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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1901**

Douglas R. Sell,
Relator,

vs.

Public Employees Retirement Association
of Minnesota, Board of Trustees,
Respondent.

**Filed July 18, 2011
Affirmed
Hudson, Judge**

Public Employees Retirement Association of Minnesota
PERA ID No. 302630

Marshall H. Tanick, Charles A. Horowitz, Mansfield, Tanick & Cohen, P.A.,
Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Rory H. Foley, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

Relator, a former state employee, argues that the board of the Public Employees Retirement Association (PERA) abused its discretion by failing to apply principles of equitable estoppel to restore certain service credit after written statements and PERA's website failed to reflect his earlier transfer and subsequent withdrawal of retirement funds. We affirm.

FACTS

Relator Douglas R. Sell first worked for the State of Minnesota from March–May 1970; at that time, he was enrolled as a member of the Minnesota State Retirement System (MSRS). He left state employment to enlist in the United States Air Force, where he served until his honorable discharge in 1977. Sell then worked for Minnesota local governmental units from 1978–1986. During that period, he was enrolled as a member of the Public Employees Retirement Association (PERA).¹

In 1986, Sell began work for the Minnesota State Board of Dentistry. In June 1986, he filed an election to transfer his then-existing, accumulated PERA contributions and service credit to MSRS. Those contributions covered his service from June 1, 1978–January 31, 1986, for total service credit of seven years, eight months. In 1991, Sell

¹ The Minnesota State Retirement System (MSRS) is a state-established retirement entity that provides benefits for state employees. The Public Employees Retirement Association (PERA) is a state-established retirement entity that provides benefits for employees of local governmental units. Both entities provide benefits based in part on credit for allowable service by an employee. *See* Minn. Stat. § 352.01, subd. 11 (2010) (defining allowable service relating to MSRS); Minn. Stat. § 353.01, subd. 16 (2010) (defining allowable service relating to PERA).

again left state government to work for local governmental units. In October 1991, he filed a retirement-plan withdrawal application with MSRS and withdrew over \$69,000 before taxes, the total sum in his MSRS account. He placed these funds in an investment account.

Sell continued to work for local governmental units and continued to pay into his PERA account. Despite Sell's earlier transfer, from PERA to MSRS, of funds representing seven years, eight months' service credit, he continued to receive benefit statements from PERA that erroneously included that service credit in his PERA account. Sell also frequently accessed online information relating to his benefit account, which also included the erroneous service credit.

In April 2010, Sell asked PERA about the cost of purchasing additional service credit for his PERA retirement, to account for his time in military service. When Sell ultimately spoke with a representative in June 2010, she also identified a different issue: that Sell's service credit had been revised downward, based on the 1986 transfer of his then-existing PERA service credit to MSRS. Sell told her that he did not recall making the transfer and that he was surprised by the reduction, which would require a significant revision to his retirement plans. He acknowledged that he had withdrawn the amounts earned for MSRS service credit and had no MSRS service credit left. He inquired as to the cost of purchasing back the service credit deleted from his PERA account.

The PERA executive director told Sell that relevant statutory law did not authorize reinstatement of service credit by repaying the refund transferred from PERA to MSRS, because once the transfer had been made, those contributions could not be restored to

PERA. Sell then contacted MSRS, who informed him that his cost to repurchase the seven years, eight months of lost service credit with MSRS would be \$183,366.31.

Through his attorney, Sell proposed a compromise that would allow him to repurchase PERA service credit for \$28,700; PERA rejected this offer and issued an administrative determination declining to restore his PERA service credit. He appealed that determination, arguing that PERA breached its contract to provide him with certain retirement benefits, or, in the alternative, that he was entitled to service-credit restoration based on principles of estoppel.

At a hearing before the PERA board, Sell argued that he had reasonably relied on the information in the PERA benefit statements and on PERA's website to calculate his future retirement benefits; he was nearing retirement; and he was unable to repay the amount sought to restore his full benefits. The PERA board denied Sell's request to restore his PERA service credit on the grounds that the credit and associated contributions had been transferred to MSRS; the credit was forfeited for purposes of determining his PERA benefit; and Sell had a remedy to restore service credit with MSRS, which would allow the calculation of an unreduced benefit and allow him to receive benefits as an MSRS annuity. This certiorari appeal follows.

DECISION

This court may reverse or modify PERA's decision if that decision is determined to be "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996) (quotation omitted). The PERA

board determined that Sell was not allowed to repurchase service credit from PERA after he transferred all of his then-existing PERA credit to MSRS in 1986.

