

STATE OF MICHIGAN
COURT OF APPEALS

MARK SHAHEEN,

Petitioner-Appellee,

v

MICHIGAN PUBLIC SCHOOL EMPLOYEES
RETIREMENT BOARD,

Respondent-Appellant.

UNPUBLISHED
December 2, 2008

No. 278751
Ingham Circuit Court
LC No. 06-001004-AA

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Respondent Michigan Public School Employees Retirement Board ("Board") appeals by leave granted from the trial court's grant of service credit for long-term disability leave to petitioner Mark Shaheen in a May 3, 2007, opinion overturning the Board's administrative decision. We reverse and remand.

Petitioner is a teacher employed by East Lansing Public Schools ("ELPS"). In September 2002, petitioner was seriously injured in a motorbike accident. He was hospitalized and underwent months of rehabilitation. Consequently, he was unable to work for the rest of the 2002-2003 school year. Petitioner returned to work in August 2003.

Petitioner received sick leave pay from September 20 until October 28, 2002, when he exhausted his accumulated sick leave time. He then received short-term disability ("STD") benefits from October 28 to December 20, 2002. Beginning December 20, 2002, petitioner received long-term disability ("LTD") benefit payments. These payments continued until petitioner returned to work in August 2003. Pursuant to a collective bargaining agreement negotiated between the teachers' union and the ELPS school board, the school board provided LTD coverage without cost to its teachers. The school board purchased and held the LTD policy on behalf of the teachers, but the insurance carrier, not the school district, made the LTD payments. Under the policy, petitioner was permitted to receive LTD payments for as long as he was considered disabled, until age 65. His LTD payments were for approximately two-thirds of his regular income, and he received these payments monthly from the LTD insurance carrier.

Petitioner is also a member of the Michigan Public Schools Employees' Retirement System ("MPSERS"). MPSERS uses service credit to determine an employee's retirement allowance; this credit is calculated based on the length of time that a retiree has worked for the

school district. Petitioner received service credit for the time that he was on sick leave and for the time he received STD benefits, but he did not receive service credit for the period during which he received LTD benefits. Therefore, the school district made contributions to MPSERS toward petitioner's retirement benefits when he was on sick leave and received STD benefits, but not when he received LTD benefits, because he was not accruing service credit for that time period. Petitioner did not perform any service for ELPS when he received LTD payments.

Petitioner challenged MPSERS's refusal to award him service credit for the time he received the LTD payments, claiming that he was entitled to service credit for this time period. MPSERS denied petitioner's request for service credit, advising him that his LTD payments were not considered "compensation" under section 3a of the Public School Employees Retirement Act, MCL 38.1301 *et seq.*, for purposes of calculating his retirement service credit.

Petitioner brought his complaint before the Board, which denied his request for service credit. The Board noted that petitioner has the burden of proof, but had not carried this burden. The Board noted that it is required to award service credit if a member receives remuneration for services performed for a school, i.e., if he receives "compensation." MCL 38.1308(1); MCL 38.1368(1). It concluded, in pertinent part,

3. The LTD paid to Petitioner was not remuneration for services that he performed for the school since he did not perform any service for East Lansing School from December 20, 2002 through August 18, 2003.
4. MCL 38.1303a defines compensation, in part, as remuneration earned by a member for service performed as a public school employee.
5. Therefore, Petitioner did not earn any service credit for the period from December 20, 2002 through August 18, 2004³ [sic, 2003] because he did not receive any remuneration for any service that he performed as a public school employee during that time period.
6. MCL 38.1303a(3) provides that compensation does not include other fringe benefits paid by a school district. A fringe benefit is defined as a payment, other than wages or salary, in the form of a pension, vacation or insurance. (New World Dictionary, Second College Edition) The LTD payments were a type of insurance payment paid to Petitioner when he was unable to work.
7. Thus, the LTD payments received by Petitioner are not compensation. Therefore service credit may not be provided for the time that Petitioner received LTD.

Noting that MCL 38.1303a(1), (2), and (3) did not specifically list whether LTD benefits are or are not compensation, the Board invoked its authority under MCL 38.1303a(5) to determine whether the LTD payments made to petitioner were a creditable form of compensation. The Board explained its reasoning as follows:

The Board has exercised its authority by promulgating 1985 MR 4, Rule 38.1127 which states in part:

Only if the kind of remuneration or item of economic value received by a member is specifically authorized by either the retirement statute or the retirement board shall it be included in computing the member's final average compensation.

