

NO. A07-1571

State of Minnesota
In Court of Appeals

In the Matter of the Disability Earnings Offset of
Mylan Masson

RELATOR'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. Is income from a preexisting employment in a second job excluded from “reemployment” under the provisions of Minn. Stat. § 353.656 subd. 4(b), so that the income from that position is not used to calculate a disability benefit offset?

PERA held: No, all income earned after a disability is used in calculating the offset.

Authorities:

In re Brittain, 724 N.W.2d 512 (Minn. 2006).

State v. McCoy, 682 N.W.2d 153 (Minn. 2004).

Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000).

Minn. Stat. § 353.656 subd. 4(b) (2006).

Minn. Stat. § 645.16 (2006).

STATEMENT OF THE CASE

This is an appeal of a determination by the Board of Trustees of the Public Employees Retirement Association of Minnesota (PERA Board). Relator Mylan Masson requested that the PERA Board exclude income that she earned during a period of duty related disability from the calculation of any offset to her disability benefit under the PERA Police and Fire Plan. The income Ms. Masson requested be excluded was from a second job that she had held in addition to her police position. Following the award of duty related disability benefits, PERA began applying an offset to Ms. Masson's benefit based upon income she continued to receive from the second job. Ms. Masson had held that second job prior to her disability, and she continued to hold the position after her duty related disability. The PERA Board of Trustees denied her request in an order dated June 18, 2007. Ms. Masson obtained a Writ of Certiorari from this court on August 16, 2007 pursuant to Minn. Stat. § 606.01 because she disputes the meaning given to "reemployment" by the PERA Board.

STATEMENT OF FACTS

The underlying facts in this case are not in dispute. Ms. Masson was a police officer for the Minneapolis Park Board, having been hired to that full-time position in 1991 (the "Police Position"). *Appendix at page 5 (hereafter "A-").* Ms. Masson was injured on duty in 2001, and was ultimately awarded a duty related disability by PERA in 2005, effective back to May 2004. A-5. Ms. Masson was also employed by the State of Minnesota, through the Minneapolis Community and Technical College (the "College Position"), beginning in July 1994. *Id.* Prior to her work related injury, Ms. Masson was employed in the College Position on a full-time basis. The full-time status of the College Position continued after she became disabled from working as a police officer, and Ms. Masson continued to be employed on a full-time basis by the State of

Minnesota after her work injury. *Id.* Ms. Masson has never replaced her employment with the Minneapolis Park Board after she was released from that position due to her disability.

PERA requested information from Ms. Masson in the early Spring of 2006 and 2007 regarding income earned from reemployment. *A-19.* Ms. Masson responded on those forms that she did not have any reemployment, but that what income she did earn was from a position held prior to her disability. *Id.*

PERA applied an offset reduction to Ms. Masson's disability benefit based upon her income from the College Position with the State of Minnesota, despite that the income from that employment was due to a position she held prior to the duty related disability with the Minneapolis Park Board. As a result of the on-going offset and amounts being recouped for initial overpayment due to the offset, Ms. Masson's monthly benefit is reduced approximately \$1,000.00. *A-18.*

Ms. Masson's College Position is not employment that participates in PERA. Pursuant to Minn. Stat. § 353.01 subd. 2(b), Ms. Masson's College Position is excluded from covered employment. PERA did not include the College Position income when calculating Ms. Masson's disability benefit, but it was used to reduce the benefit she was awarded.

ARGUMENT

Ms. Masson asserts that the offset from her duty related disability benefit for income from employment that she held at the same time as her Police Position is inappropriate. The express language of Minn. Stat § 353.656 and the legislature's intent reflect that police and fire disability benefits are to be reduced in those cases where the disabled member has income from "reemployment". Ms. Masson has not become reemployed so that there should not be an offset to her benefit.

Ms. Masson's position is supported by the language of the statute, and is consistent with the intent of the statute. The application of the offset employed by PERA operates to the disadvantage of Ms. Masson, compared to other disabled members.

