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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1841**

In the Matter of the Determination of
Correctional Service Retirement Plan Benefits
of Lori Hanson.

**Filed September 9, 2008
Reversed and remanded; motion granted
Huspeni, Judge***

Public Employees Retirement Association of Minnesota
File No. 471565

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Huspeni,
Judge.

UNPUBLISHED OPINION

HUSPENI, Judge

Relator Lori Hanson challenges the decision of the Public Employees Retirement
Association (PERA) Board of Trustees that she should be admitted to the correctional

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

plan on a prospective basis and contends that she should have been admitted on a retroactive basis dating back to July 2000. Because the PERA Board's decision is not supported by substantial evidence, we reverse and remand.

FACTS

Relator has worked as a jail program coordinator for Washington County since 1993. From the beginning of her employment until June 2007, she was a member of the "Coordinated Plan" for retirement benefits. In 1999, a new retirement plan titled "Local Government Correctional Service Retirement Plan" (correctional plan) was enacted. 1999 Minn. Laws ch. 222, art. 2, § 7, at 1443. To be eligible for the correctional plan, the local government correctional employee had to, among other things, "spend[] at least 95 percent of the employee's working time in direct contact with persons confined in the jail or facility." *Id.*, § 8, at 1444. In 2000, the eligibility requirement was amended to require that the local government correctional employee had to be "directly responsible for the direct security, custody, and control of the county correctional institution and its inmates." Minn. Stat. § 353E.02, subd. 2(a)(2) (2002); 2000 Minn. Laws ch. 461, art. 10, § 1, at 1258.

In July 2000, three Washington County jail program coordinators who had been promoted from "Correctional Officer classification" (Cynthia Doty, Thomas Hollister, and John Warneke) were recommended by the county and approved for the correctional-plan membership. The other two jail program coordinators (relator and William Hoffman) were not recommended for inclusion in the correctional plan. It is somewhat unclear why relator and Hoffman were not recommended. According to the PERA

Board, Washington County recommended the three jail program coordinators (Doty, Hollister, and Warneke) for correctional-plan membership because they had been promoted from correctional-officer positions; however, the statute does not list such promotion or previous experience as a factor in determining correctional-plan eligibility. *See* Minn. Stat. § 353E.01-.04 (2006).

In late 2006, the correctional-plan eligibility of the three jail program coordinators was questioned by PERA.¹ After a series of communications between PERA, Washington County Sheriff's Office, and the three jail program coordinators, the correctional-plan membership of the three jail program coordinators was revoked. It appears that in the course of evaluating the eligibility of these three jail program coordinators, the question arose of whether the other two jail program coordinators (relator and Hoffman) should be included in the correctional plan. Ultimately, in April 2007, after receiving the county sheriff's recommendation, the PERA Board determined that: (1) correctional-plan membership should be reinstated for the three jail program coordinators, including the period of time that the dispute was pending, and

¹ A memo from the manager of account information management sent to the PERA Board states: "The Washington County Sheriff's Office currently employs five individuals as Jail Program Coordinators. In November 2006, an attorney representing one of these Coordinators called to advise us that the pension coverage being provided to these positions was not identical. . . . To learn more about these positions, PERA staff requested further information from [] County Human Resources." Relator's brief states that the "attorney representing one of these Coordinators" was Hoffman's attorney.

(2) correctional-plan membership should be granted prospectively for relator and Hoffman based on Washington County's certification.²

Apparently, relator did not participate in the PERA Board's decision to grant her correctional-plan membership; the record is devoid of any correspondence from relator, and the PERA Board minutes and attendance record from the April 2007 meeting do not indicate her presence. Instead, it seems relator simply received notification of the PERA Board decision after the fact in a letter from the PERA Board in July 2007 notifying her that "Washington County recently certified your eligibility to participate, prospectively, in PERA's Correctional Plan, effective June 3, 2007." The letter also stated that the PERA Board's determination was a final decision appealable by filing a petition for writ of certiorari with this court. Relator subsequently filed her petition for writ of certiorari, challenging the PERA Board's decision to grant her correctional-plan membership only prospectively.

