

2016

Neal K. Ostler, Appellant/Petitioner, vs. Utah State Retirement Board, Appellee/Respondent.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NEAL K. OSTLER,

Appellant/Petitioner, _____ :

UTAH STATE RETIREMENT BOARD,

Appellee/Respondent. _____ :

CASE NO. 20160220-CA

Agency Case No. 13-25R

**BRIEF OF APPELLEE
UTAH STATE RETIREMENT BOARD**

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UTAH APPELLATE COURTS

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Appellant/Petitioner,

vs.

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APPEAL FROM THE UTAH STATE RETIREMENT BOARD

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LIST OF PARTIES

Neal K. Ostler
Petitioner/Appellant

Utah State Retirement Board
Respondent/Appellee

Salt Lake Community College
Third Party Respondent/Appellee

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over formal administrative proceedings of the Utah State Retirement Board (“Board”) pursuant to Utah Code Ann. § 49-11-613(7), § 63G-4-403(1), § 78A-4-103(2)(a), and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue No. 1: Whether the Board correctly interpreted and applied provisions of the Retirement Act in rejecting Ostler’s attempt to create an extra-statutory retirement benefit?

An agency’s interpretation and application of statute is typically reviewed “as a question of law under the correction-of-error standard.” *Sindt v. Ret. Bd.*, 2007 UT 16, ¶ 5, 157 P.3d 797. Relief will be granted “only if, on the basis of the agency’s record, [we] determine[] that a person seeking judicial review has been substantially prejudiced [because] . . . the agency has erroneously interpreted or applied the law.” *Id.* (quoting Utah Code Ann. § 63G-4-403(4), (4)(d)) (alterations in original).

Issue No. 2: Whether the Board correctly determined that Ostler’s claims against his former employer Salt Lake Community College were barred by the statute of limitations or laches?

“The applicability of a statute of limitations [is a] question[] of law, which we review for correctness.” *Jensen v. Young*, 2010 UT 67, ¶ 10, 245 P.3d 731 (quoting *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 11, 156 P.3d 806). “[T]he determination of whether a party was prejudiced for purposes of the doctrine of laches is

a legal conclusion that we review for correctness, [but] we will not set aside a trial court's findings of fact underlying that conclusion unless they are clearly erroneous." *Anderson v. Doms*, 1999 UT App 207, ¶ 8, 984 P.2d 392 (citing *Sweeney Land Co. v. Kimball*, 786 P.2d 760, 761 (Utah 1990)).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 49-11-102(15):

“‘Contributions’ means the total amount paid by the participating employer and the member into a system”

Utah Code Ann. § 49-11-102(31):

“Member contributions” means the sum of the contributions paid to a system . . . , including refund interest if allowed by a system, and which are made by:

- (a) the member; and
- (b) the participating employer on the member's behalf under Section 414(h) of the Internal Revenue Code.

Utah Code Ann. § 49-11-102(49) (emphasis added):

“Service credit” means:

- (a) the period during which an employee is employed and compensated by a participating employer and meets the eligibility requirements for membership in a system . . . , *provided that any required contributions are paid to the office*; and
- (b) periods of time otherwise purchasable under this title.

Utah Code Ann. § 49-11-401(3):

In the accrual of service credit, the following provisions apply:

- (a) A person employed and compensated by a participating employer who meets the eligibility requirements for membership in a system . . . shall receive service credit for the term of the employment provided that all required contributions are paid to the office.

Utah Code Ann. § 49-11-501 (in relevant part):

- (1) If a member shall for any cause, except retirement, permanent or temporary disability, or death, terminate employment with a participating employer the member may leave the member contributions in the fund or may receive a refund of the member contributions as provided under this section.

...

- (5) A member who receives a refund of member contributions forfeits the service credit based on those contributions.

...

Utah Code Ann. § 49-11-502 (in relevant part):

- (1) (a) If a member receives a refund of member contributions and is subsequently reemployed in a position covered by a system . . . , the participating employer or the member may redeposit an amount equal to the member contributions refunded and interest charged under Section 49-11-503.

(b) The interest shall be compounded annually from the date of refund through the month of payment.

(c) If a redeposit is made, service credit shall be restored to the member's account and credited to the same system . . . from which the refund was taken.

...

