STATE OF MICHIGAN

COURT OF APPEALS

GILLIAN EMLAW WILLIAMS, Petitioner-Appellee,	UNPUBLISHED January 11, 2011
v	No. 292556 Ingham Circuit Court
PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM and PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, Respondents-Appellants.	LC No. 06-001684-AA

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondents appeal by leave granted an order of the circuit court ordering respondents to allow petitioner to switch retirement plans retroactive to 1990. For the reasons set forth in this opinion, we reverse and remand for reinstatement of the order of the Retirement Board denying permission for petitioner to join the member investment plan.

I. FACTS AND PROCEDURAL HISTORY.

In 1989 when petitioner was 18 years old, she began working for the Washtenaw Intermediate School District as a seasonal employee for five weeks during the summer. While she attended college, petitioner worked for five weeks each summer from 1989 through 1992, and in the summer of 1994. She also worked for ten weeks during the summer of 1996. The school district offered its employees a choice of two retirement plans: the basic retirement plan and the member investment plan (MIP). The MIP became effective in 1987 and pursuant to MCL 38.1343a, newly hired employees were given 30 days to select a retirement plan. If a new employee did not choose a retirement plan within that 30-day period, they were enrolled by default in the basic plan. From January 1, 1990, all new employees were automatically placed in the MIP. The Public School Employees Retirement System (PSERS) left it to individual school districts to inform their employees about their retirement choices. Petitioner did not select a retirement plan when she was hired in 1989 so consequently, she was enrolled in the basic retirement plan. Petitioner alleges that the school district did not make her aware that she had a choice between the basic plan and MIP.

MCL 38.1343a was amended by 1990 PA 298 to provide a 15-month open window period in which basic plan members could switch into the MIP. This window period began

in the fall of 1991, and in October of that year, the Office of Retirement Services mailed enrollment packets to the homes of all members of the basic plan. The enrollment packets explained the two retirement plans and gave an estimate of how much the basic plan members would have to contribute to transfer to the MIP. According to defendant PSERS, this packet was mailed to petitioner's address of record, her parent's home, which was the same address where petitioner received her tax forms. Defendant PSERS asserted that all basic plan members were sent at least three mailings advising them of the opportunity to join the MIP. Lois Musbach, an analyst with the service credit section in the Office of Retirement Services believed that a packet was sent to the address on file for petitioner, but did not know to what address the packet was actually sent or whether it may have been returned as undeliverable. Musbach further testified that respondent had allowed members to elect the MIP outside of the two statutory windows based on extenuating circumstances, including where employees could prove that respondents sent the information to the wrong address or where an employer informed respondent that the employer had failed to give the employee the necessary forms. According to defendant PSERS's records, petitioner never responded to the information sent to her, nor did she elect to join the MIP and she remained a member of the basic retirement plan. Petitioner contends that she did not receive these mailings and was therefore unaware of her opportunity to switch plans.

In 2004 petitioner began working full-time at Lincoln Consolidated Schools. In 2005, she learned about the two retirement plans and that she had been enrolled in the basic plan. She sought to switch plans, but her request was denied by PSERS. She requested and received a formal hearing, which resulted in a recommendation that petitioner be allowed to join the MIP. PSERS filed exceptions to the recommendation, and on October 26, 2006, the Retirement Board rejected the hearing officer's recommendation and denied petitioner's request to transfer from the basic retirement plan into the MIP. The Retirement Board made the following relevant findings:

> From 1989 to 2005, Petitioner's address on file was with the Respondent was [petitioner's parent's address]. Petitioner received tax forms at this address. In the fall of 1991, all Basic Plan Members had the opportunity to enroll in the Member Investment Plan under the provisions of 1990 PA 298. All Basic Plan Members were sent a minimum of three mailings advising them of the opportunity to join the Member Investment Plan. The mailings were sent to the Petitioner's address on file with the Respondent. (citations omitted).

The Retirement Board concluded that none of the statutory provisions pertaining to membership in the retirement plans required respondents or any other entity to notify petitioner about changes in the law:

> 1990 PA 298 amended MCL 38.1343a(3) to provide members of the Basic Plan, such as Petitioner, with the option to elect the Member Investment Plan. This statute did not require the Respondent or anyone else, to notify the Petitioner of [t]his statutory change. Because Petitioner did not elect the Member Investment Plan under the provision of 1990 PA 298, she remained in the Basic Plan . . . Petitioner is presently a member of the Basic Plan as required by 1985 PA 91, MCL 38.1343a.

