RENDERED: MARCH 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2005-CA-000995-MR

VICTOR KEISKER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-00613

KENTUCKY RETIREMENT SYSTEMS — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Out-of-state retiree Victor Keisker appeals from an order of the Franklin Circuit Court upholding the Kentucky Retirement Systems' calculation of the amount of monthly out-of-pocket health insurance premium reimbursement he is entitled to under KRS[2] 61.702 and KAR[3] 1:290, and upholding

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

[2] Kentucky Revised Statutes.

[3] Kentucky Administrative Regulations.

the Retirement Systems' request for recoupment of premium reimbursement overpayments made by the agency to Keisker. For the reasons stated below, we affirm.

Victor Keisker is a retired Louisville police officer who currently lives in Lynn Haven, Florida. Keisker had 20 years of service at the time of his 1992 retirement. He retired under the County Employees Retirement System (CERS) Hazardous Duty plan. As a benefit of his CERS retirement status, Keisker is entitled to receive health insurance covering himself and his spouse.

After retiring from his job as a police officer, Keisker moved to Florida and began working for the Florida Department of Environmental Protection. As a benefit of his employment with the State of Florida, Keisker began receiving health insurance coverage for himself and his spouse; however, the State of Florida did not pay the full premium, and Keisker was required to pay a portion of the premium out of his own pocket. As a CERS retiree residing out of state, Keisker was eligible to apply for reimbursement of amounts he paid toward his Florida health care plan through the Retirement Systems' medical insurance reimbursement plan (MIRP). The rules concerning participation in the MIRP and eligibility for premium reimbursement are set forth in KRS 61.702 and 105 KAR 1:290.

Central to this appeal is the MIRP formula provision contained in 105 KAR 1:290 Section 2(2), which provides that reimbursement entitlements must be reduced by any amount contributed by an employer toward the recipient's medical insurance premium.

Prior to 2002, it appears that the agency reimbursed Keisker for his total out-of-pocket premium under the MIRP formula. Beginning in 2002, however, Keisker did not receive full reimbursement of his out-of-pocket costs under the agency's reimbursement formula. Instead, Keisker received reimbursement of an amount equal to the difference between the agency's monthly premium allowance for a couple health insurance plan and the amount paid by the State of Florida. For example, in 2002 the total premium for Keisker's Florida insurance for himself and his wife was $583.96. Of this amount, the State of Florida paid $450.34, resulting in an out-of-pocket expense to Keisker of $133.62 per month. The monthly premium allowance in 2002 for a couple plan was $522.92 per month. Pursuant to the Retirement Systems' MIRP formula as set forth in 105 KAR 1:290 Section 2(2), Keisker was reimbursed $72.58 per month, which was based upon the premium allowance for a couple plan ($522.92) less the Florida contribution ($450.34). This resulted in a net out-of-

pocket expense to Keisker of $61.04 per month ($133.62 - $72.58), or $732.48 per year.[4]

On March 20, 2003, Steven L. Mackey, Medical Insurance Ombudsman of the Retirement Systems, wrote Keisker a letter informing him that the agency had over-reimbursed him by a total of $232.48 for the period of June 2002 through September 2002.[5] After receiving the March 20, 2003, Mackey letter, Keisker objected to the agency regarding its request for reimbursement, and further objected to the agency's failure to pay his full out-of-pocket costs for his Florida health care insurance. Keisker contended that, pursuant to KRS 61.702, he was entitled to 100% reimbursement of his out-of-pocket costs up to the amount of the monthly premium allowance for a couple health care plan.

On June 4, 2003, a final administrative decision letter was issued by Jennifer A. Jones, Legal Counsel for Retirement Systems, reiterating that Keisker had been over-reimbursed for the period of June through September 2002, and

[4] In 2003 the total premium for Keisker's Florida insurance was $659.87 per month, of which the State of Florida paid $508.00. This resulted in Keisker having to pay $150.98 per month out-of-pocket. The Retirement Systems' premium allowance for a couple plan in 2003 was $545.76 per month, and pursuant to the Systems' formula for reimbursement, it reimbursed Keisker $36.88 per month ($545.76 - $508.88). As a result, Keisker's unreimbursed out-of-pocket expense in 2003 was $114.10 per month, or a total of $1,369.20 for 2003.

[5] The over-reimbursement resulted from Keisker having been reimbursed based upon the reimbursement rate for the family plan rate rather than the retiree and spouse (couple) rate. The letter requested reimbursement of the overpayment pursuant to 105 KAR 1:290 Section 7(1).

reaffirming the agency's interpretation of the relevant statutes and regulations which set forth the reimbursement rate for of out-of-pocket health care premiums. Keisker subsequently appealed the administrative decision letter pursuant to KRS 61.645 and KRS Chapter 13B. The matter was referred to Administrative Law Judge (ALJ) Paul F. Fauri.

