

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the matter of VERONICA FOUSHEE.

UNPUBLISHED  
November 2, 1999

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VERONICA FOUSHEE,

No. 208136  
Wayne Circuit Court

Plaintiff-Appellee,

LC No. 96-646682 AS

v

WAYNE COUNTY RETIREMENT  
COMMISSION,

Defendant-Appellant.

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Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

I. Introduction

Defendant Wayne County Retirement Commission appeals as of right an order for superintending control and payment of disability retirement benefits entered in favor of plaintiff Veronica Foushee. We affirm.

II. Basic Facts

Foushee was a Wayne County employee for more than twenty years. The parties do not dispute that on August 9, 1990, Foushee was at work as a food service supervisor at the Wayne County Jail when a food service truck tailgate fell on her, injuring her neck, shoulder, and hand. The record does not reveal a great many details regarding this accident other than indicating that Foushee sustained additional injuries or aggravated the injuries she received from the tailgate when she assisted another worker injured in the accident. She returned to work the next day and, somehow, further aggravated the injury, which prompted her to seek medical care.

Two months after the injury, on October 12, 1990, Foushee applied for disability retirement, which we understand to mean that she would be eligible for special retirement benefits because she

sustained a disabling injury. The Commission's Medical Director, Dr. Henry Kaine, examined Foushee and reported to the Commission that she was partially disabled and could not work at that time. He did not find that she was totally and permanently disabled and, accordingly, recommended that the Commission deny her request for disability retirement. The Commission denied her application on November 26, 1990. On November 28, 1990, Foushee applied for "normal retirement" benefits, based on her years of service, pursuant to Wayne County Retirement Ordinance (the "Retirement Ordinance") §10.01. In an affidavit attached to her motion for superintending control and payment of retirement benefits, Foushee alleged that

[a]t the time of my application for service retirement benefits, I was told by the representative of the Wayne County Retirement Commission who processed my application that I could later convert to a disability retirement upon providing the Commission with sufficient medical documentation.

Presumably, any retirement benefit conversion would occur pursuant to Retirement Ordinance §20.01. The Commission finally approved her application for "normal," service-based retirement benefits on February 1, 1991.

On February 14, 1991, two weeks later, Foushee asked the Commission to convert her normal retirement benefits, which she called her "straight life retirement," to disability retirement. The Commission responded to Foushee's request with a February 27, 1991 letter directing her to make another appointment with Dr. Kaine, presumably so that he could assess her level of disability. Dr. Kaine observed weakness in Foushee's right arm and a mass behind her right shoulder. He could not determine whether the weakness was "voluntary or otherwise" and would not venture an opinion on the degree or permanence of her disability until he received the results of additional medical tests. Subsequently, in an April 29, 1991 letter, the Commission informed Foushee that it "Passed for the Day" on her request for disability retirement. A hand-written and difficult-to-decipher note on the bottom of this letter states that Foushee called the Commission on May 2, 1991 and indicated that she was awaiting additional test results and would contact the Commission, we assume, to forward those results for its consideration.

On February 9, 1993, well after Foushee requested disability retirement benefits, the Commission apparently received an opinion letter from its counsel addressing whether the Retirement Ordinance would allow an individual receiving normal retirement benefits to convert to disability retirement. The opinion letter, individually signed by counsel to the Commission, concluded that the Retirement Ordinance did *not* provide for such a conversion. Nevertheless, Foushee received a letter signed by Ronald Yee, Deputy Director of the Wayne County Employees' Retirement System dated June 20, 1995, which said in pertinent part:

Upon receipt of additional medical documentation as to the extent of your medical problems, we will request that our Medical Director make a determination in your case. Should you be granted a Duty Disability retirement your pension benefit would be recalculated and a retroactive benefit paid in addition to an increased monthly benefit.

Mr. Yee was apparently either unaware of the February 9, 1993 opinion letter from the Commission's counsel or he elected to disregard it. Rather clearly, in our view, Mr. Yee's letter contemplated that the Retirement Ordinance allowed an individual retired under normal retirement to convert to disability retirement, exactly contrary to the conclusion the Commission's counsel reached in the February 9, 1993 opinion letter.

Apparently acting in reliance on Mr. Yee's representation that the Commission would permit a retired employee to convert the form of retirement benefits he or she received in certain circumstances, Foushee went to two physicians seeking documentation of her disability. Dr. Norvil Wyche found that she suffered from a number of physical problems as well as a "post traumatic nervous disorder." Dr. Kafi, a psychiatrist, reached a similar diagnosis, and both concluded that Foushee was totally and permanently disabled specifically due to the accidents at work in August 1990. Most importantly, Foushee submitted this new medical information to Dr. Kaine. Finally, on August 10, 1995, Dr. Kaine wrote to the Commission recommending that it grant Foushee the disability retirement because she was totally and permanently disabled. He recommended that she be reevaluated for her disability after a year.

Despite Dr. Kaine's recommendation, the Commission again denied Foushee's request to convert her normal retirement benefits to disability retirement. On September 11, 1995, Joseph A. Magda, Executive Director of the Wayne County Employee's Retirement System sent a letter to Foushee explaining this decision:

[T]he Retirement Commission voted to deny your request for a conversion from a regular retirement to a duty disability retirement. The reason for this denial was that the Commission did not feel that the basis under which you were paid Worker's Compensation benefits (physical injury caused as a result of the tailgate of a cart falling on your right arm), was the same injury under which you are now totally and permanently disabled (major depression with psychotic features associated with post traumatic stress syndrome).

Mr. Magda's description of the decision did not refer, in any sense, to the February 9, 1993 opinion letter indicating that the Commission would violate the Retirement Ordinance if it allowed an individual who received normal retirement to convert his or her benefits to duty disability retirement. Rather, the *only* reason Mr. Magda gave for denying Foushee's request was that the Commission did not believe that her psychiatric problems were related to the injury at work.

Foushee appealed this decision to the Commission, alleging that it had articulated an improper "reason" for the denial. On January 29, 1996, the Commission denied this appeal. This time Mr. Magda's letter, also dated January 29, 1996, explained that after "a closed client counsel session," the Commission based its denial on:

1) a prior opinion from Corporation Counsel dated February 9, 1993, opining that the Retirement Ordinance does not provide for an individual who chose to retire under normal retirement, to convert to a disability retirement; 2) the agreement signed

by Ms. Foushee in redeeming her Worker's Compensation claim precludes her from now modifying her retirement selection and 3) the condition from which Ms. Foushee is disabled from working is not the condition from which she had been in receipt of Worker's Compensation benefits and is [sic] therefore not eligible for a duty disability retirement.

Evidently, this letter was the first time that the Commission notified Foushee that it was relying on the February 9, 1993 opinion letter to justify the denial, almost *five years* after Foushee filed her application to convert her benefits and almost *three years* after the Commission received the opinion letter itself. This communication was, apparently, also the first time that the Commission notified Foushee that it believed that the agreement she signed to redeem her Worker's Compensation claim precluded her from modifying her retirement selection, more than *two years* after Foushee signed the agreement.

### III. Proceedings Below

In mid-November 1996, Foushee filed a complaint in the circuit court seeking an order of superintending control to compel the Commission to reverse its decision denying her disability retirement. Foushee alleged that she was entitled to disability retirement pursuant to Retirement Ordinance §20.01(a)(5) because she had the requisite approval from Dr. Kaine and the Retirement Ordinance did not give the Commission the discretion to ignore a recommendation by its Medical Director that she receive disability retirement benefits.

The Commission countered that Retirement Ordinance § 20.01 did not apply to Foushee because she retired *before* she applied for disability retirement benefits and, thus, was not a "member" of the retirement system at that time as the Retirement Ordinance required. Among a number of other affirmative defenses, most of which are not relevant to this appeal, the Commission asserted that superintending control was inappropriate because it acted in accordance with the law, presumably the Retirement Ordinance, and Foushee Worker's Compensation redemption agreement precluded any future claims for her injuries.

Supporting her claim, Foushee argued in her circuit court brief that the Commission's assertion that her disabling injury had to be the same injury for which she received Worker's Compensation came from Retirement Ordinance § 14.05, which did not apply to her because of her length of service, and that the evidence on the record clearly supported a conclusion that the food service truck accident actually caused her disabling injury. She contended that it was "unfair" of the Commission to articulate new reasons for its denial, including the inability to covert her benefits, when the Commission invited her to continue to submit evidence of a disability, essentially representing that conversion was possible. Furthermore, she pointed out that she was actually an active "member" of the retirement system when she first applied for and was denied the disability benefits and that the Worker's Compensation redemption agreement expressly provided that it did not affect her retirement benefits. Finally, she argued, the Retirement Ordinance contemplated this sort of conversion given the remedial nature of retirement benefits and the absence of a prohibition against converting from normal to duty disability retirement benefits.

In light of these positions, the circuit court engaged in a relatively lengthy discussion on the record with counsel for both parties regarding the potential for converting retirement benefits under the Retirement Ordinance and the evidence purportedly supporting the Commission's denial. The circuit court concluded that, given the language of the redemption agreement, Foushee retained all her rights under the Retirement Ordinance. Counsel for the Commission conceded as much when she concurred with the court's statement that "[Foushee] still had whatever rights she had under the retirement ordinance, she still had even though she kind [sic: signed] this Waiver and Release." Counsel for the Commission stated that she "wouldn't disagree" with the circuit court's characterization of county retirees as "inactive" members of the retirement system, but members nonetheless. When all was said and done, the Commission's attorney essentially admitted that there was nothing in the Retirement Ordinance that prohibited the Commission from granting Foushee the disability retirement, but that the Commission was justified in denying her request in this instance because Foushee's primary disabling injury, her post-traumatic stress disorder, was not related to her initial injury at work. The circuit court disagreed completely, finding that there was no "substantial, competent, and material evidence on the record" that the post-traumatic stress disorder was unrelated to Foushee's initial injury at work. In fact, the circuit court noted, both of Foushee's physicians and the Commission's physician, Dr. Kaine, found a direct connection between the accident and Foushee's disabling mental health problems.

Thereafter, the circuit court entered an order of superintending control that directed the Commission to convert Foushee to disability retirement retroactive to June 27, 1995, to pay her the difference between disability and normal retirement benefits retroactive to that date, and to pay her disability retirement benefits from that date forward. The circuit court denied the Commission's motion for reconsideration.

#### IV. Superintending Control

The nature of the action in the circuit court gives us an important framework for our analysis. Thus, it is important to understand that an order of superintending control is an original action "designed to require the defendant to perform a clear legal duty" or to correct an error of law. *In re Lafayette Towers*, 200 Mich App 269, 272; 503 NW2d 740 (1993). Such an order "enforces the superintending control power of a court over lower courts or tribunals," including administrative agencies that act in a "judicial or quasi-judicial" capacity. *Beer v Fraser Civil Service Comm*, 127 Mich App 239, 243; 338 NW2d 197 (1983). This authority vested in superior courts to compel a lower body to act according to the law derives from statute and court rule. See generally MCL 600.615; MSA 27A.615; MCR 3.302. Superintending control is, in every sense of the word, an "extraordinary" remedy, *In re Wayne County Prosecutor*, 232 Mich App 482, 484; 591 NW2d 359 (1999), and is only obtainable if "another plain, speedy, and adequate remedy is not available," *Chrysler Corp v Dep't of Civil Rights*, 117 Mich App 95, 102; 323 NW2d 608 (1982), citing *Farmers State Bank of Concord v Dep't of Commerce, Financial Institutions Bureau*, 77 Mich App 313; 258 NW2d 496 (1977). See MCR 3.302(B).

The parties, on appeal, advance essentially the same arguments they pursued in the circuit court. That leaves us in a somewhat awkward position because their arguments do not take into account the standards of review that we must employ to review a circuit court's decision to grant an order of

superintending control, which we describe in more detail later in this opinion. We do not sit in the place of the circuit court on this matter.

Moreover, the Commission's decision to continue to press its legal arguments regarding the redemption agreement and the inflexibility of the Retirement Ordinance without any hesitation strikes us as inconsistent with its attorney's statements at the hearing on this matter. In the criminal trial context, the similar action of failing to object, which concedes a point as effectively as the Commission's attorney's statements at the hearing, constitutes a waiver of the underlying issue on appeal. See *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). Therefore, we will not address the argument related to the redemption agreement.<sup>1</sup> See *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506, 515-516; 442 NW2d 720 (1989) (Court will not address an issue that a party "withdrew" in the lower court even if raised again on appeal). We will, however, address converting benefits under the Retirement Ordinance, despite these admissions, because this issue may affect other Wayne County employees. We address the evidence on the record supporting the Commission's conclusion that Foushee's post-traumatic stress disorder did not qualify her for disability retirement because the parties raised and disputed that issue below. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

## V. Conversion Under The Retirement Ordinance

### A. Standard Of Review

We review a circuit court's decision to grant or deny a request for an order of superintending control for an abuse of discretion. *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). When that decision revolves around a question of law, as with deciding whether Retirement Ordinance § 20.01 applies in this case, we address the legal question de novo. See *id.*

The abuse of discretion standard is better applied to the circuit court's factual findings related to granting or denying a request for an order of superintending control. See *In re Gosnell*, *supra* at 333. A court abuses its discretion when its decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

There was some confusion in the briefs and the record concerning the appropriate standard for the circuit court to apply when determining whether to grant or deny an order of superintending control. The parties and the court appeared to conclude that the standard of review for agency action in the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, applied in this case. See MCL 24.306(1); MSA 3.560(206)(1). However, the APA does not apply to this case because the Commission is not a state agency. See MCL 24.203; MSA 3.560(103); *City of Detroit v General Foods Corp*, 39 Mich App 180, 185-186; 197 NW2d 315 (1972). Rather, when dealing with common-law writs, the proper standard to apply in the trial court is a "substantial evidence test."<sup>2</sup> *In re Payne*, 444 Mich 679, 687-690; 514 NW2d 121 (1994).

As a result of this standard of review, and in the context of this case, a circuit court would abuse its discretion if it entered the order of superintending control without evidence that the Commission acted without “substantial evidence” to justify its denial of Foushee’s request to convert her retirement benefits. Accordingly, we examine the circuit court’s factual findings with an eye to the evidence of the Commission’s findings in this case. Nevertheless, to be clear, our review is not a direct, de novo review of the Commission’s actions when they relate to factual matters and we give the circuit court the “considerable” amount of deference that the “abuse of discretion” standard of review typically requires. See *Fletcher v Fletcher*, 200 Mich App 505, 512; 504 NW2d 684 (1993), modified on other grounds 447 Mich 871 (1994); see also *Alken-Ziegler, Inc v Waterbury Headers Corp*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (rel’d 10/12/1999), slip op at 8-9.

### B. Interpreting The Retirement Ordinance

We interpret ordinances in the manner that we interpret statutes. *Jones v Wilcox*, 190 Mich App 564, 566; 476 NW2d 473 (1991). If the language of the ordinance is unambiguous, then we apply it as written. *Id.* Because we read the ordinance as a whole, we must assume that every word has meaning. *Bannan v City of Saginaw*, 420 Mich 376, 384-385; 362 NW2d 668 (1984). We are mindful of the purpose of the ordinance, and may not abandon “the canon of common sense” when interpreting the Retirement Ordinance in a reasonable manner. *Id.*; *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 395, 406; 597 NW2d 284 (1999).

