

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002153-MR

BOB MARANGO

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01758

KENTUCKY RETIREMENT SYSTEMS AND
BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Bob Marango appeals from the Franklin Circuit Court's judgment affirming an administrative decision by the Kentucky Retirement Systems (KRS) to spread out two lump sum payments for unpaid overtime over the

five years when they were earned rather than crediting them when paid, for purposes of calculating Marango's retirement benefits.

Marango was a hazardous member of the Kentucky Employees Retirement System (KERS), administered by KRS pursuant to his employment with the Department of Fish and Wildlife Resources. While employed, Marango filed an action in Meade Circuit Court against his employer for failure to pay him overtime during fiscal years 1998-1999 through 2003-2004. Prior to trial, the parties entered into a negotiated settlement agreement, which was memorialized through a court order entered on July 8, 2008.

The order specified the Department of Fish and Wildlife would pay \$40,000 to Marango through two \$20,000 payments, which would "be treated as unpaid overtime compensation subject to applicable state and federal withholdings[.]" The Commonwealth of Kentucky was ordered to credit the first \$20,000 payment "as though made in the fiscal year ending June 30, 2008[,] for purposes of retirement calculation." The remaining \$20,000 was to be paid within twenty days of Marango's resignation, so long as he retired by August 1, 2009, as required by the settlement agreement.

Both parties abided by the terms of the settlement agreement. The Department of Fish and Wildlife Resources paid Marango his regular salary and lump sum payments through regular payroll in 2008 and 2009. During the time Marango received both his salary and a lump sum payment, the Department of Fish and Wildlife Resources reported to KRS the total amount paid to Marango each

payroll period as part of Marango's creditable compensation earned during that month in accordance with the then current 105 KAR 1:140 §1 (1) (2009). The Department of Fish and Wildlife Resources treated these payments as creditable compensation by deducting Marango's employment contributions for retirement from these payments as required by KRS 61.543(1) and KRS 61.560(2). It also reported these payments as wages on Marango's 2008 and 2009 W-2 forms.

Pursuant to KRS 61.510(14)(c), as a hazardous member of KERS, Marango's final compensation was calculated based on his three highest paid years of service. Because the Department of Fish and Wildlife Resources reported the lump sum payments to KRS when paid, two of Marango's highest years were the years in which he received the lump sum payments.

Initially, KRS advised Marango the lump sum payments would be included in the calculation of his compensation for the final three years of employment. Marango began receiving retirement benefits accordingly. Later, KRS decided the payments should be treated as severance/lump sum bonus payments which would be creditable compensation averaged over Marango's total years of qualifying service pursuant to KRS 61.510(13).¹

Marango sought to clarify that the Meade Circuit Court order entering the negotiated settlement agreement was awarding him back pay and moved for

¹ Initially, KRS determined the second payment would be treated as a severance/lump sum bonus payment. After Marango requested an administrative hearing, KRS determined that both payments were severance/lump sum bonus payments and would be averaged over Marango's total service. Marango again requested an administrative hearing.

CR 60.02(f) relief. In granting this relief, the Meade Circuit Court clarified and amended its settlement order to specify the payments were compensation for unpaid overtime and not severance pay or a lump sum bonus, and were wages reportable as earnings to Marango for years 2008 and 2009.

KRS ultimately reclassified the payments as “unpaid overtime” then calculated the percentage of unpaid overtime compensation claimed for each calendar year and applied those percentages to the monies actually received to determine “Marango’s creditable compensation for the fiscal years 1998-1999 through 2003-2004[.]” Recalculating Marango’s creditable compensation from the lump sum payments to credit them when earned rather than paid resulted in Marango’s receiving a substantially reduced monthly retirement payment.

Marango requested an administrative hearing on how the payments should be calculated and continued to insist the payments be considered creditable compensation when paid. Following an administrative hearing, the hearing officer issued a recommended order in favor of the KRS decision to attribute the payments to the years they were earned, rather than paid. The hearing officer reasoned “[a]pplying the payments to the time period in which they [were] actually earned is consistent with the basis of the benefit formula of KRS 61.595 used to determine the member’s monthly annuity payment” and “[a]pplying the money when actually earned ensures the formula established by the legislature is not skewed by a member or agency to artificially increase, or decrease, a member’s retirement allowance.” The hearing officer determined KRS met its burden of proving

“assigning the two \$20,000 payments to [Marango] as unpaid overtime compensation when they were earned by [Marango] between 1998 and 2004 instead of when they were paid in 2008 and 2009 was correct” and issue preclusion and estoppel did not apply.

Marango filed exceptions. The Board of Trustees adopted the hearing officer’s recommended order as the final order of KRS.

Marango appealed to the Franklin Circuit Court, which affirmed the Board’s final order, determining it was appropriate to afford KRS deference in interpreting 105 KAR 1:140 §1 (1) and (3) as counting creditable compensation when earned. It determined that such an interpretation is consistent with the legislative intent of the General Assembly when enacting KRS 61.595 and the Meade Circuit Court’s order was not binding on KRS. The Franklin Circuit Court further determined equitable estoppel was inapplicable, the subsequent amendment to 105 KAR 1:140 was irrelevant and there was no due process violation.

Marango’s motion to alter, amend or vacate was denied and Marango timely appealed. The issues on appeal are as follows: (1) whether KRS has the authority to credit the payments over the period that the overtime was earned, rather than when it was paid; (2) whether the Meade Circuit Court’s order governs how the payments are to be credited for purposes of retirement; and (3) whether KRS is equitably estopped from reducing Marango’s monthly payment. Because we determine the first basis for relief is warranted, we do not reach Marango’s other arguments.

This case presents a pure issue of law as to how the relevant statutes and regulations should be interpreted. We review issues of law involving the decision of an administrative agency *de novo*. *Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 381 (Ky.App. 2004). In construing statutes, we are required to give effect to the intent of the General Assembly as found in language of the statute. *White v. Check Holders, Inc.*, 996 S.W.2d 496, 497 (Ky. 1999); *Karem v. Bd. of Trustees of Judicial Form Ret. Sys.*, 293 S.W.3d 401, 403-404 (Ky.App. 2009); KRS 446.080(4). If the language of a statute is clear and unambiguous, further interpretation is unwarranted and the statute must be given its written effect. *White*, 996 S.W.2d at 497; *Gilbert v. Commonwealth, Cabinet for Health and Family Services*, 291 S.W.3d 713, 716 (Ky.App. 2008).

While we defer to an agency's interpretation of a statute if the statute is silent or ambiguous, if any apparent ambiguity can be resolved using traditional methods of statutory construction, deference is inappropriate. *Metzinger v. Kentucky Ret. Sys.*, 299 S.W.3d 541, 545 (Ky. 2009).

KRS's focus on whether its practice is consistent with the benefit formulas of KRS 61.595 is misplaced. This statute explains what percentage of final compensation is due depending upon years of service. It does not provide a basis for calculating final compensation.

Instead, the relevant statute is KRS 61.510, which provides definitions for "creditable compensation" and "final compensation." Although there is a paucity of case law interpreting this statute, we note the discussion of the statute in *Ryan v.*

Bd. of Trustees of Kentucky Ret. Sys., 2008-CA-000332-MR, 2008 WL 1757236 (Ky.App. 2008) (unpublished), is inapplicable to the question before us. In *Ryan*, the issue was whether KRS could properly recalculate an employee's cost to purchase service credit where the employee's current rate of pay at the time of the purchase changed subsequent to a settlement agreement for back pay; here, we are examining whether back pay should be counted when it was earned or when it was paid for purposes of determining retirement benefits. Therefore, we examine the plain language of the statute.

KRS 61.510(13) defines "creditable compensation" as: "wages . . . paid to the employee as a result of services performed for the employer . . . which are includable on the member's federal form W-2 wage and tax statement under the heading 'wages, tips, other compensation[.]'" KRS 61.510(13) (emphasis added). Pursuant to KRS 61.510(14)(c) (emphasis added), final compensation of a hazardous position member means "the creditable compensation of the member during the three (3) fiscal years he was paid at the highest average monthly rate divided by the number of months of service credit during that three (3) year period multiplied by twelve (12)." Therefore, an employee's retirement should be based on his highest paid years, which include all creditable compensation when paid except any amounts that constitute a lump-sum bonus, severance pay or employer-provided payment for service credit of \$1,000 or more, which are averaged over the employee's total service. KRS 61.510(13), (14).

Wages reportable on a W-2 include “all remuneration for employment . . . paid[.]” 26 U.S.C. § 3401(a); 26 U.S.C. § 3121(a). Employers provide a W-2 to employees for “the remuneration paid by such person to such employee during the calendar year,” which includes “the total amount of wages” and “the total amount deducted and withheld as tax[.]” 26 U.S.C. § 6051(a)(3)(5) and (6).

When the language of KRS 61.510(13) and the relevant federal tax statutes are examined, it is clear and unambiguous that creditable compensation should be credited in the year it is paid and reported on a W-2 unless it qualifies to be spread out under one of the enumerated exceptions. It is undisputed that Marango’s lump sum payments do not come under these provisions. Therefore, they must be credited when paid.

KRS’s interpretation that it can substitute the word “earned” for the word “paid” is not entitled to any deference. The General Assembly did not use the words “paid” and “earned” interchangeably in the KRS statutes and these words have distinct meanings. *See e.g.* KRS 61.702(8)(a) (discussing “earned” months of service). There is no indication the General Assembly granted KRS any discretion to reinterpret the clear meaning of the word “paid.”

Here, where there is no dispute as to when the settlement amounts were paid, KRS had a pure ministerial duty to make calculations based on the payment information it received and to pay out retirement benefits accordingly.

KRS’s action of substituting “earned” for “paid” cannot be justified based on the administrative regulations it promulgated pursuant to KRS 61.510. While the

General Assembly vested KRS’s Board of Trustees with very broad powers to adopt administrative regulations to administer KERS in KRS 61.645(9)(g), “an administrative agency may not seek to amend, alter, enlarge, or limit terms of legislative enactment.” *Ruby Const. Co., Inc. v. Dep’t of Revenue, Commonwealth ex. rel. Carpenter*, 578 S.W.2d 248, 252 (Ky.App. 1978). We will not be “bound by an erroneous administrative interpretation no matter how long standing[,]” *Camera Ctr., Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000), or “sustain the validity of a regulation that contravenes the statute it seeks to interpret[,]” *Ruby Const. Co., Inc.*, 578 S.W.2d at 252. *See Metzinger*, 299 S.W.3d at 546-547.

Therefore, to the extent that KRS has interpreted 105 KAR 1:140 to contradict the unambiguous language of KRS 61.510(13) and (14), such interpretation is erroneous and cannot be sustained.

Because KRS 61.510 requires Marango’s creditable compensation to be applied when paid, we reverse and remand to the Franklin Circuit Court for a judgment consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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