows:

[A] member who no longer is working as a public school employee or in any other capacity for which service credit performed in this state is allowed under this act, upon the member's written application to the retirement system, shall be entitled to a retirement allowance . . . if 1 of the following applies:

(a) The member is 55 years of age or older and has 30 or more years of credited service as provided under this act of which at least 15 years were served as a public school employee.

A “retirement allowance” is “a payment for life or a temporary period provided for in this act to which a retirant, retirement allowance beneficiary, or refund beneficiary is entitled.” MCL 38.1307(5). MCL 38.1383(1) provides that a

retirement allowance shall date from the first of the month following the month in which the applicant satisfies the age and service requirements of this act and terminated reporting unit service, but not more than 12 months before the month in which the application was filed with the retirement system, if the applicant satisfies the legal requirements for the retirement allowance at the time the application is filed.

R 38.1128, which addresses post-retirement employment, provides that “[a] retirant may, after 1 month immediately following his or her retirement allowance effective date, become employed in a reporting unit or with the state of Michigan in a position which is covered by” the State Employees’ Retirement Act, MCL 38.1 *et seq.*

The retirement board concluded that petitioner’s retirement allowance effective date was July 1, 2008. This conclusion was incorrect as a matter of law. It is undisputed that petitioner turned 55 years old in July 2007, that she had accumulated the necessary years of service, and submitted her retirement application. These were the only requirements necessary for her to begin receiving her retirement allowance as of August 1, 2007. Therefore, August 1, 2007 was petitioner’s retirement allowance effective date.

A careful examination of the Retirement Act as of August 2007 reveals that there was no waiting period expressly set forth therein to prevent retirants from returning to employment in public school service or state service within 30 days of their retirement. The only limitation is set forth in an administrative rule, R 38.1128, which prohibits a retirant from returning to work within one month of retiring. However, neither that rule, nor any other rule or statute, purports to void, cancel, or otherwise alter a retirement allowance effective date. Thus, while petitioner violated R 38.1128 by working four half-days in August of 2007, this action did not alter her effective retirement date.

The applicable administrative rules do not set forth the penalty for violating R 38.1128. Petitioner’s effective retirement date was August 1, 2007, and her only violation was to work four half-days in August 2007. There was no legal basis to strip all her retirement benefits through June 2008. We agree with the circuit court that the retirement board’s decision in this respect was arbitrary and capricious.

We further agree with the circuit court’s analysis of the appropriate remedy:

It would appear to this Court upon review of the entire record that the appropriate remedy would be for Petitioner to forfeit the amount she earned in the few days she worked at the end of August 2007, amounting to \$532.28. Furthermore, R. 38.1129(2) speaks directly to this point proclaiming that “[i]nstead of suspending a retirement allowance where excess post retirement earnings are involved, the retirant may pay the retirement system . . . the total amount of excess earnings.” Having Petitioner pay this sum back would meet the requirements of R.

38.1129(2) as the only excess earning Petitioner received were the four days in August 2007.

Petitioner's rule violation was to work four half-days in August 2007. Repaying the salary earned those days will return all parties to the positions they would have been in had petitioner properly waited until September 1, 2007, to resume work.

Respondents argue that the circuit court erred by reversing the retirement board's conclusion that petitioner never intended to stop working, but this point is irrelevant. Respondents point to no statute or rule that would require petitioner to subjectively have intended to cease working. In fact, the statutes specifically allow for her to resume work after one month.

Respondents argue that R 38.1128 should be interpreted in light of IRS rules that require retirees in this type of retirement plan fully sever their employment relationship before returning to work. However, such an interpretation does not require a different result. R 38.1128 may be read as imposing a one month waiting period to ensure that the employment relationship is severed. It does not follow that the remedy for a violation should be the forfeiture of a year's worth of benefits rather than whatever amount of salary was improperly collected during the one month period.

Given our conclusion based upon the language of the relevant statutes and rules, we need not reach petitioner's estoppel or constitutional arguments. Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro