STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. CAPRATHE,

Petitioner-Appellee,

v

MICHIGAN JUDGES RETIREMENT BOARD,

Respondent-Appellant.

UNPUBLISHED
April 29, 2004

No. 246390
Ingham Circuit Court
LC No. 02-000289-AA

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Petitioner appeals by leave granted an order reversing the decision of the Judges Retirement Board. We reverse the circuit court's decision and remand to the Michigan Judges Retirement Board for further proceedings consistent with this opinion.

Petitioner sought to transfer six months' worth of credit for service as a Bay County public defender to the Board in order to raise his effective time spent as a judge to eighteen years as of the required date. This would qualify petitioner for a different computation of his actuarial present value for the purpose of a retirement plan election. After an administrative hearing, the hearing referee recommended that the Board grant petitioner the six months. The Board, however, ruled that petitioner was not entitled to such a transfer because the Board did not have a policy to accept such transfers. On review, the circuit court reversed the Board, and ordered it to allow petitioner to transfer his service credits.

This Court reviews the circuit court's review of an administrative agency's decision to "determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 233-235; 559 NW2d 342 (1996). The latter standard is the same as clear error where, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 234-235. However, statutory interpretation is an issue of law subject to de novo review. *Ronan v Michigan Pub School Employees Retirement Sys*, 245 Mich App 645, 648; 629 NW2d 429 (2001). Substantial evidence is "evidence that a reasoning mind would accept as sufficient to support a conclusion." *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). The circuit court may set aside an agency's legal ruling if it violates the constitution or a statute or if it contains "a substantial and material error of law."

Adrian School Dist v Michigan Pub School Employees Retirement Sys, 458 Mich 326, 332; 582 NW2d 767 (1998).

Although de novo review of statutory interpretation is appropriate by the circuit court, *Ronan, supra* at 648, the circuit court's opinion did not turn solely on statutory interpretation. The circuit court stated that it adopted the decision of the hearing referee in part because the record indicated that the Board intended to apply section six and no *evidence* supported an intent by the Board to limit its application. De novo review of evidentiary issues decided by an administrative agency is not the correct standard. *Boyd*, *supra* at 234-235. However, statutory interpretation was the primary issue before the circuit court.

Petitioner sought to transfer credit for his prior service as a public defender for use in calculating his retirement allowance under the reciprocal retirement act, MCL 38.1101 *et seq*. Critical to resolution of this issue is MCL 38.1105 and 38.1106. In particular, the last sentence of MCL 38.1105 forbids such transfers "except as provided in section 6:"

> A member of a reciprocal retirement system who has thirty months or more of credited service acquired as a member of the system and who has attained the age but has not met the service requirements for age and service retirement shall be entitled to use his or her credited service in force previously acquired as a member of governmental unit retirement systems in meeting the service requirements of the system from which he or she retires. If the member has a break in governmental unit employment for a period longer than fifteen years, his or her service rendered in the employ of the governmental units prior to his or her last break in service shall not be used in satisfying the service requirement for age and service retirement in the system from which he or she retires. *Except as provided in section six, credited service acquired in a governmental unit in which the member was previously employed shall not be used in determining the amount of his or her retirement allowance payable by the reciprocal retirement system from which he or she retires unless otherwise provided by the retirement system* (emphasis added).

MCL 38.1106, in turn, allows petitioner to transfer credit for his six months of service from Bay County to the Judges Retirement System, but only if there is a specific resolution from each jurisdiction agreeing to the transfer. Under section 6, MCL 38.1106:

> (1) A reciprocal unit, designated as the preceding reciprocal unit, *may* enter into an agreement with a reciprocal unit, designated as the succeeding reciprocal unit, to transfer credited service of *a member* who leaves the employ of the preceding reciprocal unit and enters the employ of the succeeding reciprocal unit. *The agreement shall be by resolution of the governing body of each reciprocal unit. The resolution shall specify the amount of credited service being transferred from the preceding reciprocal unit to the member's credit in the succeeding reciprocal unit and the amount of financial consideration being transferred from the preceding reciprocal unit to the succeeding reciprocal unit.* The financial consideration transferred under this section shall not be greater than the larger of the following:

(a) The accumulated contributions of the member whose credited service is being transferred.

(b) The actuarial present value of the retirement allowance payable by the preceding reciprocal unit under section 4 if the preceding reciprocal unit does not transfer the member's credited service under this section.

(2) A succeeding reciprocal unit, before passing a resolution described in subsection (1), shall determine the actuarial present value of the retirement allowance that will be payable to the member under the retirement plan of the succeeding reciprocal unit attributable to the credited service to be transferred under subsection (1).