- (3) A member who redeposits a refund of member contributions under this section shall receive the amount of service credit forfeited in taking the refund.

...

Utah Code Ann. § 78B-2-305:

An action may be brought within three years:

...

- (4) for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state;

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND THE PARTIES

A. Utah Retirement Systems

The following is a brief explanation of the operations of the Utah Retirement Systems under the provisions of the Utah State Retirement and Insurance Benefit Act in order to assist the Court in understanding why the Utah State Retirement Board's decision must be affirmed. The Utah Retirement Systems is created and governed by Utah Code Title 49, the Utah State Retirement and Insurance Benefit Act (the "Retirement Act" or "Act"). The Utah Legislature enacted the Retirement Act in order to provide a comprehensive system of retirement and health insurance benefits to state and local public employees throughout the State of Utah. The Legislature created within the Retirement Act an administrative office—the Utah State Retirement Office, also known as the Utah Retirement Systems (the "Retirement Office" or "URS"), and a governing body—the Utah State Retirement Board (the "Retirement Board" or "Board"). *See* Utah Code Ann. §§ 49-11-201, -202. The Board, in conjunction with participating employers and members, maintains the systems on an actuarially sound basis and promotes uniformity in the administration of the systems. *See id.* § 49-11-203. The systems are administered as qualified plans under the Internal Revenue Code in order for the members and employers to enjoy favorable tax advantages for the benefits.

Membership in URS is based upon qualifying employment with a participating public employer. *See, e.g., id.* § 49-11-401(3). Employees are enrolled by their employer with URS, and they participate in either or both a defined benefit (pension)

plan and a defined contribution (401(k), etc.) plan. In a defined benefit plan, service credit accrues over time, and once the employee is eligible to retire, they must file an application, and a monthly retirement allowance is calculated based on the number of years worked and the final average salary. A member cannot qualify for a retirement benefit until they have accrued at least four years of service credit. *See, e.g.*, § 49-13-401(1)(c)(i).

Depending on the date of first employment and nature of the employment, each employee participates in one or more of the distinct retirement “systems” contained in the Act, each of which is designated for one or more of various categories of public employees, including general public employees, public safety, firefighters, judges, and governors and legislators. *See* Utah Code Ann. § 49-12-103, § 49-13-103, § 49-14-103, § 49-15-103, § 49-16-103, § 49-17-103, § 49-18-103, § 49-19-103, § 49-22-103, and § 49-23-103. The systems are either “contributory” or “noncontributory” retirement systems. A contributory system is funded by contributions from both the participating employer and the member, while a noncontributory system requires no member contributions and is funded solely through contributions from the participating employer. *See, e.g., id.* § 49-13-301, § 49-14-301.

Member and employer contributions are distinct, not only based upon by whom they are paid, but also by how they are attributed to the member. Member contributions vest immediately to the member and are nonforfeitable. *See id.* § 49-14-301(5)(c). Consequently, under the Act, members who have participated in a contributory system may, upon termination of employment, choose to either receive a refund of their member

contributions or leave those contributions with the fund to potentially receive a retirement allowance. *See id.* § 49-11-501(1). If the member chooses to receive a refund of their member contributions, the service credit in the system is forfeited. *See id.* § 49-11-501(5). However, the member may redeposit the amount of the refund with interest in order to reinstate the forfeited service credit. *See id.* § 49-11-502.

In contrast, the Act does not provide a mechanism for members to obtain a benefit from employer contributions alone in a contributory system. Under the Act, employer contributions are not specifically vested to an individual member. They are held in trust for the purpose of paying costs and administering the systems. *See id.* § 49-11-301(3) (“The assets of the funds are for the exclusive benefit of the members, participants, and covered individuals and may not be diverted or appropriated for any purpose other than that permitted by this title.”) Much like employer-paid insurance premiums, the fact that retirement contributions are paid allows a member to qualify for a benefit, but the member has no claim upon the paid amounts themselves and only receives a benefit to the extent the member otherwise qualifies under the terms of the plan (in insurance, by suffering a loss or incurring a claim, and in retirement, by meeting the conditions to retire or otherwise receive payment of a benefit).

The Act requires the Board to certify employer contribution rates annually to maintain the systems, plans, and programs on a financially and actuarially sound basis. Each year, the actuary recommends contribution rates to the Board that are based on actuarial assumptions and methods, the Board’s funding policy, valuation of plan liabilities and assets, and a review of actual plan experience. The calculation of

contribution rates by URS' actuary is based on such assumptions and experience, including employees who leave public employment, take a refund of their member contributions, and forfeit service credit. Thus, the Board and URS carefully administer the systems according to the Act, other applicable law, and fiduciary and actuarial principles.

B. Neal K. Ostler

Ostler was a member of a contributory system, specifically, the Public Safety Contributory Retirement System ("Public Safety Contributory System"), due to his employment with the Salt Lake County Sheriff's Office and the Department of Corrections between August 1972 and August 1988. R. 725. As a member of the Public Safety Contributory System, Ostler made member contributions, which were immediately vested and credited to him by URS. R. 652. Ostler's employers made employer contributions that were placed in the trust fund. R. 651. In August 1990, having terminated from public employment, Ostler requested and received a refund of his member contributions from URS in the amount of approximately \$27,000. R. 727. Upon refund of the member contributions, Ostler forfeited 15.167 years of service in the Public Safety Contributory System. R. 652. On multiple occasions, URS informed Ostler that if he paid the redeposit amount of the previously refunded contributions plus interest, he could restore the forfeited service credit. R. 22, 653, 658, 669, 679. Ostler has admitted that he knew at the time of the refund that the funds would have to be redeposited with interest before he would be eligible for those years of retirement service credit. R. 679. To date, Ostler has not made a redeposit of the refunded member contributions and has,

therefore, not restored the forfeited service credit in the Public Safety Contributory System. R. 653, 727; Appellant's Br., at 5.

After terminating public safety employment with the Department of Corrections, Ostler became a member of a noncontributory system, the Public Employees' Noncontributory Retirement System ("Noncontributory System"), due to his employment with the Utah Department of Commerce, the Davis Applied Technology Center, and Salt Lake City Corporation at various intervals between 1988 and 2004. R. 603. Ostler earned and has been granted 3.352 years of service credit in the Noncontributory System from this employment. R. 653, 659. This amount of service credit is insufficient, on its own, to qualify him for a retirement allowance because a member must have four years of service credit to qualify for a retirement allowance. *See* Utah Code Ann. § 49-13-401(1)(c).

Despite his forfeiture of Public Safety Contributory service credit and an insufficient amount of service credit in the Noncontributory System to qualify for a benefit, Ostler seeks to qualify for a retirement allowance. Appellant's Br., at 7-14. Yet he has declined the statutory remedies available to him—redepositing the refund or earning more service credit. *Id.* at 5. If Ostler returns to employment with a URS participating employer and makes a redeposit of the refunded member contributions and interest for his Public Safety Contributory service, his service credit in that system would be restored. *See* Utah Code Ann. § 49-11-502(1)(c), (3). Alternatively, Ostler could become employed with a URS participating employer and earn additional service credit in order to receive enough service credits to qualify for a retirement allowance. *See, e.g.,*

id. § 49-13-401(1). Under either scenario, once he meets all statutory retirement conditions, Ostler could then qualify for and receive an allowance because he would have more than four years of service credit, the minimum period required to qualify for an allowance in any system covered by the Act. *See, e.g., id.*

C. Salt Lake Community College

Salt Lake Community College (“SLCC”) is a public community college that is a participating employer with URS. R. 123, 125. SLCC employed Ostler part time from 1992-1998. R. 407. SLCC did not enroll Ostler with URS, claiming that he was not eligible to earn service credit because he was not a full-time employee, and therefore not eligible for retirement benefits. R. 407.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Rather than redeposit his refunded member contributions to restore the forfeited service credit or earn additional service credit through new employment, on July 30, 2013, Ostler brought a Request for Board Action before the Board under Utah Code § 49-11-613 (“2013 Request”), asking the Board’s Adjudicative Hearing Officer (“Hearing Officer”) to ignore the plain language of the statute and grant him a retirement benefit without a legal basis. R. 1. In his 2013 Request, Ostler asserted two claims: first, for service credit based on the portion of employer contributions remaining with URS from his years in the Public Safety Contributory System; and second, for contributions and accompanying service credit in the Noncontributory System based on his employment with SLCC as a contracted, part-time employee. R. 1. As the party responsible for

paying contributions if Ostler's second claim were to be granted, SLCC was eventually joined to the action as a necessary party. R. 400-01.

