

2010

# Kevin A. McLeod v. Utah State Retirement Board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KEVIN A. McLEOD,	)	REPLY BRIEF
Petitioner/Appellant,	)	
v.	)	Appeal #: 201000026
UTAH STATE RETIREMENT BOARD,	)	
Respondent/Appellee.	)	

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REPLY BRIEF OF APPELLANT

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Petition for Review from a Decision of the Utah State Retirement Board

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## ARGUMENT

### ISSUE I

#### **MCLEOD’S INTERPRETATION OF §49-11-504(9) IS IN ACCORDANCE WITH THE PLAIN LANGUAGE OF THE STATUTE AND IS NOT SUPERFLUOUS**

Despite the glaring ambiguity that Utah Code Ann. §49-11-504(9) (2000) presents and the numerous attempts to show that McLeod’s interpretation of §49-11-504(9) is the correct interpretation of the statute, the Retirement Board continues to contend that the “plain language” of §49-11-504(9) UCA “clearly” states that (McLeod’s) benefit should be calculated in two pieces based on the two service time periods. *See* Brief of Appellee at 13. In their brief, the Retirement Board also contends that finding otherwise would render the statute meaningless or superfluous. *Id.* The Retirement Board’s interpretation of the statute makes little sense and seems to fly in the face of the plain language of the code. The statute states:

(9)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.

The plain language of the statute requires the Retirement Board to use the proper formula to calculate retirement benefits for a retiree who has returned to employment. The Retirement Board is quite right that McLeod does not dispute their using the proper *equation* to calculate McLeod's benefit. What is in dispute is how that equation is to be solved and what percentage is to be included in that equation. The Retirement Board is emphatically incorrect when they bizarrely contend that any interpretation of §49-11-504(9), other than their own, is "superfluous."

The most plausible plain reading of the statute is that if someone retires from the system, collects retirement, returns to the system, and then retires again that the two service periods will be calculated by two different formulas: the one "in effect at the date of the retiree's original retirement" and the one "in effect at the date of the subsequent retirement." This does not mean that there are two separate benefits. It simply means that the formula used to calculate the retirement benefit will be the one in effect when the member retires, and if they retire multiple times, the correct formula is the one in effect at the time of each retirement. Clearly the legislature has an interest in making sure the calculation of retirement benefits is done based on the most current formula at the time a person retires. That is the purpose of the statute and that purpose is not meaningless or superfluous. As this past legislative session has shown, the legislature has a substantial interest in making sure that the formula used to calculate retirement benefits is based on



current economic conditions and within the budgetary guidelines of the Utah Retirement Board.

“This Court’s primary responsibility in construing legislative enactments is to give effect to the Legislature’s underlying intent.” *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982). Generally, the best indication of that intent is the statute’s plain language. “Thus, we (the Court) will interpret a statute according to its plain language, unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute. *West Jordan* at 446.

McLeod’s interpretation of the word ‘formula’ is, and always has been, the equation used to calculate a retiree’s benefit, which varies depending on what percentage is used to calculate it. To conceptually understand McLeod’s interpretation of the statute and why it does not render it meaningless, it is helpful to see how McLeod’s plain reading of the statute affects his specific situation and the difference between his understanding of the statute and URS’s interpretation.

Public safety retirement benefits are calculated under a specific formula set by statute. The formula for the first 20 years of employment is two and one-half (2 ½%) percent times 20. That number is then multiplied by the average of the top three earning years. For every year after 20 years, until 30, it is calculated the same, except the percentage is reduced to two percent (2%).

### **Utah Retirement Systems Interpretation<sup>1</sup>**

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<sup>1</sup> The salary amounts used are roughly similar to McLeod’s actual salary. The figures are rounded off solely to demonstrate the differences of interpretations of the statute. See Hearing Transcript at 72:11 and 72:15 for specific amounts.



When McLeod retired for the first time in 1997 his average salary was roughly \$50,000. His total term of service was also about 20 years. Again, the formula is the first 20 years of employment multiplied by two and one-half (2½%) percent times 20. That number is then multiplied by the average of the top three earning years.