DISABILITY BENEFITS PURSUANT TO MINN. STAT. § 353.656 ARE NOT SUBJECT TO OFFSET DUE TO EARNINGS FROM A NON-PERA COVERED EMPLOYMENT THAT DID NOT REPLACE THE POLICE POSITION FROM WHICH THE BENEFIT RECIPIENT IS DISABLED.

Ms. Masson's disability benefit should not be reduced due to income she earns from a position that did not replace her Police Position. The income being used in this case is from a College Position that Ms. Masson held prior to her duty related disability. The College Position continued after Ms. Masson's disability, just as it had before her occupational disability, so it is not the result of "reemployment". The issue in this case turns upon the meaning given to "reemployment" by the PERA Board.

The standard of review for issues involving the appropriate construction of a statute is *de novo*. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). In determining the appropriate meaning to a statutory provision, the court must first determine if the statutory provision is ambiguous. *State v. McCoy*, 682 N.W.2d 153, 158-59 (Minn. 2004). In *McCoy*, the Minnesota Supreme Court stated that:

To ascertain and effectuate the legislature's intent, courts must first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when it is subject to more than one reasonable interpretation. A court must give a plain reading to any statute it construes, and when the language of the statute is clear, the court must not engage in any further construction.

Id. Accordingly, when the statute is not ambiguous, that is the end of the court's analysis. See *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 827 (Minn. 2005).

“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit of the law.” Minn. Stat. § 645.16 (2006). If the statute is determined to be ambiguous, the court is required to give effect to the legislature’s intention. *Id.* Minn. Stat. § 645.16 contains a number of factors that a court can consider, among others:

1. the occasion and necessity for the law;
2. the circumstances under which it was enacted;
3. the mischief to be remedied;
4. the object to be attained;
5. the former law, if any, including other laws upon the same or similar subjects;
6. the consequence of a similar situation;
7. the contemporaneous legislative history; and
8. legislative and administrative interpretation of the statute.

Id.

When interpreting a statute, a court should read and construe the statute as a whole. A section of a statute must be interpreted in the context of the surrounding sections of that same statute to ensure a consistent interpretation of the statutory provisions. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

The statutory provision at issue in this case is Minn. Stat. § 353.656 subd. 4(b). That section addresses the limitations on benefits payable to disabled members under the police and fire plan. The statute states:

If a disabled member resumes a gainful occupation with earnings that, when added to the normal disability benefit, and workers’ compensation benefit if applicable, exceed the disabilitant reemployment earnings limit, the amount of the disability benefit must be reduced as provided in this paragraph. The disabilitant reemployment earnings limit is the greater of:

- (1) the salary earned at the date of the disability; or
- (2) 125 percent of the base salary currently paid by the employing governmental subdivision for similar positions.

The disability benefit must be reduced by one dollar for each three dollars by which the total amount of the current disability benefit, any workers’ compensation benefits if

applicable, and actual earnings exceed the greater disabilitant earnings limit. In no event may the disability benefit as adjusted under this subdivision exceed the disability benefit originally allowed. (Emphasis added)

1. The Express Terms of the Statute Support Excluding the Preexisting Second Job Income.

The statute's express terms refer to "reemployment" and a member resuming a gainful occupation. In the present case, Ms. Masson had already established the employment with the State of Minnesota years before she became disabled, and her duty related injury did not prevent her from continuing her College Position. She has never resumed employment as a police officer or replaced her police officer position. She has, at no time since the injury, become reemployed. As a result, she does not have any disablement reemployment income.

Where the legislature utilizes words in a statute with out providing a specific definition for those words, the court is to interpret those words by their plain meaning. *In re Brittain*, 724 N.W.2d 512, 517, (Minn. 2006). The court should presume that the legislature made a choice in using particular words, or in not providing a definition for words used. *Id at 519*. In *Brittain*, the court considered the legislature's choice of the words "any act of duty" contained in Minn. Stat. § 353.656 subd. 1. The court explicitly noted that the legislature could have selected different words to be more restrictive than "any", but did not. *Id.*

Had the legislature intended that employment of any type would lead to an offset, and in particular, supplemental employment that pre-dated the disability, (just as the Minnesota Supreme Court concluded in *Brittain*) it could have chosen different language for the statute to achieve that purpose. Because it did not adopt a definition of what reemployment income should consist of, the plain meaning of the terms in the statute should apply.

The PERA Board has effectively said that income from any source after a disability is to be used to calculate an offset. The scope of the offset applied by PERA is overbroad.

Reemployment, in its ordinary meaning, applies to an individual who has left a position and either resumes that job or acquires a new one. The only job that Ms. Masson left was the Police Position that she was disabled from performing. She has never resumed or replaced that position. This interpretation is further supported by the legislature's intent in providing this benefit in the statute.

2. **Legislative Intent Supports Exclusion of Income from a Preexisting Second Job.**

The statute, read as a whole, reflects the legislature's intent to establish a meaningful benefit for members who serve as police officers and fire fighters who become disabled. As the facts reflect, Ms. Masson had sustained a duty related disability as a result of her employment as a police officer. The factual record reflects that she could not return to her job as a police officer with the Minneapolis Park Board, and she could not secure employment else where as a police officer.

The Minnesota Legislature, in creating the PERA programs through Chapter 353 of Minnesota Statutes, provided for essentially two benefit programs. The first program, which is not at issue here, involves "basic" or "coordinated" members, as those groups are defined in the statute. The majority of PERA employee members are eligible for benefits under this portion of the statute. A disability benefit is available to those members, and the provisions for that disability benefit are set out in Minn. Stat. §§ 353.33 through 353.34 (2006).

While these sections do not directly pertain to Ms. Masson, the Legislature's treatment of this large block of public employees is telling as to the intent of the statute. Minn. Stat. § 353.335 provides (for this large group of basic and coordinated members) that "[d]isability benefit recipients must report *all earnings from reemployment and from income from workers compensation* to the association annually by May 15 in a format prescribed by the executive

director”. (*Emphasis added*) The mandate for this larger population of public employee members is to report reemployment earnings. No where does the statute target preexisting employment. The statute’s focus is exclusively on “reemployment”. The fact that PERA staff seek out income from any source in calculating offsets is of no moment. Correspondence from PERA and sent to Ms. Masson are captioned and refer to reemployment as well as workers compensation income. *A at* .

The second benefit program under the statute, which is the program at issue here, is the police and fire program. Those provisions are set forth in Sections 353.63 through 353.659. The legislature made an express statement of its intent that special treatment is to be accorded police and fire employees due to the hazardous nature of their public service. Minn. Stat. § 353.63 (2006).

The police and fire sections of the statute go on to describe enhanced benefits for both retirement and disability, particularly for in the line of duty disabilities, such as Ms. Masson’s disability. The statute further provides that the police and fire members are required to contribute a higher portion of their compensation to fund these benefits. See Minn. Stat. § 353.65 (2006).

The statutory provisions at issue here reflect an intent to provide an enhanced benefit for disabled members that replaces a designated portion of their police officer salary, subject only to an offset if the disability benefit together with workers’ compensation benefits exceeds the value of the member’s prior employment (see, Minn. Stat. § 353.656 subd. 2), or if the member becomes reemployed. The significance of reemployment, as expressly referenced in the statute, is that if the member replaces their police or fire position with a new job, some portion of the

disability benefit may be reduced, depending on how much the member earns in the new position.

PERA's application of the offset provisions in this case frustrates that intent because it penalizes Ms. Masson for having had a second job during her police officer employment. The intent of the statute is to apply an offset if the position from which a member becomes disabled is replaced by a new position. That has not happened in this case. Ms. Masson's preexisting second employment has not changed, and she has not replaced the police position that gives rise to this disability. PERA has effectively reduced Ms. Masson's benefit as a result not of replacing her police position through some actual reemployment, but as a result of her having been industrious prior to her injury.

PERA embraces this intent, as it sends information requests to police and fire members asking them to report reemployment earnings. *See A*. This inquiry belies the intent that the statute focuses on reemployment. To apply offset to non-reemployment income is beyond the intent of the statute and an undue penalty to Ms. Masson.