D E C I S I O N

"[W]e review the PERA [B]oard's decision under the standard used for agency decisions." *In re Hildebrandt*, 701 N.W.2d 293, 298 (Minn. App. 2005). Accordingly, this court will reverse the PERA Board's decision only if it is "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Id.* (quoting *Axelsson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299 (Minn.1996)).

² In order to qualify for correctional-plan membership, the employer must certify that the employee meets the definition of a local government correctional employee. Minn. Stat. § 353E.02, subd. 2(a)(1)-(4).

Minn. Stat. § 353E.02 (2006) provides that local government correctional service employees are eligible for membership in the correctional plan. Local government correctional service employee is defined as:

[A] person whom the employer certifies:

(1) is employed in a county correctional institution as a correctional guard or officer, a joint jailer/dispatcher, or as a supervisor of correctional guards or officers or of joint jailers/dispatchers;

(2) is directly responsible for the direct security, custody, and control of the county correctional institution and its inmates;

(3) is expected to respond to incidents within the county correctional institution as part of the person's regular employment duties and is trained to do so; and

(4) is a "public employee" as defined in section 353.01, but is not a member of the public employees police and fire fund.

Minn. Stat. § 353E.02, subd. 2(a)(1)-(4). The PERA Governance Manual provides:

Correctional plan coverage is restricted to those positions that are certified by employers to be eligible. A properly completed certification form will generally have a *prospective* application only unless:

....

2. It is discovered that the employing unit did not certify a position that had clearly met the membership criteria in a timely manner. In such instances, the position shall be granted Correctional Plan coverage *retroactively* as provided for under M.S. Section 353.27, subdivision 12, once the balance of omitted Correctional Plan employee deductions and employer contributions with interest are paid.

PERA Governance Manual, Section 5.1 H (emphasis added).

Relator essentially argues that that the PERA Board's decision to classify her as a member of the Correctional Plan on a prospective basis is not supported by substantial evidence. Relator "must demonstrate by a preponderance of the evidence that the PERA [B]oard's findings are arbitrary, unreasonable, or not supported by substantial evidence." *Hildebrandt*, 701 N.W.2d at 300. Substantial evidence means: "(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).

The evidence supporting the PERA Board's determination seems to be based on a summary of the events in the April 12, 2007 PERA Board minutes:

The Washington County Board adopted a resolution on April 3, 2007, stating that the County Board wishes to continue to include in the Correctional Plan, the three individuals that had been certified in 2000 and they are now asking to include the other two Jail Program Coordinators on a prospective basis once they have implemented the proposed job changes.

There may also be some support for the determination in Washington County's March 2007 "Request for Board Action" which reads:

The intention of the Washington County Sheriff is to update the job descriptions to make the 5 Jail Program Coordinators more generalists than specialists, rotating assignments to increase knowledge and productivity. The Coordinators will be expected to respond to incidents in the jail and receive the training to do so.

After reviewing the applicable State Statute and the rationale for the original enrollment of three Jail Programmers in the Correctional Officer Pension Plan, Staff

recommends the Washington County Board of Commissioners affirms its decision of July 11, 2000 to continue to include in the Correctional Officer Pension Plan the following employees: Cynthia Doty, Tom Hollister and John Warneke, and include William Hoffman and Lori Hanson in the Correctional Officers Pension Plan prospectively when the position descriptions, training requirements and job assignments have been updated to reflect the more general duties of the position.

We conclude that, without more, the PERA Board's wholesale reliance on Washington County's assertions does not meet the substantial-evidence standard. In *Hildebrandt*, this court reversed the PERA Board's decision and rejected the notion that wholesale reliance on an agency's conclusion suffices as substantial evidence:

The board, in denying benefits, adopted the PERA staff's conclusion that Hildebrandt's disability was caused by personality conflicts with her employer rather than by the job itself. There is nothing in the record before us that supports this conclusion and PERA points to no evidence that suggests Hildebrandt's disability was simply the result of personality conflicts.