Here, since LTD is not specifically listed in MCL 38.1303a or otherwise authorized by the Board as compensation, it cannot be compensation and no service credit may be provided for it.

The Board then noted,

1985 MR 4, Rule 38.1117 states that:

Service credit shall not be given except as authorized by the act for reporting unit employment which was specifically excluded from membership by statute or administrative directive. . . .

Here the directives set forth in the Reporting Instruction Manual do not provide service credit for LTD. Thus, service credit may not be given for LTD paid to Petitioner.

The Board concluded,

The Public School Employees Retirement System has interpreted MCL 38.1303a to mean that compensation does not include LTD payments and therefore service credit is not given for the time period that a member receives LTD payments. There are no cogent reasons to change that interpretation.

Therefore, the Board determined that although petitioner received LTD payments, he failed to prove that he was entitled to receive service credit for the period when he received LTD payments.¹ The Board summarized as follows its conclusions of law and its decision to deny petitioner's request for service credit:

The Retirement Board, exercising its mandate under MCL 38.1303a, has determined that LTD is considered nonreportable compensation. Though Petitioner has presented many reasons why he advocates that this determination should be changed, the Board has broad authority to determine whether any form of remuneration that is not identified in MCL 38.1303a should be considered compensation reportable to the retirement system and has acted upon that authority/mandate. Thus, Petitioner has failed to meet his burden of proof under

¹ Essentially, petitioner failed to satisfy his burden of proof, which obligated him to establish that the compensation that he received between December 2002 and August 2003, which he admitted consisted of LTD benefits, was creditable toward his retirement.

the statute and is not entitled to service credit from the time period in 2002-2003 that he was receiving LTD benefits.

Petitioner appealed the Board's ruling to the circuit court, arguing that the LTD payments constitute credible compensation under the statute. The circuit court agreed with petitioner, ruling that "the long-term disability payments are creditable compensation for purposes of the state retirement program" and reversing the Board's decision.

We review a decision of an administrative agency in the same manner as the circuit court—we "may set aside an order of an administrative agency if it violates the constitution or a statute or if the ruling contains a substantial and material error of law." *Ronan v Mich Pub School Employees Retirement Sys*, 245 Mich App 645, 648; 629 NW2d 429 (2001).

This Court reviews a lower court's review of an agency 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 Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). This standard of review is the same as a "clearly erroneous" standard of review. *Id.* at 234-235. A finding is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235.

* * *

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. Const 1963, art 6, § 28; MCL 24.306; *Boyd, supra* at 232. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994). Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124; 223 NW2d 283 (1974); *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). [*Dignan v Mich Pub School Employees Retirement Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002).]

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Colbert v Conybeare Law Office*, 239 Mich App 608, 616; 609 NW2d 208 (2000). A court or other entity entrusted with the duty of interpretation should consider the object of the statute and the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Id.*

The Public School Employees Retirement Act, MCL 38.1301 *et seq.*, entitles public school employees to service credit for time spent off work while receiving "compensation." *Ronan, supra* at 648-649. An employee's length of service is measured in service credits, which

are important for calculating retirement benefits. The central issue presented to the Board, the circuit court, and now us, is whether LTD payments constitute “compensation” that may be credited toward retirement benefits. Essentially, this necessitates dissecting the provisions of MCL 38.1303a, which defines the scope of the term “compensation” as used in the Public School Employees Retirement Act and designates to the Board the authority to determine whether a particular employee benefit constitutes “compensation.” MCL 38.1303a states,

(1) Except as otherwise provided in this act, “compensation” means the remuneration earned by a member for service performed as a public school employee.

(2) Compensation includes salary and wages and all of the following:

(a) Remuneration earned for all services performed as a public school employee including, but not limited to, teaching, coaching, and participation in extracurricular activities.

* * *

(f) Pay for vacation, holiday, and sick leave while absent from work. As used in this subdivision, “sick leave” includes weekly worker’s disability compensation payments received for personal injury in the employ of and while employed by a reporting unit.

* * *

(3) Compensation does not include any of the following:

(a) Payments for unused sick or annual leave.

(b) Bonus payments.

(c) Payments for hospitalization insurance and life insurance premiums.

(d) Other fringe benefits paid by and from the funds of employers of public school employees.

(e) Remuneration paid for the specific purpose of increasing the final average compensation.

(f) Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used.

(4) The retirement board shall require a sworn affidavit from the member that final compensation does not include remuneration paid either directly or indirectly for actual or anticipated expenses.

(5) Based upon information and documentation provided by the member, the retirement board shall determine both of the following:

(a) Whether any form of remuneration paid to a member is identified in this section.

(b) Whether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system under this section.

(6) In any case where a petitioner seeks to have remuneration included in compensation reportable to the retirement system, the petitioner shall have the burden of proof.

The statute does not mention whether LTD payments are compensation, and the parties dispute whether LTD benefits should be considered a form of creditable compensation. Essentially, the Board argues, “Look at this laundry list of what is included as compensation; LTD benefits are not among them, so they are not compensation.” Petitioner argues, “Look at the laundry list of items that are specifically excluded from the definition of compensation; LTD benefits are not listed, so they must be a form of compensation.” However, MCL 38.1303a(5) clearly indicates that the retirement board has the authority to determine whether any form of remuneration paid to a member, including LTD payments, should be considered compensation. The Board determined, consistent with its administrative rules, that LTD payments did not fall within the definition of “compensation” under which service credit may be given. We find this reasoning to be sound and defer to the Board’s interpretation of the statute.

In *Dignan*, *supra* at 576, 579, this Court applied MCL 38.1303a(5) and held that the circuit court had erred in failing to defer to the retirement board’s characterization of a contractual terminal allowance payment as outside the definition of “compensation.” The parties in *Dignan* had disputed the calculation of the petitioner’s retirement benefits based on her final average compensation. *Id.* at 573. The petitioner argued that the \$14,500 payment made pursuant to her employment contract was longevity pay that should factor into her final average compensation. *Id.* at 573-574. The retirement board disagreed, concluding that the payment was not longevity pay, and thus not compensation, but the circuit court reversed the decision. *Id.* at 575.

The *Dignan* Court affirmed the board’s decision and reversed the circuit court for failing to defer to the board’s authority to make that determination, stating:

The fact that the school district did not treat the \$14,500 payment as longevity pay is consistent with the contract’s unambiguous language. Given that respondent’s decision was supported by competent, material, and substantial evidence, the circuit court was prohibited from substituting its discretion for that of respondent, even if the court might have reached a different result. Deference is afforded to

an agency's choice between two alternative views because of the agency's administrative expertise. [*Dignan, supra* at 578-579 (internal citations omitted).]

In this case, we conclude that the Board's reasoning was sound and a proper application of the law. Therefore, the circuit court clearly erred when it failed to defer to the Board's reasoning and conclusion. Again, as the Board noted in its ruling on this matter, its rules dictate that "[o]nly if the kind of remuneration or item of economic value received by a member is specifically authorized by either the retirement statute or the retirement board shall it be included in computing the member's final average compensation." 1985 MR 4, Rule 38.1127. This rule essentially constitutes an adoption of the principle of *expression unius est exclusion alterius*, the express mention of one thing is the exclusion of others. This is a valid, longstanding principle of statutory construction, and the Board's decision to apply this principle to determine whether a form of compensation is creditable is not a substantial or material error of law. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 355, 362-363; 459 NW2d 279 (1990). The Board concluded that because "LTD is not specifically listed in MCL 38.1303a or otherwise authorized by the Board as compensation, it cannot be compensation and no service credit may be provided for it." The Board's reading of the statute to indicate that LTD payments are not creditable compensation is a valid application of the statute.

