

FILED: September 25, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

GEORGE A. RIEMER,
Petitioner,

v.

OREGON PUBLIC EMPLOYEES RETIREMENT BOARD
and OREGON STATE BAR,
Respondents.

Public Employees Retirement Board
111361

A152820

Submitted on June 07, 2013.

George A. Riemer filed the briefs *pro se*.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Erin C. Lagesen, Assistant Attorney General, filed the brief for respondent Public Employees Retirement Board.

No appearance for respondent Oregon State Bar.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

HADLOCK, J.

Affirmed.

1 HADLOCK, J.

2 Petitioner seeks judicial review of an order of the Oregon Public
3 Employees Retirement Board that recalculated petitioner's retirement benefit to correct
4 prior errors and ordered petitioner to reimburse the Public Employees Retirement System
5 (PERS) for overpaid benefits. Petitioner, who retired from the Oregon State Bar in 2006,
6 contends that the board erred in determining when his PERS membership began and in
7 concluding that he was ineligible to purchase "waiting time" retirement credit for time
8 that he worked for the Bar but was not yet a PERS member. We affirm.

9 The facts material to our decision are undisputed. Petitioner began working
10 for the Bar in January 1981. A Bar employee is not considered to be an "employee" for
11 purposes of the PERS statutes. ORS 9.080(4). However, a Bar employee may, "at the
12 option of the employee, for the purpose of becoming a member of [PERS], be considered
13 an 'employee' as the term is defined in the public employees' retirement laws." *Id.*
14 Petitioner exercised that option in July 1982 through written notice to the board.

15 In March 2006, petitioner submitted a retirement application to PERS,
16 listing April 1, 2006, as his effective retirement date. On April 25, 2006, petitioner
17 purchased six months of waiting-time credit from PERS for \$3,247.45.

18 In June 2006, PERS sent petitioner a letter stating that he had not received
19 "service time credit" or contributions to his retirement account for time he had worked for
20 the Bar before July 1982. Accordingly, PERS adjusted petitioner's account to reflect
21 contributions from August 1981 through June 1982. The adjustment increased

1 petitioner's monthly retirement benefit by several hundred dollars. In February 2007,
2 PERS sent the Bar an invoice for \$27,727.02 for the purportedly missed contributions
3 and interest. The Bar appealed that adjustment, asserting that petitioner had not been a
4 member of PERS before exercising that option in July 1982 and, consequently, the Bar
5 had not been required to make contributions before that time. Petitioner responded that,
6 although he was not considered an employee for purposes of the PERS statutes until he
7 exercised the option in July 1982, under ORS 238.015(1), his PERS membership had
8 begun the first full pay period six months after he began working at the Bar--that is, in
9 August 1981.

10 PERS concluded that petitioner's membership had begun in August 1982,
11 the first full month after he had elected to be considered an employee under ORS
12 9.080(4), and, accordingly, that the Bar was not liable for contributions before that time.
13 PERS notified the Bar in June 2008 that it had decided the Bar's appeal, and it cancelled
14 the invoice. For unknown reasons, PERS failed to notify petitioner of its decision at that
15 time. It also failed to correct petitioner's account, and, consequently, it continued to
16 calculate and pay his monthly benefit based on the account balance that included the
17 now-cancelled contributions from 1981 and 1982.

18 PERS finally notified petitioner of the error in June 2011. It also informed
19 petitioner that he had not been eligible to purchase waiting-time credit even though he
20 had been employed by the Bar for more than six months before his PERS membership
21 began. PERS explained:

1 "Under ORS 238.125, the purchase of retirement credit for waiting time is
2 premised upon payment of the employee and employer contributions that
3 would have been required if the employee had been a member during that
4 period. You were not an 'employee' for PERS' purposes during your
5 waiting time, so no employee or employer contributions could have been
6 required and, therefore, there is no basis upon which to acquire retirement
7 credit for that period."

8 PERS informed petitioner that, as a result of the adjustments to his account, his monthly
9 benefit payment would be reduced by \$477.21. It also informed him that he was required
10 to repay the overpaid benefits, which PERS ultimately calculated to total \$29,314.03.

11 Petitioner requested a hearing on the starting date of his PERS membership
12 and his eligibility to purchase waiting-time credit. After a hearing before an
13 administrative law judge (ALJ), both petitioner and PERS moved for summary
14 determination, the administrative equivalent of moving for summary judgment. *See Fort*
15 *Vannoy Irrigation v. Water Resources Comm.*, 214 Or App 88, 90 n 1, 162 P3d 1066
16 (2007), *aff'd*, 345 Or 56, 188 P3d 277 (2008). The board concluded that petitioner's
17 membership in PERS had not begun until August 1982 and that petitioner was not
18 eligible to purchase waiting-time credit. It entered a final order granting PERS's motion
19 and denying petitioner's.

20 Petitioner seeks judicial review of the board's order, assigning error both to
21 the board's conclusion regarding the starting date of his PERS membership and to the
22 board's determination about his eligibility to purchase waiting-time credit. We address
23 those two assignments of error later in this opinion. In a separate assignment of error,
24 petitioner contends that the board violated his due process rights by failing to follow its

1 own administrative rules and "by PERS engaging in obfuscation, gross incompetence,
2 and unconscionable delay in determining his retirement benefit." We reject that
3 argument without discussion. In addition, petitioner asserts that the Bar began making
4 contributions to his retirement account on his behalf in July 1982 and that, even if the
5 board correctly determined that his PERS membership began in August 1982, the board
6 failed to refund to him those July contributions. Petitioner did not properly raise that
7 issue before the board, so it is not before us, and we do not consider it.

8 We begin with petitioner's argument concerning the starting date of his
9 PERS membership. Both parties cite ORS 9.080(4) and ORS 238.015(1) in support of
10 their positions, and our determination of the issue turns on the proper interpretation of
11 those statutes. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (setting out
12 the method for interpreting Oregon statutes). We consider the version of those statutes
13 that was in effect in 1982, when petitioner elected to become a PERS member. ORS
14 9.080(4), which has not been materially amended since that time, provides, in pertinent
15 part:

16 "Except as provided in this subsection, an employee of the state bar
17 shall not be considered an 'employee' as the term is defined in the public
18 employees' retirement laws. However, an employee of the state bar may, at
19 the option of the employee, for the purpose of becoming a member of the
20 Public Employees Retirement System, be considered an 'employee' as the
21 term is defined in the public employees' retirement laws. The option, once
22 exercised by written notification directed to the Public Employees
23 Retirement Board, may not be revoked subsequently, except as may
24 otherwise be provided by law. Upon receipt of such notification by the
25 Public Employees Retirement Board, an employee of the state bar who
26 would otherwise, but for the exemption provided in this subsection, be

1 considered an 'employee,' as the term is defined in the public employees'
2 retirement laws, shall be so considered."

3 ORS 238.015 was formerly numbered ORS 237.011. In 1982, that statute provided, in
4 part:

5 "No person may become a member of the system unless he is in the
6 service of a public employer and has completed six months' service
7 uninterrupted by a total of more than 30 working days during the six
8 months' period. Every employe of a participating employer shall become a
9 member of the system at the beginning of his first full pay period following
10 the six months' period. All public employers participating in the Public
11 Employes' Retirement System established by chapter 401, Oregon Laws
12 1945, as amended, at the time of repeal of that chapter, and all school
13 districts of the state, shall participate in, and their employes shall be
14 members of, the system, [with exceptions not pertinent here.]"

15 *Former* ORS 237.011 (1981), *renumbered as* ORS 238.015 (1995). Petitioner takes the
16 position that ORS 9.080(4) establishes *how* a Bar employee becomes a PERS member
17 and ORS 238.015 establishes *when* a public employee becomes a member. Petitioner
18 notes that ORS 9.080(4) provides that, upon the board's receipt of a Bar employee's
19 notification, the employee is considered an *employee*, not a member of PERS. He further
20 observes that ORS 238.015(1) provides that a person becomes a PERS member after
21 completing six months in the service of a public employer, not six months after becoming
22 an "employee." In petitioner's view, once he notified the board that he had elected to be
23 treated as an "employee" for purposes of becoming a PERS member, his membership was
24 effective as of the earlier date on which he had completed six months of service with the
25 Bar. In essence, petitioner contends that, when he exercised his option to be treated as an
26 "employee," his PERS membership was retroactive.

1 The board responds that ORS 238.015(1) establishes the prerequisites for
2 PERS membership and the date on which membership begins for eligible persons. With
3 respect to eligibility, the board asserts, the statute provides that a person must be an
4 "employee" within the meaning of the PERS statutes and must have completed six
5 months of service to the employer. Once the person meets those eligibility requirements,
6 the board contends, the employee becomes a PERS member. According to the board,
7 petitioner met the six-month service requirement in 1981 but did not meet the
8 requirement that he be an "employee" until the month after he made the election to be so
9 considered in July 1982.

10 We agree with the board. Petitioner's view of the statutes requires that a
11 person in his position be considered to have been a PERS member before having been
12 considered an employee. That view is precluded by the provision, "Every *employee* of a
13 participating employer *shall become a member* of the system at the beginning of his first
14 full pay period following the six months' period." ORS 238.015(1) (emphasis added).
15 Under that provision, a person must be an employee before becoming a member. The
16 statute simply will not bear petitioner's contention that, once a person is considered to be
17 an employee, membership is effective as of the first full pay period after the six-month
18 waiting time, regardless of when that period ended relative to the person obtaining
19 "employee" status. There is no suggestion in either ORS 9.080(4) or ORS 238.015(1)--or
20 any other statute of which we are aware--that the legislature intended for a Bar
21 employee's membership to be effective retroactively. To the contrary, such an

1 interpretation would conflict with the forward-looking connotation of what it means to
2 "become" a member.

3 In sum, we conclude that the board correctly determined that petitioner's
4 PERS membership began in August 1982, the month after he elected to be considered an
5 "employee" for purposes of becoming a PERS member. We reject petitioner's contrary
6 argument.

7 We turn to petitioner's contention that he was entitled to purchase "waiting
8 time" credit for the six months preceding his membership in PERS. ORS 238.125
9 provides:

10 "A member of the system who has a combined total of 10 years or
11 more of creditable service in the system and prior service credit at the time
12 of retirement, and who was required to complete one or more periods of six
13 months or less in the service of an employer participating in the system
14 before becoming a member of the system, shall receive retirement credit for
15 those periods of six months or less if the member * * * pays to the board in
16 a lump sum an amount determined by the board to be equal to:

17 "(1) The total amount of employee contributions to the fund by or on
18 behalf of the employee that would have been required for the six months'
19 period if the employee had been a member of the system during that period,
20 which amount shall be credited to the regular account of the member; and

21 "(2) The total amount of employer contributions to the fund the
22 employer of the employee would have been required to make in respect to
23 the employee if the employee had been a member of the system during the
24 six months' period, which amount shall be credited to the reserve for
25 pension accounts in the fund."

26 Petitioner contends that he completed six months of service before becoming a PERS
27 member, whether he became a member in August 1981 or August 1982. The board
28 responds that the statute contemplates that a PERS member can purchase waiting-time

1 credit only for periods in which the member qualified as an "employee" under the PERS
2 statutes. The board observes that ORS 238.125 "formulates the purchase price of waiting
3 time based on what contributions the 'employee' and the 'employer of the employee'
4 would have been required to make if the 'employee' had been a member of PERS during
5 the six-month service period."

6 We agree with the board, for two reasons. First, ORS 9.080(4) provides
7 that a Bar employee "shall not be considered an 'employee'" for purposes of the PERS
8 statutes unless the Bar employee exercises the option to be so considered. As the board
9 notes, ORS 238.125 contemplates that waiting-time credit may be purchased only for
10 time that a person was an "employee" within the meaning of the PERS statutes.
11 Petitioner is not eligible to purchase waiting-time credit for the period before he elected
12 to be considered an "employee" for PERS purposes.

13 Second, once petitioner did elect to be considered an "employee," he was
14 not required to "complete one or more periods of six months or less in the service of an
15 employer participating in the system before becoming a member of the system," one of
16 the prerequisites to purchasing waiting-time credit. After petitioner notified the board
17 that he wished to be considered an "employee" for PERS purposes, he became a PERS
18 member the next month. In short, there was no waiting period for which petitioner could
19 buy retirement credit. It follows that the board did not err in concluding that petitioner
20 was not eligible to purchase waiting-time credit.

21 Affirmed.