

2010

Kevin A. McLeod v. Utah State Retirement Board : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEVIN A. McLEOD,

Appellant/Petitioner,

v.

UTAH STATE RETIREMENT BOARD,

Appellee/Respondent.

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BRIEF OF APPELLEE

CASE NO. 201000026

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APPEAL FROM THE UTAH STATE RETIREMENT BOARD

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

Utah Code Ann. § 49-11-613(7) allows a person who is dissatisfied by a decision of the Utah State Retirement Board (“Board”) to “obtain judicial review by complying with the procedures and requirements of Title 63G, Chapter 4, Administrative Procedures Act.” Utah Code Ann. §63G-4-403 confers jurisdiction on the Supreme Court or Court of Appeals to review all final agency action resulting from formal adjudicative hearings.

Utah Code Ann. §78A-4-103(2)(a) and Rule 14 of the Utah Rules of Appellate Procedure confer jurisdiction on the Court of Appeals over the final orders and decrees resulting from formal adjudicative proceedings.

STATEMENT OF ISSUES

1. Did the Board correctly apply the plain language of Utah Code Ann. § 49-11-504(9) (2007) in calculating Kevin McLeod’s (“Mr. McLeod’s”) retirement benefit based on two periods of service?
2. Did the Board correctly deny Mr. McLeod’s claim of equitable estoppel against Utah Retirement Systems (“URS”) as a government agency when Mr. McLeod failed to show an unusual circumstance or that URS made a statement to him on which he reasonably relied to his detriment?

STANDARD OF REVIEW

Mr. McLeod argues that the Board mistakenly calculated his retirement benefit by calculating his retirement benefit based on two different periods of service in accordance

with Utah Code Ann. §49-11-504(2007). The Court of Appeals has stated that it reviews the “Board’s application or interpretation of a statute ‘as a question of law under the correction-of-error standard.” *Sindt v. Retirement Bd.*, 2007 UT 16 ¶ 5, 157 P.3d 797, 799.

Mr. McLeod also argues that the Board should be equitably estopped from denying his claim. Mr. McLeod’s estoppel “claim presents a mixed question, which ‘involves the application of law to fact.’” *Terry v. Retirement Bd.*, 2007 UT App 87, ¶ 8, 157 P. 3d 362 (*quoting State v. Hamilton*, 2003 UT 22, ¶ 33 n. 12, 70 P.3d 111). The Court of Appeals has stated that it “reviews the underlying facts for clear error and the application of the law to those facts for correctness.” *See id.* ¶ 9.

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. §49-11-504(9) (a)(b) (2007):

-
- (9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:
- (a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and
 - (b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

Utah Code Ann. §49-11-613(1)(2009), All members, retirees, . . . or covered individuals of a system . . . shall acquaint themselves with their rights and obligations under this title. . . .”

SUMMARY OF THE PROCEEDINGS

This is a petition for review from the final order of the Board, dated December 17, 2009, taken on the Request for Board Action of Mr. McLeod.

On August 19, 2009, this matter came before the Board's Hearing Officer, Richard C. Howe ("Hearing Officer"), under Utah Code Ann. §49-11-613, for a formal administrative hearing on Mr. McLeod's claim that his post-retirement benefits be calculated using his post-retirement final average salary for all his years of service. Hearing Officer issued a Memorandum Decision on October 14, 2009, denying Mr. McLeod's request for additional retirement benefits, holding that the URS correctly followed the applicable statute in calculating Mr. McLeod's retirement benefits, and that URS was not estopped from calculating his benefit in accordance with the statute under common law. On December 17, 2009, the Board adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Order.

SUMMARY OF THE FACTS

The Hearing Officer made, and the Board adopted, the following findings of fact which are the basis of this appeal:

1. Mr. McLeod worked for Bountiful City and then for the Davis County Sheriff's Office accruing just over 20 years of service credit in the Public Safety Noncontributory Retirement System by November 1996. Hearing Transcript [hereinafter "HT"] 5:4-12.
2. In or about October 1996, Mr. McLeod was offered a position at Browning Arms. HT 9:12-17, 22:[1]5-21.
3. Mr. McLeod testified that he was concerned about his financial situation and determined to call the retirement department at the Utah State Retirement Office ("URS") with questions about his benefits. HT 12:2-9.
4. URS has no record of a telephone call between Mr. McLeod and URS at any time during the year 1996. HT 156:16-157:20. However, Mr. McLeod claimed to have spoken with URS by telephone at least twice in

October or November of 1996 regarding what would happen if he were to retire from Davis County, and then come back to work for Davis County at a later date. HT 13:3-20:2.

5. Mr. McLeod failed to provide any verifiable evidence, such as a document or a recording, of the substance of any conversations with URS in 1996. The only evidence of the substance of these conversations is Mr. McLeod's testimony that a URS employee told him if he retired and later returned to work for Davis County that his retirement benefit would be cancelled upon his reemployment, and that when he retired the second time, his benefit would be based on all his years of service credit combined and would be calculated as one period of service.

6. URS disputed Mr. McLeod's assertion that a URS employee told him that if he retired and was reemployed, his benefit for all of his years would be recalculated at his second retirement based on one period of service and using his new and significantly higher three highest years of salary.

7. Mr. McLeod came away from those phone conversations with URS with the understanding that he could retire, draw retirement, return in two years to the same office, retire later a second time and have his retirement benefit calculated on the basis of one period of employment. However, he has not met his burden of proof that he was actually told that.

8. Mr. McLeod retired from his Davis County Sheriff's Office position in December 1996 and went to work for Browning Arms. HT 9:12-17, 22:[1]5-21.

9. Between December 1996 and January 1999, URS paid Mr. McLeod his statutorily earned retirement benefits totaling approximately \$50,000. HT: 85:8-15.

10. Mr. McLeod returned to work for Davis County in January 1999, and pursuant to the retirement laws, had his retirement benefit cancelled while he remained employed. HT 22:25-23:4; 86:7-15.

11. In March of 2001, while still employed by Davis County, Mr. McLeod contacted URS and understood for the first time that his benefit would not be calculated the way he wished. HT 37:17-38:21.

12. Mr. McLeod continued working for the Davis County Sheriff's Office until April 16, 2007, when he voluntarily terminated his

employment, retired, and began receiving his retirement benefits. HT 47:5-18;48:2-25.

13. In April 2007, URS calculated Mr. McLeod's retirement benefit, pursuant to the relevant statute, based on two periods of service: 1) the service he performed prior to his first retirement, and 2) the service he performed between his first and second retirement. URS then added these calculations together to determine Mr. McLeod's retirement benefit. Mr. McLeod received full retirement service credit for each of his years he worked for public employers participating with URS. HT 170:17-23; 240:15-22.

Hearing Record (hereinafter "HR") at 292-96. *See*, Addendum A.

In addition to the Board's stated findings of fact, the Board notes that:

In 1996, URS has no record of a telephone call between Mr. McLeod and URS. HT 156:16-157:20. According to URS policy, in 1996, telephone questions regarding post-retirement benefit calculation would have been answered by Judy Lund ("Ms. Lund"), Director of the Retirement Department at URS. HT 222:24-223:20. Mr. McLeod claims that an unnamed URS employee told him that his retirement benefit would be cancelled upon his reemployment, his benefit would be based on all his years of service credit, and that his benefit would not be adversely or negatively affected by working more years. HT 15:9-16:21; 72:4-73:15. Ms. Lund specifically testified at the hearing that she would not have told Mr. McLeod what he claims the unidentified URS employee said, and that she does not know any URS employee that would have made those statements. HT 182:17-183:5; 225:15-226:4 ; 254:2-5.

Thus, URS specifically disputes Mr. McLeod's assertion that a URS employee told him that if he retired and was reemployed, his benefit for all of his years would be recalculated at his second retirement using his new and significantly higher three highest

years of salary. HT 182:1-183:5; HT 225:10-226:4; and HT 235: 6-23. This was not the law in 1996, and despite taking over 20 depositions of current and previous URS employees, Mr. McLeod could produce no evidence outside of his own word that URS ever made such a statement to him or any other similarly situated individual during this time period. Hence, the most likely scenario as to what was said in that phone conversation was that Mr. McLeod misunderstood what the URS employee was telling him regarding his benefits.

In fact, all of the actual written communication between URS and Mr. McLeod shows that URS was uniformly consistent in informing Mr. McLeod that his benefit would be calculated based on two periods of service in accordance with UTAH CODE ANN. §49-11-504(9). HR at 171, 174, 176-177, 179, and 182; *See also*, HR at 216; HT: 39:13-47:21. This statute provides that his first retirement benefit would be reinstated, and any new service credit earned after his first retirement would be calculated separately and supplement that benefit.

SUMMARY OF THE ARGUMENT

The Hearing Officer correctly determined that URS properly interpreted and applied Utah Code Ann. §49-11-504(9)(2007) in calculating Mr. McLeod's retirement benefit in 2007. Mr. McLeod "retired" from his position with Davis County in December 1996 and began receiving retirement benefits with URS. In January 1999, Mr. McLeod was reemployed with Davis County, and pursuant to the applicable statute at that time, had his retirement benefit cancelled. When Mr. McLeod retired again in April 2007,

URS calculated his benefit based on two periods of service in accordance with Utah Code Ann. §49-11-504(9)(2007) which states,

(9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:

(a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and

(b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

Utah Code Ann. §49-11-504(9) specifically enumerates two distinct service time periods for recalculating a retirement benefit. The statute's plain language requires a recalculation based on a) "all service credit accrued *prior to [the retiree's original retirement] date*, and, b) "all service credit accrued *between the first and subsequent retirement dates*." Utah Code Ann. §49-11-504(9)(emphasis added). By using the conjunction "and" between the two subsections, the Legislature clearly indicated that URS should use both applicable formulas in calculating Mr. McLeod's post-retirement benefits and not one or the other as Mr. McLeod desires. Thus, these two subsections clearly state that the retirement benefit should be calculated in two pieces based on the two service time periods.

However, in the alternative, even if the statute is found to be ambiguous, the statutory construction rules and public policy considerations show that URS correctly applied the law in calculating Mr. McLeod's benefits. URS is mandated to provide retirement benefits on an "actuarially sound basis" and "consistent with sound fiduciary and actuarial principals." Utah Code Ann. §49-11-103. Ms. Lund, Director of the Retirement Department at URS, testified at the hearing that allowing Mr. McLeod to

retire and take benefits for two years, then cancel his benefit and recalculate it one piece based on a higher final average salary like he desires, would have a negative actuarial impact on the retirement system and increase the retirement contribution rate. HT 233:4-11. Therefore, the better interpretation of Utah Code Ann. §49-11-504(9) is URS' interpretation of how to calculate a post-retired employee's benefit which is consistent with "sound actuarial principles" and in accordance with the purpose of Title 49, the Utah Retirement Act.

In addition, to not prevailing under the plain language of the statute, the Hearing Officer also correctly determined that Mr. McLeod's estoppel claim against URS failed because Mr. McLeod failed to prove an unusual circumstance with such certainty to obtain estoppel against URS as a governmental entity, and because even if the Hearing Officer applies the common law estoppel rules, Mr. McLeod failed to prove either that URS made a statement that it later repudiated or that Mr. McLeod reasonably relied to his detriment on that alleged statement.

"As a general rule, estoppel may not be invoked against a governmental entity. In Utah, there is a limited exception to this general principle for 'unusual circumstances' 'where it is plain that the interests of justice so require.' This exception applies, however, only if 'the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception.'" *Anderson v. Public Service Comm'n*, 839 P.2d 822, 827 (Utah 1992)(internal citations omitted). Given that Mr. McLeod could not produce any evidence other than his own self-serving testimony regarding the substance of his alleged conversations with URS in 1996, the Hearing Officer correctly determined

that, “I do not find *certainty* here in trying to reconstruct what was said in oral conversations taking place in 1996 between Petitioner [Mr. McLeod] and unknown persons at URS.” HR at 263 (emphasis added). Because of this lack of certainty about the facts, Mr. McLeod failed to prove an “unusual circumstance” or grave injustice required to prevail against URS as a governmental entity.

Even if Mr. McLeod could sustain an estoppel claim against URS as a governmental entity, Mr. McLeod cannot prove the elements of estoppel. Specifically, Mr. McLeod did not prove that URS made any statement which it later repudiated, nor did Mr. McLeod reasonably rely to his detriment on the alleged statements made by URS. Utah Courts have stated that in order to prevail on a claim for equitable estoppel, Mr. McLeod bears the burden to prove:

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party’s statement, admission, act or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Holland v. Career Service Review Bd., 856 P.2d 678 (Utah Ct. App. 1993)(rejecting employee’s equitable estoppel claim); *See also, Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah Ct. App. 1990)(holding that Board was estopped from decreasing member’s benefit after he terminated his employment and retired). Mr. McLeod cannot meet either of the first two elements of estoppel, let alone all of them as required to prevail.

First, Mr. McLeod failed to prove that URS made a statement to him which was incorrect as required under the first element of estoppel.

In order to prevail under this element, Mr. McLeod must challenge the Board's findings of fact. However, Mr. McLeod failed to properly challenge the Board's findings of fact because he did not "marshal the evidence" supporting the Hearing Officer's findings as required under Rule 24 of the Utah Rules of Appellate Procedure. However, even if this Court were to review the Board's findings for "clear error", the hearing record supports the Board's findings.

In addition, a finding of fact of a statement by URS could not have been made by the Hearing Officer to effectuate estoppel because the sole evidence of a statement made by URS was Mr. McLeod's disputed testimony of the 1996 conversations which was inadmissible hearsay, and under Utah law cannot be the sole basis for a finding of fact. In Utah, administrative hearings are allowed to accept otherwise non-admissible hearsay into evidence, but such hearsay evidence cannot be the sole basis for a finding of fact. The Utah Administrative Procedures Act in Utah Code Ann. §63G-4-206(1)(c) states, "The presiding officer may not exclude evidence solely because it is hearsay." However, Utah Code Ann. §63G-4-208(3) limits the findings of fact which can be based on hearsay in stating, "A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence." Because the only evidence of the alleged 1996 conversations with URS was Mr. McLeod's hearsay testimony, as a matter of law, a finding of fact could not have been made claiming URS made a statement which it later repudiated.

Second, Mr. McLeod cannot meet the second element of estoppel, which is the reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act or failure to act. Hearing Officer Howe correctly determined in his Decision:

Here, a major career decision rested upon the answers to [Mr. McLeod's] telephone inquiries. Or, as he testified, it was a "life changing" decision. [HT 58:19-22 and HT 131:6-8] He could have requested written confirmation from URS of the answers to the questions he asked. He could have made a written record of the persons he talked to and their position in URS. He could have had a professional review the statutes to verify what he claims he had been told. A greater in-depth inquiry was warranted in this major career decision than just two relatively brief telephone calls to unnamed persons at URS.

HR at 263.

Thus, the Hearing Officer correctly determined that Mr. McLeod failed to prove his claim for estoppel against the Board as a governmental entity. Mr. McLeod did not prove the "facts with specificity," nor "injustice of sufficient gravity" to invoke any exception to the general rule that estoppel may not be invoked against a governmental entity. *Anderson v. Public Service Comm'n*, 839 P.2d at 827. In addition, Mr. McLeod failed to prove the elements of estoppel because he could not prove URS made an incorrect statement, or that he reasonably relied on that statement.

ARGUMENT

- I. URS CORRECTLY INTERPRETED AND APPLIED UTAH CODE ANN. §49-11-504(9)(2007) IN CALCULATING MR. MCLEOD'S RETIREMENT BENEFIT WHICH DIRECTS URS TO CALCULATE POST-RETIREMENT BENEFITS BASED ON TWO PERIODS OF SERVICE.**

Utah Code Ann. §49-11-504(9)(2007), which governs retirement benefits for post-retired employees, unambiguously requires URS to calculate Mr. McLeod's retirement benefit based on two different periods of service. URS correctly did so for Mr. McLeod by adding the retirement benefit he earned prior to his first retirement in December 1996, to the retirement benefit he earned between 1999 and 2007, when he retired a second time. The statute states in relevant part:

(9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:

(a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and

(b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

Despite Mr. McLeod's contentions to the contrary, the applicable statute in this case is the statute in effect at the time the disputed benefit calculation was made. Here, the 2007 statute governs the calculation of Mr. McLeod's disputed retirement benefit, not the 1999 or 2000 statute when he returned to work, because 2007 is when Mr. McLeod's retirement benefit was calculated. Nevertheless, even if the 2000 statute is used, Mr. McLeod still does not prevail because the language is plain in supporting URS' calculation of his retirement benefit.¹

¹ Utah Code Ann. §49-1-505(4)(1996), section 49-11-504's predecessor, states in relevant part, "If a member is reinstated to active service and subsequently retires after the two-year period as provided in Subsection (1)(a)(iv), the member's retirement allowance shall be calculated using: (a) the formula in effect at the date of the member's original retirement for all service prior to that date; and (b) the formula in effect at the date of the subsequent retirement for all service rendered between the first and the subsequent retirement dates." There is no substantive difference between this language and the language in the 2007 statute.

When interpreting a statute, the Utah Supreme Court has held that, “[u]nder our rules of statutory construction, we look first to the statute’s plain language to determine its meaning.” *Sindt v. Utah State Ret. Bd.*, 2007 UT 16, ¶8, 157 P.3d 797, (Utah 2007) (quoting, *Mountain Estates v. State Tax Comm’n*, 2004 UT 86, ¶9, 100 P.3d 1206). “Only if we find some ambiguity need we look further.” *CIG Exploration, Inc. v. Tax Comm’n*, 897 P.2d 1214, 1216 (Utah 1995)(finding phrase “erroneously or illegally collected” in refund statute was not ambiguous and State Tax Commission correctly assessed taxes based on property valuation as of statutory valuation date). However, “[t]he fact that the parties offer differing constructions of the statute, in and of itself, does not mean that the statute is ‘ambiguous.’ See, *Eppersen v. Utah State Retirement Bd.*, 949 P.2d 779, 783 n.6 (Utah Ct. App. 1997). ‘Ambiguous’ means capable of ‘two or more plausible meanings.’” *Derbidge v. Mutual Protective Ins. Co.*, 963 P.2d 788, 791 (Utah Ct. App. 1998)(quoting, *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993); *Village Inn Apts. v. State Farm Fire & Cas. Co.*, 790 P.2d 581, 583 (Utah Ct. App. 1990)). Further, “[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful.” *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996)(citation and quotation omitted). “It is our duty to construe each act of the legislature so as to give it full force and effect.” *Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶9, 94 P.3d 234, 237-38, quoting, *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991).

In this case, in accordance with the plain language of the statute, URS calculated Mr. McLeod’s benefit by adding the retirement benefit he earned prior to his first

retirement in December 1996, to the retirement benefit he earned between 1999 and 2007, his second retirement date. The statute states:

- 9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:
- (a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and
 - (b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

Mr. McLeod attempts to manufacture some ambiguity in the statute in claiming that the word “formula” is ambiguous. *See*, Brief of Appellant at 40. Yet, he offers no different interpretation of the word “formula” than what has already been accepted by URS. URS and Mr. McLeod both agree that “formula” means the applicable retirement formula used to calculate a retirement benefit, in this case, the public safety noncontributory retirement system formula found in Utah Code Ann. §49-15-402(2007). That formula will be different for each retirement system, but there is no dispute or ambiguity as to the meaning of the word as used by the Legislature.

Instead, Mr. McLeod incorrectly argues that when the statute states that a person in Mr. McLeod’s situation will accrue “additional service credit” after retiring and returning to the system, that this means his retirement benefit will be calculated based on one term of service rather than two. Mr. McLeod’s interpretation belies the plain meaning of the statute for two reasons: 1) calculation of the retirement benefit is different from service credit accrual; and 2) the Legislature clearly delineated two “terms of service” in Utah Code sections 49-11-504(9)(a) and (9)(b), and used the conjunction

“and”, instead of “or” in describing how retirement benefits should be calculated. Each of these reasons is discussed below.

First, in his argument Mr. McLeod incorrectly attempts to mix the issues of service credit accrual with the issue of the proper calculation of his retirement benefit. Mr. McLeod received “full credit” for his post-retirement employment with Davis County Sheriff’s Office between 1999 and when he retired a second time in 2007. When his retirement benefit was recalculated in 2007, his retirement benefit for his service between 1999 and 2007 was calculated pursuant to the applicable public safety formula and added to his previous retirement benefit and his past credit earned. Thus, the retirement benefit Mr. McLeod received in 2007 was significantly greater than the retirement benefit he received in 1996 when he retired the first time. Hence, Mr. McLeod was placed back into the applicable retirement system in all respects as the statute dictates. He earned additional service credit and increased his retirement benefits in accordance with the applicable statutes. Although his retirement benefit was not calculated as he wished, he was a member of the system and was treated in all respects like every other similarly situated individual.

Second, Utah Code Ann. §49-11-504(9) specifically enumerates two distinct service time periods for recalculating a retirement benefit. The statute’s plain language requires a recalculation based on a) “all service credit accrued *prior to [the retiree’s original retirement] date*, and, b) “all service credit accrued *between the first and subsequent retirement dates.*” Utah Code Ann. §49-11-504(9)(emphasis added). These

two provisions clearly state that the benefit should be calculated in two pieces based on the two service time periods. Finding otherwise would render this part of the statute “meaningless” in violation of the statutory construction rules. *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996)(holding “statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd.”)

In addition, if the statute, as Mr. McLeod suggests, would have allowed the calculation of Mr. McLeod’s retirement benefit based on the combination of Mr. McLeod’s service, presumably the Legislature would have used the word “or” instead of “and” between §§49-11-504(9)(a) and (b). By using the word “and”, the Legislature clearly indicated that URS should use both applicable formulas in calculating Mr. McLeod’s retirement benefits and not one or the other as Mr. McLeod desires.

Nevertheless, the plain language of the statute requires URS to calculate Mr. McLeod’s retirement benefit exactly as it did, by calculating his retirement benefit based on two periods of service.

II. IN THE ALTERNATIVE, EVEN IF THE COURT FINDS AMBIGUITY IN SECTION 49-11-504(9), THE RULES OF STATUTORY CONSTRUCTION FAVOR URS’ TERPRETATION BECAUSE CONSTRUING OTHERWISE RENDERS THE STATUTE SUPERFLUOUS AND VIOLATES THE STATED PURPOSES OF TITLE 49.

As stated supra, Utah Code Ann. §49-11-504(9) contains no ambiguity. However, in the alternative, if ambiguity is found, the statutory construction rules and public policy considerations show that URS correctly applied the law in calculating Mr. McLeod’s benefits. Utah common law regarding statutory construction requires that finders of fact

look to the legislative history and policy considerations when interpreting ambiguous statutes. “Only when [the Court] find[s] ambiguity in the statute’s plain language need [the Court] seek guidance from the legislative history and relevant policy considerations.” *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994). ““When interpreting an ambiguous statute, [the Court] first tr[ies] to discover the underlying intent of the legislature, guided by the purpose of the statute as a whole and the legislative history.’ *Hansen v. Salt Lake Co.*, 794 P.2d 838, 841 (Utah 1990)(citations omitted). [The court] then tr[ies] to harmonize ambiguous provisions accordingly. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991).” *Sullivan v. Scoular Grain Co.*, 853 P.2d 877 (Utah 1993).

The Legislature set forth the purpose of Title 49 in Utah Code Ann. §49-11-103:

- (1) The purpose of this title is to establish:
 - (a) retirement systems and the Utah Governors' and Legislators' Retirement Plan for members which provide:
 - (i) a uniform system of membership;
 - (ii) retirement requirements;
 - (iii) benefits for members;
 - (iv) funding on an actuarially sound basis;
 - (v) contributions; and
 - (vi) economy and efficiency in public service; and
 - (b) a central administrative office and a board to administer the various systems, plans, and programs established by the Legislature or the board.
- (2) This title shall be liberally construed to provide maximum benefits and protections *consistent with sound fiduciary and actuarial principals.* (emphasis added).

Hence, URS is mandated to provide retirement benefits on an “actuarially sound basis” and “consistent with sound fiduciary and actuarial principals.” Judy Lund, Director of the Retirement Department, testified at the hearing that allowing Mr. McLeod

to retire and take benefits for two years, then cancel his benefit and recalculate it on a higher final average salary, like he desires, would have a negative actuarial impact on the retirement system and increase the retirement contribution rate. HT 233:4-11. She stated that Mr. McLeod's benefit that he received between December 1996 and January 1999 is worth "\$139,407.20" in today's dollars. HT 234:15. Thus, if Mr. McLeod is allowed to calculate his benefit as he desires, he will receive an approximate \$140,000 windfall which he did not earn and the law does not allow.

Indeed, it hardly takes an actuary to understand that if you pay into a system for a few years, then begin drawing benefits from that system for a time without putting any additional money in, you will have less money (all other things being equal) than an individual who puts the same amount of money in an account, but does not draw on that money in the first place. Therefore, the better interpretation of Utah Code Ann. §49-11-504(9) is URS' interpretation of how to calculate a post-retired employee's benefit which is consistent with "sound actuarial principles" and in accordance with the purpose of Title 49.

In contrast, Mr. McLeod's interpretation of Utah Code Ann. §49-11-504(9) cannot be accepted because doing so would render that section insignificant and superfluous. In Sutherland's Rules of Statutory Construction, often quoted by Utah Courts, it states, "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" §46.06. Utah Courts have similarly held, "[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292

(Utah 1996)(citation and quotation omitted). “It is our duty to construe each act of the legislature so as to give it full force and effect.” *Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶9, 94 P.3d 234, 237-38, *quoting*, *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991).

Despite the clear law, Mr. McLeod incorrectly claims that his benefit should be calculated based on one period of service rather than the two that the statute requires because of his retirement. He claims that 49-11-504(9) should be interpreted to mean that a post-retirement benefit will only be calculated in two pieces if the legislature happened to change the retirement formula between the first and second retirement dates. *See*, Brief of Appellant at 41. However, such an interpretation to Utah Code Ann. §49-11-504(9) would render it unnecessary or “superfluous” because any new legislative action changing the retirement formula would automatically apply prospectively. Contrary to Mr. McLeod’s arguments, the Legislature had no need for a separate statute allowing it to pass laws affecting retirement benefits in the future because it specifically was granted that power through the Utah Constitution. *See*, Ut. Const. art. VI, § 1(1). Mr. McLeod’s interpretation of Utah Code Ann. §49-11-501(9) seems to indicate that the Legislature merely wanted to clarify its position that it could change the “formula” and that it would have an effect at some future time. One wonders whether Mr. McLeod also believes that the Legislature needs to clarify its ability to pass laws in every section of the Utah Code. Thus, Mr. McLeod’s interpretation of the statute is superfluous and renders the statute insignificant in violation of the statutory construction rules.

Hence, even if Utah Code Ann. §49-11-504(9) is found to be ambiguous, URS' interpretation of the statute should prevail because URS' interpretation is consistent with "sound actuarial principles" in accordance with the purpose of the statute, and because Mr. McLeod's interpretation renders the statute "superfluous." Utah Code Ann. §49-11-504(9) is clear that Mr. McLeod's retirement benefit should be calculated based on two periods of service, which is exactly how URS calculated his retirement benefit.

III. BECAUSE MR. MCLEOD FAILED TO PROVE AN UNUSUAL CIRCUMSTANCE, THAT URS MADE A STATEMENT WHICH IT LATER REPUDIATED, OR THAT HE REASONABLY RELIED ON URS' STATEMENTS TO HIS DETRIMENT, HE CANNOT PREVAIL ON A CLAIM FOR EQUITABLE ESTOPPEL AGAINST THE BOARD AS A GOVERNMENT AGENCY.

Mr. McLeod cannot prevail against URS under equitable estoppel because Mr. McLeod failed to prove an unusual circumstance with such certainty to obtain estoppel against URS as a governmental entity, and because even if the Hearing Officer applies the common law estoppel rules, Mr. McLeod failed to prove either that URS made a statement that it later repudiated or that Mr. McLeod reasonably relied to his detriment on that alleged statement.

A. Estoppel Cannot Be Invoked Against a Government Entity Absent Unusual Circumstances and Grave Injustice.

"As a general rule, estoppel may not be invoked against a governmental entity. In Utah, there is a limited exception to this general principle for 'unusual circumstances' 'where it is plain that the interests of justice so require.' This exception applies, however, only if 'the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception.'" *Anderson v. Public Service Comm'n*, 839

P.2d 822, 827 (Utah 1992)(finding that Commission was not estopped from revoking limousine company's certificate of convenience and necessity after allegedly orally settling all claims against company)(citations omitted). This governmental estoppel rule has been characterized by the Utah Court of Appeals as a, "high standard of proof" *Terry v. Retirement Bd.*, 2007 UT 87, ¶ 15, 157 P.3d 362, 366.

The Utah Supreme Court has stated the following regarding the policy behind the general government estoppel rule:

We have no doubt about the soundness nor the salutary purpose of the rule that estoppel generally is not assertable against the government or governmental institutions. There are good and sufficient reasons for that rule, including the safeguarding of the interests of the public, which are often somewhat in hazard because of the vagaries of political tides, frequent changes of public officials, the possibility of collusion, or of circumventing procedures set up by law, then suing for the value of goods furnished or services rendered.

Utah State Univ. v. Sutro & Co., 646 P.2d 715, 718 (Utah 1982). Thus, if Mr. McLeod is able to prevail against the Board for estoppel without evidence other than his word that he was told incorrect information, it would undoubtedly open the door for additional claims of less dubious merit at eventual great cost to the State and its political subdivisions in increased retirement contribution rates to pay for these claims.

Certainly this policy played into Hearing Officer Howe's decision that "I do not find *certainty* here in trying to reconstruct what was said in oral conversations taking place in 1996 between Petitioner [Mr. McLeod] and unknown persons at URS." HR at 263 (emphasis added). Thus, Mr. McLeod failed to prove an "unusual circumstance" or grave injustice because the substance of his alleged conversations with URS could not be found with "certainty". *Id.*

B. Mr. McLeod's Claim for Estoppel Against the Board Fails for Lack of a Statement Made by URS which was Inconsistent with a Claim Later Asserted, and for Mr. McLeod's Lack of Reasonable Reliance to his Detriment on those Alleged Statements.

Even if Mr. McLeod could sustain an estoppel claim against the Board as a governmental entity, Mr. McLeod cannot prove the elements of estoppel. Specifically, Mr. McLeod did not prove that URS made any statement which it later repudiated, nor did Mr. McLeod reasonably rely to his detriment on the alleged statements made by URS. Utah Courts have stated that in order to prevail on a claim for equitable estoppel, Mr. McLeod bears the burden to prove:

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Holland v. Career Service Review Bd., 856 P.2d 678 (Utah Ct. App. 1993)(rejecting employee's equitable estoppel claim); *See also, Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah Ct. App. 1990)(holding that Board was estopped from decreasing member's benefit after he terminated his employment and retired). Mr. McLeod cannot meet either of the first two elements of estoppel, let alone all of them as required to prevail.

i. Mr. McLeod failed to prove URS made a statement to him which it later repudiated.

At the hearing, Mr. McLeod failed to prove URS ever made an incorrect or inconsistent statement to him. The first element of estoppel is a statement made by one

party inconsistent with a claim later asserted. *Holland v. Career Service Review Bd.*, 856 P.2d 678 (Utah Ct. App. 1993) In order to challenge the Board’s finding that Mr. McLeod never received a statement by URS that URS later repudiated, Mr. McLeod must properly marshal the evidence and then show how the finding was “clear error.”

- a. Mr. McLeod failed to properly marshal the evidence to correctly challenge the Hearing Officer’s finding that URS never made a statement to Mr. McLeod which it later repudiated.

Mr. McLeod failed to correctly challenge the Hearing Officer’s findings of fact numbers four through seven, that Mr. McLeod failed to show URS made a statement to him which it later repudiated, because he did not “marshal the evidence” supporting those findings as required under Rule 24(a)(9) of the Utah Rules of Appellate Procedure and the common law. In order to prevail on a claim for estoppel under the common law elements, Mr. McLeod must show that URS made a statement to him that it later repudiated. *Holland v. Career Service Review Bd.*, 856 P.2d 678 (Utah Ct. App. 1993) (To show estoppel, a Plaintiff must prove, “(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted . . .”) Although Mr. McLeod never affirmatively states he is challenging any of the Board’s findings of fact, in his argument on estoppel, he certainly implies that he is challenging those facts.² Thus, the

² In his Appellate Brief, Mr. McLeod specifically argues that the Retirement Office made statements to him which it later repudiated. For example, McLeod brief makes the following statements: “The numerous statements by employees of the Retirement Office to Kevin McLeod clearly satisfy the first element for a claim of equitable estoppel[.] . . .” Brief of the Appellant at 31; “[Mr. McLeod] was told on both [1996] occasions the same thing [by the Retirement Office], that it would make no difference, . . . and that his total retirement would be calculated based on his full years of service . . .” Brief of the Appellant at 29-30; “Because of the statements and assured attitude of the retirement

Board presumes that Mr. McLeod is challenging the Board's factual findings that Mr. McLeod was never actually told that he could have his retirement benefit calculated the way he now desires.

Utah R.App.P. 24(a)(9) states that "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." The Utah Supreme Court has held that "To successfully challenge an agency's factual findings, the party 'must *marshall* [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.'" *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶16, 164 P.3d 384, 390, *quoting*, *Grace Drilling Co. v. Board of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct. App. 1989).

The Utah Supreme Court has more recently added:

To adequately fulfill the marshaling requirement, the appellant must temporarily assume the role of his adversary, presenting us, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177 (quoting *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724). A recital of the trial court's findings with which the appellant disagrees does not amount to marshaling. Rather, the appellant must educate the court as to exactly how the trial court arrived at each of the challenged findings. This requires "a precisely focused summary of all the evidence supporting the findings," correlated to the location of that evidence in the record. *Id.* Failure to provide this summary amounts to an invitation to the appellate court to invest its time and resources to "go behind the trial court's factual findings" itself; an

officer that he talked to, McLeod left the Davis County Sheriff's Office with a high level of comfort that his retirement would not be adversely affected." Brief of Appellant at 30; and, "Nevertheless, we can be assured that those comments [by the Retirement Office regarding how his retirement benefit would be calculated] were made . . ." Brief of Appellant at 30.

invitation which the appellate court may, in its discretion, refuse. *Id.* ¶ 82 n. 16.

...

Therefore, appellants must first “present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case.” *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 26, 140 P.3d 1200 (internal quotation marks omitted). Then, appellants must “explain why those findings contradict the clear weight of the evidence.” *Id.* Once appellants have established every pillar supporting their adversary's position, they then must ferret out a fatal flaw in the evidence and show why those pillars fail to support the trial court's findings. They must show the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah Ct.App.1994) (internal quotation marks and citations omitted).

Friends of Maple Mountain, Inc. v. Mapleton City, 2010 UT 11, ¶¶10, 12, 228 P.3d 1242.

In this case, Mr. McLeod made no attempt to comply with the “marshaling” requirement of Rule 24 of the Utah Rules of Appellate Procedure. McLeod failed to provide a “precisely focused summary” of the evidence in the “light most favorable” to the Hearing Officer’s findings and failed to show any fatal flaws in the Hearing Officer’s findings. Although Mr. McLeod’s Appellate Brief set forth 13 pages and 81 separate “relevant facts”, some of which were inconsistent with the Hearing Officer’s factual findings³, he did not properly challenge the Board’s findings of fact because of his failure to “marshal the evidence” as required to challenge such factual findings before an appellate court under Rule 24 of the Utah Rules of Appellate Procedure. It appears that

³ See e.g. Mr. McLeod’s Appellate Brief facts 10, 12-13, 18, 28, and 33, asserting as a fact that in 1996 URS made an incorrect statement to Mr. McLeod regarding how his benefit would be calculated. Brief of Appellant at 14-15, 17. Mr. McLeod’s Appellate Brief facts also mischaracterized much of Ms. Judy Lund’s testimony. Brief of Appellant at 20-24.

Mr. McLeod failed to realize that “[t]his court does not retry the facts, *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991); it reviews them for clear error. *Housekeeper v. State*, 2008 UT 78, ¶18, 197 P.3d 636.” *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶12, 228 P.3d 1242.

Although no specific remedy is warranted for a failure to marshal the evidence, the Utah Appellate Courts have held that, “[i]f the marshaling requirement is not met . . . [the Courts] assume that the evidence supports the trial court’s findings” and may “affirm . . . on that basis alone.” *Commercial Debenture Corp. v. Amenti, Inc.*, 2010 UT 10, ¶14, 231 P.3d 804, 807, *quoting*, *Chen v. Stewart*, 2004 UT 82, ¶80, 100 P.3d 1177, 1196 (internal quotation marks omitted); *see also*; *Friends*, 2010 UT 11, ¶13 (“As Friends has not met the marshaling requirement, we will assume that the trial court’s findings are supported by the evidence and therefore are not clearly erroneous.”). Because Mr. McLeod cannot marshal the evidence in a reply brief (*See e.g., Atlas Steel, Inc. v. Utah State Tax Comm’n*, 2002 UT 112, ¶¶ 40-41, 61 P.3d 1053 (attempting to marshal evidence in a reply brief were “eleventh hour” tactics which denies appellee the chance to respond and defend the evidence.)), and because the Hearing Officer, Hearing Officer, made clear his findings of fact which are supported by the evidence, URS respectfully requests that this Court refuse to look behind the Hearing Officer’s factual findings.

- b. Even if this Court determines to review the Hearing Officer’s findings of fact, the hearing record supports the Hearing Officer’s findings that URS never made a statement to Mr. McLeod which it later repudiated.

The hearing record shows that the Board’s findings of fact are supported by the record and are not “clear error.” The Utah Court of Appeals has held that the standard of review in estoppel cases before the retirement board present “a mixed question, which ‘involves the application of law to fact.’” *Terry v. Retirement Bd.*, 2007 UT App 87, ¶ 8, 157 P.3d 362 (quoting *State v. Hamilton*, 2003 UT 22, ¶ 33 n.12, 70 P.3d 111). We review the underlying facts for clear error and the application of the law to those facts for correctness. *See id.*” *Whitaker v. Retirement Bd.*, 2008 UT App 282, ¶ 11, 191 P.3d 814. The “clear error” standard of review comes from Rule 52(a) of the Utah Rules of Civil Procedure which states in relevant part, “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Thus, in challenging a factual finding, McLeod bears the burden to show that the factual finding was “clearly erroneous.”

A hearing officer’s finding of fact is only clearly erroneous if it is so lacking in support as to be against the “clear weight of the evidence.” *Uncon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 11, 210 P.3d 263, quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *See also, Chen v. Stewart*, 2004 UT 82, ¶19, 100 P.3d 1177, 1184. In addition, “[t]he trial court’s factual findings will not be considered clearly erroneous unless they are ‘not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court’s determination.’” *Save Our Schs. v. Bd. Of Educ.*, 2005 UT 55, ¶ 9, 122 P.3d 611, 613, quoting *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). In this case, because the Hearing Officer’s findings of fact

are supported by the clear weight of the evidence, particularly in light that all disputes must be resolved in favor of the Hearing Officer's findings of fact, they are not "clear error" and must be upheld.

Specifically, the Hearing Officer's relevant findings of fact are numbers four through seven. They state:

4. URS has no record of a telephone call between Mr. McLeod and URS at any time during the year 1996. HT 156:16-157:20. However, Mr. McLeod claimed to have spoken with URS by telephone at least twice in October or November of 1996 regarding what would happen if he were to retire from Davis County, and then come back to work for Davis County at a later date. HT 13:3-20:2.
5. Mr. McLeod failed to provide any verifiable evidence, such as a document or a recording, of the substance of any conversations with URS in 1996. The only evidence of the substance of these conversations is Mr. McLeod's testimony that a URS employee told him if he retired and later returned to work for Davis County that his retirement benefit would be cancelled upon his reemployment, and that when he retired the second time his benefit would be based on all his years of service credit combined and would be calculated as one period of service.
6. URS disputed Mr. McLeod's assertion that a URS employee told him that if he retired and was reemployed, his benefit for all of his years would be recalculated at his second retirement based on one period of service and using his new and significantly higher three highest years of salary.
7. Mr. McLeod came away from those phone conversations with URS with the understanding that he could retire, draw retirement, return in two years to the same office, retire later a second time and have his retirement benefit calculated on the basis of one period of employment. However, he has not met his burden of proof that he was actually told that.

HR at 293-94.

Each of these facts is supported by the testimony taken at the hearing. For example, Ms. Judy Lund, Retirement Director at URS testified at the hearing that URS

has no record of any phone call from Mr. McLeod to URS in 1996. HT 147:24 – 148:12 and HT 156:9 – 157:20. Despite Mr. McLeod claiming he spoke with URS twice in 1996 regarding retirement options, URS specifically disputed Mr. McLeod's version of the substance of these phone calls. HT 225:10-226:4; 235:6-23. Ms. Lund also testified that, pursuant to URS policy in 1996, any phone calls regarding post-retirement retirement calculation questions, like the ones Mr. McLeod alleged he asked, would have been transferred to her. HT 182:1-183:5. Ms. Lund testified that she knew the correct answer to the questions Mr. McLeod was alleged to have asked URS in 1996 and that she would not have told Mr. McLeod that his final benefit would be calculated on one period of employment as Mr. McLeod now desires. HT 222:24-223:20; HT 182:1-183:5; HT 235:6-23. In addition, Ms. Lund was specifically not aware of anyone else at URS that would have said what Mr. McLeod claims was said. HT 223:6-20; 225:10-25.

Most significantly, the sole evidence presented to prove that Mr. McLeod was told that he could calculate his post-retirement benefit on one period is Mr. McLeod's own self-serving testimony that URS told him that was the case in several brief phone conversations in 1996, almost 13 years prior to the hearing. Mr. McLeod provided no other witnesses to the conversation. In addition, Mr. McLeod provided no written statement from URS confirming his alleged conversation with URS. In fact, all the written correspondence between Mr. McLeod and URS confirms URS's position that he was consistently told that his benefit would be calculated in two pieces. *See*, HR at 171, 174, 176-177, 179, and 182.

These facts supported the hearing officer's conclusion in his Decision that although Petitioner believed he could "retire, draw retirement, return in two years to the same office, retire a second time and have his retirement benefit calculated on the basis of one period of employment . . . I cannot find that [Petitioner] was actually told that in either [1996 phone] call." HR at 262.

Thus, because the Hearing Officer's findings of fact are supported by the Hearing Record, they are not against the "clear weight of the evidence", and should be upheld. By upholding the findings of fact that URS never made a statement to Mr. McLeod which it later repudiated, Mr. McLeod's claim for estoppel against the Board of necessity fails.

- c. Disputed oral statements that are inadmissible hearsay are not enough to prove a statement was made to effectuate estoppel against a governmental entity.

In addition to the reasons already discussed *supra*, a statement by URS could not be found by the Hearing Officer to effectuate estoppel against URS because disputed oral representations alone are not enough to prove a statement against a governmental entity, and because the sole evidence of a statement made by URS was Mr. McLeod's disputed testimony of the conversations which was inadmissible hearsay, and under Utah law cannot be the sole basis for a finding of fact.

Despite Mr. McLeod's arguments, disputed oral statements are not enough to prevail against a governmental entity on a claim for estoppel. *See e.g. Terry v. Retirement Bd.*, 2007 UT App 87, *Whitaker v. Utah State Retirement Bd.*, 2008 UT App 282, 191 P.3d 814. In both *Terry* and *Whitaker*, the Court found that general written statements (a life insurance policy and retirement annual statements) were not enough to

prevail on a claim for estoppel. Therefore, if these written statements are not enough to effectuate estoppel, it logically follows that disputed oral representations can never be enough to prevail on an estoppel claim. As the Utah Supreme Court noted in *Anderson v. Public Service Comm'n*, 839 P.2d 822, 827 (Utah 1992), “The few cases in which Utah courts have permitted estoppel against the government have involved *very specific written representations* by authorized government entities.” *Id.* (emphasis added).

For example, Mr. McLeod mistakenly relies on *Eldredge v. Retirement Bd.*, 795 P.2d 671, 675 (Utah App. 1990) as his authority for why he should prevail on estoppel. *See*, Brief of Appellant at 31 and 34. However, in this case where the Court allowed estoppel against URS, URS admittedly communicated with Mr. Eldredge both orally and in specific writing that the disputed service credit was granted to him under law, including providing him a letter stating that the 6.123 years of disputed service were eligible for service credit and a retirement estimate showing that he had obtained these years of service credit. Unlike *Eldredge*, in this case URS specifically denies ever making an incorrect statement to Mr. McLeod.

Additionally, as a matter of law, the Hearing Officer could not make a finding that URS made an oral disputed statement to Mr. McLeod which it later repudiated because such a finding of fact would be based solely on inadmissible hearsay. In Utah, administrative hearings are allowed to accept otherwise non-admissible hearsay into evidence, but such hearsay evidence cannot be the sole basis for a finding of fact. The Utah Administrative Procedures Act in Utah Code Ann. §63G-4-206(1)(c) states, “The presiding officer may not exclude evidence solely because it is hearsay.” However, Utah

Code Ann. §63G-4-208(3) limits the findings of fact which can be based on hearsay in stating, “A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.”

Mr. McLeod desires to use his testimony of the disputed hearsay conversations between URS and Mr. McLeod in 1996 as the sole evidence to prove that URS made statements which it later repudiated.⁴ Because his testimony is the sole basis for proving URS made a statement which it later repudiated, no finding of fact can be made that URS made such a statement to Mr. McLeod.

Mr. McLeod may respond to this problem as he did before the Hearing Officer that Mr. McLeod’s testimony of URS’ statements to him are merely trying to show his “state of mind” when he retired, and thus the alleged statements are an exception to the hearsay rule. HR at 227-228. However, if such is the case, Mr. McLeod has then provided absolutely no evidence that a statement was made by URS which was later repudiated.

Mr. McLeod also argued before the Hearing Officer that he was not offering his testimony of the conversations with URS to prove the truth of the matter asserted or to “show that what he was told was true”, and thus, these statements were not hearsay at all. HR at 257. If Mr. McLeod claims that his testimony is not necessarily true regarding the conversations with URS, he once again has no evidence for the substance of these

⁴ Mr. McLeod may also claim that URS made other written statements to him after his first retirement in 1996 which he claims were misleading. These alleged statements are not relevant to the matter because they did not affect his decision to retire the first time with URS in December 1996 which is his claimed “reliance” on URS’ statements.

conversations and no finding of fact can be made in that regard. What it appears that Mr. McLeod fails to realize is that in order to prevail on a claim for estoppel, he has the burden to prove, under UTAH CODE ANN. §49-11-613(4), that he received a statement by URS which was later repudiated. Because his only evidence of such a statement was inadmissible hearsay, as a matter of law, no finding of fact could have been made based solely on Mr. McLeod's disputed testimony. As such, Mr. McLeod cannot prevail on the first crucial element of estoppel.

- ii. The Hearing Officer correctly determined that Mr. McLeod's reliance on the alleged URS statements was not reasonable.

In addition to not being able to prove a statement made by URS, Mr. McLeod cannot meet the second element of estoppel, which is the reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act or failure to act. In the few cases where estoppel has been permitted against a government entity, they have each involved very specific reliance and grave injustice. For example, in *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689 (Utah 1979), the Plaintiffs spent over \$200,000 in renovating their club in direct reliance on the Liquor Commission's statements that they were in compliance with the law. In the *Eldredge* case, the Plaintiff quit his job and irrevocably retired based on the written letter and information the Retirement Office had sent to him. In this case, there is no such reasonable reliance.

Hearing Officer Howe correctly determined in his Decision:

Here, a major career decision rested upon the answers to [Mr. McLeod's] telephone inquiries. Or, as he testified, it was a "life changing" decision.

[HT 58:19-22 and HT 131:6-8] He could have requested written confirmation from URS of the answers to the questions he asked. He could have made a written record of the persons he talked to and their position in URS. He could have had a professional review the statutes to verify what he claims he had been told. A greater in-depth inquiry was warranted in this major career decision than just two relatively brief telephone calls to unnamed persons at URS.

HR at 263.

In addition, as noted by Hearing Officer Howe, the Legislature placed a statutory duty on Mr. McLeod to understand his rights and responsibilities concerning his retirement benefits. Utah Code Ann. § 49-11-613(1)(a) states, “All members, retirees, participants, alternative payees, or covered individuals of a system, plan or program under this title shall acquaint themselves with their rights and obligations under this title.” Therefore, “life changing” decisions based on brief telephone conversations with unknown persons at URS do not rise to the level of reasonable reliance to prevail on a claim for estoppel.

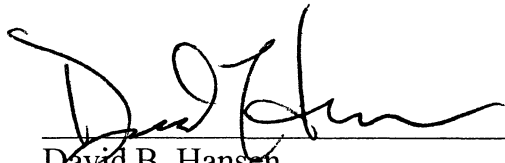
In sum, Mr. McLeod failed to prove his claim for estoppel against the Board as a governmental entity. Mr. McLeod did not prove the “facts with specificity,” nor “injustice of sufficient gravity” to invoke any exception to the general rule that estoppel may not be invoked against a governmental entity. *Anderson v. Public Service Comm’n*, 839 P.2d at 827. In addition, Mr. McLeod failed to prove the elements of estoppel because he could not prove URS made a statement, or that he reasonably relied on that statement. Thus, Mr. McLeod’s estoppel claim against the Board must be rejected in its entirety.

CONCLUSION

Utah Code Ann. §49-11-504(9)(2007) unambiguous requires URS to calculate Mr. McLeod's retirement benefit, being a post-retired employee, based on two separate periods of service.

In addition, Mr. McLeod's allegations regarding estoppel fail because he failed to properly marshal the evidence to challenge findings of fact, because he cannot prove facts with "certainty" to show that URS made a statement which it later repudiated, and because he failed to reasonably rely to his detriment on the alleged URS statements. As such, the Court should uphold the Hearing Officer's decision deny Mr. McLeod's request for relief in its entirety.

DATED this 29th day of July, 2010.

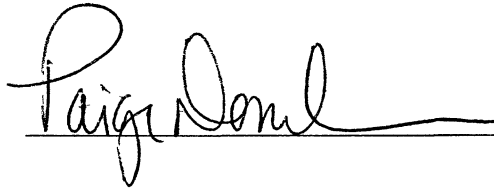


David B. Hansen
Howard, Phillips & Andersen

CERTIFICATE OF MAILING

I hereby certify that on this the 29th day of July, 2010, I mailed two (2) true and correct copies of the above **Appellee Brief**, to the following:

Reed M. Richards
Brandon R. Richards
2568 Washington Blvd., Suite 200
Ogden, UT 84401



ADDENDUM A

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BEFORE THE UTAH STATE RETIREMENT BOARD

KEVIN MCLEOD,

Petitioner,

v.

UTAH STATE RETIREMENT BOARD,

Respondent.

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

File #: 07-16R

A hearing was held on August 19, 2009, before the Adjudicative Hearing Officer on Petitioner's Request for Board Action. Kevin McLeod ("Mr. McLeod") was represented by Mr. Reed M. Richards and Brandon R. Richards. The Utah State Retirement Board ("Board") was represented by Mr. David Hansen and Liza Eves of Howard, Phillips & Andersen. Based upon the testimony given, the evidence received, and the legal memoranda submitted, the Adjudicative Hearing Officer issued a memorandum decision on October 14, 2009, denying Petitioner's Request for Board Action. The Adjudicative Hearing Officer now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Mr. McLeod worked for Bountiful City and then for the Davis County Sherriff's Office accruing just over 20 years of service credit in the Public Safety Noncontributory Retirement System by November 1996. Hearing Transcript [hereinafter "HT"] 5:4-12.

2. In or about October 1996, Mr. McLeod was offered a position at Browning Arms. HT 9:12-17, 22:5-21.
3. Mr. McLeod testified that he was concerned about his financial situation and determined to call the retirement department at the Utah State Retirement Office (“URS”) with questions about his benefits. HT 12:2-9.
4. URS has no record of a telephone call between Mr. McLeod and URS at any time during the year 1996. HT 156:16-157:20. However, Mr. McLeod claimed to have spoken with URS by telephone at least twice in October or November of 1996 regarding what would happen if he were to retire from Davis County, and then come back to work for Davis County at a later date. HT 13:3-20:2.
5. Mr. McLeod failed to provide any verifiable evidence, such as a document or a recording, of the substance of any conversations with URS in 1996. The only evidence of the substance of these conversations is Mr. McLeod’s testimony that a URS employee told him if he retired and later returned to work for Davis County that his retirement benefit would be cancelled upon his reemployment, and that when he retired the second time his benefit would be based on all his years of service credit combined and would be calculated as one period of service.
6. URS disputed Mr. McLeod’s assertion that a URS employee told him that if he retired and was reemployed, his benefit for all of his years would be recalculated at his second retirement based on one period of service and using his new and significantly higher three highest years of salary.
7. Mr. McLeod came away from those phone conversations with URS with the understanding that he could retire, draw retirement, return in two years to the same office, retire later a second time and have his retirement benefit calculated on the basis of one

period of employment. However, he has not met his burden of proof that he was actually told that.

8. Mr. McLeod retired from his Davis County Sheriff's office position in December 1996 and went to work for Browning Arms. HT 9:12-17, 22:5-21.
9. Between December 1996 and January 1999, URS paid Mr. McLeod his statutorily earned retirement benefits totaling approximately \$50,000. HT: 85:8-15.
10. Mr. McLeod returned to work for Davis County in January 1999, and pursuant to the retirement laws, had his retirement benefit cancelled while he remained employed. HT 22:25-23:4; 86:7-15.
11. In March of 2001, while still employed by Davis County, Mr. McLeod contacted URS and understood for the first time that his benefit would not be calculated the way he wished. HT 37:17-38:21.
12. Mr. McLeod continued working for the Davis County Sheriff's Office until April 16, 2007, when he voluntarily terminated his employment, retired, and began receiving his retirement benefits. HT 47:5-18;48:2-25.
13. In April 2007, URS calculated Mr. McLeod's retirement benefit, pursuant to the relevant statute, based on two periods of service: 1) the service he performed prior to his first retirement, and 2) the service he performed between his first and second retirement. URS then added these calculations together to determine Mr. McLeod's retirement benefit. Mr. McLeod received full retirement service credit for each of his years he worked for public employers participating with URS. HT 170:17-23; 240: 15-22.

CONCLUSIONS OF LAW

1. In April 2007, URS correctly followed the statutory scheme in U.C.A. §49-11-504(9) (2007) in calculating Mr. McLeod's retirement benefit which is based on two periods of service.

That statute states:

(9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:
(a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and
(b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

2. U.C.A. §49-11-504(9) (2007) contains no ambiguity. The plain language of the statute supports URS' calculation of Mr. McLeod's benefits based on two periods of service.

3. U.C.A. §49-11-613(1) (2007) requires that, "All members, retirees, . . . or covered individuals of a system . . . shall acquaint themselves with their rights and obligations under this title." Thus, the ultimate responsibility to understand retirement benefit rights, including retirement calculations lies with the member.

4. Mr. McLeod cannot prevail on a claim for estoppel against URS. "As a general rule, estoppel may not be invoked against a governmental entity. In Utah, there is a limited exception to this general principle for 'unusual circumstances' 'where it is plain that the interests of justice so require.' This exception applies, however, only if 'the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception.'" *Anderson v. Public Service Comm'n*, 839 P.2d 822, 827 (Utah 1992)(citations omitted).

5. The elements of equitable estoppel are: (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act or failure to act; and (3)

injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act. *Eldredge v. Utah State Retirement Board*, 795 P.2d 671 (Utah App. 1990); *Holland v. Career Service Review Board*, 856 P.2d 678 (Utah Ct. App.1993).

6. Mr. McLeod has not proved with “certainty” the representations of URS upon which he relies. Additionally, his reliance on those representations if they were made, was not reasonable under his circumstances of making a major career decision.

ORDER

IT IS HEREBY ORDERED that Mr. McLeod’s request for board action that his retirement benefit should be calculated on one period of service based on U.C.A. §49-11-504(9) must be and is denied. In addition, Mr. McLeod’s argument that URS should be estopped from calculating his benefit in two periods as statutorily required is also denied.

BOARD RECONSIDERATION

Within ten (10) days of a Board order, any party may file a written request for reconsideration stating the specific grounds upon which relief is requested as set forth in Utah Code Ann. §49-11-613. This filing for reconsideration is not a prerequisite for seeking judicial review of the order on review. The request for reconsideration shall be filed with the Board and one copy sent by mail to each person making the request. The Board chairman or executive director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, he may seek a judicial review within thirty (30) days after the date that the order constituting final Board action is issued. Petitioner shall name the Board and all other appropriate parties as respondents. The Utah Court of Appeals has jurisdiction to review all final Board actions resulting from formal proceedings. All petitioners shall follow the procedures established in Utah Code Ann. § 63G-4-101 et. seq.

DATED this 2nd day of December, 2009.

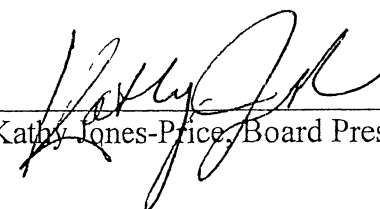


Richard C. Howe
Adjudicative Hearing Officer

The foregoing Findings of Fact, Conclusions of Law, and Order of Denial of the Adjudicative Hearing Officer is hereby adopted as the order of the Utah State Retirement Board.

Dated this 17 day of December, 2009.

UTAH STATE RETIREMENT BOARD

BY 
Kathy Jones-Price, Board President

CERTIFICATE OF MAILING

I hereby certify that on this the 22 day of Dec, 2009, I mailed a true and correct copy of the above **Findings of Fact, Conclusions of Law and Order**, postage pre-paid, to the following:

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