701 N.W.2d at 300. Here, there is no indication the PERA Board investigated the facts of relator's case on an individual basis. In determining that she should receive prospective membership, the PERA Board did not cite to relator's employment history or discuss the details of her job duties in 2000 or the present. The only reference to job duties was in a letter from PERA to Warneke:

PERA asked the County whether—in July 2000 and currently—the job duties and requirements of the three Correctional Plan members differed from those of the Coordinated members [relator and Hoffman]. *The County could not answer regarding any differences in July 2000 as both the Human Resources Director and Sheriff employed at that time were no longer working for the County.* As for any

current differences, however, we were told that there were none.

(Emphasis added.) These statements reinforce the point that the PERA Board did not collect the relevant information regarding previous job duties, did not collect evidence specific to relator, and did not base its “prospective membership” decision on substantial evidence. Instead, the PERA Board merely based its determination on Washington County’s assertions, which we find insufficient.

The PERA Board stresses the fact that the sheriff certified relator for correctional-plan membership, and seems to suggest that employer certification is all that is required to support its determination. But the PERA Board provides no legal authority for the proposition that certification alone meets the substantial-evidence standard or that the PERA Board is not required to conduct additional research beyond receiving the certification. On the contrary, PERA’s own governance manual suggests that additional research should be conducted when it states that retroactive coverage should be granted when “[i]t is discovered that the employing unit did not certify a position that had clearly met the membership criteria in a timely manner.” PERA Governance Manual, Section 5.1 H. Further, we observe that it was the PERA Board that raised the issue of reconsidering correctional-plan membership, and because it owes a fiduciary duty to act in good faith and exercise care and judgment, it is responsible for thoroughly investigating the issue. *See* Minn. Stat. §§ 353E.01, subd. 1(b) (stating that the board of trustees shall adhere to fiduciary responsibilities in chapter 356A), 356A.02, subd. 2(3)-(4) (noting that fiduciary duties must be exercised in the “determination of eligibility

for membership or benefits . . . [and] the amount or duration of benefits”), 356A.04, subd. 1 (2006) (listing “active . . . members of the plan” as beneficiaries of the PERA Board’s fiduciary duties).

Generally, if a decision is not supported by substantial evidence, it is simply reversed. *See, e.g., Interstate Power Co., Inc. v. Nobles County Bd. of Comm’rs*, 617 N.W.2d 566, 577 (Minn. 2000) (recognizing the “general principle that when a governmental body denies a permit with such insufficient evidence [] the decision is arbitrary and capricious, [and] the court should order issuance of the permit” (quotation omitted)). But remand is appropriate when the record “is so inadequate that judicial review is impossible.” *Id.* Here, the record is devoid of any evidence regarding relator’s job duties dating back to 2000. Without such information, it is impossible for this court to determine whether relator’s membership should have been retroactive instead of prospective. Accordingly, we reverse the PERA Board’s decision and remand for appropriate proceedings through which evidence may be received and specific findings and conclusions drawn and decision made regarding relator’s correctional-plan membership.

The PERA Board moved to strike pages 10 through 45 of relator’s appendix, which consist of relator’s Washington County training activity reports. “The papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.” Minn. R. Civ. App. P. 110.01; *see* Minn. R. Civ. App. P. 115.04, subd. 1 (providing that rule 110 applies to certiorari proceedings to the extent possible). By its very nature, review by certiorari is solely based on the record

before the agency or body. *Amdahl v. County of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977). This court “will strike documents included in a party’s brief that are not part of the appellate record.” *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff’d*, 504 N.W.2d 758 (Minn. 1993). Because relator’s training activity reports were not in the record before the PERA Board, we grant the PERA Board’s motion to strike. We note, however, that granting the motion to strike supports our earlier observation regarding the paucity of the record properly before us for review. And, granting the motion to strike should in no way be interpreted as limiting evidence to be received on remand.

Reversed and remanded; motion granted.