

No. A07-1571

STATE OF MINNESOTA

IN COURT OF APPEALS

In the Matter of the PERA Police and Fire Plan Line of Duty Disability Benefits Offsets
for Mylan Masson,

Relator,

vs.

Public Employees Retirement Association,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUE

- I. Does the earnings limit in Minn. Stat. § 353.656, subd. 4 (2006) apply to any employment earnings subsequent to receipt of a PERA police and fire disability benefit?

The Administrative Law Judge found that the statutory offset applied to any earnings after the commencement of disability benefits, including earnings from an employment position held concurrently with the Police and Fire Plan employment.

The PERA Board of Trustees adopted the Administrative Law Judge's findings and conclusions concerning the statutory offset.

Apposite Authority:

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

STATEMENT OF THE CASE

On July 27, 2001, Relator Mylan Masson (hereinafter "Relator") was injured in the course of her employment as a police officer with the Minneapolis Park Police Department. On that same date, Relator also held a separate position as the Assistant Director for the Center for Criminal Justice and Law Enforcement program at the Minneapolis Community and Technical College from July 12, 1994, to the present time.

On February 17, 2004, the City of Minneapolis Park Police Department terminated Relator due to her long-term disabilities stemming from her work-related injury.

On May 7, 2004, Relator applied for PERA Police and Fire Plan ("P & F Plan") Line of Duty disability benefits pursuant to Minn. Stat. § 353.656, subd. 1 (2006). PERA approved Relator's application for P & F Plan Line of Duty disability benefits.

On August 23, 2006, PERA offset Relator's disability benefits by the income she earned at the Minneapolis Community and Technical College pursuant to Minn. Stat. § 353.656, subd. 4 (2006).

On October 25, 2006, PERA advised Relator that it had overpaid her \$8,700.26 in disability benefits, and that it would withhold 25% from her future benefits until the overpayment was satisfied. On November 6, 2006, PERA advised Relator that it had recalculated the overpayment to be \$12,701.72.

On November 30, 2006, Relator's attorney requested a fact-finding conference to contest PERA's overpayment calculations and the offsets taken against her PERA P & F Plan disability benefits. On April 16, 2007, a fact-finding conference was held before Administrative Law Judge Beverly Jones Heydinger. On May 16, 2007, Administrative

Law Judge Heydinger issued her findings of fact, conclusions of law, and recommended to the PERA Board that it deny her request for recalculation of the offsets taken against her disability benefits.

On June 14, 2007, the PERA Board of Trustees adopted the Administrative Law Judge's findings and recommendation and denied Relator's request to exclude her earnings from her position at the Minneapolis Community and Technical College from the offsets pursuant to Minn. Stat. § 353.656, subd. 4 (2006).

On August 15, 2007, Relator filed and served a Petition for Writ of Certiorari, Proposed Writ of Certiorari, and Statement of the Case.

On August 23, 2007, the Court directed the parties to answer whether the appeal was timely if governed by Minn. Stat. § 14.63 (2006), the Administrative Procedures Act, or if filed pursuant to Minn. Stat. § 606.01 (2006).

On August 31, 2007, Relator and PERA each filed the requested informal memoranda requested by the Court.

On September 17, 2007, Relator served her Brief.

On September 28, 2007, the Court issued an Order indicating that the appeal was timely and should proceed.

STATEMENT OF FACTS

Relator is a 52 year old member of the Public Employees Retirement Association's ("PERA") Police and Fire Fund Plan ("P & F Plan"). Exhibit ("Ex.") 11. Relator initially worked as a City of Minneapolis park agent starting in 1988, until she

became a licensed police officer in 1990. Transcript (“T.”)¹ 40. Relator worked as a police officer with the Minneapolis Park Police Department from January 11, 1991 until February 17, 2004. Relator’s Appendix (“RA”) 5; Exs. 2 and 17; T. 40. On July 27, 2001, Relator was injured in the line of duty, and thereafter qualified for PERA P & F Plan disability benefits pursuant to Minn. Stat. § 353.656, subd. 1 (2006). RA5. She also applied for workers’ compensation benefits from the City of Minneapolis’ Third Party Administrator, Berkley Administrators. Ex. 2. Relator resolved her workers’ compensation claim with the City by a Stipulation for Settlement in May, 2005. Ex. 17. Relator received \$31,600 in a net lump sum payment. *Id.*

Relator had also been concurrently employed at the Center for Criminal Justice and Law Enforcement (“Center”) while employed by the City of Minneapolis Park Police Department. RA5; T. 41. She began at the Center in February 1992, and on July 12, 1994, she became its Assistant Director. Ex. F; T. 41.

Relator received P & F Plan disability benefits in addition to her lump sum workers’ compensation benefits award. RA5-7; Ex. 4. PERA paid Relator monthly P & F Plan disability benefits offset by her workers’ compensation benefit payments during the period when she received both disability and workers’ compensation benefits. RA2; Ex. 4. PERA monitors disability benefits payments to P & F Plan members who also receive workers’ compensation benefits. Exs. 3, 11, 30; T.10. A P & F Plan member must complete and return an Annual Earnings form that sets forth the amount of

¹ Transcript references are to the April 16, 2007 fact-finding conference.

any "compensation from any source of work (including self-employment) performed in the past calendar year." Ex. 11; T. 13. The Annual Earnings Form also requires that the member project anticipated "re-employment earnings" for the next year. Exs. 11, 30. A PERA P & F Plan member's combined income and disability benefit may not exceed 125% of the then current salary for the position that the member held prior to injury. Minn. Stat. § 353.656, subd. 4 (2006); RA17. PERA also monitors a P & F Plan member's wages to ensure that the member's disability and workers' compensation benefits, when added with any earnings, do not exceed the 125% statutory maximum. T. 7, 10; RA5. When a member's combined wages, disability benefits, and workers' compensation benefits exceed 125% of the then current salary for the position that the member held when disabled, Minn. Stat. § 353.656, subd. 4 requires that PERA offset benefits by one dollar for every three dollars over the 125% maximum. T. 7; RA6-7, 17. The member must attach a W-2 form to the Annual Earnings statement. T. 14.

Minnesota Statutes § 353.656, subd. 4 limits the amount of income, disability benefits, and workers' compensation benefits that a member may receive and still qualify for P & F Plan disability benefits. RA17. Minn. Stat. § 353.656, subd. 4 (b) provides:

If a disabled member resumes a gainful occupation with earnings that, when added to the normal disability benefit, any workers' compensation benefits if applicable, and actual earnings exceed the greater 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 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, and any workers' compensation benefits if applicable, and actual earnings exceed the greater disabilitant reemployment earnings limit. In no event may the disability benefit as adjusted under this subdivision exceed the disability benefit originally allowed.

Minn. Stat. § 353.656, subd. 4.

PERA Staff determined the current base salary paid a police officer with the Minneapolis Park Police Department, factored in Relator's workers' compensation settlement and her earnings from her position at the Center for Criminal Justice and Law Enforcement, and applied this offset provision against Relator's P & F Plan disability benefit. RA5-6; T. 8; Exs. 2, 3, and 4. On June 10, 2006, the Minneapolis Park Board informed PERA that as of October 26, 2005, Relator's salary as a full-time park police officer would have been \$28.857 per hour had she not become disabled. RA6; Ex. 8; T. 11. On July 31, 2006, the Park Board informed PERA that Relator had settled her workers' compensation case on May 16, 2005 for a lump sum settlement payment of \$39,500. RA6; Exs. 13 and 17.

