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### Summary of Nevada Public Employees Retirement Board v. Smith, 129 Nev. Adv. Op. 65

Jeff Scarborough  
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ADMINISTRATIVE LAW: PUBLIC EMPLOYEE RETIREMENT SYSTEM (PERS)

**Summary**

The Court determined two issues: (1) whether an employee under the Public Employees' Retirement System ("PERS") could receive retirement benefits before effectively retiring from PERS; and (2) whether an employee under PERS is entitled to equitable relief under NRS 286.190(3)(a) against PERS when PERS did not provide inaccurate information.

**Disposition**

PERS members may not receive PERS retirement benefits until they effectively retire from PERS, per NRS 286.541. Furthermore, an employee under PERS is not entitled to equitable relief against PERS under NRS 286.190(3)(a) when there is nothing to suggest that PERS falsely recorded information or provided inaccurate information on which the employee detrimentally relied upon.

**Factual and Procedural History**

Judge Douglas Smith was justice of the peace with 23 years of Public Employees' Retirement System ("PERS") service, and was elected to the Eighth Judicial District Court in November of 2008. Judge Smith consulted with PERS about retirement options using an expected retirement date of December 31, 2008. PERS provided Judge Smith with a guide that stated his effective date of retirement is the day after his last day of employment, the day after his application is received, or the date requested on the application, whichever is later.

Judge Smith consulted Clark County about health insurance. Judge Smith faced a gap between plans. Judge Smith learned that he could extend his and his family's health insurance up to February 1st if he continued as a justice of the peace into January. Judge Smith provided a resignation letter to Clark County designating January 4, 2009, as his last day. Clark County reported Judge Smith's termination date as January 4, 2009, and afforded him coverage through January 31, 2009. Judge Smith received his last Clark County paycheck on December 19, 2008.

Judge Smith waited until January 8, 2009 to file papers required to retire from PERS. By then, he had been sworn in as a district court judge. In that capacity, he was employed by a PERS-eligible employer and earning creditable service with PERS. After research, PERS determined that Judge Smith could not retire from PERS while employed in a PERS-eligible position. PERS therefore denied Judge Smith's application for retirement benefits. Judge Smith appealed PERS's decision to the PERS Board. Judge Smith cited NRS 286.190(3)(a) and asked for an equitable exception to NRS 286.541(2). He argued it was unduly harsh to deny him early retirement benefits because he filed his paperwork three days late. The Board denied Judge Smith's appeal and held that the NRS 286.541(2) "clearly prohibits a member from retiring while he is actively employed and receiving service credit."

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<sup>1</sup> By Jeff Scarborough

Under NRS 1A.280(3)(a), Judge Smith had until March 31, 2009, to give written notice that he intended to withdraw from PERS and participate in Judicial Retirement System (“JRS”). If he did not, he would automatically remain in PERS.<sup>2</sup> Judge Smith signed and faxed his JRS election form on March 31. Judge Smith transmitted the election form under a letter stating that he was doing so “under protest as there is an open appeal process on going.” Pursuant to Judge Smith's election, PERS calculated its retirement benefits liability to him at more than \$1 million. On June 15, 2009, PERS transferred that sum to JRS, which has invested and managed it since.

Judge Smith petitioned for judicial review. The district court reversed the PERS Board's decision to deny Judge Smith's retirement application, declared a retroactive retirement date of January 8, 2009, and ordered PERS to pay all retirement payments due retroactive to January 8, 2009. PERS timely appealed. The district court held that PERS should have honored Judge Smith's benefits even after he was sworn in as a district court judge and that PERS should have equitably excused Judge Smith's noncompliance with NRS 286.541 and allowed him to reverse his eventual election to transfer from PERS to JRS.

## **Discussion**

*PERS members may not receive PERS retirement benefits until they effectively retire from PERS.*

NRS 286.541(2) defines when a PERS member's retirement becomes effective. Under NRS 286.541(2), retirement becomes effective on whichever of the following days is the later: (a) the day immediately following the applicant's last day of employment; (b) the day the completed application form is filed with the System; (c) the day immediately following the applicant's last day of creditable service; or (d) the effective date of retirement specified on the application form.

To retire from PERS, NRS 286.541(1) requires the member to file a completed application for service retirement allowances with PERS. NRS 286.541(2) defines the effective date of retirement from PERS. It is the latter of the four listed conditions. It can be the day after the employee's last day of employment, if the other three conditions have been met. It can be the day the completed application form is filed with PERS, if the other three conditions have been met. It can be the day after the employee's last day of creditable service, if the other conditions have occurred. Or it can be the effective date specified on the application, again if the other three conditions have been satisfied. Even if an employee has met all the other conditions of NRS 286.541(2), paragraphs (a) and (c) preclude an employee from effectively retiring until the day after the employee's last day of creditable service, whichever is later. Together, paragraphs (a) and (c) thus prevent an in-service distribution. But the district court held that NRS 286.541(2) sets a retirement date only for purposes of calculating benefits, thus allowing Judge Smith to retire from PERS even after going to work for a PERS-eligible employer. This Court found the district court's reading wrong.

