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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA STATE RETIREMENT SYSTEM

In the Matter of the Denial of the Application of David Musielewicz for MSRS General Employees Retirement Plan Increased Retirement Benefit

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came before Administrative Law Judge Eric L. Lipman for a fact-finding conference on January 29, 2019. The hearing record closed at the conclusion of the hearing.

Julie A. Leppink (Legal Director) appeared on behalf of the staff of the Minnesota State Retirement System (MSRS). David Musielewicz, the plan member, appeared on his own behalf and as his own counsel.

STATEMENT OF THE ISSUES

1. Is Mr. Musielewicz entitled to receive a monthly annuity benefit greater than $3,139.91 per month?

2. Because of the conduct of its staff, is MSRS estopped from providing Mr. Musielewicz a monthly annuity benefit that is less than $3,814 per month?

SUMMARY OF RECOMMENDATION

Because MSRS lacks the statutory authority to increase the amount of Mr. Musielewicz's monthly annuity payments, the MSRS Board of Directors (Board) should affirm the executive director's September 12, 2018 determination of benefits. The Administrative Law Judge further concludes that, based on the facts of this case, it is not appropriate to estopp MSRS from correctly tabulating the monthly benefit amounts.

FINDINGS OF FACT

1. David Musielewicz was a long-term employee with the state of Minnesota, serving his entire career as part of the legislative staff of the Minnesota Legislature. He began working for the state of Minnesota in January of 1987 and, as part of his employment, made contributions to the Unclassified Retirement Plan.[1]

[1] Exhibit (Ex.) A at 1-3.

2. Mr. Musielewicz was originally a member of the MSRS Unclassified Plan. The Unclassified Plan is a defined-contribution pension plan.[2]

3. Minnesota law confers upon certain employees in the Unclassified Plan the option to change their coverage and join the MSRS General Plan. The General Plan is a defined-benefit retirement plan.[3]

4. In January 2011, Mr. Musielewicz transitioned from a member-beneficiary of the Unclassified Plan to a member-beneficiary of the General Plan. As a result of this change, Mr. Musielewicz was obliged to both transfer the assets that he had accumulated under the Unclassified Plan as well remit additional pension contributions.[4]

5. When Mr. Musielewicz joined the General Plan, he became eligible for application of the "Rule of 90." Under the Rule of 90, covered employees are eligible to retire when their age and years of state service are equal to or greater than 90.[5]

6. For those employees who are covered by the Rule of 90, there is an additional election: those employees are entitled to choose between determining the amount of their monthly annuity payments by using either the "step method" or the "level method."[6]

7. Retiring employees are permitted to select the calculation method that yields them the highest monthly benefits.[7]

8. The step method of calculating monthly benefit amounts applies a particular formula to the amount of monthly pay that was earned by the employee during the employee's highest five years of earning (the high-five earnings). The step method received its name because two different percentages are used in the formula that is applied to the employee's earnings history: 1.2 percent is multiplied to each of the first ten years of state service, and then a second "stepped up" percentage of 1.7 percent is multiplied to any remaining years of state service.[8]

9. Because Mr. Musielewicz worked for the state of Minnesota for a total of 31 and 1/3rd years, his first ten years of service was multiplied by 1.2 percent (for a total of 12 percent) and the remaining 21 and 1/3rd years of service was multiplied by 1.7 percent (for a total of 36.266 percent). The sum of these calculations (12 percent plus 36.266 percent) results in a "Total Step Factor" to be applied of 48.266 percent.[9]

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[2] Ex. A at 2; Testimony (Test.) of David Musielewicz; Test. of Cheryl Cincoski.
[3] *Id*.
[4] Minn. Stat. § 352D.02, subd. 3 (2018); Exs. A, B.
[5] *See* Minn. Stat. § 352.116, subd. 1 (2018).
[6] *See* Minn. Stat. § 352.115 (2018).
[7] *Id*.
[8] Ex. C at 2; Exs. 8, 10.
[9] Exs. 8, 10.

10. As noted in paragraph 8, under the step method, the employee's monthly pay during the employee's highest five years of earning is multiplied by the Total Step Factor in order to calculate the amount of the monthly retirement annuity.[10]

11. The "level method" takes a different approach when tabulating the monthly annuity amounts. The factor that is applied to the employee's high-five earnings is developed by multiplying 1.7 percent to each year of the employee's service. The method is regarded as "level" because the same percentage is multiplied to each of the years of state employment.[11]

12. The level method also differs from the step method in another significant way. For employees that are eligible to retire under the Rule of 90, but retire before their "normal retirement age," the benefit amounts are "reduced by one-quarter of one percent for each month that the employee is under normal retirement age . . . ."[12]

13. In Mr. Musielewicz's case, the level method multiplies 1.7 percent to each of Mr. Musielewicz's 31 and 1/3rd years of state service and then reduces that sum by "one-quarter of one percent for each month" that was between Mr. Musielewicz's retirement date and his 65th birthday.[13]

14. The General Plan also includes a set of optional and actuarially equivalent retirement annuities that will remit payments to the retired employee during the employee's life, and then to the employee's surviving spouse for life.[14]

15. Following his enrollment as a member in the General Plan, Mr. Musielewicz began receiving statements from the General Plan that included projections of future monthly benefits. The statements noted that Mr. Musielewicz's eligibility under the Rule of 90 would accrue on April 29, 2016.[15]

16. The statements do not reflect the early-retirement reductions that would occur if monthly benefits were calculated under the "level method."[16]

17. Prior to retiring, Mr. Musielewicz requested a written estimate of retirement benefits from MSRS. The benefit estimate letter dated November 17, 2017, suggested that Mr. Musielewicz's monthly benefit, with a "survivor option" that would remit 75 percent of the monthly amounts to his spouse after his death, would be $3,391.09 if he retired on March 7, 2018.[17]

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[10] Ex. 10 at 1.
[11] Ex. 8 at 2.
[12] *See* Minn. Stat. § 352.116, subd. 1(b) (2018); Ex. 8 at 2.
[13] Ex. 8 at 2.
[14] *See, e.g.,* Ex. 15.
[15] *See* Exs. C, D, E, F.
[16] *Id*.
[17] Ex. 3; 13.

18. The estimate included a notice that it was "based on current information" and that "[MSRS] reserve[s] the right to correct errors and prepare a new estimate."[18]

19. Using June 4, 2018, as projected retirement date, and his years of state service, Mr. Musielewicz submitted these parameters to the pension benefit calculator on MSRS's website. The calculator provided an estimate of $3,814 per month under a "single life" annuity option.[19]

20. From the estimate of $3,814 per month under a "single life" annuity option, Mr. Musielewicz tabulated outcomes for lesser monthly payments if he selected coverage options that included remittances to his spouse after his death.[20]

21. On April 4, 2018, Mr. Musielewicz submitted his application for retirement benefits with an announced retirement date of June 2, 2018. In his application, Mr. Musielewicz chose a "75% survivor benefit" option.[21]

22. Mr. Musielewicz received a letter from MSRS confirming the receipt of his application.[22]

23. Mr. Musielewicz retired from state service on June 2, 2018. By retiring, Mr. Musielewicz relinquished the opportunity to increase the amount of his retirement benefits by working longer in a covered position. Additionally, in retirement, he is subject to the earnings limitations in Minn. Stat. § 352.115, subd. 10(a).[23]

24. On July 5, 2018, MSRS sent Mr. Musielewicz a retirement benefit authorization. The statement set forth MSRS's final calculation of retirement benefits under the "75% survivor benefit" option. It stated that on an ongoing basis, Mr. Musielewicz would receive annuity payments of $3,139.91 each month.[24]

25. Mr. Musielewicz wrote to MSRS in July and August 2018 to request more information about MSRS's calculation of his retirement benefits.[25]

26. MSRS responded with an explanation of how his retirement benefit amounts were tabulated. It maintained that, when reduced by the cost of the 75 percent survivor option, Mr. Musielewicz is entitled to receive $3,139.91 each month.[26]

27. Maintaining that the retirement benefit authorization incorrectly tabulated the amounts that were due, Mr. Musielewicz submitted an appeal of the determination to the Executive Director of MSRS (Executive Director).[27]

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[18] Ex. 3.
[19] Ex. 6; Test. of D. Musielewicz*; see also* Ex. 4 (calculation using an Aug. 4, 2018 retirement date).
[20] Test. of D. Musielewicz.
[21] Exs. G, 1, 13.
[22] *See* Ex. H.
[23] Ex. O; Test. of D. Musielewicz.
[24] Exs. 1, 13.
[25] Exs. 2, 6.
[26] Ex. 8.

28. In a decision dated September 12, 2018, the Executive Director determined that Mr. Musielewicz's monthly benefit was accurately calculated in the retirement benefit authorization. The Executive Director concluded that, with a 75 percent survivor option, Mr. Musielewicz is entitled to an annuity of $3,139.91 per month.[28]

29. Mr. Musielewicz filed a petition for review of the Executive Director's determination by the Board. The Board referred this matter to the Office of Administrative Hearings for a fact-finding conference.[29]

30. At the evidentiary hearing, Cheryl Cincoski, Director of Retirement Services for MSRS's Pension Division, conceded that following a "computer overhaul" in 2015, MSRS officials were aware that its computer system was, in some cases, incorrectly tabulating benefit estimates. Staff concerns about the errors were routed to the agency's technology vendor for review, but the pension benefit calculator was not disabled during this period and remained available for use (by Mr. Musielewicz and others) on the MSRS website.[30]

31. MSRS officials do not know how many queries to the pension benefit calculator were incorrectly tabulated or the types of eligibility and benefit scenarios that produce incorrect results.[31]

32. MSRS officials did not notify plan members that its computer system was incorrectly tabulating benefit estimates in some cases.[32]

Based upon these findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board and the Administrative Law Judge have jurisdiction over this matter under Minn. Stat. §§ 14.50, 356.96, subd. 5(b) (2018).

2. MSRS is governed by state law and is charged with the management and oversight of retirement plans for certain public employees.[33]

3. On September 12, 2018, MSRS issued a benefit determination in this matter. The determination included a notice that meets the requirements of Minn. Stat. § 356.96, subd. 3 (2018).

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[27] Ex. 9.
[28] Ex. 10.
[29] Ex. 11; *see also* Minn. Stat. § 356.96, subd. 7(b) (2018).
[30] Test. of C. Cinoski.
[31] *Id*.
[32] *See id*.
[33] *See* Minn. Stat. §§ 352.01-.98, 356.001-.99, 356A.01–.13, 356B.05, .10 (2018).

4. Mr. Musielewicz's appeal of that determination was filed within 60 days of that notice and therefore was timely submitted.[34]

5. MSRS gave proper notice of the fact-finding conference and has complied with all relevant procedural requirements of the statute.

6. MSRS is governed by a Board, which is charged with the responsibilities, among others, to appoint an Executive Director and to "consider and dispose of, or take any other action the board of directors deems appropriate concerning denials of applications for annuities . . . under this chapter . . . ."[35]

7. The Executive Director is the administrative head of MSRS and is charged with the responsibility to "determine the amount of the annuities and disability benefits of employees covered by the system and authorize payment of the annuities and benefits . . . in accordance with the provisions of this chapter . . . ."[36]

8. The members of the Board and the Executive Director are fiduciaries, and as such, owe a fiduciary duty to "the active, deferred, and retired members of the [general employee retirement] plan, who are its beneficiaries," to the taxpayers, and to the state of Minnesota.[37]

9. The members of the Board are mandated to act in good faith and to exercise the judgment and care of a prudent person in the circumstances.[38]

10. The members of the Board carry out their activities to (1) provide authorized benefits to plan participants and beneficiaries, (2) incur and pay reasonable and necessary administrative expenses, and (3) manage a covered pension plan in accordance with the purposes and intent of the plan document."[39]

11. The Board's activities, which include the determination of the amount or duration of benefits, "must be carried out faithfully, without prejudice, and in a manner consistent with law and the plan document."[40]

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[34] Ex. 11.
[35] Minn. Stat. § 352.03, subd. 4(a)(2), (4).
[36] *Id.*, subd. 6(9).
[37] *Id.*, 356A.04, subd. 1.
[38] Minn. Stat. § 356A.04, subd. 2.
[39] Minn. Stat. § 356A.05(a).
[40] Minn. Stat. §§ 356A.02, subd. 2(2)-(4), 356A.05(b).

12. The plan member has the burden to show, by a preponderance of the evidence, that the plan member is not receiving the annuity benefit required by law.[41]

13. Mr. Musielewicz cannot maintain this burden because the Executive Director does not have the statutory authority to upwardly adjust a retirement benefit for a General Plan member beyond that which follows from a tabulation of either the step method or the level method.[42]

14. An annuity benefit of $3,814 per month is more than would be paid to a retiree with Mr. Musielewicz's years of service and salary history under a "single life" annuity option.[43]

15. The annuity estimate generated by Mr. Musielewicz's use of the MSRS pension benefit calculator was incorrect.[44]

16. A benefit of $3,391.09 per month is more than would be paid to a retiree with Mr. Musielewicz's years of service and salary history under a "75% survivor" annuity option.[45]

17. The annuity estimate remitted by MSRS staff to Mr. Musielewicz on November 17, 2017, was incorrect. It overestimated Mr. Musielewicz's future annuity benefits by 7.99 percent.[46]

Based upon the foregoing conclusions of law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED THAT the Board:

1. **AFFIRM** the Executive Director's denial of Mr. Musielewicz's request for an increase in his monthly annuity benefit.

2. **WARN** plan members of the known hazards and estimation errors that can result from a plan member's proper use of MSRS's pension benefit calculator.

Dated: February 25, 2019

Signature redacted

ERIC L. LIPMAN
Administrative Law Judge

[41] Minn. R. 1400.7300, subp. 5 (2017).
[42] Minn. Stat. § 352.115, subd. 3.
[43] Ex. 10 at 1.
[44] *Compare* Ex. 4, *with* Ex. 10 at 1.
[45] Ex. 8 at 2; Ex. 10 at 2.
[46] *Compare* Ex. 3, *with* Ex. 10 at 1.

NOTICE

This report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2018), the Board shall not make a final decision until this report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this report, and the Board must consider the exceptions in making a final decision. Parties should contact Erin Leonard, Executive Director, MSRS, 60 Empire Drive, Suite 300, St. Paul, Minnesota 55103, (651) 296-2761, to learn the procedure for filing exceptions or presenting argument.

MEMORANDUM

Mr. Musielewicz's argument is threefold: (1) he maintains that the mistakes rendered by the MSRS pension calculator, (2) MSRS's knowledge that its calculator was generating errors during the time that Mr. Musielewicz was submitting queries, and (3) the errors in the written estimate provided by MSRS staff all combine to form a promise to pay him at least $3,800 per month under a "single life" benefit option. Mr. Musielewicz bases his claim upon the doctrine of promissory estoppel. This doctrine implies a contract where the promisor makes a unilateral or otherwise unenforceable promise and the promisee relies on that promise to the promisee's detriment.[47]

While MSRS's conduct in this case is very troubling, and resulted in a reduced standard of living for Mr. Musielewicz, MSRS did not give a binding promise to pay Mr. Musielewicz $3,800 per month. Nor could it do so. As detailed below, Mr. Musielewicz's claim fails as a matter of law.

First, courts have not applied the doctrine of promissory estoppel to create an obligation to pay specific amounts when the initial, implied promise was not precise as to the benefits that would be conferred.[48] In this case, the MSRS forecasts of future benefits were qualified by the language that the amounts were "estimated" and that MSRS "reserved the right to correct errors and prepare a new estimate."[49] The application of the doctrine of promissory estoppel is not appropriate in cases where the promise to pay is not clear and definite.

This is particularly true in cases involving disclaimers. Minnesota courts have held that employees are not permitted to rely upon projections of future benefits when the accuracy or sustainability of those predictions is disclaimed in the very same documents.[50]

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[47] *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 748 (Minn. 1983); *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 593 (Minn. 1975); *see also* Restatement (Second) of Contracts § 90 (1981).

[48] *See Meriwether Minnesota Land & Timber, LLC v. State*, 818 N.W.2d 557 (Minn. Ct. App. 2012); *Faimon v. Winona State University*, 540 N.W.2d 879 (Minn. Ct. App. 1996).

[49] Exs. 3, 4.

[50] *See Barker v. Cnty. of Lyon*, 813 N.W.2d 424, 427 (Minn. Ct. App. 2012) ("It is not 'reasonable' to rely on language conferring benefits in a document providing that another person or entity has the right to

Further, to the extent that Mr. Musielewicz's estoppel claim seeks benefit amounts that he does not qualify for under Minnesota law, that claim must fail. Promissory estoppel claim cannot oblige a decision that MSRS does not have the decision-making power to make in the first instance.[51] One cannot, for example, press a government agency into violating a statute by way of estoppel.

The fact that there is money in MSRS's General Plan accounts does not alter this analysis. Unless there has been wrongful misconduct by agency officials – more wrongful than mere mistakes – the courts will not apply estoppel doctrines to require agencies to pay money in violation of the legislature's appropriations.[52] Negligent mistakes by agency employees will not override the separation of powers and the appropriation process – even in deserving cases.[53]

None of this is to say that MSRS's conduct in this case was a model of good government. It was not. The fact that agency officials knew that the MSRS pension benefit calculator was generating incorrect estimates in some cases and did not disable the calculator or otherwise warn visitors to the website of the known hazards beggars description. It also belies the agency's marketing claims that it serves plan members as their "foundation for retirement."[54] Not so in Mr. Musielewicz's case. Agency officials knew of a gaping hole in the "foundation" of plan members and did not make significant efforts to warn others away from that hazard.

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alter or terminate those benefits"); *see also Mahony v. Universal Pediatric Servs., Inc.*, 753 F.Supp.2d 839, 859 (S.D. Iowa 2010) ("[N]o reasonable person would have relied on representations found in a handbook that were disclaimed in the very same handbook"); *Rice v. NM, Inc. Ball & Roller Div.*, 210 S.W.3d 536, 543 (Tenn. Ct. App. 2006) ("Even if the plaintiff could show that the term sheet came to him in a promissory manner [i.e., we promise to pay you an estimated $165,000 at age 65], the plaintiff still cannot prevail because the specific amount of money "promised," is not "sufficiently definite to be enforced." "The $165,000 figure was an estimate. An estimate is simply that -- an estimate. An estimated amount cannot reasonably be construed as a guaranteed absolute figure.") (citation omitted).

[51] *See Bd. of Educ. of Minneapolis v. Sand*, 34 N.W.2d 689, 695 (Minn. 1948) ("Estoppel cannot be invoked to confer upon a political subdivision of the state governmental power otherwise lacking"); *see generally In Utah Power & Light Co. v. United States*, 243 U. S. 389, 408-409 (1917); *The Floyd Acceptances*, 7 Wall. 666 (1869).

[52] *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 838 (Minn. 2005) (the affirmative misconduct required for estoppel against the government "is not simple inadvertence, mistake, or imperfect conduct"); *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. Cnty. of Itasca*, 258 N.W.2d 877, 879-80 (Minn. 1977) (erroneous tax advice made in good faith was not sufficiently culpable to justify a finding of equitable estoppel against the government).

[53] *See generally OPM v. Richmond*, 496 U.S. 414, 428 (1990) ("operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive."); *Federal Crop Insurance Corporation v. Merrill*, 332 U. S. 380, 385-86 (1947) ("not even the temptations of a hard case" will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard "the duty of all courts to observe the conditions defined by Congress for charging the public treasury").

[54] *See, e.g.,* Ex. 15 at 1.

Even if it does not have the authority to provide monetary relief to Mr. Musielewicz, MSRS can act to protect others from similar harms.[55] And it should.

E. L. L.

[55] *See* Recommendation 2, *supra*; Minn. Stat. § 352.03, subds. 4(a)(3), 6(5), (15), 16.