SLCC filed a Motion for Summary Judgment against Ostler, asserting that his claims against SLCC were barred by the statute of limitations and laches. R. 404-05. The Hearing Officer granted the Motion and dismissed SLCC from the action. R. 568-72.

With only his first claim remaining, Ostler then filed a Motion for Summary Judgment against the Board. R. 599-645. The Board filed a Cross Motion for Summary Judgment. R. 646-91. The Hearing Officer issued a Memorandum Decision denying Ostler's Motion and granting the Board's Cross Motion, R. 714-17, which was later memorialized in a formal Findings of Fact, Conclusions of Law, and Order. R. 724-32.

The Retirement Board then issued a Final Order, adopting the Hearing Officer's previous decisions (Order Granting SLCC's Motion for Summary Judgment, and Findings of Undisputed Fact, Conclusions of Law, and Order) as the final board action. R. 733-53. Within the requisite time period, Ostler appealed the Board's final action to this Court. *See* Petitioner's Notice of Claim.

SUMMARY OF THE FACTS

1. Between 1972 and 1988, Ostler participated as a member of the Public Safety Contributory Retirement System, codified at Title 49, Chapter 14 of the Act, through his employment with the Salt Lake County Sheriff's Office and the Utah Department of Corrections. R. 5, 603-04, 714, 725-26.

2. During his public safety employment, Ostler and his employers paid the certified contributions rates to URS, and Ostler accrued a total of 15.167 years of service credit in the Public Safety Contributory System. R. 5, 608, 714, 726.
3. In August 1990, having previously terminated public safety employment, Ostler requested and received a refund of the total member contributions he paid to the Public Safety Contributory System, as allowed by the Act. R. 5, 714, 727.
4. Ostler received a refund in the amount of approximately \$27,000. R. 5, 605, 714, 727.
5. Ostler's Application for Refund of Contributions provides notice that service credit will be forfeited when a refund of member contributions is taken. R. 669, 727.
6. Ostler has admitted that it was "understood by me that the funds would have to be re-deposited with interest before I would be eligible for those years of retirement service." R. 655, 679, 727.
7. Ostler later participated as a member of the Public Employees' Noncontributory Retirement System, codified at Title 49, Chapter 13 of the Act, through employment with the Utah Department of Commerce, Davis Applied Technology Center, and Salt Lake City Corporation at various periods between 1988 and 2004. R. 652, 726.

8. Ostler's employers paid the statutorily required contributions, and Ostler accrued a total of 3.352 years of service in the Noncontributory System. R. 653, 659.
9. Ostler was also employed by another participating employer, Salt Lake Community College, as a part-time employee in various capacities from 1992 through 1998. R. 6, 725.
10. Though SLCC participated with URS, SLCC did not enroll Ostler, nor pay retirement contributions, because SLCC believed Ostler did not meet the statutory conditions to qualify for retirement contributions as a part-time employee. R. 6, 33, 34, 408, 488, 553.
11. Ostler filed suit in the Third District Court against SLCC in 1999, Case No. 990907653, claiming he was owed benefits by SLCC, including state retirement benefits, among other things. R. 224, 420.
12. Ostler knew that he was not enrolled with URS at the earliest upon beginning employment in 1992, and at the latest, in 2001, when he claimed as a cause of action in his 2nd Amended Complaint that SLCC failed to provide him retirement benefits as required under Title 49. R. 253.
13. In 2003, Ostler's district court action against SLCC was dismissed on a finding that the College was not required to provide the benefits claimed by Ostler. R. 308.
14. Upon information and belief, Ostler has not been employed by a participating employer in Utah since 2004. R. 28.

15. To date, Ostler has not redeposited funds to URS to reinstate his service credit.

SUMMARY OF THE ARGUMENT

I. THE BOARD CORRECTLY DETERMINED UNDER UTAH LAW THAT OSTLER FORFEITED ALL SERVICE CREDIT BASED ON THE REFUND OF HIS MEMBER CONTRIBUTIONS AND WAS THEREFORE NOT ELIGIBLE FOR A RETIREMENT ALLOWANCE.

Ostler impermissibly seeks service credit based solely on employer contributions in a contributory retirement system. This is an attempt to create a benefit that does not exist under the law. The Act provides that retirement service credit accrues when “all required contributions are paid to the office.” *Id.* § 49-11-401(3). In a contributory system, contributions are required from both employers and members. *See id.* § 49-14-301(1). Thus, to grant service credit based solely on employer contributions would ignore these substantive provisions of the statute.

In addition, under the Act, only “member contributions are credited by the office to the account of the individual member” and “are vested and nonforfeitable.” *Id.* § 49-14-301(5). There is no provision in the Act to provide a benefit in a contributory system based on employer contributions alone, nor a mechanism for splitting service credit attributable to either member or employer contributions. To do so would require this Court “to fashion a statutory rule out of whole cloth without having any idea of the legislature’s intentions,” something that Utah courts have declined to do. *Mariemont Corp. v. White City Water Imp. Dist.*, 958 P.2d 222, 227 (Utah 1998).

Ostler has a remedy to obtain a retirement allowance. He can become reemployed by a participating employer and restore the forfeited service credit by making a full redeposit of the refunded member contributions or earn additional service credit that would qualify him for a benefit. Ostler's failure to do so does not require this Court to redesign the statute on his behalf.

Finally, legal and policy arguments favor the Board's administration of the statute. The Board is required to maintain the systems according to law, and the IRS has provided a determination that the Board's administration of the Public Safety Contributory Retirement System is in compliance with the Internal Revenue Code. Adopting Ostler's interpretation could jeopardize the favorable tax advantages that URS can provide as qualified plans. Ostler's interpretation would also change the actuarial assumptions underpinning the level of contribution rates needed to fund the system, which take into account, for example, members who will elect a refund and otherwise not qualify for a retirement allowance. To adopt Ostler's interpretation would therefore create an unfunded new benefit not contemplated by the Legislature, and the Board properly rejected it.

II. THE BOARD CORRECTLY DISMISSED OSTLER'S CLAIMS AGAINST SLCC AS TIME-BARRED BY THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS OR LACHES.

Ostler's claims against SLCC before the Board, brought approximately 15 years after Ostler's last day of work with SLCC, were appropriately dismissed by the Board under the applicable statute of limitations. It was undisputed that the three-year general statute of limitations found in Utah Code § 78B-2-305(4) applies to Ostler's claim against

SLCC. The issue here is when it began to run. “As a general rule, a statute of limitations begins to run ‘upon the happening of the last event necessary to complete the cause of action.’” *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 20, 108 P.3d 741. In this matter, all of the elements to determine whether Ostler was eligible and qualified for retirement service credit due to his employment with SLCC existed and could have been proved or disproved during Ostler’s employment with SLCC. The last event creating a cause of action for service credit would be the payment or non-payment of retirement contributions by SLCC after each pay period.

The Board’s ruling is consistent with the better reasoned decisions of other jurisdictions. Four state courts have found that the statute of limitations begins to run at the time the retirement contributions are or should have been made to the applicable retirement system – typically each pay period.¹ These cases are consistent with the federal ERISA discovery rule that the statute of limitations begin to run when there is a “clear repudiation” of benefits that is made known to the beneficiary. *See Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520-21 (3d Cir. 2007) (holding that beneficiary clearly knew his benefits had been reduced when he did not receive full payment and was

¹ *See Jiricek v. Woonsocket Sch. Dist.* #55-4, 489 N.W.2d 348 (S.D. 1992); *Lane v. Non-Teacher Sch. Employee Ret. Sys. of Missouri*, 174 S.W.3d 626, 638 (Mo.App. W.D. 2005); *Fishbein v. State ex rel. Louisiana State Univ. Health Sciences Ctr.*, 898 So.2d 1260, 1266 (La. 2005); *Bailey v. Shelby County*, 2013 WL 2149734 (Tenn. Ct. App. 2013).

therefore barred by statute of limitations). While URS plans are not governed by ERISA, URS believes that the clear repudiation rule reflects good policy by allowing an individual an opportunity to discover the harm before acting on it, but not allow an individual to delay resolution of disputes or wait until evidence is lost or distorted prior to filing a claim.

