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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001108-MR

KENTUCKY EMPLOYEES RETIREMENT SYSTEM

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00410

KATHRYN M. HARGRAVES

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; AND MILLER, SENIOR JUDGE.¹

VANMETER, JUDGE: Kentucky Employees Retirement System ("KERS") appeals an Opinion and Order of the Franklin Circuit Court reversing a decision of KERS that appellee, Kathryn M. Hargraves, was not eligible under KRS 61.552(17) to purchase one year of out-of-state employment credit. We reverse and remand the decision of the Franklin Circuit Court.

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

From September 22, 1980, to September 24, 1981, Hargraves was employed by Vanderburgh County, Indiana as a legal aid lawyer. Although she was eligible, Hargraves did not participate or make any contributions to the Indiana Public Employees Retirement Fund ("PERF"). Madelyn Grayson, with the Vanderburgh County Auditor's Office, provided the following Certification of Full Time Service:

I can verify that you were employed full time as a Staff Attorney for the Legal Aid Society of Vanderburgh County from 9/22/1980 through 9/24/1981. As a full time employee, you were eligible for PERF benefits. At the time you became a Vanderburgh County employee, PERF was permitting members to waive their PERF contributions for one year. A PERF membership record should have been completed and signed by you stating that you become eligible for PERF benefits in September of 1980, but that you chose to waive your contributions until September of 1981. Neither Vanderburgh County nor PERF have any record of this Membership Record ever being completed and sent in. Even though there is no Membership Record on file for you, PERF told me that if you became employed in another PERF-COVERED position, after six months of employment in that position you would then be entitled to recognition of the creditable service earned while working for Vanderburgh County. Therefore, I can state that you have one year of creditable service earned with Vanderburgh County.

In 1981, Hargraves became employed by the Kentucky Natural Resources and Environmental Protection Cabinet. In 2000, Hargraves decided to purchase out-of-state service credit

toward her retirement. However, because Hargraves had never belonged or contributed to PERF, KERS refused to allow her to purchase any Indiana service credit. Upon review, the Franklin Circuit Court reversed the decision of KERS, holding that KERS must recognize Hargraves' right to purchase one year of "creditable service" under PERF. This appeal follows.

On appeal from a ruling by an administrative agency courts apply

the substantial evidence standard of review applicable to decisions of administrative agencies. "If the findings of fact are supported by substantial evidence of probative value, than they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found."

Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc., Ky., 91 S.W.3d 575, 578

(2002)(quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Insurance Commission*, Ky., 437 S.W.2d 775, 778 (1969)). Here, the parties agree that no question exists as to the facts. The only issue concerns the interpretation of KRS 61.552(17) and its application to those facts. As correctly noted by the circuit court, questions of law arising out of administrative proceedings are fully reviewable de novo by the courts. See *Camera Center, Inc. v. Revenue Cabinet*, Ky., 34 S.W.3d 39, 41 (2000) (court holding that "an erroneous

interpretation or application of the law is reviewable by the court which is not bound by an erroneous administrative interpretation no matter how long standing such an interpretation."); Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 408 (1992) (court holding that "[i]f a board has misconstrued the legal effect of the facts, courts are not bound to accept legal conclusions of that administrative body").

At the time Hargraves requested to purchase the out-of-state credit, KRS 61.552(17)² provided as follows:

After August 1, 1998, any employee participating in one (1) of the state-administered retirement systems . . . **may purchase credit in the system** in which the employee has the service credit for **up to ten (10) years service in a regular full-time position that was credited to a state or local government-administered public defined benefit plan in another state** other than a defined benefit plan for teachers. The employee shall pay the full cost of the service as determined by the system. Payment may be by lump sum, or the employee may pay by increments. The employee may transfer funds directly from the other state's plan if eligible to the extent permitted under subsection (16)(h) of this section and to the extent permitted by the other state's laws and shall provide proof that he is not eligible for a retirement benefit for the period of service from the other state's plan.

(Emphasis added).

² In 2003, KRS 61.552 was amended such that section 17 became section 18.

Under the facts as provided by Madelyn Grayson of the Vanderburgh County Auditor's Office, Hargraves was eligible but did not participate in PERF. Thus, she had nothing more than one year of creditable service, which would be credited to her only if she returned and worked an additional six months in a PERF-covered position. Although KERS determined that the language of the statute required Hargraves to actually have her Indiana time credited to PERF, the Franklin Circuit Court disagreed, holding that "KRS 61.552(17) clearly allows an employee to purchase out of state credit that has been credited to a benefit plan. The State of Indiana recognizes Ms. Hargraves' year of employment as earned creditable service, which is all that is required in KRS 61.552." We disagree with the conclusion of the circuit court.

The plain language of KRS 61.552(17) permits the purchase of out-of-state service that "was credited to a state or local government-administered public defined benefit plan." Unfortunately, the only evidence in the record is that Hargraves' service was not credited. Instead, her service is only "creditable," and it will be recognized or "credited" by the out-of-state plan only if she returns and works six months in a PERF-covered position. To hold otherwise would be tantamount to permitting an unauthorized purchase of out-of-state governmental service credit which either was not covered

by a defined benefit plan, or was not applicable because the employee chose not to participate in coverage.³ In this instance, the legislature has made a policy determination to permit employees to purchase out-of-state credit to a Kentucky administered plan only for service credit earned while the out-of-state position was covered by a defined benefit plan and the employee elected to participate. Courts may not add to or subtract from legislative enactments. *Commonwealth v. Garrett*, Ky. App., 8 S.W.3d 573, 575-76 (1999).

The Opinion and Order of the Franklin Circuit Court is reversed and remanded to the circuit court for reinstatement of the order of the KERS.

COMBS, CHIEF JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS.

MILLER, SENIOR JUDGE, DISSENTING: Because I believe the provisions of Kentucky Revised Statutes (KRS) 61.552(17)⁴ providing for the purchase of out-of-state governmental employment service credit is entitled to a broader interpretation than that accorded by the majority, I respectively dissent.

³ Beyond the plain language of KRS 61.552(17), this interpretation is supported by other subsections of KRS 61.552 in which the General Assembly has permitted the purchase of service credit time not covered by a defined benefit plan. *E.g.*, KRS 61.552(15) (purchase of credit for any period of approved maternity leave or sick leave without pay); KRS 61.552(19) (purchase of credit service for time served in the Kentucky Peace Corps).

⁴ In 2003, KRS 61.552 was amended such that section 17 was recodified as section 18.

KRS 61.552(17) provides that a Kentucky governmental employee participating in one of the state-administered retirement systems is entitled to purchase additional retirement credit for prior out-of-state "service in a regular full-time position that was credited to a state or local government-administered public defined benefit plan in another state."

It is uncontested that Hargraves currently participates in one of the state-administered retirement systems, that she previously accumulated one year of service in a regular full-time governmental position in Indiana, and that in her Indiana position she was entitled to full participation in the Indiana state government defined benefit plan.

I believe, broadly interpreted, Hargraves' one year of service in the Indiana position was "credited" to the Indiana plan so as to entitle her to purchase that year of credit pursuant to KRS 61.552(17).

When analyzing a statute, we must interpret statutory language with regard to its common and approved usage. KRS 446.080. In so doing, we must refer to the language of the statute rather than speculating as to what may have been intended but was not expressed. Commonwealth v. Allen, Ky., 980 S.W.2d 278, 280 (1998). In other words, a court "may not interpret a statute at variance with its stated language." Id. (citation omitted). See also Gurnee v. Lexington-Fayette Urban

County Government, Ky. App., 6 S.W.3d 852, 856 (1999).

Therefore, any statutory analysis must begin with the plain language of the statute. In so doing, however, our ultimate goal is to implement the intent of the legislature. See Wesley v. Board of Education of Nicholas County, Ky., 403 S.W.2d 28, 29 (1966); AK Steel Corp. v. Commonwealth, Ky. App., 87 S.W.3d 15, 17 (2002).