On August 23, 2006, PERA Staff determined that Relator's combined workers' compensation benefits, earnings, and P & F Plan disability benefits exceeded the 125% statutory earnings threshold. T. 17. PERA Staff informed Relator that based on its review of her workers' compensation benefits and earnings report for the 2005 reporting period, it had determined that her total benefits and wages had exceeded the 125% statutory maximum. RA 6; Ex. 16. It further determined that Relator had been overpaid

\$7,062.86 in Line of Duty disability benefits. *Id.* It, therefore, reduced her September 2006 benefit payment to \$2,942.42. *Id.*

PERA estimated that Relator would receive \$8,634 per month over 30 years (360 months). T. 21. It then combined the amortized workers' compensation benefits with her post-disability earnings and determined the average monthly amount from those sources. PERA then compared that figure to the 2004 park police salary rate, and if those combined benefits exceeded the salary rate being paid for that period, PERA deducted one dollar in benefits for every three dollars that Relator exceeded the salary rate. T. 21-22; Ex. 20; RA6.

On October 25, 2006, PERA advised Relator that it had completed the disability benefit offset calculations for the period May 7, 2004 through December 31, 2004, and determined that she had been overpaid \$1,638. Ex. 22. PERA notified Relator that her total overpayment was \$8,700.86. Ex. 22.

On November 6, 2006, PERA informed Relator that it had recalculated her overpayment and that the revised total was \$12,701.72. Ex. 23; RA7. PERA indicated that it would withhold 25% from Relator's future benefit payments to recover the overpayment. Ex. 23; RA7.

In December, 2006 PERA reviewed Relator's account in preparation for a January 2007 increase in PERA P & F Plan disability benefits and to adjust for any future offset to be taken. Ex. 25; T. 25. On December 21, 2006, PERA informed Relator that P & F Plan members would receive a 2.5% benefit increase effective January, 2007. Ex. 28. The benefit adjustment increased her monthly disability benefit, prior to offsets,

to \$2,542.33. Ex. 28. PERA advised Relator that it would take the necessary offsets against her ongoing monthly benefits, resulting in a \$1,562.83 monthly post-offset benefit, until PERA had recovered the total overpayment. Ex. 28; T. 30.

On March 15, 2007, Relator submitted her 2006 Annual Earnings Form indicating that she had received income during 2006, "but not from [RE]-employment." Ex. 30. Relator contested PERA Staff's application of the offset against her earnings from the Center for Criminal Justice and Law Enforcement as she had held this position prior to and after her injury. Exs. 30, 32.

On April 16, 2007, a fact-finding conference was held before Administrative Law Judge Beverly J. Heydinger. RA4. On May 16, 2007, Judge Heydinger issued her Findings of Fact, Conclusions of Law, Recommendation, and Memorandum. RA4. Judge Heydinger concluded that PERA properly took the offsets against Relator's benefits as required by Minn. Stat. § 353.656, subd. 4. RA8. She recommended that the Board deny Relator's request that the offset amounts be recalculated to exclude her earnings from her position at the Center for Criminal Justice and Law Enforcement. RA8.

On June 14, 2007, the PERA Board of Trustees considered Relator's argument in opposition to the Administrative Law Judge's Findings, Conclusions, and Recommendation. RA3. The Board voted to adopt the Administrative Law Judge's May 16, 2007 Findings of Fact, Conclusions of Law, Recommendation, and Memorandum.

On August 15, 2007, Relator filed a Petition for Writ of Certiorari with this Court.

ARGUMENT

I. STANDARD OF REVIEW.

PERA is a Minnesota public retirement fund that administers pension plans for county and municipal employees in accordance with the provisions of Minn. Stat. ch. 353 (2006). Its Board is subject to the fiduciary duties and standards imposed by Minn. Stat. ch. 356A. Although a public retirement fund is analogous to an administrative agency, the PERA Board's benefit appeals review is not a "contested case" subject to the Administrative Procedures Act, Minn. Stat. ch. 14 (2006). Minn. Stat. § 353.03, subd. 3(c) (2006); see *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 554 N.W.2d 297, 299 (Minn. 1996). The PERA Board's decisions are subject to review by this Court pursuant to Minn. Stat. § 353.05, subd. 5 (2006). Thus, only the limited review afforded a writ of certiorari applies to the review of the PERA Board's decision in this case. *Stang v. Minnesota Teachers Retirement Ass'n Bd. of Trustees*, 566 N.W.2d 345, 347-48 (Minn. Ct. App. 1997).

Review by certiorari is limited to looking at the legal import of the facts in the record and determining whether there was a reasonable basis for the lower tribunal's decision. *Dietz v. Dodge County*, 487 N.W.2d 237, 241 (Minn. 1992). Decisions of the PERA Board will be reversed only if they are "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within the jurisdiction or based upon an error of law." *Axelson*, 544 N.W.2d at 299 (quoting *Dokomo v. Independent Sch. Dist. No. 11*, 459 N.W.2d 671, 675 (Minn. 1990)); *In re Application of Allers*, 533 N.W.2d 646, 652

(Minn. Ct. App.), *rev. den.* (Minn. Aug. 30, 1995). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than ‘some evidence;’ (4) more than ‘any evidence;’ and (5) evidence considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

II. THE PERA BOARD PROPERLY DETERMINED THAT THE EARNINGS LIMIT IN MINN. STAT. § 353.656, SUBD. 4(B) (2006) APPLIES TO ANY EARNINGS AFTER THE COMMENCEMENT OF THE P & F PLAN DISABILITY BENEFIT.

A. Minnesota Statutes Section 353.656, Subdivision 4 (B) Unambiguously Requires PERA To Consider Relator’s Second Job In Applying The Statutory Offset.

Where a statute’s language is clear, the courts must give effect to the legislature’s clear intent. *See Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If the statute’s language is unambiguous, “further construction is neither necessary nor permitted.” *Owens ex. rel. Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000); *see also* Minn. Stat. § 645.16 (2006). A statute is only ambiguous when it is subject to more than one reasonable interpretation. *See American Family Ins. Group v. Schroedl*, 616 N.W.2d 273 (Minn. 2000).

Section 353.656 unambiguously required PERA to consider Relator’s employment with the Center for Criminal Justice and Law Enforcement in calculating her disability benefits. Section 353.656, subdivision 4 (b), provides:

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 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 disability reemployment earnings limit. In no event may the disability benefit as adjusted under this subdivision exceed the disability benefit originally allowed.

Minn. Stat. § 353.656, subd. 4 (b).

The statute is plain on its face. The statute applies if the member: (1) "resumes a gainful occupation," (2) makes earnings from that occupation, and (3) the earnings from the occupation plus the disability benefit and the workers' compensation benefit exceed the 125 % of the base salary of the prior position. *Id.* Any member who works for wages after being disabled is subject to the setoff if the combined wages and benefits exceeds the 125 % limit.

Relator argues she can hold a full time job as an assistant director of an educational institution and that her substantial salary from that job cannot be considered by PERA. There is no reasonable way to read Section 353.656 to produce that result. The statute applies if the disabled person "resumes a gainful occupation." The statute does not contain any limitation on that occupation. The legislature could have distinguished between newly-acquired full-time jobs and recently-acquired full-time jobs, but it did not do so. Relator clearly resumed a gainful occupation as an assistant director. She received earnings at that occupation. Those earnings, when added to the disability benefit and the workers' compensation benefit, exceeded 125 % of her base salary for her

police officer position. The statutory requirements were clearly met in Relator's case. If, as in this case, a statute is clear and unambiguous, then courts are to apply the plain meaning of the statute and engage in no further construction. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 910 (Minn. 2006).

Once the 125 % limit was reached, the offset was triggered, and PERA was required to offset the disability benefit by one dollar for every three dollars by which the combined P & F disability benefit and workers' compensation benefit exceed the 125% cap on benefits. Minn. Stat. § 353.656, subd. 4. PERA applied the offset calculations based upon the current salary paid to an officer at Minneapolis Park Police and the amount of workers' compensation that Relator received. T. 20-24; Exs. 15, 22, 21, 25, 26, and 31. There were no disputes concerning the actual dollar amounts offset. RA8. These offsets follow the clear mandates of the statute.

B. Even If The Statute Is Ambiguous, PERA's Construction And Application Of The Offset Provisions Is Consistent With Legislative Purpose For The Coordination Of Benefits.

Although the administrative law judge did not explicitly find that the offset statute is ambiguous, the fact that she applied the canons of statutory construction suggests that she did find the statute ambiguous.² Statutory construction is appropriate only when a

² The Administrative Law Judge referred to Minn. Stat. § 645.16 in her Memorandum: The objective in statutory interpretation is to ascertain and give effect to the Legislature's intent (footnote citing to Minn. Stat. § 645.16 omitted). In ascertaining legislative intent, the meanings of the words in an ambiguous statute should not be interpreted in isolation but in light of the statute's overall context and purpose (citation omitted). One also must presume that
(Footnote Continued on Next Page)

statute is ambiguous. *Waller v. Powers Dept. Stores*, 343 N.W.2d 655 (Minn. 1984). The test for ambiguity is whether statutory language has more than one reasonable interpretation, and if so, the court may look to legislative intent, agency interpretation, and principles of continuity. *Occhino v. Grover*, 640 N.W.2d 657 (Minn. Ct. App. 2002).

Even if this Court finds ambiguity, however, the canons of statutory construction in Minn. Stat. §§ 645.16 and 645.17 support PERA's application of the offset against Relator's benefits.

Section 645.16 provides, in part:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) to object to be obtained;...
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (2006).

Moreover, Section 645.17 provides, in part:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

- (2) the legislature intends the entire statute to be effective and certain;

(Footnote Continued From Previous Page)

the Legislature 'intends to favor the public interest as against any private interest'.

RA10.

(3) the legislature does not intend to violate the Constitution of the United States or of this state;

(5) the legislature intends to favor the public interest as against any private interest.

Minn. Stat. § 645.17 (2006).

The Administrative Law Judge applied these principles in analyzing the offset provisions in Minn. Stat. § 353.656, subd. 4(b). As she noted in her Memorandum: “[A]s discussed above, the public purposes of Minn. Stat. § 353.656, subd. 4, and similar statutory offset provisions, are to limit the amount of disability benefits government entities must pay to disabled employees; the purpose is not to indemnify government employees from all post-disability losses of earnings.” RA10-11. In Minn. Stat. § 353.656, subd. 4, the legislature plainly enacted a ceiling on the total disability benefits that a P & F Plan member could receive from the Plan, workers’ compensation, and ongoing earnings. RA17. The offset provisions so enacted further the public purpose in limiting the P & F Plan disability benefits paid when the member receives benefits from multiple sources.

Relator narrowly reads Minn. Stat. § 353.656, subd. 4(b) to authorize an offset only against that income from an employment position commenced after the member has become disabled, and not to any concurrently held position when the member became disabled. She urges this statutory construction by focusing on the term “reemployment earning” in Minn. Stat. § 353.656, subd. 4(b) and argues that only new employment commenced after the date of her disability may be used to offset her P & F Plan disability benefits. Relator Brief (“Rel. Br.”) 4. PERA Staff offset Relator’s P & F Plan disability

benefits once her income from the Center for Criminal Justice and Law Enforcement, when combined with her disability benefits and her workers' compensation benefits, exceeded 125% of the current salary for an officer with the Minneapolis Park Police. This is exactly what the statute instructs PERA Staff to do. RA17.

The offset applies when a member "resumes a gainful occupation." RA17. The statute by its terms does not, as Relator argues, apply only to new employment. Rather, by its very terms, it applies once a member "resumes a gainful occupation with earnings." RA17. Plainly the statutory language, "resumes a gainful occupation," refers to when a member returns to work following an injury since it appears in the same paragraph discussing "reemployment earnings." *Id.* Relator's focus on the term "reemployment" in a later clause of Minn. Stat. § 353.656, subd. 4 as demonstrating that the legislature intended that only new employment earnings may be used for the offset ignores the first clause in this section. Rel. Br. 4-9. The statutory offset applies when a P & F Plan member "resumes employment" and limits a member's combined earnings from "reemployment," workers' compensation, and P & F Fund disability benefits to 125% of the current base salary for an officer in her former department. Minn. Stat. § 353.656, subd. 4 (2006) directs that PERA determine the current salary for the same position that the member held prior to her disability, and compare that salary total with her combined earnings, workers' compensation benefits, and any P & F Plan disability benefits being paid Relator in order to determine whether the 125% threshold has been exceeded. RA17. The offset provision does not apply, as Relator argues, only to newly-commenced post-disability employment.

Patricia Kappelhoff, a PERA Pension Analyst/Coordinator, testified that PERA applies this statutory offset against all P & F Plan members who work following the commencement of PERA P & F Plan disability benefits, when their combined earnings, P & F Plan benefits, and any workers' compensation benefits exceed the 125% maximum statutory threshold as set forth in Minn. Stat. § 353.656, subd. 4(b) (2006). T. 7.

The administrative law judge properly accepted PERA's construction and application of the statute, and rejected Relator's narrower construction limited to newly commenced employment. RA10. Minn. Stat. ch. 353 sets forth different provisions in the P & F Plan from the offset provisions applied to members in the PERA Coordinated Plan. Both Plans provide for offsets against concurrent income when a member receives disability benefits. Minn. Stat. § 353.33, subd. 7 offsets a coordinated plan member disability benefits on a dollar per dollar basis once the member receives income that when combined with any workers' compensation benefits exceeds the salary that the member received on the date she became disabled or the salary currently paid someone in that position, whichever is greater. *Id.* The P & F Plan, however, offsets the disability benefit by one dollar for every three dollars that a P & F Plan member's combined benefits and workers' compensation benefits exceed the higher 125% statutory threshold. Deference should be given to PERA's interpretation. *See* Minn. Stat. § 645.16 (18); *Chevron*, 467 U. S. at 843-44; *City of Crystal Police Relief Ass'n v. City of Crystal*, 477 N.W.2d 728, 731 (Minn. Ct. App. 1999).

After recognizing the statutory differences for offsetting non-police and fire members benefits from the offsets taken against P & F Plan members, the ALJ noted:

Ms. Masson interprets the statute to limit the earnings offset only to income from new employment that the member began after being disabled. However, that interpretation goes well beyond what the language of the statute can support. There is nothing in Minn. Stat. § 353.656, subd. 4, that suggests that only earnings from an entirely new job will be offset. Ms. Masson next relies on a somewhat narrower interpretation of Minn. Stat. § 353.656, subd. 4(b). She points to the literal meaning of the term “resume”-that is, “to return to or begin again after an interruption” and argues that she never left her employment at MCTC and thus she did not “resume” that employment. Although that is a plausible reading of the terms “resume” and “re-employment,” it is not the only one, nor is it the most logical. It is more likely that the statute implicitly contemplates a temporary absence and loss of income because of the disabling injury and a return to employment once the person has recovered. Returning to work after being on sick leave could also be regarded as a resumption of gainful activity following a police and fire plan member’s occupational disability.

RA10.

The Board, in adopting the ALJ’s recommendation, rejected the narrow statutory construction that only earnings from a newly commenced position may be offset. RA2. Rather, the Board adopted a more sensible reading of the statute that supported PERA’s consideration of all combined wages currently earned, and any workers’ compensation benefits earned.

When the statute is read in its full and proper context, it is clear that *any* earnings Relator receives after P & F Plan disability benefits are initiated, constitute *reemployment* earnings that must be combined with her current P & F disability benefits and any workers’ compensation also being paid. Relator’s narrow reading of the statute is contrary to the intent of the statute and would clearly create confusion in applying the earnings limits established in the statute. If the statute is construed as Relator contends,

any earnings from a position that a member held simultaneously with her P & F Plan qualifying position, could not be considered by PERA, no matter how much she earned.³