The circuit court based its decision to reverse the Board's ruling entirely on its mistaken understanding of the reasoning of the Supreme Court majority in *Adrian School District v Michigan Public School Employees' Retirement System*, 458 Mich 326; 582 NW2d 767 (1998). In that case, the parties disputed whether an employee earned service credit during the time that he received worker's compensation payments. *Id.* at 328-330. The *Adrian School District* Court held that weekly worker's compensation benefits qualified as "compensation," as the statute defined the term at that time. *Id.* at 334. It explained,

First, included in the items comprising "compensation" is "sick leave pay while absent from work." Worker's disability compensation benefits are a form of sick leave pay because they are compensation for illness or injury suffered by a public school employee while on the job. Accordingly, a reasonable interpretation of "sick leave pay" encompasses worker's disability compensation benefits. [*Id.*]

The majority also reasoned that because the statute did not exclude such payments from the definition of "compensation," the Legislature must have intended to include them:

Worker's disability compensation is not an expressly excluded form of remuneration. Hence, it must be viewed as falling within the expansive definition of compensation. Common sense dictates that it must be included in the phrase "sick leave pay while absent from work." The Legislature provided a list of inclusive phrases to outline types of remuneration included in the term "compensation," such as the phrase "sick leave pay while absent from work." It seems likely that it chose that terminology because, had it done otherwise, the retirement act would have to be amended *each time* a new form of compensation is negotiated.

* * *

Thus, in making its declaratory ruling that disability payments are a form of sick leave pay that earn retirement service credit, the retirement board gave effect to the Legislature's intent. [*Id.* at 335-336 (emphasis in original).]

Notably, the statutory definition of "compensation" applicable in *Adrian School District* is not the definition applicable in this case. When our Supreme Court decided *Adrian School District*, the statute defined "compensation" to include "sick leave pay while absent from work." *Ronan, supra* at 649. In support of its holding, the majority in *Adrian School District* reasoned that worker's compensation payments were akin to "sick leave." *Id.* at 334. However, in 1996, the Legislature amended the definition of "compensation" to expressly include weekly worker's compensation payments as "sick leave." *Id.* at 337. The statute now states,

As used in this subdivision, "sick leave" includes weekly worker's disability compensation payments received for personal injury in the employ of and while employed by a reporting unit. [MCL 38.1303a(2)(f). See also 1996 PA 268; *Ronan, supra* at 649 n 2.]

In this case, the circuit court acknowledged the statutory amendment but still found the Court's reasoning in *Adrian School District* persuasive and applied it to support its reasoning that LTD payments are a form of creditable compensation.

Our Supreme Court's decision in *Adrian School District* is not controlling in this case. *Adrian School District* addressed a different form of remuneration, worker's compensation payments, under a different statutory definition of compensation. Its persuasive authority in this case is questionable. Significantly, the majority in *Adrian School District* found support for its holding in the fact that when the case was pending on appeal, the Legislature amended the definition to specifically include worker's compensation payments as a form of "sick leave." *Adrian School Dist, supra* at 337. The amendment bolstered the majority's conclusion that the amended version of the statute was meant to clarify the Legislature's original intent to include worker's compensation benefits in its definition of sick leave. *Id.* Yet we cannot glean any such indication about legislative intent regarding LTD payments in this case.

The Legislature has defined what types of remuneration are and are not "compensation" for purposes of the Public School Employees Retirement Act. The statute specifies that compensation include certain investments, longevity pay, overtime pay, merit pay, and vacation, holiday and sick leave while absent from work. The 1996 revision redefined compensation and specifically redefined "sick leave." *Id.* "[T]he further definition of 'sick leave' provided by the amendment was specifically limited to include only weekly worker's disability compensation payments, and not some broader category like 'payments made pursuant to worker's compensation claims'" or, by extension, payments that serve the same purpose as sick leave, or payments made to an employee during an illness or injury that prevents the employee from working. See *Ronan, supra* at 651. The retirement board, acting under its statutory authority to determine "[w]hether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system . . .," MCL 38.1303a(5)(b),

determined that the unmentioned LTD payments are not compensation. We agree with the board's application of the law and conclude that the circuit court erred in disturbing the board's decision. No substantial and material error of law necessitating reversal was found in this case.²

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Peter D. O'Connell

² Petitioner claims that the retirement board erred when it refused to award him service credit for LTD benefits because, in another case, it had determined that service credit could be awarded during the time an employee received STD benefits. However, petitioner fails to provide any authority to support his position that the Board is bound in some manner by a declaratory ruling in one case holding that a particular type of benefit constituted creditable compensation when deciding, in a separate case involving separate parties and circumstances, whether a different type of benefit constitutes creditable compensation. Therefore, we will not consider this argument further. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).