“When any former [PERA] member accepts a refund, all existing service credits and all rights and benefits to which the person was entitled prior to the acceptance of the refund must terminate.” Minn. Stat. § 353.35, subd. 1 (2010). Service credit “must not be restored” unless the former employee (1) acquires at least six months of allowable service credit and (2) repays all of the refund, plus 8.5 % annual interest. *Id.*

Sell does not argue that he satisfied the statutory requirements for restoring service credit. The PERA board denied Sell’s request to restore seven years and eight months of service credit because he transferred that credit to MSRS and later withdrew the funds accumulated in his MSRS account. Sell does not dispute that this conclusion is mandated under the statute. Rather, he maintains that PERA should be equitably estopped from strictly applying the statute, based on the information supplied through PERA’s annual statements and website, which led him to believe that he still retained service credit with PERA for the amounts transferred to MSRS.

The discretionary doctrine of equitable estoppel is “intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights.” *Brown v. Minn. Dep’t of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985) (quotation omitted). To establish a claim for equitable estoppel, a plaintiff must show that he reasonably relied to his detriment on a defendant’s representations or inducements. *Id.*

Although “the government may be estopped if justice requires,” a plaintiff who wishes to invoke estoppel against a governmental agency must show an element of fault or wrongful conduct on the part of the agency and “has a heavy burden of proof.” *Id.* If no wrongful conduct is found to exist, no further analysis is required. *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980). “[The] ‘wrongful conduct’ element has . . . been interpreted to require some degree of malfeasance.” *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006); *see also Mesaba Aviation Div. v. Cnty. of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (concluding that county official’s erroneous tax advice did not give rise to estoppel). Most recently, the Minnesota Supreme Court held that, when a city employee mistakenly advised a homeowner that a survey was an “as-built” survey on which he could rely in constructing a shed on his property, the city’s error amounted only to “a simple mistake,” which did not constitute wrongful conduct necessary to establish the first element of equitable estoppel. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 26 (Minn. 2011).

Sell argues that PERA’s conduct of providing erroneous information to him in its annual statements and on its website amounted to “wrongful conduct.” But, as in *Sarpal*, Sell has failed to show that PERA’s conduct in supplying the erroneous information was anything more than a “simple mistake,” which cannot establish wrongful conduct. *See id.* at 25–26 (stating that “a simple mistake by a government official is not wrongful”).

Additionally, even if PERA’s action could constitute wrongful conduct, Sell has failed to establish the additional requirement of reasonable reliance. *See Brown*, 368 N.W.2d at 910 (stating that equitable estoppel requires reasonable reliance). Since at

least 2001, Sell's yearly PERA benefit statements have stated that they contain "estimates . . . for informational purposes only," and they advise that "the law will govern in the event of any conflict with the information on this statement." Sell does not dispute documentation establishing his 1986 transfer of all of his existing PERA credit to MSRS. He also acknowledges that, in 1991, he withdrew approximately \$69,000, which represented his accumulated MSRS service credit, and placed that money in an investment account. Sell received PERA statements for 1991 and subsequent years, which did not reflect a reduction in service credit, even though he had withdrawn those funds. Based on his previous transfer of credit to MSRS and his subsequent withdrawal of the MSRS funds, we cannot conclude that his reliance on the erroneous service-credit information in the PERA statements and on the website was reasonable.

In reviewing whether to apply principles of equitable estoppel against PERA, we also note that the PERA board owes a fiduciary duty not only to Sell, but also to the plan and to its members. Minn. Stat. § 353.03, subd. 1(f) (2010); *see Mesaba Aviation Div.*, 258 N.W.2d at 880 (noting public-interest factor in determining whether equitable estoppel should be applied against government). That duty encompasses acting in good faith and exercising due care in the administration of the plan and its capital, Minn. Stat. § 356A.04, subd. 2 (2010), and would be compromised if PERA were not entitled to correct clerical errors by properly recalculating benefits.

Sell also raises the procedural argument that he lacked an opportunity to raise the factual issue of reasonable reliance before an administrative agency. But Sell received an administrative determination that he could not have his service credit restored, and he

appealed that determination to the PERA board. *See* Minn. Stat. § 356.96 (2010) (stating public pension plan appeal procedures). Sell appeared at a hearing before the PERA board and argued that he reasonably relied on the benefit statements and the website to calculate his future retirement benefits. The PERA board rejected his argument, and substantial evidence supports PERA's determination.

We conclude that the doctrine of equitable estoppel did not preclude PERA from correcting Sell's service record and denying him restoration of his service credit.

Affirmed.