The Court should also not be swayed by Relator's hypothetical scenario to illustrate that she is allegedly penalized by the statute in a manner that the legislature did not intend. Rel. Br. 9-11. Relator's hypothetical scenario argues that the application of the offset against a pre-existing employment position does not recognize the member's lost income from a second employment position and any gains in that second position only "increases the amounts required to be offset." Rel. Br. 10. On the contrary, PERA Staff applied the offset that the legislature specifically set forth in Minn. Stat. § 353.656, subd. 4. The legislature did not intend that the PERA P & F Plan disability benefits program would place the member in the same or better position than prior to their disabling condition. Had that been the case, there would have been no reason to enact offset provisions at all. As the Judge Heydinger recognized, "[U]nder the statute, the disability benefit is not intended to make the employee whole, but only to assure that there is a steady income after the injury." RA11.

³ From a practical standpoint, PERA's administration of the statutory offset provision can only be done if applied uniformly to a member's earnings from concurrent employment, her receipt of P & F disability benefits, and any workers' compensation benefits paid, without regard to the date that the member began that employment. To expect that PERA could monitor the date of every member's commencement only of subsequent employment and not a concurrent position would be an onerous burden. Rather, PERA Staff sends P & F Plan members an Annual Earnings Statement to complete and return. Exs. 11 and 30. It is on the basis of the information provided on the Annual Earnings Statement that PERA is able to determine if a P & F Plan member has exceeded the 125% maximum.

Finally, contrary to Relator's argument, this case is not analogous to the manner in which the Workers' Compensation Act, Minn. Stat. ch. 176 (2006), treats a second employment position in the calculation of an employee's average weekly wage. Rel. Br. 11. The legislature enacted specific statutes that address the calculation of an injured workers' weekly wage when the injured employee held two concurrent employments when injured. Minn. Stat. § 176.011, subd. 18 (2006). The legislature made no similar provision in the PERA P & F disability Plan. Instead, it set forth in clear language in Minn. Stat. § 353.656, subd. 4(b) when the offset must be taken. RA17. PERA Staff's construction and application of the statutory offset to a member receiving compensation from any employment position held prior to her injury entitling her to P & F Plan disability benefits is consistent with that statute. It is also consistent with the manner in which PERA treats a member's concurrent workers' compensation benefits. For example, the Annual Earnings form that a member receiving disability benefits must return, asks the member to report all workers' compensation benefits received during the reporting period. *See* Exs. 11 and 30. Although Relator received a lump sum workers' compensation payment through her Stipulation for Settlement, one such benefit that any other P & F Plan member would be required to report would be temporary partial disability benefits, which is a wage loss benefit paid when an injured employee returns to work at a wage loss due to fewer hours worked or to a lesser paying position than was held prior to her work-related injury. *See* Minn. Stat. § 176.101, subd. 2(a) (2006). As indicated in Exs. 15, 21, 25, and 26, PERA factors in a P & F Plan member's earnings, together with workers' compensation benefits and the PERA benefit, and not just post-

injury employment income, as a basis for calculating an offset. This plainly demonstrates that any and all employment earnings must be reported on the Annual Earnings Statement, not just earnings from new employment. This is consistent with language in Minn. Stat. § 353.656, subd. 4.

Minnesota Statutes Section 353.656, subdivision 4 does not unfairly penalize Relator by reducing her disability benefits. The statute simply offsets the amount by which her combined disability and workers' compensation benefits and post-injury income exceed the 125% cap set by the legislature. To adopt Relator's construction of the statutory offset provision in Minn. Stat. § 353.656, subd. 4 is contrary to both the clear language and intent of the statute.

CONCLUSION

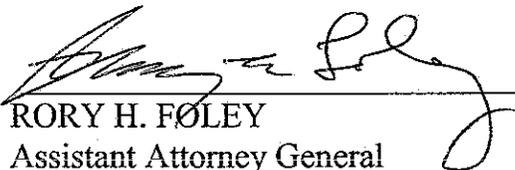
For the foregoing reasons, the Court should affirm the PERA Board of Trustees'

Order.

Dated: 10/17/07

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