"Where there is no ambiguity in a statute, there is no need to resort to the rules of statutory construction in interpreting it. The words of the statute are simply accorded their commonly understood meaning." Stewart v. Estate of Cooper, Ky., 102 S.W.3d 913, 915 - 916 (2003). The words of a statute are to be given their plain meaning unless to do so would constitute an absurd result. Executive Branch Ethics Com'n v. Stephens, Ky., 92 S.W.3d 69, 73 (2002). If there is any doubt from the language used by the legislature as to the intent and purpose of the law, then courts in interpreting the statute should avoid a construction which would be unreasonable and absurd in preference to one which is reasonable, rational, sensible and intelligent. Id.

I believe that the legislature's use of the term "credited" in KRS 61.552(17) is ambiguous and that, under the principles stated above, it is necessary to refer to legislative

intent and, further, to apply the rule that the statute be given a rational construction.

It seems to me that the purpose of KRS 61.552(17) is to enhance the mobility of government (state and local) employees thus ensuring the availability of a trained and efficient workforce. To accomplish these ends the statute attempts to protect the retirement of incoming employees by placing them upon the same footing they would have enjoyed in the departing state.

Too many times employees are penalized in changing jobs (often by necessity) by having to "cash-in" their retirement or leaving same at the hands of remote and reckless administrators. By its passage of KRS 61.552(17) our legislature has attempted to, in part, remedy this peril at least as to state and local employees.

Moreover, the legislature has adopted the policy of permitting the purchase of retirement time for the broad purpose of reducing governmental employment levels through early retirement. I believe the legislative intent of KRS 61.552(17) was, in part, to also advance this policy.

Based upon what I view as the legislative intent behind KRS 61.552(17) as described above, I believe the statute, and the term "was credited," are entitled to broad interpretation. Applying a broad interpretation to the statute,

I believe Hargraves' one year of service in her full-time state employment position in Indiana is covered under the statute and that she should be entitled to purchase the service for credit to her Kentucky retirement plan.

As I view the situation at hand the state of Indiana waived employee contribution for the first year of employment as an incentive benefit for incoming employees.⁵ If the employee thereafter continued in his Indiana governmental service for six additional months his retirement time would then be computed ab initio. Hargraves in fact continued her governmental service career, albeit in Kentucky, and I believe that in light of this Hargraves should be accorded the same status as if she had remained an additional six months in a covered position in Indiana. Thus having been employed an additional six months in this Commonwealth, it is my view she was and is entitled to recognition as having received credit for her initial year of government service in Indiana.

In my view the central issue in this case is not whether Hargraves actually contributed to a retirement plan in Indiana. Hargraves is recognized by the Indiana retirement system as having served one year in an Indiana public Employees Retirement Fund position. In this respect she was "credited"

⁵ Further, as most government jobs are subject to a probationary period, it seems reasonable that no employee contribution to an applicable retirement fund would be required until the probationary period has been successfully completed.

with participation in a defined benefit plan in another state. Indeed the Vanderburgh County Auditor's Office provided a letter averring that Mrs. Hargraves had "one year of creditable service earned with Vanderburgh County." The majority applies a hyper-technical distinction between "credited" and "creditable" to reach its conclusion that Hargraves' Indiana service is not covered under KRS 61.552(17). I believe this distinction neither recognizes the legislative intent of the statute nor applies a rational interpretation to the provision.

Lastly, Hargraves is purchasing her way into the Kentucky plan by a cash outlay. It is a cash contribution incidentally fixed by the Administrators of our plan over which she has no control. She is not getting something for nothing. The issue is simply one of calculating retirement time. Under these circumstances, there is no rational reason to reach the hyper-technical interpretation of the statute accorded by the majority.

For the reasons set forth herein, I would affirm the decision of the circuit court.

BRIEF FOR APPELLANT:

Brown Sharp II
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Phillip J. Shepherd
Frankfort, Kentucky