The formula used to calculate his retirement is:  $(20 \times 2\frac{1}{2}\%) \times \$50,000$

This equals \$25,000.00 per year which is approximately what his retirement benefit was during the two year period McLeod retired from 1996-1998.

URS then recalculates McLeod's benefit based on his next term of service, completely separate from the prior years of service. He came back into the retirement system in 1998 and retired in 2007. This would almost put his second term of service at ten years. Again, as mentioned above, the formula used to calculate this term of service is ten years multiplied by two percent (2%). This amount is then multiplied by the average of the top three earning years.

Thus, the formula used, in McLeod's case, is  $(10 \times 2\%) \times \$85,000$ , equaling \$17,500.

Those two amounts (\$25,000 + \$17,500) are then added together to reach the entire allowed benefit (\$42,500).

### **McLeod's Interpretation**

McLeod's interpretation is much simpler, and much more in line with the wording of the statute. The equation is exactly the same. The first 20 years of employment multiplied by two and one-half (2½%) percent. That number is then multiplied by the average of the top three earning years. All subsequent years are calculated at two percent (2%).



Therefore, for the service period of 1976-1996 McLeod's retirement is calculated using the two and one half percent equation. When McLeod re-entered the system in 1998 his retirement was then calculated using the two percent equation. Thus, McLeod retirement benefit ought to be calculated:

20 (years) multiplied by 2 ½% which is 50%

10 (years) multiplied by 2% which is 15%.

These two percentages added together is 65%. 65% is then multiplied by his highest three years of salary (\$85,000) to get a total benefit of \$59,500. McLeod's interpretation of the statute is clearly in accordance with the plain language of the statute.

The Retirement Board further contends 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." *Brief of Appellee* at 18. This argument is nonsensical. Kevin McLeod worked for 28+ years in law enforcement before he started to collect his final retirement in 2007. He contributed *exactly* the same amount to his retirement benefit as anyone else that worked the same amount of time. McLeod's entire objective in pursuing this case is that he be treated the same as anyone else that has worked his same amount of time. It is true that McLeod retired for roughly two years, from December of 1996 to January of 1999 and received his initial retirement benefit. Subsequently, he also lost two years toward the necessary thirty years to receive the maximum benefit. In order to get the maximum amount of benefits afforded to a peace officer, he would have to be



employed by a law enforcement agency for thirty years (in order to reach the maximum retirement allowed under U.C.A. §49-14-402(2)(a)). As mentioned above, in law enforcement, the formula for the first 20 years of employment is two and one-half (2½%) percent times 20. That number is then multiplied by the average of the top three earning years. For every year after 20 years, until 30, it is calculated the same, except the percentage is reduced to two percent (2%). After 30 years of employment, law enforcement officers do not accrue additional retirement benefits. Therefore it makes sense to only remain employed for thirty years (even with gaps in terms of service) before an officer finally retires and begins to collect retirement. Because McLeod retired for two years from December 1996 to January 1999, he lost two years toward his thirty required years of service necessary for a maximum retirement benefit.<sup>2</sup> He had to work an additional two years (from 2005-2007) to accrue the service years toward his maximum benefit. In those additional two years, he more than gave up in the amount he received in benefits those two years between his terms of service. He contributed to the system just as much as anyone else with his similar terms of service. All he asks is that he be treated the same as anyone else who has worked the same amount of time that he has.

The Retirement Board's brief states that "Mr. McLeod's benefit that he received between December 1996 and January 1999 is worth \$139,407.20 in today's dollars" and that "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." *See Appellee's Brief* at 18. As mentioned above, during McLeod's first retirement period he received roughly \$50,000

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<sup>2</sup> McLeod served 28 years



in his retirement benefit. The Retirement Board attaches ten percent (10%) interest to the received benefit and then arrives at \$140,000. There is no deposit or savings account in the country that is returning ten percent in interest on a deposit. The fact that the Retirement Board imputes received benefits at ten percent interest seems to demonstrate their lack of good faith in calculating retirement benefits and in administering the various retirement systems to public employees. At best, McLeod's \$50,000 benefit should be imputed with a three or four percent interest rate. Furthermore, as stated above, that amount is more than offset by having to work two additional years before receiving benefits.

Finally, the Retirement Board incorrectly states McLeod's interpretation of §49-11-504(9). Appellee's Brief states "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 Appellee at 19. McLeod never contended that retirement benefits need be calculated in two pieces, at least as far as this statute is concerned. In fact, Appellant's Brief clearly states "...to bifurcate the two terms of service is certainly not justified by the statute, and in fact, seems to be contrary to the clear language of the statute." *See* Brief of Appellant at 41. Again, the Retirement Board fails to grasp McLeod's interpretation and what seems to be the plain language of the statute. The statute does not mandate two periods of service for a retiree who has returned to work after retirement and starts to accrue additional service credit. If the Legislature meant two bifurcated time periods, then they would have so stated. All the statute says is that the



formula that is in effect at the date of the retiree's *original* and *subsequent* retirement dates will be added together to reach the proper percentage to calculate the final retirement benefit.

**ISSUE II**  
**PUBLIC POLICY SUPPORTS MCLEOD'S INTERPRETATION OF U.C.A. 49-11-504(9)**

In an attempt to bolster their claim that URS properly interpreted the statute in issue here, URS mentioned several provisions in Title 49 to show that public policy considerations support their position. *See* Brief of Appellee at 17-18. Even if the Court does find ambiguity in the statute, public policy considerations support McLeod's interpretation of the statute. When faced with a question of statutory construction, Utah Courts first look first to the plain language of the statute. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991); *Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989) (per curiam). "Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations." *Schurtz*, 814 P.2d at 1112; *Bonham*, 788 P.2d at 500.

Retirement benefits of state employees were among the most "hot button" issues addressed in the 2010 legislative session. The formula, or equation, used to calculate retirement benefits was among the forefront of legislative issues. Senator Dan Liljenquist sponsored a number of bills aimed at fixing the entire system of public pensions. The rate of contribution for the public safety retirement system was changed during the 2010 legislature session. This change directly effects the statute in controversy in the case at bar and demonstrates the purpose of the Legislature in passing this statute in the first



place. This past session the legislature completely revamped the public safety contribution plan, and changed the calculation of retirement benefits from 2.5% of the top three years of salary to 1.5% of the top five years' salary. *See* U.C.A. §49-23-304(2)(a)(2010). During the debate of Senate Bill 63 (the bill now codified as §49-23-304), Senator Lilenquist stated that the purpose behind these bills was to "ensure that we can meet 100% of our pension obligations. To do that, we have to reduce the risk that our current system is bearing."<sup>3</sup> The new law passed by the legislature and signed by Governor Herbert on March 29, 2010 reduces the contribution rate by the State of Utah to public safety retirees in order to pay off losses incurred by the Utah State Retirement Board during the 2008 financial crisis. As mentioned above the new law lowers the yearly contribution percentage from 2.5% to 1.5%. It also changed the formula in that it increased the number of years to calculate a retiree's average salary. Previously, as mentioned above, the formula to calculate retirement benefits is, for the first 20 years of employment, two and one-half (2 ½%) percent times 20. That number is then multiplied by the average of the top three earning years. For every year after 20 years, until 30, it is calculated the same, except the percentage is reduced to two percent (2%). SB 63 increased the average of the top three earning years to five years. Therefore, as a result of SB 63, the formula will be, for the first 20 years of employment, one and one-half (1 ½%) percent times 20. That number is then multiplied by the average of the top five earning years. There is no longer a 30 year stop date for accruing retirement benefits. The

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<sup>3</sup> See Senate Debate: SB 0063S01 at 12:01

<<http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2010GS&bill=sb0063s03&Headers=true>>



period is indefinite. This new formula will significantly decrease the retirement benefit for a law enforcement retiree after 2011.

The point of the changes instituted by this, and other retirement reforms, is as Senator Liljenquist mentioned, to make sure that the State can meet its financial obligations and to maintain the soundness of the various retirement systems. The “formula” mentioned in U.C.A. §49-11-504(9) is directly affected by the changes made to the public safety retirement system in the 2010 legislature. The formula was changed from a 2.5% multiplier to a 1.5% multiplier, and the number of years used to calculate the average annual salary was increased from three to five years. This was all done in order to maintain the actuarial soundness of the system. For example, if a peace officer from a hypothetical Utah city police department retired in 2005 and started to collect retirement, his/her retirement would be calculated using the current 2.5% multiplier. If he/she then decides to return to that police department after July 2011 (the effective date of §49-23-304,) her benefit will be canceled and all service accrued after returning to work will be calculated using the new 1.5% multiplier. When this officer decides to retire again, his/her retirement should be calculated using the 2.5% multiplier for all service accrued before 2005 and the 1.5% multiplier for all service accrued during her second term of service all multiplied by the average of the top five earning years, at least according the plain language of §49-11-504(9). Public policy dictates that the legislature has a direct interest in changing or altering the formula used to calculate retirement benefits. That is the purpose behind the statute at issue here.



The Legislature defined the purpose of Utah Retirement Board in Utah Code Ann. §49-11-103, as outlined in the Appellee's Brief on page 17. Subsection 2 states "This title shall be liberally construed to provide maximum benefits and protections consistent with sound fiduciary and actuarial principles." Not only does this subsection mandate that Title 49 be construed liberally in favor of state employees who are members of the systems, but it also indicates that the Retirement Board has fiduciary duties toward state employees that are members of their retirement systems and to current retirees. Blacks Law Dictionary describes a fiduciary as "a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor." It further describes a fiduciary as "one who must exercise a high standard of care in managing another's money or property" *Blacks Law Dictionary*, 8<sup>th</sup> Edition 2004. As a fiduciary, URS had a heightened duty to be honest and exercise a high standard of care toward Kevin McLeod. They had a duty to inform him how they were going to calculate his retirement benefit and how decisions he made would impact that benefit. They especially had a duty to calculate his benefit properly and in accordance with statutory guidelines. Furthermore, as a fiduciary, it seems that URS ought to have a duty to keep track of members' phone calls. This could have been done by recording or by taking notes about what was said and noting which employee took the call, as is the practice with current system members. It seems that an agency that has a fiduciary duty to their members should be doing all of these things.



The purpose of Title 49 is more than met by McLeod's interpretation of §49-11-504(9). Recent legislative history and actions taken by the legislature in reforming and creating new retirement systems for state employees indicate that an important concern of the legislature is protecting the financial soundness of the State. The intent of the legislature can be inferred by the plain language of §49-11-504(9) coupled with their recent actions to protect the financial soundness of the system.

**ISSUE III**  
**THE RETIREMENT BOARD IS EQUITABLY ESTOPPED FROM DENYING**  
**MCLEOD THE PROPER CALCULATION OF HIS RETIREMENT BENEFIT**

The Retirement Board continues to contend that McLeod has failed to prove that URS made a statement inconsistent with a claim later asserted to which he relied upon to his detriment, despite the clear evidence provided by McLeod in the hearing and in Appellant's Brief.

As a general rule under case law, the doctrine of estoppel may not be asserted against the state and its agencies. *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982). Nevertheless, Utah courts have carved out an exception to this general common law rule in unusual circumstances "where it is plain that the interests of justice so require." *Id.* at 720; see, e.g., *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689 (Utah 1979). "In cases where such an issue arises, the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Utah State Univ.*, 646 P.2d at 720. Clearly, the finding of equitable estoppel against a government agency is a factual



inquiry and McLeod produced more than enough facts to satisfy a claim for equitable estoppel.

The elements essential to invoke 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. *Holland v. Career Service Review Bd.* 856 P.2d 678, 682 (Utah App. 1993).

**A. McLeod Provided Enough Evidence at the Hearing to Prove that URS Made a Statement to Him Which Was Later Repudiated.**

URS made a series of statements to McLeod that they later repudiated. It is clear that much of the information McLeod received from URS was received orally over a series of telephone calls. McLeod testified at the Hearing that he made over three phone calls to URS asking specific questions about his situation. *See* T. 15:9-25; 19:6-13; 25:2-8. Neither URS, nor McLeod, took notes of these phone calls. Nevertheless, the statements can be inferred by the actions McLeod took in reliance upon them.

**i. McLeod properly marshaled the evidence to challenge the Hearing Officer's finding that URS never made a statement to McLeod.**

URS argues that "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." In support of their argument, URS cited *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶¶10, 12, 228 P.3d 1242. It reads:



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. 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 invitation which the appellate court may, in its discretion, refuse. *Chen v. Stewart*, 2004 UT 82, ¶77, 100 P.3d 1177.

...

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.*

Appellant’s Brief clearly outlined the evidence produced at the hearing and explained why the Hearing Officer’s application of the law to those facts was erroneous.

Appellant’s Brief outlined, and directly cited to, the facts as they were laid out in the hearing. In its brief, Appellant outlined that he had never received written confirmation of his conversations with URS. *See* Appellant’s Brief at 17. He also outlined that he did not take notes of the phone calls he made. *Id.* These two facts were the primary reason why the Hearing Officer ruled that he could not find certainty that URS made any statement at all to McLeod about his retirement situation. The Memorandum Decision reads:

In the instant case, there was no written communications from URS to the Petitioner before he retired. He relies on two telephone calls made to URS which were unfortunately not recorded in any manner by either URS or Petitioner. We have only his account of what questions he asked and what responses he received. We do not know who he talked to (name or position) . A relatively brief telephone call may not always be adequate to explain an unusual fact or situation with enough detail to obtain an accurate answer. I have no doubt that the Petitioner came away from those calls 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.



But I cannot find that he was actually told that in either call. *See* Memorandum Decision at Page 2.

McLeod fully satisfied the burden established by the Utah Supreme Court when it said that appellants must “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. It certainly doesn’t help Appellant’s case that McLeod never received written communications from URS. In fact, as outlined above, the Hearing Officer used those particular facts to rule against the Petitioner at the hearing. Appellee’s Brief further maintains that “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.” *See* Appellee’s Brief at 25. McLeod disagrees. All of the relevant evidence that the Hearing Officer used to arrive at his decision was included in the Appellant’s Brief. The Utah Rules of Appellate Procedure 24(a)(9) state that “A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” The Utah Supreme Court clarified the Rules that “to successfully challenge an agency's factual findings, the party ‘must marshal [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.’” *Grace Drilling Co. v. Bd. of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct.App.1989).



McLeod fully satisfied the marshaling requirement of Rule 24 of the Utah Rules of Appellate Procedure. All relevant evidence that the Hearing Officer, and thus the Board, used to arrive at their Findings of Fact was included, and cited to, in Appellant's Brief. Facts such as no written representations, no recording of phone calls, and no taking of notes during the alleged phone calls, which go to the heart of the decision by the Board to deny McLeod's petition, are properly included and "precisely summarized" in Appellant's Statement of Facts. *See* Brief of Appellant at 17. After outlining the facts, the Appellant attacked the reasoning of the Hearing Officer and "ferret(ed) out a fatal flaw in the evidence." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991) and argued why the Hearing Officer's application of the law to those facts was erroneous and asks this Court to review them for "clear error." *Housekeeper v. State*, 2008 UT 78, ¶18, 197 P.3d 636. McLeod is not asking this Court to retry the facts. Quite the contrary, McLeod is asking the court to review *all* relevant facts marshaled by the Appellant and to overrule the decision of the Hearing Officer and estopp the Utah Retirement Board from abrogating the promises made to McLeod in 1996.

**ii. The Hearing Record shows that URS made numerous statements to McLeod, which they later repudiated.**

Despite never requesting or receiving written declarations from the Retirement Office that his retirement would be calculated using one continuous period, the facts demonstrate that URS did in fact make statements to McLeod that it later repudiated. Claims for equitable estoppel "presents a mixed question, which 'involves the application of law to fact.'" *Terry v. Retirement Bd.*, 2007 UT App 87, ¶ 8, 157 P.3d 797



(quoting *State v. Hamilton*, 2003 UT 22, ¶ 33 n. 12, 70 P.3d 111.) The court reviews the underlying facts for clear error and the application of the law to those facts for correctness. See *Id.*

URS recites portions of the Hearing Officer's findings of fact in an effort to prove that URS has no record of telephone calls between McLeod and URS in 1996. See Brief of Appellee at 28. Clearly neither side has physical documents proving the substance of these phone calls. Also, it is important to note that Utah courts have *never* held that there must be written representations to prevail on an estoppel claim against a government entity. Presumably, since it has never held as such, oral declarations can be used as evidence of an estoppel claim. McLeod emphatically renews his assertion that he called URS on three separate occasions between 1996-1999 and was told that his retirement would be calculated as one continuous term of service, and not two bifurcated terms. Both times he made contact with URS in 1996 the operator indicated that his service would be calculated as one continuous term.

McLeod also received statements from Utah Retirement Systems that showed his benefit calculated as one continuous period. Although he received these statements after he retired from the Davis County Sheriff's Office, it further demonstrates and adds credibility to his claims that he was told his retirement would be calculated as one continuous period, not two as the Retirement Board is now claiming. These statements are not ambiguous. The statements plainly show one continuous term of service from the time McLeod began working at the Bountiful Police Department in 1976 to when he finally retired from the Davis County Sheriff's Office in 2007. These statements, albeit



received after McLeod first retired in 1996, add a lot of weight to McLeod's claim that he received information from the Retirement Board that his retirement benefit would be based on one period of service. Furthermore, these statements are prepared by URS employees and it is presumable, probably likely, that URS employees would look at these statements and assume that retirement benefits are calculated as one continuous time-period. These statements clearly denote one time period as the basis for calculating retirement benefits for a retiree who has returned to work. It is highly likely that an employee, looking at these statements, would conclude that the time of service would be calculated as one continuous benefit.

Because of the assured attitude of the retirement 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. Unfortunately, we do not know who he talked to in the office. URS continues to maintain that *all* calls regarding post retirement would have been answered by Judy Lund: "Any phone calls regarding post-retirement retirement calculation questions, like the ones Mr. McLeod alleged he asked, would have been transferred to her." *See* Brief of Appellee at 29. This assertion is directly contradicted by Ms. Lund herself when she testified that phone calls generally first go to the Customer Service Department and then to someone who can properly answer the question. Presumably, questions about post retirement benefits would have gone to her, if she were available to take the call. However, if Ms. Lund was unavailable backs-ups or specialists in other areas attempted to answer the questions. *See* Appellant's Brief at 20 or the Hearing Transcript 153:3-7; 154: 8-21. It is not difficult to realize that Ms. Lund was not



available 100% of the time to answer questions. Due to the number of employees in the office and the large amount of turnover in the past 13 years we will probably never know who McLeod talked to. It is also entirely possible that the person he talked to no longer remember the conversation, is not willing to divulge exactly what was said, or no longer works for URS.

Nevertheless, we can be assured that those comments were made, not only because of McLeod's recollection, but also because he immediately, after having those two conversations with the Retirement Office, talked in detail with Sheriff Cox and with his wife, Diane McLeod. He relayed to both of them exactly what he was told: that upon his return to work his retirement would not be adversely affected except that he would lose the two years of service when he was gone, and that the benefit would be canceled until he finally retired. By his actions and the testimony of people surrounding him at the time, confirmed by the statements he received in the mail, the first three prongs of estoppel are met: 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. *Holland* at 682. The third prong "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" is met when the Board denied all of McLeod's direct appeals.

**iii. The oral statements URS made to McLeod are not hearsay under the Utah Rules of Evidence.**



The Retirement Board asserts that 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.” *Brief of Appellee* at 31 The Board has failed to properly describe and apply the hearsay rule. The hearsay rule does not ban *all* out of court statements being admitted into evidence; only that it not be offered for the truth of the matter asserted. Utah Rules of Evidence 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. If an out of court statement is introduced for any purpose *other* than to prove the truth of the matter asserted, there is no need to cross examine the declarant; so the statement is not hearsay. Specifically, statements offered to show their effect on the hearer and statements offered as circumstantial evidence of declarant’s state of mind are not covered under the hearsay rule. The Utah Supreme Court has held that “when an out-of-court statement is offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule.” *State v. Sorensen*, 617 P.2d 333, 337 (Utah 1980) McLeod is not offering the oral statements made by URS to him for the truth of the matter asserted but in order to show the motive behind his decision to retire and in an effort to explain why he took the actions he did. Because the oral statements are not hearsay, they are admissible and available to be used as a basis for a finding of fact in an administrative hearing. Again, the Board misunderstands the hearsay rule when they state “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



conversations.” It makes no difference whether or not the information McLeod received from URS was true or not. A URS employee told McLeod that his retirement would be calculated as one continuous period, not bifurcated based on two separate terms of service. McLeod relied on those statements when he made the decision to retire. It matters not that the information given to him was true. The mere fact that the statements were made is what is at issue. Because the statements were offered to show why McLeod made the retirement decisions that he did, and not for the actual truth of those statements, they are not covered under the Hearsay Rule and may be used as the sole basis for a ruling by an administrative law judge.

The Hearing Officer erred when he ruled that McLeod did not meet all of the elements of estoppel. Kevin McLeod would have received his full retirement benefit if accurate advice had been given to him. He would have either not retired when he left for the two years, not left at all, waited another year to return until the law changed and allowed him to place his future retirement in a retirement fund 401(k) and collect his retirement during the full term that he served as Chief Deputy at the Davis County Sheriff’s Office. The year after McLeod first retired in 1996 the law was changed so that members could opt to have their retirement placed in a 401(k) retirement plan. Ever since then, retiree’s who are temporarily retiring, either to take a job in the private sector (like McLeod did) or for any other purpose, can place their retirement into a 401(k). If McLeod would have had that option available to him, he may have taken it. All of these options would have allowed him to receive the full benefit of his retirement. The only



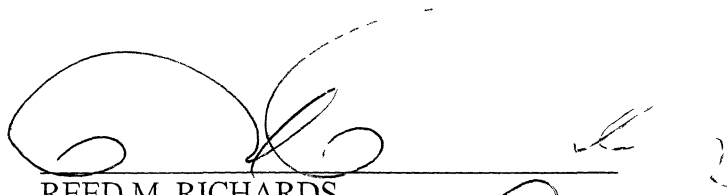
limited area where the Retirement Office has taken the position that he cannot receive his retirement is to do exactly what he did, based on their advice.

### **CONCLUSION**

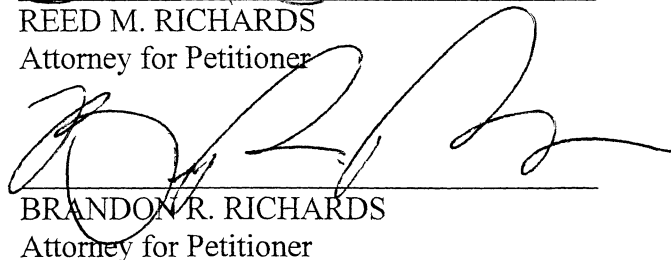
The Retirement Board did not interpret Utah Code Ann. §49-11-504(9) accurately. A proper interpretation of the statute is that the formula that is in effect at the date of the retiree's *original* and *subsequent* retirement dates will be added together to reach the proper percentage to calculate the final retirement benefit. The Retirement Board is reading language into the statute that is not there: that the terms of service are bifurcated and added together rather than one continuous fluid period.

Additionally, McLeod has shown that Hearing Officer erred when it determined that he had not met all of the elements required to invoke estoppel against the Utah Retirement Board. URS made statements to McLeod in a series of phone calls from 1996-1999. They then repudiated those statements when McLeod called for a fourth time to clarify what had be previously told to him in 2001, after McLeod had relied on their information. McLeod will lose hundreds of thousands of dollars over his lifetime because of the mistake of the Retirement Board. This is more than enough to satisfy the standards of equitable estoppel against URS. This grave injustice cannot be allowed to stand and the Court ought to invoke estoppel against the Utah Retirement Board.





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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Reply Brief was mailed this 31 day of August, 2010, to attorneys for Respondent at the following address:

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