The parties set forth stipulations, briefed the legal issues, and submitted the matter to the ALJ upon the record. No evidentiary hearing was held. On January 6, 2004, the ALJ issued his report and recommended order. The ALJ upheld the Retirement Systems' interpretation of KRS 61.702 and promulgation of 105 KAR 1:290 and its claim to reimbursement.[6]

Keisker timely filed exceptions to the ALJ's Report and Recommended Order. On April 6, 2004, the Administrative Appeals Committee of the Board of Trustees of Kentucky Retirement Systems issued a Final Order adopting the ALJ's recommended order as the final order of the Agency. Keisker subsequently appealed to the Franklin Circuit Court.

On April 13, 2005, the Franklin Circuit Court entered an order upholding the Retirement Systems' interpretation of KRS 61.702 and 105 KAR 1:290, and the agency's claim of entitlement to reimbursement from Keisker. This appeal followed.

[6] The ALJ, citing KRS 13A.140, noted that he was without authority to adjudicate the regulation as invalid.

Before us, Keisker contends that KRS 61.702 requires that he be reimbursed for the full amount of his out-of-pocket health care premiums up to the monthly premium allowance for a couples plan; that the Retirement Systems' reimbursement formula and 105 KAR 1:290 contravene KRS 61.702; that the Retirement Systems' "purported goal of equalizing benefits is ultra vires"; that the Retirement Systems' formula violates the constitutional freedom of interstate travel and migration; and that the formula is unconstitutional because it is arbitrary and capricious.

The principal issues in this appeal concern the proper interpretation of KRS 61.702 and whether the Retirement Systems' promulgation of 105 KAR 1:290 comports with KRS 61.702. The interpretation of a statute is a matter of law for the court. White v. McAllister, Ky. 443 S.W.2d 541 (KY. 1969). We review questions of law arising out of administrative proceedings de novo. Camera Center, Inc. v. Revenue Cabinet, 34 S.W.3d 39, 41 (Ky. 2000); Revenue Cabinet v. Joy Technologies, Inc., 838 S.W.2d 406, 408 (Ky.App. 1992).

The fundamental rule in the interpretation and construction of a statute is that the court should "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible." Moore v. Alsmiller, 289 Ky. 682, 686-87, 160 S.W.2d 10, 12 (1942). Generally a statute is open to

construction only if the language that is used is ambiguous and requires interpretation. If the language is clear and unambiguous and if applying the plain meaning of the words would not lead to an absurd result, further interpretation is unwarranted. Overnite Transportation v. Gaddis, 793 S.W.2d 129, 131 (Ky.App. 1990). However, when a statute is ambiguous and its meaning uncertain, the legislative intent should be ascertained by considering the whole statute and the purpose intended to be accomplished. Department of Motor Transportation. v. City Bus Co., Ky., 252 S.W.2d 46, 47 (Ky. 1952). In construing the statute, the court must consider the policy and the purpose of the statute, the reason and the spirit of the statute, and the mischief intended to be remedied. Barker v. Commonwealth, 32 S.W.3d 515, 516-17 (KY.App. 2000). The court's interpretation of the statute should produce a practical and reasonable result. Walker v. Kentucky Department of Education, 981 S.W.2d 128, 130 (Ky.App. 1998). Statutes should not be interpreted so as to bring about absurd or unreasonable results." Estes v. Commonwealth, 952 S.W.2d 701, 703 (Ky. 1997).

Our task is to determine whether KRS 61.702 authorizes the promulgation of 105 KAR 1:290 Section 2(2),[7] which provides that "[t]he monthly reimbursement rate shall be reduced by the

[7] Keisker does not allege that any of the other provisions of 105 KAR 1:290 are inconsistent with KRS 61.702.

amount contributed by an employer or agency toward the recipient's medical insurance premium." With the foregoing principles of statutory construction in mind, we now review the text of the statute. KRS 61.702 provides, in relevant part, as follows:

> (1) (a) The board of trustees of Kentucky Retirement Systems shall arrange by appropriate contract or on a self-insured basis to provide a group hospital and medical insurance plan for present and future recipients of a retirement allowance from the Kentucky Employees Retirement System, County Employees Retirement System, and State Police Retirement System . . . .
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> (b) The board may authorize present and future recipients of a retirement allowance from any of the three (3) retirement systems to be included in the state employees' group for hospital and medical insurance and shall provide benefits for recipients equal to those provided to state employees having the same Medicare hospital and medical insurance eligibility status . . . .
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> . . . .
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> (c) For recipients of a retirement allowance who are not eligible for the same level of hospital and medical benefits as recipients living in Kentucky having the same Medicare hospital and medical insurance eligibility status, the board shall provide a medical insurance reimbursement plan as described in subsection (7) of this section. (Emphasis added).
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> . . . .
>
> (3) (a) The premium required to provide hospital and medical benefits under this section shall be paid:

. . . .

> 5. In full from the Kentucky Retirement Systems insurance fund for all recipients of a retirement allowance from any of the three (3) retirement systems where such recipient is a retired former member of one (1) or more of the three (3) retirement systems (not a beneficiary or dependent child receiving benefits) and had two hundred and forty (240) months or more of service upon retirement.

. . . .

> (7) The board shall promulgate an administrative regulation to establish a medical insurance reimbursement plan to provide reimbursement for hospital and medical insurance premiums of recipients of a retirement allowance who are not eligible for the same level of hospital and medical benefits as recipients living in Kentucky and having the same Medicare hospital and medical insurance eligibility status. An eligible recipient shall file proof of payment for hospital and medical insurance at the retirement office. Reimbursement to eligible recipients shall be made on a quarterly basis. The recipient shall be eligible for reimbursement of substantiated medical insurance premiums for an amount not to exceed the total monthly premium determined under subsection (3) of this section. The plan shall not be made available if all recipients are eligible for the same coverage as recipients living in Kentucky. (Emphasis added).

KRS 61.702 (1)(a) and (b) provide that the Retirement Systems must provide similarly situated retirees covered under the Kentucky Employees Retirement System, the County Retirement

System, and the State Police Retirement System with health insurance equal to the health insurance benefits provided to current state employees. Accordingly, Keisker, along with other similarly situated retirees, is entitled to the same health insurance benefit as current state employees – no more, no less. We believe the legislature intended that the term "benefit" refer to the monetary monthly premium allowance as opposed to any other measure of benefits. For example, the monthly premium allowance for 2002 for a couple plan was $522.92 per month.

KRS 61.702(c) recognizes that some retirees will choose to move out-of-state following their retirement. This subsection of the statute provides that if an out-of-state retiree is, for some reason, "not eligible" to obtain the "same level" of health insurance as his Kentucky counterpart, then he is entitled to an amount of reimbursement as defined in subsection 7 of KRS 61.702.

As relevant to this case, the crucial provision of subsection 7 is the sentence "[t]he recipient shall be eligible for reimbursement of substantiated medical insurance premiums for an amount not to exceed the total monthly premium determined under subsection (3) of this section." We construe the reference to "the total monthly premium determined under subsection (3) of this section" as referring to the monthly premium allowance described above (for example, $522.92 per

month in 2002), and establishing the monetary insurance benefit level to which a retiree is entitled.

We believe that the legislature anticipated that in most situations, out-of-state retirees will obtain insurance from other sources, and will accordingly be reimbursed a monthly premium allowance in an amount up to, but not to exceed, the monthly premium allowance allotted for a similarly situated in-state retiree (for example, $522.92 per month in 2002).[8] We further believe, however, that the legislature intended that if an employee had insurance coverage through an out-of-state employer, such as the State of Florida, any premiums paid by the employer would be deducted from the monthly premium allowance. Because the overall statutory scheme seeks to place all retirees on the same monetary benefit footing, we construe the "not to exceed" clause of the subsection as mandating that the amount paid by a retiree's employer be deducted from the monthly premium allowance. This places in-state retirees, out-of-state retirees on a Kentucky insurance plan, out-of-state retirees with private insurance, and out-of-state retirees with employer funded insurance on the same footing

In summary, we construe the text of KRS 61.702 as providing for a deduction of insurance premiums paid by a third-party employer from the monthly premium allowance. This

[8] If the retiree had to pay more than the monthly premium allowance, he would have to pay those costs out of his own pocket.

construction ensures that an out-of-state retiree does not receive a greater allotment for insurance coverage than his Kentucky counterpart (or his out-of-state counterpart who participates in the Kentucky insurance system),[9] which we believe comports with the legislative intent of the statute. It follows that 105 KAR 1:290 Section 2(2) is consistent with KRS 61.702. "A regulation is valid unless it exceeds statutory authority or is repugnant to the underlying statutory scheme." Jewish Hosp., Inc. v. Baptist Health Care System, Inc., 902 S.W.2d 844, 848 (Ky.App. 1995). Such is not the case here; thus, the regulation is valid.

Keisker argues, however, that if the agency's interpretation of the statute is correct, as we have determined that it is, then KRS 61.702 is unconstitutional as a violation of his constitutional freedom of interstate travel and migration, and violative of Section 2 of the Kentucky Constitution because it is arbitrary and capricious. However, Kentucky Rules of Civil Procedure (CR) 24.03 provides that "when the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or

[9] Under Keisker's interpretation, again using 2002 as an example, he would have received a total monthly reimbursement allowance of $583.86 (the total cost of his Florida insurance) as compared to a $522.92 allowance for Kentucky retirees. We are persuaded that the legislature did not intend this result.

other paper first raising the challenge upon the Attorney-General." Brashars v. Commonwealth, 25 S.W.3d 58 (Ky. 2000).[10] Keisker has failed to cite us to his preservation of this issue by compliance with CR 24.03, and our review of the record fails to disclose such notification. In any event, we assign no merit to Keisker's constitutional arguments.

In summary, the statute is valid, the regulation promulgated by the agency is consistent with the statute, and the agency properly applied the formula described by 105 KAR 1:290, Section 2(2) to Keisker's circumstances. Based upon this conclusion, it follows that the agency has properly calculated the reimbursement to which Keisker is entitled, and Keisker is liable to the agency for repayment of the over-reimbursements applicable to the months of June through September 2002.

For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| David Leightty<br>Louisville, Kentucky | Brown Sharp II<br>Frankfort, Kentucky |

[10] Our Supreme Court may wish to reexamine this rule. It appears superfluous to require such notification when the Commonwealth is already a party to the proceedings. It further appears antithetical to judicial economy.