> There are no currently existing statutory provisions which allow the Petitioner to change from the Basic Plan to the Member Investment Plan.
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> Petitioner did not have any due process right to be informed of the opportunity to elect the Member Investment Plan when 1985 PA 91 and 1990 PA 298 were enacted.
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> Therefore, Petitioner has failed to prove, by a preponderance of the evidence, that she is a member of the Member Investment Plan or has the right to change form the Basic Plan to the Member Investment Plan. As a result the Respondent is not required to accept Petitioner as a member of the Member Investment Plan or to accept contributions from her to the Member Investment Plan as provided in MCL 38.2343a.

Petitioner filed a petition for review in the circuit court. She requested a taking of additional evidence under MCL 24.305 and MCR 7.105(I), which was granted on February 20, 2007. On remand, the hearing officer articulated the issue as:

> . . . whether, after considering additional evidence taken by Petitioner and presented by Petitioner through this Hearing Officer, the Board's Order of October 26, 2006, denying Petitioner's request to transfer from the Basic Retirement Plan to the Member Investment Plan, should be upheld and reiterated in its entirety.

While the remand proceedings were pending, petitioner filed an original action in the Ingham Circuit Court seeking declaratory and injunctive relief on the basis of alleged violations of the Administrative Procedures Act (APA), MCL 24.201 *et. seq.*, and the Open Meetings Act (OMA), MCL 15.261 *et. seq.* The circuit court granted summary disposition in favor of the Retirement Board on November 27, 2007, and this Court affirmed that decision.[1]

On January 23, 2008, the hearing officer issues a Supplemental Proposal for Decision (SPFD) on remand, recommending that the Retirement Board's order denying petitioner's request to change retirement plans be upheld and reiterated in its entirety. Thereafter, petitioner filed exceptions to the SPFD and on April 24, 2008, the Retirement Board adopted the hearing officer's findings and conclusions.

The circuit court found on appeal, however, that the Retirement Board's decision was arbitrary, capricious, and an abuse of discretion. The trial court stated on the record:

> . . . I agree that notice of the law, we're all presumed to know the law, but Michigan is in fact a notice state, and I take that very seriously, especially when it

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[1] *Williams v Michigan Public School Employees Retirement Bd*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 282543).

> comes to someone's retirement, which is what I started out saying, and this young woman was not given enough facts or information to provide her notice she was even eligible for a retirement, and I think there were many opportunities for that to occur . . . so what I'm going to do is I believe that the ruling that-where the board said that she was denied entry into the MIP was arbitrary and capricious, it was abuse of discretion. I am going to allow her to be enrolled in the MIP plan retroactive to her employment in 1990. I'm going to authorize her to be allowed to make the MIP contribution as described in MCL 38.1343a, and I think that's all I need to do. I think the reading of defendant's interpretation of all this is narrow-too narrow for my comfort level.

II. ANALYSIS.

On appeal, respondents first contend that petitioner failed to preserve for appeal her objections to the Retirement Board's decision because she did not file any exceptions to the SPFD, and the SPFD included a recommendation that the board deny her request to join the MIP. We review this issue of law de novo. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97; 754 NW2d 259 (2008).

When the Retirement Board chose not to follow the hearing referee's proposal for decision and denied petitioner's request to join the MIP, she timely objected by filing her petition for review with the circuit court. The circuit court remanded the case back to the agency, but only for consideration of petitioner's allegations of procedural irregularities, not to consider the merits of her argument that she should be allowed to join the MIP. On remand, the agency considered petitioner's Administrative Procedures Act[2] and Open Meetings Act[3] claims, as well as petitioner's procedural due process claim that respondents did not give her an adequate hearing. There was no reason for petitioner to object to the SPFD on the basis of issues that were not considered in the SPFD and had already been appealed to the circuit court. None of the issues considered in the SPFD formed the basis of the circuit court's order that petitioner be allowed to join the MIP. Therefore, that issue remained before the circuit court while the procedural claims were on remand, and the circuit court did not err by addressing petitioner's claims.