### C. Section 20.01

The relevant portion of § 20.01 of the Retirement Ordinance, entitled “General requirements for disability retirement,” provides:

- (a) The Retirement Commission may retire a member on account of disability if each of the following conditions are satisfied:
  - (1) A written application for disability retirement, in the form prescribed by the Retirement System, has been filed with the Retirement System by the member or the member’s department head;
  - (2) Membership is terminated prior to the selected date of retirement;
  - (3) The member meets the service requirements for disability retirement specified by the member’s coverage group and benefit plan;
  - (4) The member is medically examined by or under the direction of the medical director;
  - (5) The medical director certifies that (i) the member is mentally or physically incapacitated for continued employment by the County, (ii) the incapacity is likely to be permanent, and (iii) the member should be retired on account of the incapacity.

#### (1) *Defining A Member*

Our first task is to determine the meaning of the term “member,” which appears in every sentence of § 20.01. The Retirement Ordinance does not specifically define the term “member.” Section 2.10 does define a “retired member” as “an individual who is being paid a pension on account of the *individual’s membership* in the Retirement System.” [Emphasis added.] The circuit court noted the reflexive character of that definition; a “retired member” is a “member” of the Retirement System. Under this definition, we agree with the circuit court that Foushee is both a “member” of the Retirement System as well a “retired member” because she draws a pension. This is not inconsistent with the definition of a “member” in *Random House Webster’s College Dictionary* (2<sup>nd</sup> ed), which is a “person . . . belonging to or forming part of an organization . . .” See *Weisman v US Blades, Inc*, 217 Mich App 565, 568; 552 NW2d 484 (1996) (Court may refer to a dictionary to aid in common understanding of a word). In this case, Foushee belongs to or forms part of the Retirement System. Her connection to the Retirement System is clear from her years of service and her ability to draw normal retirement benefits.

The Retirement Ordinance may use the terms “retired member” and “member” to differentiate between a current employee and a retiree. However, we do not see any evidence of such a distinction from the relevant sections of the Retirement Ordinance that the parties provided for us. Therefore, we do not go so far as to conclude that “member” and “retired member” are mutually exclusive terms. Instead, we keep an eye open for the context in which the Retirement Ordinance uses those terms.

### (2) *Who “May Retire”*

With this definition of “member” in mind, we turn back to the text of § 20.01. We first observe that, as the Commission argues, the term “may” in subsection (a) indicates that it has discretion to permit a member to draw disability retirement benefits. See *Law Dep’t Employees Union v Flint*, 64 Mich App 359, 368; 235 NW2d 783 (1975). There is nothing in subsection (a) that specifically asserts that it only applies to an initial decision of the Commission to permit a “member” to go from active employment status to retirement. Nor does the language give any hint that it is inapplicable to an attempt to convert between normal and disability retirement benefits for a “member.” Rather, subsection (a) specifically refers the Commission to the terms in subsections (a)(1) through (a)(5) to define the scope of its discretion. In essence, subsection (a) is not a substantive provision. It merely sets the ground rules, so to speak, for determining when the Commission may permit disability retirement, establishing that a “member” must meet *every* requirement in subsections (a)(1) through (a)(5) before she or he can receive disability retirement benefits. As noted above, and in the absence of any explicit distinction between a “member” and a “retired member,” Foushee is a “member” within the meaning of subsection (a). Accordingly, we examine each of the five following criteria to determine if Foushee falls within the definition of a member whom the Commission “may retire” under this section.

### (3) *The First Factor*

Preliminarily, the Commission requires certain paperwork to commence the process for determining eligibility for disability retirement. The parties do not dispute that she filled out the necessary paperwork to apply for disability retirement, even before she first applied for normal retirement benefits. Thus, we find that Foushee fulfilled the terms of subsection (a)(1).

#### (4) *The Second Factor*

Subsection (a)(2) is difficult to understand and the parties vigorously dispute its meaning. This factor appears to refer to a temporal relationship between when a member ceases actively working for Wayne County and when he or she begins to draw disability retirement benefits. After reading § 20.01 as a whole and comparing it to the identical clause in § 10.01(a)(2) for normal retirement benefits, we conclude that the only logical meaning of this condition is to preclude a member of the Retirement System from drawing retirement benefits before she or he actually retires. *Bannan, supra* at 384-385. That is, “members” cannot work and draw a salary or earn a wage from Wayne County while also drawing disability retirement benefits (or normal retirement benefits, for that matter). Furthermore, there is no language in § 20.01 or other logical reason to apply these identical phrases differently in the normal and disability retirement contexts. Thus, we take careful note of the Commission’s willingness to permit Foushee to retire under § 10.01, implicitly finding that she met this criterion for normal retirement benefits, and hold the Commission to that same interpretation in the disability retirement context. We find that Foushee passed this second threshold test.

#### (5) *The Third Factor*

Subsection (a)(3) refers to “service requirements for disability retirement specified by the member’s coverage group and benefit plan,” apparently referring to the length of time a member must be an active employee to qualify for disability retirement benefits. Section 14.05 states that

[t]he service requirement for disability retirement is 10 or more years of credited service. The service requirement is waived if the retirement Commission finds the disability to be the natural and proximate result of actual performance of duty in the employ of the County and worker’s compensation is paid on account of the same disability.

The Commission does not dispute that Foushee fulfilled the service requirement by working for Wayne County for more than twenty years. Although the Commission evidently argues that Foushee does not meet the waiver requirement because the disabling injury, the post-traumatic stress disorder, is unrelated to “actual performance of duty in the employ of the County” and her Worker’s Compensation was for the injury specifically to her hand and arm, not the post-traumatic stress disorder, the argument is irrelevant. By the plain language in § 14.05, Foushee would only need to fulfill those criteria if she had not already served “10 or more years of credited service.” She worked for many more than the required number of years, and we find that, as the circuit properly noted, has fulfilled this criterion for disability retirement benefits.

#### (6) *The Fourth Factor*

Subsection (a)(4) requires little discussion because it obliged Foushee to be “medically examined by or under the direction of the medical director,” Dr. Kaine. The record indicates that Dr. Kaine examined her at least three times. We find that there is no question that Foushee adhered to this fourth provision.

(7) *The Fifth Factor*

In conjunction with subsection (a)(4), subsection (a)(5) requires the Commission's medical director to determine that "(i) the member is mentally or physically incapacitated for continued employment by the County, (ii) the incapacity is likely to be permanent, and (iii) the member should be retired on account of the incapacity." Dr. Kaine made each of these findings in his August 10, 1995 letter to the Commission, referring to his own observations of Foushee's condition as well as Drs. Kafi and Wyche's opinions. According to Mr. Magda's January 29, 1996 letter to Foushee, the Commission ultimately rejected Dr. Kaine's recommendation because the Commission believed that "the condition from which Ms. Foushee is disabled from working is not the condition from which she had been in receipt of Worker's Compensation benefits and is [sic] therefore not eligible for a duty disability retirement."

We underscore that there is no language in § 20.01 whatsoever that implies these conditions for disability retirement benefits. Furthermore, as discussed above, the Commission cannot read those conditions into § 20.01 through the definition of "service requirement" in § 14.05 in this case because Foushee worked more than ten years and did not have to rely on the terms of the waiver provision in § 14.05. As a result, where and when Foushee received her disabling injury is irrelevant so long as Dr. Kaine certified that she met the three criteria in § 20.01(a)(5). The Commission's inability to point to any evidence on the record contradicting the permanent and complete nature of Foushee's disability in light of Drs. Kaine, Kafi, and Wyche's contrary opinions, certainly means that it did not have the "substantial evidence" required to support its denial. Accordingly, we find that Foushee met these criteria and the circuit court did not err when it concluded that the Commission lacked "substantial, competent, and material evidence" for its denial.

(D) The Conversion Question

The Commission raises an important point when it notes that, unlike converting from disability retirement benefits to normal retirement benefits, the Retirement Ordinance lacks an express provision for the change Foushee desires to make: from normal retirement benefits to disability retirement benefits. If we were able to identify an express clause in the Retirement Ordinance permitting this change, then our analysis would be far easier. However, a number of reasons persuade us that the absence of such an express provision indicates that the Retirement Ordinance's drafters did not contemplate that a change in this direction is impermissible.

First, the absence of any express requirement that a retiree who served ten or more years as a Wayne County employee suffer a job-related disabling injury as a condition of receiving disability retirement benefits suggests that the Retirement Ordinance drafters intended to protect loyal, long-serving employees *during* their retirement and not merely up to the time they retired. See *Bannan, supra* at 322, citing *O'Connell v Dearborn Police & Fire Pension Bd*, 334 Mich 208; 54 NW2d 301 (1952) ("While defendant argues that this distinction [between retirement benefits that stem from charters and ordinances] elevates form over substance, this Court recognizes that pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby."). Providing financial security for those individuals who, due to the permanent and extensive

nature of their disabilities, will not be able to supplement their retirement income through even minor jobs is consistent with this intent.

Second, § 20.02 of the Retirement Ordinance protects the Commission from being forced to continue paying disability retirement benefits if a previously disabled retiree becomes able-bodied, even during retirement and regardless of an intent to return to work. As a result, permitting a conversion either to or from normal retirement would not lead to an unjust or illogical result for the Commission and the Retirement System, especially in this case where Foushee is not attempting to receive benefits under both retirement plans or any other improper “double dipping.”

Finally, we do not specifically apply the doctrine of equitable estoppel in this case to prevent the Commission from relying on the absence of express language in the Retirement Ordinance to justify the denial. See *Hoye v Westfield Ins Co*, 194 Mich App 696, 705; 487 NW2d 838 (1992). However, we must acknowledge that from 1991 through 1996 the Commission represented to Foushee that this conversion was available and encouraged her to pursue the conversion actively, that her actions indicate that she relied on this representation,<sup>3</sup> and that her reliance was justifiable. If we were to defer to the Commission’s current interpretation of the Retirement Ordinance to even the slightest extent, and we do not, we would be obliged to consider this conduct as completely contradictory to its restrictive interpretation and, therefore, as weighing heavily against a holding in its favor. See *Rhoton v Central States, Southeast and Southwest Areas Pension Fund*, 717 F2d 988 (CA 6, 1983).

## VII. Conclusion

Our de novo review of retirement benefit conversion under the Retirement Ordinance and our review of the circuit court’s factual determinations, especially those relevant to the application of the five factors under § 20.01, lead us to conclude that the circuit court did not err when it granted Foushee’s request for an order of superintending control. The Commission was acting contrary to the Retirement Ordinance when it claimed, after asserting the opposite opinion for almost five years, that conversion was not possible and it most certainly denied Foushee’s application for disability retirement benefits without substantial evidence.

Affirmed.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot

<sup>1</sup> In any event, the Commission’s argument regarding the redemption agreement is meritless because both the transcript of the hearing on the redemption agreement and the agreement itself indicate that it would not affect Foushee’s retirement benefits. It was logical to refer to “normal” retirement benefits at that time because that was the type of benefit was receiving. Furthermore, we question whether payment under a retirement benefit plan, a contractual arrangement, can be considered liability. As a result, Foushee’s decision to “release” Wayne County from further “liability” is irrelevant in this context.

<sup>2</sup> There is, apparently, a similarity between the “substantial evidence test” for orders of superintending control and the “competent, material and substantial evidence on the whole record” test in the APA, MCL 24.306(1)(d); MSA 3.560(206)(1)(d). See *In re Payne*, 444 Mich 679, 689 n 6; 514 NW2d 121 (1994). Thus we see no error requiring reversal in the trial court’s decision to apply the standard of review in the APA to reach its decision in this case.

<sup>3</sup> Even though Foushee’s affidavit did not explicitly recount that she relied on the Commission’s representations, her compliance with the directions in Mr. Yee’s and Mr. Magda’s letters to obtain additional medical documentation of her condition affirmatively demonstrates reliance.