

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Salary
Determinations Affecting Retired and
Active Employees of the City of Duluth

Allen Johnson, et al., Petitioners

PREHEARING ORDER

Administrative Law Judge Bruce H. Johnson (the ALJ) conducted a prehearing conference in this contested case proceeding beginning at 9:00 a.m. on Friday, August 21, 2009 in the Duluth City Council Chamber, third floor, Duluth City Hall, 411 West First Street, Duluth, MN 55802.

The following attorneys appeared at the prehearing conference:

Jon K. Murphy, Assistant Attorney General, represented the PERA Staff.

Thomas F. Andrew, Attorney at Law, appeared on behalf of all of the active City of Duluth employees who are or become parties to this proceeding and are currently represented by Local 101 of the International Association of Firefighters who have been paid amounts for personal leave which PERA is now contesting as not being salary under governing law. Mr. Andrew's representation is limited to that issue.

Elizabeth A. Storaasli, Attorney at Law, appeared on behalf of Respondent Paul T. Ostman.

Bryan F. Brown, Attorney at Law, appeared on his own behalf.

The following parties personally appeared at the prehearing conference:

Helene Abbott	Douglas Belanger
James Charbonneau	John Edwards
Thomas Ehle	Charles Erickson
John Hall	David Hanson
William Johnson	Matthew Ketola
William Lindgren	Richard Mattson
Robert Mills	Paul Ostman
Anne	Peterson
John Ray	Ronald Schlichting

Erik Simonson
James Wright
Lee Youngblom

Mark Wick
Pamela Wutz

Petitioner James Rose was excused from attendance by prior request granted by the ALJ.

On August 13, 2009, PERA filed a Petition for Consolidation of OAH Docket Nos. 4-3600-20751-5 through 4-3600-20820-5, inclusive. The ALJ finds that those cases do involve common questions of law but do not necessarily involve common questions of fact, and therefore that consolidation is appropriate to address common questions of law but not necessarily issues of fact.

Based on the record in this matter, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

- (1) PERA's Petition for Consolidation is GRANTED, in part, and DENIED, in part, to the extent described in the Memorandum that follows.
- (2) OAH Docket Nos. 4-3600-20751-5 through 4-3600-20820-5, inclusive, are hereby CONSOLIDATED for the purpose of considering and adjudicating any dispositive motions and pending further orders of the ALJ.
- (3) PERA may add additional petitioners, who are similarly situated, as parties to this consolidated proceeding by initiating a separate contested case proceeding and serving such similarly situated parties with a Notice of Hearing. Upon the filing of any such Notice of Hearing with OAH, the new contested case shall become consolidated with the contested case proceeding specified above.
- (4) Any petitions for intervention must comply with Minn. R. 1400.6200 and must be filed and served on or before Friday, September 11, 2009.
- (5) All discovery, including responses or objections to timely requests for written discovery and depositions, must be completed on or before November 30, 2009;
- (6) The parties are encouraged to engage in informal prehearing exchanges of relevant information, such as letter or email requests and replies, whenever practicable, and they shall promptly submit any discovery disputes to the ALJ for resolutions in order to meet the discovery deadline.

- (7) Any dispositive motions, including motions for summary disposition, must be filed on or before Thursday, December 31, 2009, with any responses thereto filed on or before Friday, January 15, 2010.
- (8) The parties shall have fourteen working days following receipt of any order or recommendation issued by the ALJ on a pending motion for partial summary disposition in which to request certification the Board of Trustees of the Public Employees Retirement Association pursuant to Minn. R. 1400.7600.
- (9) After the time for requesting certification has expired, the ALJ will schedule another prehearing conference in this matter to determine the course of further proceedings. At that time, the ALJ will consider any requests to sever any cases or groups of cases consolidated by this Prehearing Order for separate evidentiary hearings.
- (10) In accordance with Minn. R. 1400.5550, all filings with the Office of Administrative Hearings (OAH) of documents relating to this consolidated contested case proceeding must be made by transmitting the document to OAH by hand delivery, U. S. Mail, or facsimile transmission. Although service of documents filed with OAH upon other parties to this proceeding must normally be accomplished by personal service or by U. S. Mail, any party agreeing to accept service of documents by email may do so by completing Exhibit A to this Prehearing Order and sending it to the ALJ to be filed at the following address:

Bruce H. Johnson
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

Dated: August 26, 2009

s/Bruce H. Johnson

BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

MEMORANDUM

On July 10, 2009, PERA issued Notices of Hearing and initiated contested case proceedings involving 70 employees of the City of Duluth who had challenged determinations by PERA that the City of Duluth (City) had erroneously treated certain amounts paid to, or on behalf of, those employees as “salary” for PERA reporting purposes, and that the City had erroneously made employer and employee contributions to PERA based on those amounts. The Notices of Hearing scheduled a prehearing conference before the ALJ on August 21, 2009, at 9:00 a.m. in the Duluth City Council Chambers

On August 13, 2009, PERA filed a Petition for Consolidation of all 70 contested case proceedings—namely, OAH Docket Nos. 4-3600-20751-5 through 4-3600-20820-5, inclusive. The ALJ concludes that those cases do involve common questions of law, primarily questions of statutory interpretation, but also concludes that the cases do not necessarily involve common questions of fact. Since the contested issues of law are likely to affect the outcomes of all 70 contested case proceedings, the ALJ has therefore consolidated all 70 cases to allow parties to make appropriate motions for total or partial summary disposition, to consider the merits of any such motions, and to issue orders or recommendations, as the case may be, to the PERA Board of Trustees. The ALJ finds that consolidating the cases for this limited purpose will save time and costs, and will not prejudice any party.

However, the 70 cases may not necessarily involve common questions of fact. Accordingly, after there have been adjudications on the merits of common questions of law, the ALJ will schedule another prehearing conference to determine the course of further proceedings. At that time, the ALJ will consider any requests to sever cases or groups of cases for separate evidentiary hearings upon a showing that severing the cases for hearing would save time and costs, and that severance would not prejudice any party.

Counsel pointed out that discovery may be necessary and appropriate to determine the scope of motions for summary disposition. The ALJ has therefore established a period of approximately 90 days during which discovery relating to contested issues of **both fact and law** may be conducted. The ALJ does not contemplate further discovery of any kind **after** all dispositive motions have been adjudicated on the merits. Since a large number of the petitioners in this proceeding are not currently represented by attorney, it may be helpful for the ALJ to describe what “discovery” is.

The legal term “discovery” refers to how parties can obtain important information from other parties before a hearing starts. Discovery can be informal, such as providing each other with copies of documents that the parties intend to introduce as evidence. Or it can be formal and proceed according to the Minnesota Rules of Civil Procedure. The administrative law judge generally has the authority to decide which exchanges of information to allow, how much information must be given to the other parties, and when and how the information must be given.

If petitioners who are not represented by an attorney want some information about the case from another party before the hearing begins, they should simply ask the party or the party's attorney for that information. OAH encourages voluntary exchanges of information. If there is a dispute about whether you are entitled to the information that you are requesting, first try to resolve the dispute through a telephone conference with the other party and the administrative law judge. If you cannot work things out informally, you may ask the administrative law judge to make a decision on how to resolve the dispute. If you want an administrative law judge to make a decision on something, you must make a "motion." Unless there is a dispute about discovery, parties should not file written discovery requests or responses with the ALJ.

A detailed explanation of the entire contested case process can be found on OAH's website at <http://www.oah.state.mn.us/ccguide.html>.

Copies of all documents that parties file with the ALJ must be provided to every other party in the proceeding. Normally, this must be done by actually delivering the documents to the other parties, by sending them by U. S. Mail, or by transmitting them by facsimile. However, there are currently 71 parties (including PERA) in this consolidated contested case proceeding, and serving documents being filed in those ways is likely to be a clerical and financial burden. Accordingly, I have attached as a form to this Prehearing Order (Exhibit A), which allows any party to agree to accept service by another party by email. Parties are not required to agree to this. However, you should bear in mind the time, effort, and cost of serving anything you file with me on the other 70 parties in this proceeding by methods other than email.

Finally, Minn. R. 1400.7100, subp. 6, provides that “[n]o party or attorney may communicate with the judge on the merits of the case unless all parties have the opportunity to participate.” Although parties or their attorneys may communicate with me on subjects that do not relate to the “merits” of a case, it is often difficult to distinguish between what is a permissible communication and what is not. If it turns out to be a communication on an impermissible topic, it is simply not possible to come up with a way for the other 70 parties to participate. Accordingly, if you need to discuss procedural issues or other issues that do not involve the merits, please contact staff attorney Laura Schlatter at (651-361-7847); email: Laura.Schlatter@state.mn.us. Ms. Schlatter will seek my advice and communicate back to you on permissible topics.

B.H.J.

Exhibit A

	OAH 2-3600-20809-2
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In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth Allen Johnson, et al., Petitioners	AGREEMENT TO ACCEPT EMAIL SERVICE
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I, _____, am a party to this contested case proceeding, and I hereby agree to accept email service of documents filed with the Office of Administrative Hearings by other parties to this proceeding in lieu of personal service or service by U. S. Mail or facsimile.

I understand that I must file original documents relating to this proceeding with the Office of Administrative Hearings or the presiding Administrative Law Judge by hand delivery, U. S. Mail or facsimile, and not solely by email.

I further understand that the Office of Administrative Hearings will be serving me by U. S. Mail with copies of any original documents that are issued by the presiding Administrative Law Judge.

My email address is: _____.

Date: _____, 2009

Signature

Type or Print Name