3. **PERA's Application of the Statute Has a Substantial Adverse Effect on Ms. Masson.**

The application of this offset penalizes Ms. Masson in a way that the legislature did not expressly intend. The impact on Ms. Masson is best illustrated by a simple example (not based on actual numbers in this case):

A member holds a police position earning an average annual income of \$50,000. She becomes disabled and receives 60% as a duty related disability, or \$30,000. That benefit is not reduced unless she replaces her police position, and then only if she is able to earn enough to reach the disabilitant reemployment earnings limit.

By contrast, if that member averaging \$50,000 as a police officer also has been contemporaneously employed in another position earning \$50,000, her pre-disability income was \$100,000. The second job, like in Ms. Masson's case, is not subject to PERA, so only the police position is used to calculate her disability benefit. She receives \$30,000 in disability benefits from PERA for the lost police job, except that PERA will reduce that amount because it deems the second job as "reemployment". Instead of recognizing that a \$50,000 position is lost, PERA is deeming the preexisting income from the second job as replacement income for the lost police officer job. PERA, because it considers any income "reemployment income" would consider in this case that the member is now benefiting from \$50,000 in employment characterized as "reemployment" and \$30,000 in disability benefits.

In reality, the foregoing illustration reflects that the member's pre-injury income of \$100,000 is now \$80,000 (\$50,000 from the pre-injury second job and \$30,000 in disability benefits). Application of an offset for the income from the second job only serves to drive the member's benefit level down. The situation further disadvantages a disabled member who had a second job prior to the disability because any growth in the income from that second job further increases the amounts required to be offset.

In Ms. Masson's case, because she has not replaced her police officer position with reemployment to a new occupation, she has less income today than she had before her duty related disability. Moreover, through no fault of her own, the application of the offset reduces the amount of benefits she receives for her disability, widening the gap in pre and post disability income compared to what she would have had if she had not had the second job. A member with

no second job at the time of the injury receives more in PERA benefits than Ms. Masson, purely because he did do more before he was injured, as Ms. Masson did.

An analogous situation can arise under Minnesota's workers' compensation statute. Minnesota expressly recognizes the potential that an individual would have two or more employments at the time of their injury for workers' compensation purposes. Minn. Stat. § 176.011 subd. 18 provides that calculation of an employee's weekly wage for determining benefits must be based upon all of the employee's employments. Under this format, an injured worker for workers' compensation purposes is not penalized for having more than one job and then becoming injured. If the second job continued after the injury, the employee is still compensated for the lost wages on the job from which she is disabled.

In this case, the error in applying the offset is the result of reading out of the PERA statute the requirement that the income that is used to compute an offset must be from reemployment related to the PERA covered position from which the individual is disabled. Disability eligibility is based upon the member being unable to continue to work in a police officer or fire fighter position, a requirement satisfied by Ms. Masson. The appropriate application of the statute is to ignore the preexisting employment for purposes of calculating the offset. The earnings of the second position were not included in the calculation of the amount of the benefit that is due to a member in Ms. Masson's position. Consistently, and appropriately, that second job should not be counted in an offset calculation.

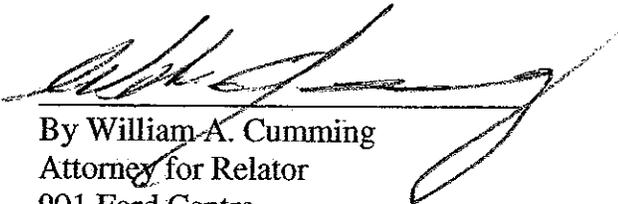
CONCLUSION

This court should conclude that reemployment for purposes of PERA police and fire disability benefits include only income from a resumption or replacement of the lost police and fire position. Income from a preexisting second job that is distinct from the police and fire

position that a disabled worker is no longer able to perform should be excluded from the calculation of an offset to disability benefits. Ms. Masson does not seek a wholesale re-interpretation of the PERA statute. Instead, the express language of the statute dictates that a duty related disability benefit will only be subject to an offset if the disabled member has reemployment.

Respectfully submitted,

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