Here, the Court found the statute conveys that the retirement from PERS becomes effective when the last of the four specified events occurs. The statute does not establish a

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<sup>2</sup> NEV. REV. STAT. § 1A.280(5) (2012).

retirement date for a limited purpose, and it never uses the word “benefits.” It would not make sense if NRS 286.541(2) applied solely to calculating benefits because other sections do so.

The PERS Board governs PERS.<sup>3</sup> PERS does not limit NRS 286.541 to the calculation of benefits. Instead, PERS determines a member's effective retirement date based on information the member provides and which of the four events listed in NRS 286.541(2) occurs last. Thus, the Court concluded that an employee cannot effectively retire from PERS until the day when the last of the four enumerated requirements is complete.

Here, Judge Smith remained an active PERS member until March 31, 2009, when he elected to transfer to JRS. The Board decided that the earliest Judge Smith could have effectively retired would have been January 8, 2009, “[t]he day the completed application form [was] filed with the System.”<sup>4</sup> But because Judge Smith took his elected office on January 5, 2009, PERS received the application while he was employed in a PERS-eligible job. Under paragraphs NRS 286.541(2), a member still employed in a PERS-eligible job may not receive retirement benefits because he has not yet reached an effective “last day of employment.”

Judge Smith's JRS election further complicates matters since he no longer has a PERS account from which he could draw benefits; all PERS contributions and liabilities have been transferred to JRS. The Court recognized that Judge Smith's dispute with the PERS Board affected his decision to join JRS, but NRS IA.280 does not allow an employee to revoke his decision. Pursuant to NRS IA.280(6), a judge who exercises the option to switch from PERS to JRS “may not re-establish the service for which the liabilities were transferred.” Accordingly, after the Board transferred Judge Smith's accrued benefits from his PERS account to his new JRS account, he can no longer participate in or receive benefits from PERS.

*Judge Smith is not entitled to equitable relief under NRS 286.190(3)(a).*

NRS 286.190(3)(a) provides that the PERS Board: “May: (a) adjust the service or correct the records, allowance or benefits of any member, retired employee or beneficiary after an error or inequity has been determined, and require repayment of any money determined to have been paid by the System in error, if the money was paid within 6 years before demand for its repayment.”<sup>5</sup> NRS 286.190(4) defines “error or inequity” as “the existence of extenuating circumstances, including, but not limited to, a member's reasonable and detrimental reliance on representations made by the System or by the public employer pursuant to NRS 286.288 which prove to be erroneous, or the mental incapacity of the member.”

The district court ignored the statute's use of the permissive “may,” and contravened the presumption that every word, phrase, and provision in a statute has meaning.<sup>6</sup> “A statute's express definition of a term controls the construction of that term no matter where the term

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<sup>3</sup> See NEV. REV. STAT. § 286.120 (2012).

<sup>4</sup> NEV. REV. STAT. § 286.541(2)(b) (2012).

<sup>5</sup> NEV. REV. STAT. § 286.190(3)(a).

<sup>6</sup> Law Offices of Barry Levinson, P.C. v. Milk, 124 Nev. 355, 366-67, 184 P.3d 378, 386-87 (2008); In re Prosole, 32 Nev. 378, 383, 108 P. 630, 632-33 (1910).

appears in the statute,” so NRS 286.190(4)'s definition of “error or inequity” controls.<sup>7</sup> Under NRS 286.190(4), error or inequity signifies extenuating circumstances, such as detrimental reliance or mental incapacity of the member. Although its use of “including, but not limited to” makes NRS 286.190(4)'s list of extenuating circumstances non-exhaustive, it is significant that none of the examples involves employee fault or neglect.

Judge Smith and dissenters cite *Nevada Public Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980), arguing that “our courts have the inherent power to seek and to do equity.” This is a true statement but the circumstances in *Byrne* were much different from Judge Smith's. In *Byrne*, PERS incorrectly told an employee he would receive \$725.35 a month upon retirement, but when the employee retired, he received a mere \$86.78 a month.<sup>8</sup> Here, PERS gave Judge Smith accurate “Estimated Calculations.” Unlike *Byrne*, nothing suggests the Board falsely recorded information or gave him inaccurate information on which he detrimentally relied. It appears that he delayed sending his retirement notice so as to ensure no gap in health insurance coverage as he changed jobs; this was his choice.

The PERS Board did not abuse its discretion when it determined that Judge Smith must wait until he retires from his current employment to collect his benefit.

### **Conclusion**

Here, Judge Smith cannot receive PERS benefits because he did not effectively retire from PERS under NRS 286.541. Additionally, Judge Smith is not entitled to equitable relief because there was nothing to suggest the PERS Board acted incorrectly on which Judge Smith detrimentally relied upon.

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<sup>7</sup> *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002); 1A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 20:8 (6th ed. 2002).

<sup>8</sup> *Nevada Pub. Emps. Ret. Bd. v. Byrne*, 96 Nev. 276, 278, 607 P.2d 1351, 1352 (1980).