We agree with respondents, however, that the circuit court erred because the Retirement Board's decision was not arbitrary, capricious, or an abuse of discretion. When this Court reviews a lower court's review of an administrative agency's decision, our role is 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*, 220 Mich App at 234. The circuit court's review of respondents' decision was "limited to determining whether the decision was contrary to law, was supported by competent, material,

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[2] MCL 24.201 *et seq*.

[3] MCL 15.261 *et seq.*

and substantial evidence of 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." *Dignan v Mich Pub Sch Employees' Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

The circuit court held that PSERS was required to provide notice to petitioner because Michigan is a "notice state." Petitioner does not advance this argument on appeal rather she asserts that respondent's action in failing to provide her notice violated her due process and equal protection rights. This Court has noted that "[o]ne of the most obvious precepts of due process is that all members of any given class must be afforded substantially the same procedure." *Arnold v Crestwood Bd of Ed*, 87 Mich App 625, 646; 277 NW2d 158 (1978). The Equal Protection Clause[4] commands that "all persons similarly situated should be treated alike." *Tennessee v Lane*, 541 US 509, 522; 124 S Ct 1978; 158 L Ed 2d 820 (2004) (internal citation and quotation marks omitted).

Petitioner argues that her due process rights were violated because she was not "provided with any notice or the same notice that was provided to other members." Similarly, she asserts "Equal protection was violated because Petitioner was not provided the same notice other employees received or the same opportunity to switch plans that was provided to other employees who did not receive information from their employers. Petitioner's argument belies the record evidence in this case. It is undisputed that respondents generally left the responsibility of providing employees with retirement information to the individual school districts. After the passage of 1990 PA 298, respondents did undertake to directly inform basic plan members about their opportunity to switch plans. Even assuming petitioner's contention that she did not receive any of the three mailings that were sent to her address of record as true, petitioner failed to produce any evidence that respondents treated petitioner any differently than other members of the class. Review of the record evidence leads us to conclude that the Board's decision on this issue was not contrary to the law, and therefore the trial court clearly erred in so holding. *Dignan*, 253 Mich App at 576.

Petitioner's next argument relative to her theory that her due process and equal protection rights were violated is seemingly grounded in her contention that she should have been able to "belatedly elect the MIP." The Equal Protection Clause requires that similarly situated people be treated similarly. *Lane*, 541 US at 522 (2004). Petitioner cites evidence in the record of the original agency hearings to the effect that other individuals who did not receive actual notice of the statutory window to switch plans were allowed to switch later. However, the record does not demonstrate that any of those allowed to switch were similarly situated to petitioner.

PSERS did allow other employees who did not receive notice to switch to the MIP after the statutory window had closed. Testimony presented by respondent on this issue indicated that members were allowed to elect the MIP outside of the two statutory windows based on extenuating circumstances. Those circumstances enumerated by respondent occurred when (1) employees could prove that respondents sent the information to the wrong address or (2) where

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[4] US Const, Am XIV, § 1.

an employer informed respondent that the employer had failed to give the employee the necessary forms. Neither extenuating circumstance is applicable to this case. Petitioner does not directly assert that respondent sent notice to the wrong address; rather she seemingly implies that notice must have been sent to the wrong address or not sent at all as she does not recall ever receiving notice. However, to prevail, petitioner must have proffered some evidence that respondent's treated her differently from other members of the class. Petitioner has failed to proffer any such evidence and accordingly, we cannot find that her due process or equal protection rights were violated by the acts or alleged omissions of respondent.

Additionally, we note that the Retirement Board found that petitioner did not have any due process right to be informed of the opportunity to elect the MIP plan and that finding is supported by the clear statutory language of MCL 38.1343a. This Court has held that no individual is entitled to notice of a new law, even one that impacts benefits received by the individual, when the statute does not specifically require such notification. *Saxon v Dep't of Social Servs*, 191 Mich App 689, 701-702; 479 NW2d 361 (1991). The statutes involved here did not require respondents to provide notice to the plan members. Therefore, the circuit court's ruling, that "Michigan is in fact a notice state," as applied to this case, was based on erroneous legal principles. Accordingly, the trial court's decision must be reversed. *Boyd*, 220 Mich App at 234.

Petitioner provides two alternative justifications for the circuit court's order. These arguments were not raised by the appellant, and petitioner would normally be required to bring a cross-appeal in order to raise them. However, alternative bases for upholding a lower court's order need not be cross-appealed. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006).

Petitioner first argues that a 1998 amendment, which added an exception to the definition of who is a member of PSERS found at MCL 38.1305, operates retroactively to make her a member of the MIP. Because statutes are presumed to operate prospectively, this Court will only apply a statute retroactively if the Legislature clearly indicated an intention to give the statute retroactive effect. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). The exception provides as follows:

> (1) "Member" means a public school employee, except that member does not include any of the following:
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> * * *
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> (*l*) A person, not regularly employed by a reporting unit, who is employed by a reporting unit in a temporary, intermittent, or irregular seasonal or athletic position and who is under the age of 19 years.

If this statute operated retroactively, it would mean that petitioner was not a member of PSERS during the summer of 1989. Everyone who first became a member on or after January 1, 1990 automatically became a member of the MIP and not the basic plan. 1989 PA 194; MCL 38.1343a. If 1998 PA 123 operates retroactively, then petitioner did not become a member until after January 1, 1990, and is a member of the MIP retroactive to her first day of employment in 1990.

To support the argument that the statute be given retroactive effect, petitioner points to the following language from the House Legislative Analysis of the bill:

> It has been pointed out that there are a small number of current retirement system members who were employed by a school district in seasonal or athletic program positions (probably as high school or college students) during the period in which participation in the MIP was voluntary, and who opted for the basic plan, not realizing they were making an irrevocable decision that would seriously affect their retirement plans after eventually joining the MPSERS as full-time employees (most likely, as teachers). This small group of people would like the opportunity to reconsider the option to join the MIP program. [House Legislative Analysis, HB 4943, July 6, 1998, p 1.]

"[L]egislative analyses are 'generally unpersuasive tool[s] of statutory construction;'" nonetheless, a court may "'"look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions."'" *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007) (citations omitted; alteration by *Kinder*). This analysis does suggest that the Legislature intended to aid people in petitioner's situation.

However, petitioner fails to note that the bill addressed this concern by offering another opportunity for people in petitioner's situation to opt into the MIP:

> (1) On or before December 31, 1998, or, if the notification described in subsection (4) is not received by July 1, 1998, then on or before the expiration of 180 days after the department receives that notification, a member who meets all of the following conditions may irrevocably elect to make the contributions described in section 43a(2) to the member investment plan:
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> (a) He or she was employed by a reporting unit on or after January 1, 1987 and before January 1, 1990.
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> (b) He or she had 1 year or less of credited service in effect on January 1, 1990.
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> (c) He or she did not elect to make contributions to the member investment plan.
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> (d) He or she was not a member during the period that members were eligible to make the election under section 43a(3).
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> * * *
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> (4) This section does not apply until the department receives notification from the United States internal revenue service that this section will not cause the retirement system not to be qualified for tax purposes under the internal revenue code. [MCL 38.1343d(1), (4).]

It does not appear that the IRS gave the triggering notification for this part of the bill to take effect. Indeed, the legislative analysis predicted this outcome. House Legislative Analysis, HB 4943, July 6, 1998, p 2. Moreover, the analysis states that the language that petitioner wishes to make retroactive was meant to reduce the state's administrative costs, because young seasonal employees were forced to contribute 4 percent of their paychecks to the retirement program, but could get the money back at the end of their season of employment, costing the state around $60,000 per year to collect the money and give it back. *Id*. Administrative efficiency would not be served by applying the statute retroactively. Consequently, contrary to the assertions of petitioner, we find no clear directive in the legislative history of the act to hold that the Legislature intended the law to be retroactive.

In sum, MCL 38.1305(1)(*l*) is not expressly retroactive, and the legislative history does not suggest that it was intended to be retroactive. If anything, a proper reading of the legislative history suggests just the opposite.

Respondents also argue that the circuit court erred by allowing petitioner's motion to take additional evidence. The additional evidence taken on remand concerned petitioner's claims of procedural irregularities. Those claims were already dealt with by this Court as stated *supra*. Furthermore, striking the additional evidence would have no impact on the issues discussed above and accordingly, this issue is moot. *Driver v Naini*, 287 Mich App 339, 355; 788 NW2d 848 (2010).

The ruling of the circuit court is reversed. We remand for reinstatement of the order of the Retirement Board denying permission for petitioner to join the MIP. We do not retain jurisdiction. No costs are accessed in this case, a public question being involved. MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello