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September 20, 2021

**VIA EFILING ONLY**
Douglas A. Anderson
Executive Director
Public Employees Retirement Association
of Minnesota
60 Empire Dr Ste 200
Saint Paul, MN 55103
doug.anderson@mnpera.org

**Re:** ***In the Matter of the PERA Coordinated Retirement Plan Annuity of Diane Edwards***
**OAH 71-3600-37519**

Dear Executive Director Anderson:

Enclosed and served upon you is the Administrative Law Judge's **RECOMMENDATION ON SUMMARY DISPOSITION** in the above-entitled matter. The official record, along with a copy of the recording of the hearing, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7874, michelle.severson@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,

Michelle Severson

MICHELLE SEVERSON
Legal Assistant

Enclosure

cc: Docket Coordinator
Julie A. Leppink
Diane Edwards

**THIS DOCUMENT CONTAINS NOT PUBLIC DATA**

OAH 71-3600-37519

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Coordinated Retirement Plan Annuity of Diane Edwards

**RECOMMENDATION ON SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig upon a Motion for Summary Disposition (Motion) filed by the Public Employees Retirement Association of Minnesota (PERA). Diane Edwards (Petitioner) responded on August 5, 2021. The Administrative Law Judge held a motion hearing on August 9, 2021, and the record closed on that date.

Julie A. Leppink, General Counsel, appears on behalf of PERA. Petitioner appears on her own behalf and without legal counsel.

Based on the record and the arguments of the parties, and for the reasons explained in the Memorandum below, which is incorporated herein, the Administrative Law Judge issues the following:

## RECOMMENDATION

Petitioner has not established that she is eligible for augmentation of her retirement annuity. Therefore, PERA's Motion should be **GRANTED** and Petitioner's request for augmentation should be **DENIED**.

Dated: September 20, 2021

JESSICA A. PALMER-DENIG
Administrative Law Judge

## NOTICE

This Report is a recommendation, not a final decision. Pursuant to Minn. Stat. §§ 353.03, 356.96 (2020), PERA's Board of Trustees (Board) will make the final decision in this matter after reviewing the record and this report. The parties may contact the Executive Director of the Public Employees Retirement Association, 60 Empire Drive, Suite 200, St. Paul, MN 55103-2088, or call the PERA at 651-296-7460 to inquire about the procedure for filing exceptions to this report and appearing before the Board when this report is considered.

It is requested that the Board serve a copy of its final decision upon the Administrative Law and all of the parties by first class mail.

## MEMORANDUM

### I. Introduction

This case concerns whether Petitioner is entitled to augmentation, or interest, on her PERA retirement annuity under Minn. Stat. § 353.34 (2020). The parties agree that there are no material facts in dispute and that summary adjudication is appropriate. The Administrative Law Judge concurs. Based on the parties' arguments and the record, the Administrative Law Judge determines that PERA's Motion should be granted and that Petitioner's claim for augmentation must be denied.

### II. Facts

Petitioner worked for Intermediate District 287 at Hennepin Technical College from November 24, 1980 to June 30, 1997.[1] In this position, Petitioner was a coordinated member of PERA's general employee retirement plan (Coordinated Plan).[2] Petitioner was laid off from her position in 1997.[3] Upon her termination, Petitioner had earned 16 years and eight months of service credit in the Coordinated Plan.[4] Petitioner chose not to receive a refund of her PERA contributions, so her Coordinated Plan annuity was deferred.[5]

Under Minn. Stat. § 353.34, subd. 3(a), Petitioner was entitled to augmentation, or interest, on her deferred annuity through December 31, 2018.[6] Petitioner's retirement estimates over the years included amounts attributable to augmentation.[7] For example, in 2014 and 2015, Petitioner's estimated monthly retirement benefit at age 65 was

[1] Declaration (Decl.) of Diane Edwards at ¶2; Decl. of Andrea Murphy at ¶4, Exhibit (Ex.) 1).
[2] Decl. of A. Murphy at ¶4.
[3] Decl. of D. Edwards at ¶2.
[4] Decl. of A. Murphy at ¶6, Ex. 4.
[5] *Id.* at ¶5; *see also* Minn. Stat. § 353.34, subd. 1(a) (providing that a former plan member is entitled to a refund of accumulated employee deductions or to a deferred annuity).
[6] Decl. of A. Murphy at ¶5; Minn. Stat. § 353.34, subd. 3(a), (d)(5) (stating that qualifying former members are entitled to augmentation, but that an annuity must not be augmented after December 31, 2018).
[7] Decl. of A. Murphy at ¶6.

$1,301.[8] The estimates identified Petitioner's contributions as including both payments Petitioner made into the retirement system during employment, in the amount of $16,535.74, and augmentation of that amount.[9] In 2014, the augmentation figure was $45,682.57, while in 2015, it had increased to $48,302.85.[10] In 2019, after augmentation was eliminated, Petitioner's retirement benefit at 65 was adjusted downward to $1,261.[11]

Petitioner received regular pension benefit statements and retirement estimates from PERA.[12] Petitioner also accessed the "myPERA" online account system and received online estimates.[13]

On June 27, 2018, PERA posted a 2018 Legislative Update on its website, and mailed the update along with members' annual Personal Benefits Statements.[14] The update provided information on deferred benefits with the following statement:

> Beginning January 1, 2019, interest applied to deferred benefits for all members will be zero percent prospectively. Any deferred member who terminated public service prior to January 1, 2012, will continue to receive deferred interest through December 31, 2018. *Beginning June 30, 2018, if a deferred member returns to the same PERA plan, deferred interest will no longer apply to the entire benefit calculation*.[15]

PERA also added the following message to myPERA in June 2019: "Attention members who terminated prior to January 1, 2012: If you terminated your public service prior to Jan. 1, 2012, *your benefit may be reduced if you return to public employment*. Members should contact PERA prior to returning to public employment to discuss their options."[16]

After leaving public service in 1997, Petitioner worked in the private sector until 2020, when she was laid off due to the COVID-19 pandemic.[17] On October 5, 2020, Petitioner began working in a nine-month clerical job with the Anoka-Hennepin School District (Anoka-Hennepin), making $14.65 per hour.[18] Though not lucrative, this position fulfilled Petitioner's "life-long passion to work with disabled young adults."[19] As an

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[8] *Id.* at Exs. 4, 6.
[9] *Id.*
[10] *Id.*
[11] *Id.* at Ex. 10. Prior retirement estimates included anticipated augmentation amounts that would have continued to accrue until Petitioner was 65 years old.
[12] *Id.* at ¶6.
[13] *Id.* at ¶¶7, 8; Ex. 18.
[14] *Id.* at ¶12, Ex. 9.
[15] *Id.* at Ex. 9 (emphasis added).
[16] *Id.* at ¶9, Ex. 10 (emphasis added).
[17] Decl. of D. Edwards at ¶3.
[18] *Id.* at ¶4.
[19] *Id.* at ¶1.

Anoka-Hennepin employee, Petitioner has again become a member of the Coordinated Plan and is currently accruing service credit.[20]

After accepting the position with Anoka-Hennepin, Petitioner contacted PERA and was told that she could expect a reduction in benefits of approximately "$20-$40 per month."[21] PERA subsequently notified Petitioner that it estimated her single life benefit at age 65 would be $867.11, an amount calculated without including augmentation.[22] PERA staff determined that when Petitioner returned to public employment covered by the Coordinated Plan, augmentation no longer applied to her retirement annuity.[23]

Petitioner appealed PERA staff's conclusion to the Executive Director, who affirmed that determination.[24] Petitioner then appealed that determination to PERA's Board, and PERA referred this matter for a fact-finding conference.[25]

## III. Summary Disposition Standard

Under Minn. Stat. § 356.96, subd. 7(b), this proceeding is a fact-finding conference and is not subject to the contested case rules of the Office of Administrative Hearings.[26] As a result, the administrative rule governing motions in contested cases, Minn. R. 1400.6600 (2021), does not apply. Nonetheless, there are no material facts in dispute that would require an evidentiary hearing. In this circumstance, summary disposition proceedings provide the parties with an opportunity to submit evidence and argument to develop the record and offer an efficient method for resolution of the parties' dispute. Therefore, based upon the parties' agreement, this matter is considered for summary adjudication.

The Administrative Law Judge applies the summary judgment standards developed by the district courts to consider the parties' motions.[27] A motion for summary disposition may be granted when no genuine issue of material fact exists.[28] A genuine issue is one that is not sham or frivolous, and a fact is material if resolving it will affect the result or outcome of the case.[29] When considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the non-moving party, and doubts and factual inferences must be resolved against the moving party.[30]

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[20] *Id.* at ¶5; Decl. of A. Murphy at ¶¶10, 15.
[21] Decl. of D. Edwards at ¶6.
[22] Decl. of A. Murphy at ¶14; Ex. 16.
[23] *See id.* at ¶¶ 10-15.
[24] *Id.* at ¶19; Ex. 21; Ex. 22.
[25] *Id.* at ¶21; Ex. 23.
[26] *See* Minn. Stat. § 356.96, subd. 7(b) ("The fact-finding conference is an informal proceeding not subject to Minnesota Rules, chapter 1400, except that Minnesota Rules, part 1400.7300, shall govern the admissibility of evidence and Minnesota Rules, part 1400.8603, shall govern how the fact-finding conference is conducted.").
[27] *Pietsch v. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. Civ. P. 56.
[28] *In re Gillette Children's Specialty Healthcare*, 883 N.W.2d 778, 785 (Minn. 2016).
[29] *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974).
[30] *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

Petitioner's response did not identify any disputed issues of fact; instead, she requested a determination in her favor as a matter of law. Therefore, Petitioner's response is essentially a cross-motion for summary disposition. When parties file cross motions for summary disposition, they "tacitly agree that there exist no genuine issues of material fact."[31] In this case, the parties expressly agree that no facts are in dispute and the dispute turns on a question of law.

## IV. Analysis

A partially or fully vested PERA member who terminates public service may leave the member's accumulated deductions in the retirement fund and obtain a deferred retirement annuity.[32] The law further provides for augmentation of a deferred annuity under certain circumstances, stating: "The deferred annuity of any former member must be augmented from the first day of the month following the termination of active service, or July 1, 1971, whichever is later, to the effective date of retirement or, if earlier, December 31, 2018."[33] Therefore, Petitioner must meet three criteria to qualify for augmentation: 1) her annuity must be deferred; 2) she must be a former member of PERA; and 3) she must have terminated public employment. PERA contends that Petitioner does not meet these requirements, and the Administrative Law Judge agrees.

First, Petitioner's annuity is no longer deferred. As an Anoka-Hennepin employee, she is an active member in PERA's Coordinated Plan; she makes contributions, earns service credit, and, depending on her compensation, may increase the "high five" salary used to calculate her pension benefit. Petitioner was terminated from public employment when she was laid off in 1997,[34] but because she is currently working for another public employer, her "termination of public service" date is now in the future.[35] Because Petitioner's annuity is no longer deferred, she is not eligible for augmentation.

Petitioner argues that she will have more than one instance in which she terminates public service, one in the past and one that will be in the future, creating multiple segments of public service. She notes the contrast between Minn. Stat. § 353.34, subd. 3, and Minn. Stat. § 356.30, subd. 1(c) (2020), which governs augmentation of a deferred annuity when a public employee with covered service in more than one pension plan "terminates *all* public service."[36] She argues that under PERA's statute, termination of "all" public service is not required for augmentation to be applied.

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[31] *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 610 (Minn. 2012) (quotation omitted).
[32] Minn. Stat. § 353.34, subd. 3(a).
[33] *Id.*, subd. 3(c).
[34] *See* Minn. Stat. § 353.01, subd. 11a (2020) (defining "termination of public service.").
[35] *See In re Johnson*, No. A20-1037, 2021 WL 1605112, at *3 (Minn. Ct. App. Apr. 26, 2021) ("But the phrase 'terminated all public service' and the phrase 'returned to public service' are mutually exclusive: no one who has already terminated all public service can return to it, and no one who returns to public service can previously have terminated it.").
[36] Emphasis added.

Petitioner asks that PERA be required to calculate an annuity for the first segment of her public employment, separate from her current service. Minnesota law allowed an annuity to be calculated in this manner in the past. Then, the law provided that:

> If a person has more than one period of uninterrupted service, the required reserves related to each period must be augmented as specified in this paragraph. The sum of the augmented required reserves is the present value of the annuity. Uninterrupted service for the purpose of this subdivision means periods of covered employment during which the employee has not been separated from public service for more than two years.[37]

The legislature repealed this statute in 2018.[38] Current law does not allow PERA to calculate an annuity based on separate public employment segments.

Second, since she returned to public service, Petitioner is no longer a "former member" of PERA's Coordinated Plan. Petitioner argues that, because she maintained her "funds with PERA after [her] employment termination in 1997, [she] never became a 'former' member."[39] A former member is someone who "terminates public service."[40] It is undisputed that Petitioner was laid off from her position with Hennepin Technical College in 1997; this constituted termination, such that she became a "former member" of PERA at that time. As augmentation only applies to deferred annuities of former members, had Petitioner not become a former member upon that termination she would not have been entitled to augmentation in the first place.

Petitioner maintains that "[n]othing in the statute states that a 'former member' loses augmentation if the employee returns to public service."[41] But the statute only allows for augmentation if Petitioner is a former member; as an active member, she is, by definition, not entitled to augmentation. Petitioner cannot simultaneously be both a former member and an active employee in covered service under the same plan.

Third, at this time, Petitioner has not terminated public service. Petitioner argues that she is entitled to augmentation under Minn. Stat. § 353.34, subd. 3(d). This statute states: "For a person who became a public employee before July 1, 2006, and who has a termination of public service before January 1, 2012, the deferred annuity must be augmented at the following rate or rates, compounded annually . . . ." According to Petitioner:

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[37] Minn. Stat. § 353.71, subd. 2(e) (2016).
[38] Laws of Minnesota 2018, ch. 211, art. 2, § 4.
[39] Petitioner's Mem. in Opposition to PERA's Motion for Summary Disposition and in Support of Appeal at 4 (Aug. 5, 2021).
[40] Minn. Stat. § 353.01, subd. 7a (2020) ("'Former member' means a member of the association who terminates public service under subdivision 11a or membership under subdivision 11b.").
[41] Petitioner's Mem. in Opposition to PERA's Motion for Summary Disposition and in Support of Appeal at 4 (Aug. 5, 2021).

> I am covered by this statute. I am a person who became a public employee before July 1, 2006, and I had "*a termination of public service* before January 1, 2012" so I am entitled to augmentation as set forth in the statute. If the statute wanted to exclude persons who after a long period of time choose to return to public service, it could have used language stating termination of 'all' public service. It does not contain the word "all."[42]

Section 353.34, subd. 3(d) addresses the calculation of interest on a deferred annuity; the eligibility criteria are found in section 353.34, subd. 3(c). Moreover, it is undisputed that Petitioner was entitled to augmentation in the past; her benefit was calculated to include augmentation for many years. But because Petitioner returned to public service, she is no longer eligible for the augmentation she earned prior to her return. As Petitioner's date of public service termination is in the future, and it will occur after December 31, 2018, she is also ineligible to accrue augmentation going forward.

Petitioner argues that this result is unfair and that she is losing 23 years-worth of augmentation, a loss that reduces her monthly benefit by hundreds of dollars.[43] She contends she was not aware that a return to public service could have this impact. She notes that, due to her age, she does not anticipate working more than a few more years and that her position is not highly paid, meaning that she will not achieve an increase in the "high five" salary used to calculate her pension. She also argues that when she called PERA to ask about the impact of her new employment, she was told that there would be only a small reduction in her benefit.

Petitioner's arguments implicate doctrines of estoppel; these are equitable doctrines designed to address unfairness in certain situations. However, the relief Petitioner seeks is unavailable. Promissory estoppel "implies a contract where the promisor makes a unilateral or otherwise unenforceable promise and the promisee relies on the promise to his or her detriment."[44] However, "where an agency has no authority to act, agency action cannot be made effective by estoppel."[45] Equitable estoppel may apply when a party can show wrongful conduct by a government actor, reasonable reliance, a unique expenditure in reliance, and that the balance of the equities weighs in favor of estoppel.[46] Stated alternatively, the party seeking to estop the government must show the government made an intentional misrepresentation of

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[42] *Id.* at 5.

[43] Petitioner also contends that a denial of augmentation violates her federal and state constitutional rights to due process and equal protection. She argues that the statute draws a distinction between former and returning employees, that there is no rational basis for this distinction, and that PERA's denial of augmentation has a disparate impact on older individuals who take low-paying jobs later in their careers. These claims essentially assert that the statute is unconstitutional as written, and not just as applied to Petitioner. These arguments are in the nature of a facial challenge, and executive branch agencies do not have authority to determine whether a statute violates a constitutional provision on its face. *See, e.g., In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495. 499-500 (Minn. Ct. App. 1993).

[44] *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996).

[45] *Id.* at 299-300 (quotation omitted).

[46] *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011).

material fact through which the government intended to induce reliance, where the other party did not know the true facts and that party relied on the government's misrepresentation to their detriment.[47] Affirmative misconduct is required, and simple inadvertence, a mistake, or imperfect conduct is not enough.[48]

Assuming the truth of Petitioner's assertion that she called PERA and received inaccurate information, there is no evidence of malfeasance or affirmative misconduct on PERA's part. The record does not show anything other than a mistake occurred, and a mistake is not enough. Further, Petitioner did not contact PERA before re-entering public service; instead, she called after she began working at Anoka-Hennepin. At that time, her right to augmentation had already been lost, making the information provided to her irrelevant to the outcome here. Petitioner contends that she did not know the consequence of her return to public service, but PERA posted information on its website and on myPERA, and sent plan participants a notice, indicating that augmentation could be lost if former members returned to public work. Finally, PERA may only pay an annuity calculated as allowed by law; it simply does not have the authority to pay Petitioner a different amount.

In this case, Petitioner returned to public employment to fulfill a life-long dream and, as a result, lost almost $400 per month in retirement payments. Had Petitioner fully understood the impact of her return to public service, she likely would not have taken her current position. The result here is similar to that in another recent case, *In re Johnson*, in which an employee briefly returned to public service and unknowingly forfeited approximately $200 in monthly retirement benefits.[49] Given that two similar cases have arisen in a relatively short time, PERA and the other state retirement plans may wish to consider whether providing some additional notice to former members explaining the possible outcome of a return to public service would be advisable.

## V. Conclusion

Petitioner has not established that that she is eligible for augmentation of her retirement annuity. The Administrative Law Judge recognizes that Petitioner will experience a substantial decrease in her monthly retirement benefit from the sum she anticipated receiving. Yet, the Administrative Law Judge concludes that the law does not permit the relief Petitioner seeks. Therefore, the Administrative Law Judge recommends that Board **DENY** Petitioner's request for augmentation.

**J. P. D.**

[47] *REM, Canby, Inc. v. Minn. Dep't of Human Servs.*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992).
[48] *Id.*
[49] *Johnson*, 2021 WL 1605112, at *1.