(3) The actuarial present value of the retirement allowance payable by the preceding reciprocal unit under subsection (1) and by the succeeding reciprocal unit under subsection (2) shall be calculated using the interest rate and mortality tables specified by the Pension Benefit Guarantee Corporation for calculating the actuarial present value of immediate and deferred pensions under a terminated pension plan as provided in part 2619 of subchapter C of chapter XXVI of title 29 of the Code of Federal Regulations, 29 C.F.R. part 2619.

(4) *Each reciprocal unit, by resolution of the governing body of the reciprocal unit, shall establish a written policy to implement the provisions of this section* in order to provide uniform application of this section to all members of the reciprocal retirement system (emphasis added).

The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with unambiguous language being enforced as it is written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). "Shall" is both unambiguous and mandatory, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002), whereas "may" signifies the Legislature's intent to make something permissive, as opposed to mandatory. *Old Kent Bank v Kal Kustom, Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

According to the plain language of the statute, a reciprocal unit is not required to accept transfer of service credits. Although the Board is required to establish a policy for the uniform implementation of transfers between reciprocal units, which the Board apparently did not do, a *lack* of a policy for uniform implementation does not, by itself, equate to the *presence* of any other policy, either to deny or to accept. The Legislature has granted the Board discretion whether to accept transfers of service credit, so petitioner is not, in the absence of any action by the Board to the contrary, entitled to a transfer. Here, there is simply no evidence that the Board ever approved by resolution any transfer of service credit into the Judges Retirement Fund, let alone one with the detail required by MCL 38.1106(1).

The circuit court erroneously departed from the literal construction of this statute because, according to its view, the literal construction would work an "absurd result." However, our Supreme Court has explicitly rejected "the so-called 'absurd result' rule of statutory construction." *Piccalo v Nix*, 466 Mich 861; 643 NW2d 233 (2002), citing *People v McIntire*, 461 Mich 147, 155-156 n 2; 599 NW2d 102 (1999). See, also, *Kelly-Stehney & Assoc, Inc v*

MacDonald's Industrial Products, Inc, 254 Mich App 608, 614 n 4; 658 NW2d 494 (2003),vacated in part on other grounds, __ Mich __ (Docket No. 123118, issued April 16, 2004).

The circuit court also found that the record did not support the Board's decision that no policy was in place regarding acceptance of transferred service credits at the date relevant to petitioner's retirement plan election. Quite to the contrary, however, the clear language of the resolution itself provided substantial evidence to support the Board's decision. *Dignan, supra.* The record indicates that the only resolution adopted by the Board clearly provided for outgoing credits only, was in effect for only one year, and had been adopted more than a year before the relevant date. The Board's decision that section 6 was not adopted for incoming service credits or for the time of petitioner's application was, therefore, supported by competent evidence, so the trial court erred in concluding otherwise. *Id.*

Finally, when an administrative agency's decision is subjected to judicial review by a circuit court, review is of the final decision, not a hearing referee's recommendations to the agency. *Dignan*, *supra* at 578. An agency is not required to accept a hearing referee's proposed decision even when the proposed decision is supported by substantial evidence. *Id*. at 578. In fact, when an agency reviews a proposal for decision, as the Board did here, that agency has all the powers it would have had if it had presided at the hearing. *Id*. at 577. Review is not of the agency's rejection, acceptance, or modification of the referee's proposal. *Id*. at 578. However, the circuit court apparently treated the proposal for decision as binding on the Board, stating that the Board had failed to show any reasoning in support of its final decision reaching several conclusions different from those of the hearing referee. The circuit court is to give deference to an agency's final decision, not to a mere proposal for decision, unless that proposal has become final through lack of agency action. *Id*. at 577-578. Therefore, the circuit court failed to apply the correct legal principles when reviewing the Board's decision.

Although we must reverse the circuit court's ruling, the Board also made an error of law in its decision. The Board denied petitioner's request because of the absence of a policy being adopted by the Board pursuant to MCL 38.1106(4). However, that subsection requires that the Board adopt a *general* policy to implement the provisions of the law, and therefore the Board must implement such a policy. The failure to have the required policy in place cannot defeat petitioner's specific claim. That issue must instead be resolved by the more specific and discretionary provision of MCL 38.1106(1), which was not addressed by the Board. We therefore remand the matter to the Board for it to establish a general implementing policy as required by MCL 38.1106(4), and to then decide petitioner's petition pursuant to MCL 38.1106(1).

Reversed and remanded for further proceedings consistent with this opinion. The Court does not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray