

**MINUTES  
OF  
ADMINISTRATIVE APPEALS COMMITTEE  
October 29, 2015 at 10:28 A.M., E.T.  
Board Room  
Perimeter Park West, 1270 Louisville Road  
Frankfort, KY 40601**

At the meeting of the Administrative Appeals Committee, held on October 29, 2015, the following members were present: Ed Davis, Chair and Mary Helen Peter.

In addition, those present were Becky Stephens, KRS, Liza Welch, KRS, Joseph Bowman, KRS, Jennifer Jones, KRS and Tracy Chambers, Recording Secretary.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried to approve the Minutes of the August 27, 2015 Administrative Appeals Committee Meeting.

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Mr. Davis noted the necessity of closed session for the purpose of reviewing the administrative appeals of Administrative Action Numbers: 14-PS-01, 15-PS-05, 15-PS-02, 15-PS-09, 15-A-10, 15-A-12 and 15-PS-14.

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Following discussion in closed session, the Committee returned to open session, whereafter the following transpired.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including the recommended order and any exceptions duly filed, in the case of Administrative Action Number: 14-PS-01, to accept the Hearing Officer's Report, Findings of Fact, Conclusions of Law, and to hereby issue its Final Order that the increase in creditable compensation greater than ten percent (10%) at issue was not the direct result of a bona fide promotion or career advancement pursuant to KRS 61.598. The claimant shall be required to pay for the additional actuarial costs assessed at \$771.36.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including the recommended order and any exceptions duly filed, in the case of Administrative Action Number: 15-PS-05, to reject the Hearing Officer's Report and to instead, remand this matter to the hearing officer for further proceedings consistent with the following:

This Committee finds that the hearing officer erred in assigning the burden of proof to Kentucky Retirement Systems. This Committee finds that the hearing officer is incorrect in characterizing the actions of Kentucky Retirement Systems as "punishment" seeking monetary penalties for violations of KRS 61.598. (See Recommended Order, p 2). This Committee specifically rejects the hearing officer's conclusion that "The Systems has the burden of establishing by a preponderance of the evidence that the Systems did not properly determine that the increase in creditable compensation greater than ten percent (10%) was not due to a bona fide promotion or career advancement pursuant to KRS 61.598. The Systems as [sic] FAILED to meet this burden of proof." (See Recommended Order, Conclusion of Law 3, p 10).

The payment of additional actuarial costs is not a penalty imposed on an employer for perceived misconduct. The statute clearly describes the amounts alleged to be owed as additional actuarial costs. There is no indication the actuarial costs are a penalty under any definition of the words. The actuarial costs are just that, costs alleged to be due. KRS 61.598 does not restrict or prohibit an employer's ability to provide an employee with annual increases in creditable compensation greater than 10% over the last five years of employment. It is perfectly permissible. It simply requires that the employer remit the actuarial costs to the pension fund associated with this increased compensation (and increased benefits obligation by KRS).

Turning to the plain language of KRS 13B.090(7), it is clear to this Committee that the burden falls squarely upon the Employer. That statute states in relevant part:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

It is the Employer, when invoking the pension spiking appeal process, that is proposing the Agency take action. The Employer, as the case may have it here, is requesting that the Agency take action by reconsidering its prior determination. The Employer is seeking a benefit, a reconsideration of the pension spiking determination so not to pay the required actuarial costs. Therefore, the Administrative Appeals Committee (AAC) specifically holds that it was error for the hearing officer to assign the burden to Kentucky Retirement Systems.

Accordingly, this Committee concludes that the Employer bears the burden of proof under KRS Chapter 61 and Chapter 13B. This matter is REMANDED to the hearing officer for further consideration on the sole issue of whether the Claimant satisfied its burden of proving by a preponderance of the evidence that the increased creditable compensation was a direct result of a bona fide promotion or career advancement as defined in KRS 61.598.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including the recommended order and any exceptions duly filed, in the case of Administrative Action Number: 15-PS-02, to accept the Hearing Officer's Report finding that the increase in creditable compensation at issue was not the result of a bona fide promotion or career advancement pursuant to KRS 61.598. However, AAC rejects those portions of the Hearing Officer's Recommended Order placing the burden of proof on Kentucky Retirement Systems. Specifically, AAC rejects the hearing officer's statement that:

The Systems bears the burden of establishing it properly determined that the increase in the member's creditable compensation greater than 10 percent was not due to a bona fide promotion or career advancement pursuant to KRS 61.598. KRS 13B.097(7) places the burden of proof on an agency to show the propriety of the penalty imposed. In essence, the Systems seeks to punish Employer for allegedly violating the pension spiking statute. Specifically, the Systems seeks to require Employer to pay actuarial costs resulting from annual increases in the member's creditable compensation greater than 10 percent over her last five fiscal years of employment. Thus, pursuant to KRS 13B.097(7), the Systems bears the burden of proof. (See Recommended Order, p 2).

AAC also specifically rejects the Hearing Officer's Conclusion of Law No. 4 insofar that it states:

The Systems has the burden of establishing by a preponderance of the evidence that propriety of the penalty imposed by establishing that the increase in the member's creditable compensation greater than 10 percent was not due to a bona fide promotion or career advancement pursuant to KRS 61.598.

AAC specifically finds that the hearing officer erred in assigning the burden of proof to Kentucky Retirement Systems. The hearing officer repeatedly misstates the statutory reference for burden of proof, "KRS 13B.097(7)." The correct statutory reference is KRS 13B.090(7). That statute states in relevant part:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to

establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

Requiring employers to fund their actuarial required costs for increases in creditable compensation is not a "penalty" as couched by the hearing officer. The statute clearly describes the amounts alleged to be owed as additional actuarial costs. There is no indication the actuarial costs are a penalty under any definition of the words. The actuarial costs are just that, costs alleged to be due. KRS 61.598 does not restrict or prohibit an employers' ability to provide an employee with annual increases in creditable compensation greater than 10% over the last five years of employment. It is perfectly permissible. It simply requires that the employer remit the actuarial costs to the pension fund associated with this increased compensation.

Turning to the plain language of KRS 13B.090(7), it is clear to this Committee that the burden falls squarely upon the Employer. It is the Employer that is proposing the Agency take action. The Employer is seeking a benefit, a reconsideration of the pension spiking determination so not to pay the required actuarial costs. Therefore, the Administrative Appeals Committee (AAC) specifically holds that it was error for the hearing officer to assign the burden to Kentucky Retirement Systems.

The end result, however, remains unchanged. The evidence of record proved that the member's creditable compensation greater than 10 percent was not due to a bona fide promotion or career advancement and the claimant is responsible for the increased actuarial costs. Accordingly, the Hearing Officer's Recommended Order Conclusion of Law No. 4 is rejected and replaced with the following:

Employer has the burden of establishing by a preponderance of the evidence that the increase in the member's creditable compensation greater than ten percent (10%) was due to a bona fide promotion or career advancement pursuant to KRS 61.598. Claimant has NOT met its burden.

The Board hereby issues its Final Order that the increase in creditable compensation greater than ten percent (10%) at issue was not the direct result of a bona fide promotion or career advancement pursuant to KRS 61.598. Claimant shall be required to pay for the additional actuarial costs assessed at \$5,049.47.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including evidence that the Claimant has paid in full the actuarial costs assessed in the amount of \$3,014.46, the unopposed motion to dismiss and any exceptions duly filed, in the case of Administrative Action Number: 15-PS-09, to accept the Order of Dismissal, and to dismiss this action, as there being no justiciable controversy between the parties.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including Claimant's Motion to Withdraw its Claim and any exceptions duly filed, in the case of Administrative Action Number: 15-A-10, to accept the Agreed Order to Dismiss Action, and to dismiss this action per the terms of the parties agreement that Kentucky Retirement Systems will accept and review supplemental material provided by the Claimant following the expiration of the 30 day time limit set forth in the February 5, 2015 letter. The parties further agree that any additional supporting materials that claimant wishes to provide for consideration must be submitted no later than thirty (30) days following the entry of the hearing officer's Agreed Order of Dismissal. Thereafter, Kentucky Retirement Systems will conduct its evaluation as to whether the member's increase in creditable compensation was the result of a bona fide promotion or career advancement as set forth in KRS 61.598 and 105 KAR 1:140 Section 8.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including Claimant's Motion to Withdraw his Claim and any exceptions duly filed, in the case of Administrative Action Number: 15-A-12, to accept the Hearing Officer's Order of Dismissal, and to dismiss this action, as there being no justiciable controversy between the parties.

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It was moved by Ms. Peter, seconded by Mr. Davis, and carried unanimously, that the Committee members having considered the record, including Claimant's unopposed motion to dismiss and any exceptions duly filed, in the case of Administrative Action Number: 15-PS-14, to accept the Order Dismissing Appeal, and to dismiss this action *with prejudice*.

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There being no further business, the meeting was adjourned at 10:52 A.M., E.T. to meet on December 21, 2015 immediately following the Disability Appeals Committee meeting.

