

CASE NO. A07-2066

State of Minnesota
In Court of Appeals

IN THE MATTER OF THE
APPLICATION FOR PERA RETIREMENT BENEFITS OF
MICHAEL A. McGUIRE

REPLY BRIEF OF RELATOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT.	1
I. Relator’s Claim of Estoppel was Raised Before the PERA Board	1
II. Equitable Estoppel Can Apply in the Present Case	4
III. The PERA Board’s Decision was Arbitrary and Capricious	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

1. *Axelson v. Minneapolis Teachers Retirement Fund Ass'n* 544 N.W.2d 297 (Minn. 1996).....4
2. *Brekke v. THM Biomedical Inc.* 683 N.W.2d 771, 775 n.4 (Minn. 2004).....1, 2, 4
3. *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668-69 (Minn. 1984).....5
4. *Deli v. Univ. of Minn.*, 578 N.W.2d 779, 781 (Minn. App. 1998).....4
5. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001).....5
6. *REM-Canby, Inc. v. Minn. Dep't of Human Servs.*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992).....1, 2, 3

Secondary Authorities

1. 4 Williston on Contracts § 8:3 (4th ed. 2007).....4
2. 28 Am. Jur. 2d Estoppel and Waiver § 28 (2007).....4

ARGUMENT

This Court should reverse the decision of the PERA Board of Trustees. The Board ignored claims and important testimony; its decision was therefore erroneous. The Board blindly applied the statute without taking into consideration any wrongdoing by its representatives. Granting Relator's requested relief is supported by Minnesota law and would not strip Respondent of the power to follow its statutory guidelines. Conversely, Respondent's action, taken over two years after payments began, is unreasonable and oppressive in light of the evidence on record. Accordingly, this Court should reverse the Board's decision.

I. Relator's Claim of Estoppel was Fully Raised Before the PERA Board.

To establish a claim of equitable estoppel against the government, a party must prove that the government made a misrepresentation, the government knew the misrepresentation was false, the government intended that its representation be acted upon, the other party did not know the facts and the other party relied upon the government's misrepresentation to their detriment. *REM-Canby, Inc. v. Minn. Dep't of Human Servs.*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992).

Relator's original appeal to the PERA Board, although not perfectly framed, was based solely on a claim of equitable estoppel. Even though Relator did not use the words "equitable estoppel," the argument was properly raised before the PERA Board. Relator's argument before the PERA Board raised questions that had no relevance except to a claim of equitable estoppel. *See Brekke v. THM Biomedical Inc.* 683 N.W.2d 771, 775 n.4 (Minn.

2004). Where equitable estoppel is not perfectly framed, a reviewing court will still consider the claim. *Id.*

The PERA Board Hearing on September 13, 2007 was a quasi-judicial proceeding. Relator was not represented by counsel, did not call witnesses, and did not cross examine witnesses. Although Relator's equitable estoppel argument was not presented in a perfectly organized fashion, it was presented nonetheless. Relator stated that he met with PERA representatives multiple times prior to retirement. T. 14. The record reflects that Relator specifically asked PERA staff about becoming an independent contractor within 30 days of retirement under a contract with the City of Bayport. *Id.* The PERA staff said "that's no problem as long as you're not an employee." *Id.* Respondent mischaracterizes Relator's answer to the PERA Board President's question in stating that the record does not support that Relator asked whether returning as an independent contractor within 30 days would pose a problem. *See* Respondent's Brief 17 n.8, 19. Relator, in fact, did not ask about earnings limitations; he asked the staff whether becoming an independent contractor within 30 days would affect his retirement status. T. 14. PERA staff knew this information to be false as explained by PERA Board member Ms. Hulmer, "everybody I work with knows about it." T. 27 (referring to the fact that returning as an independent contractor within 30 days does not satisfy the 30 day break requirement). Since the meetings with PERA representatives were intended to prepare Relator for retirement, PERA staff's response to Relator's inquiry meets the first three elements of equitable estoppel. *See REM-Canby, Inc.* 494 N.W.2d at 74.

Relator did not know information to contradict the representations that PERA staff made to him. “I really did not know and I had no way of knowing about this beyond talking to PERA staff.” T. 6. Since Relator believed PERA staff’s representations to be true, he began working as an independent contractor within 30 days of his retirement. Respondent is now attempting to reclaim all of the over \$100,000 it has paid out to Relator. Hence, the final two elements of equitable estoppel were met. *See REM-Canby, Inc.* 494 N.W.2d at 74.

The record makes abundantly clear that the issues of estoppel were raised at the hearing. Opposing counsel on the brief appeared at the September 13, 2007 hearing and excused himself because he had advised staff regarding this case. T. 2. Carla Heyl was introduced as legal advisor for the hearing. *Id.* However, opposing counsel un-excused himself during deliberations in order to specifically instruct the PERA Board not to consider equitable estoppel. “The issue before you is not what Mr. McGuire knew, not what the staff told him, not what he should have known, the issue is what does the statute require.” T. 32-33.

Opposing counsel’s advice in this regard was unsolicited, but makes clear that the issue of estoppel was squarely before the Board prior to their decision. Counsel’s unsolicited advice is repeated by the Board President as the vote is taken, underscoring its impact. T. 37. Counsel cannot argue that estoppel was not raised when, at the hearing, he spoke over the Board’s actual legal advisor to prevent consideration of an estoppel argument.

II. Equitable Estoppel Can Apply in the Present Case.

Although some cases have not distinguished between promissory and equitable estoppel, *Axelson v. Minneapolis Teachers Retirement Fund Ass'n*, only analyzed promissory estoppel. 544 N.W.2d 297 (Minn. 1996). “Promissory estoppel implies a contract in law where no contract exists in fact.” *Deli v. Univ. of Minn.*, 578 N.W.2d 779, 781 (Minn. App. 1998). Relator is not asking the Court to imply a contract in law. Equitable estoppel prevents a party from “taking unconscionable advantage of [its] own wrong by asserting [its] strict legal rights.” *Brekke*, 683 N.W.2d at 777. The PERA Board was instructed at the September 13, 2007 hearing, by opposing counsel, to assert its strict legal rights and ignore any possible wrong or misrepresentation made by PERA staff. “It’s purely a statutory construction issue... The Board as fiduciaries has to follow that statute.” T. 32-33.

“The doctrine of equitable estoppel exists to prevent fraud or injustice.” 4 Williston on Contracts § 8:3 (4th ed. 2007). Stated differently, “equitable estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary or inconsistent with his prior action or conduct. It prevents a party from asserting rights when his own conduct renders that assertion contrary to equity and good conscience.” 28 Am. Jur. 2d Estoppel and Waiver § 28 (2007). The sole purpose of PERA staff meeting with future retirees is to provide information and advice on how to properly retire. If estoppel is not applied here, it will allow government agencies to close its eyes to the actions of its representatives.

III. The PERA Board's Decision was Arbitrary and Capricious

The record reflects that misrepresentations were made by PERA staff to Relator. An agency acts arbitrarily if it fails to articulate a rational connection between facts found and the decision made. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001). The facts presented by Relator at the September 13, 2007 hearing before the PERA Board of Trustees were ignored. Opposing counsel specifically directed the PERA Board to pay no attention to anything that was said to Relator by PERA representatives. T. 32.

Respondent implies that Relator's responses to questions from the PERA Board should be given little or no weight compared to Relator's opening comments. Where a statement or response appears in the record is irrelevant. What is important, however, is whether it is in the record or not. The record establishes that specific misrepresentations were made. T. 4, 6, 14. Relator's testimony that he did not believe the 30 day separation applied to independent contractors does not contradict any part of his testimony or petition as Respondent contends. In fact, this belief was based upon information supplied to Relator by PERA representatives. *See* T. 4, 6, 14.

An agency's decision is not supported by substantial evidence if there is a "combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings." *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668-69 (Minn. 1984) (internal citations omitted).

There were several “danger signals” in the PERA Board hearing. First, there is the matter of opposing counsel’s conduct at the hearing, discussed earlier. Having recused himself to allow the PERA Board the appearance of unbiased advice, opposing counsel then returned and, without prompting, specifically instructed the PERA Board to ignore anything other than the statute, including what PERA staff told Relator. T. 2. Although he had excused himself from the meeting as legal advisor, opposing counsel ultimately conveyed what was, in his opinion, the only proper legal course of action. “Mr. McGuire has received over two years of pension benefits that he’s not entitled to. *The Board has to recover those benefits.*” T. 33 (emphasis added). Ms. Heyl, the “unbiased” legal advisor, made no comment following counsel’s nor was her opinion sought. *See* T. 33.

Furthermore, the PERA Board ignored Relator’s response to what the President identified as one of the threshold questions, “[D]id you go to PERA and say, ‘You know what? I’m going to resign in April, but I’m going to start to – you know, after the next weekend, I’m going to start working for Bayport again, as the administrator under this particular contract, as an independent contractor, is that going to give me a problem with my 30-day break?’” T. 14. Relator responded that he had done exactly that and, in fact, “met with the [PERA] individual and said, I’m going to contract back, I’m going to be a consultant, do management work for Bayport, and that’s no problem as long as you’re not an employee is exactly . . . what I was told.” T. 14. The President’s response, however, ignored any misrepresentations and changed the subject to a discussion of the specifics of Relator’s contract:

PRESIDENT DEVICH: Well, going back to work as a contractor is not exactly the issue, the issue is 30 days at this particular point in time, on a 30-day break. And with respect to the contract that you have, under "Duties," it says, "McGuire shall perform the duties as the city from time to time will assign and as outlined in Attachment A," and then it talks about a schedule where you would not exceed 40 hours per week. Correct?

MR. McGUIRE: Okay.

PRESIDENT DEVICH: And then under "Compensation," it says, "That in consideration for performance," I'll skip down to, "McGuire will be compensated at the hourly rate equivalent to Step 8 of the City pay plan and benefits in the current administrator's contract." So, the independent contractor agreement that you have basically paid you off the same contract that you had when you were the administrator?

T. 15. When the President did not receive the sought-after answer, his reaction was to disregard Relator's response and direct the discussion to a new topic.

Last, PERA is unsure of when the information in the "Working After Retirement" booklet was changed. T. 30. PERA's Executive Director stated, "I'm hoping that we had added that language in 2000 . . . I don't know for a fact that we have, though." *Id.*

Unfortunately, PERA failed to retain any copy of the booklet distributed prior to November 2006. *Id.* The Board made no effort to clarify when the language was added. The combination of these danger signals suggests that Respondent did not take a hard look at the relevant issues and demonstrates that Respondent failed to engage in reasoned decision making.

CONCLUSION

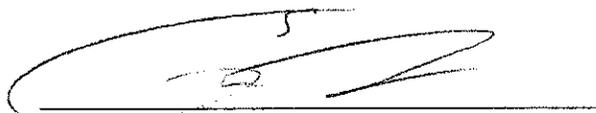
The record supports that the claim of equitable estoppel was raised and that Respondent failed to consider the claim. The record further illustrates that Respondent expressly refused to consider important facts and issues in coming to its decision, rendering its decision arbitrary and capricious. Because the record demonstrates an

arbitrary and capricious finding by Respondent, this Court should reverse Respondent's decision.

Respectfully submitted,

KELLY & FAWCETT, P.A.

Dated: 1/4/2008

A handwritten signature in black ink, appearing to be "Patrick J. Kelly", is written over a horizontal line. The signature is stylized and somewhat cursive.

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