In addition to being barred by the statute of limitations, the Board's Hearing Officer correctly ruled that to the extent there are equitable claims brought by Ostler against SLCC, they are barred by the doctrine of laches. "In Utah, laches traditionally has two elements: (1) the lack of diligence on the part of the plaintiff and (2) an injury to defendant owing to such lack of diligence." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Home*, 2012 UT 66, ¶ 29, 289 P.3d 502 (quotation and citation omitted). The Hearing Officer correctly determined that Ostler had a lack of diligence in pursuing his claim having known at the latest in 2001 that this was an issue and that SLCC would be injured by his lack of diligence by having to now pay contributions plus interest.

ARGUMENT

I. ACCORDING TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE ACT, THE BOARD CORRECTLY REJECTED OSTLER'S ATTEMPT TO CREATE AN EXTRA-STATUTORY BENEFIT.

A. Ostler Cannot Qualify for a Retirement Benefit that Does Not Exist Under the Act.

This Court must affirm the Board's Order, and reject Ostler's request for retirement service credit based solely on employer contributions in a contributory retirement system, because Ostler attempts to create a benefit that does not exist under the law. Because service credit cannot be split based on employer and member contributions under the Act, the benefit that Ostler is requesting is not provided for under the plain and unambiguous language of the Act, and Ostler's attempt to create it was properly rejected by the Board.

The law regarding statutory construction is well established. When interpreting statutes, Utah courts look first to the plain language of the statute. "Courts are bound by the plain language of the statute." *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc.*, 2006 UT 45, ¶ 17, 143 P.3d 278. Indeed, "[t]he judiciary is obligated to interpret statutes as they are created, not to redesign them." *Id.* ¶ 17 n.22 (quoting *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1997)). Furthermore, "statutory 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 internal quotation marks omitted). "It is our duty to construe each act of the legislature so as to give it full force and effect." *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City*

Corp., 2004 UT 37, ¶ 9, 94 P.3d 234 (quoting *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991)). “The meaning of a part of an act should harmonize with the purpose of the whole act. Separate parts . . . should not be construed in isolation from the rest of the act.” *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984).

Ostler’s interpretation violates these basic canons of statutory construction in an attempt to redesign the Act to create a benefit not provided for by the Legislature and ignores substantive provisions that dictate that Ostler does not qualify for a retirement allowance.

The Act’s plain language, when read as a whole, shows two crucial principles that are dispositive here: 1) a member is only granted service credit if ALL the required retirement contributions, both member and employer contributions, are paid to URS; and 2) only member contributions, not employer contributions, are vested to a member. Each of these provisions is discussed below.

First, service credit is only granted if all the required retirement contributions are paid to URS. Under the Act, an employee qualifies for a retirement allowance when they meet a statutory minimum combination of years of service credit and age. For example, under the Public Safety Contributory System, found in Chapter 14 of the Act, “A member is qualified to receive an allowance from this system when: . . . (i) the member has accrued at least 20 years of service credit; (ii) the member has accrued at least 10 years of service credit and has attained an age of 60 years; or (iii) the member has accrued at least four years of service credit and has attained an age of 65 years.” Utah Code Ann. § 49-14-401(1)(c). Service credit is accrued based on employment by a participating employer when certain conditions are met, including the payment of retirement contributions. The

Act provides, “In the accrual of service credit, the following provisions apply: (a) A person employed and compensated by a participating employer who meets the eligibility requirements for membership in a system . . . shall receive service credit for the term of the employment *provided that all required contributions are paid to the office.*” *Id.* § 49-11-401(3) (emphasis added); *see also id.* § 49-11-102(50)(a) (defining “service credit” as “the period during which an employee is employed and compensated by a participating employer and meets the eligibility requirements for membership in a system . . . *provided that any required contributions are paid to the office . . .*”) (emphasis added). In a contributory system like the Public Safety Contributory System, both employers and members pay the contributions. *See id.* § 49-14-301(1). Thus, in order to earn service credit in a contributory retirement system for any period of employment, both member and employer contributions are required. As a result, reading the Act to grant Ostler service credit in a contributory system based solely on employer contributions would render the language in section 49-11-401(3) meaningless and is an impermissible statutory interpretation.

Second, under the Act, only member contributions are vested and nonforfeitable to the member. The Act provides, “(a) All *member* contributions are credited by the office to the account of the individual member. (b) This amount, plus refund interest, is held in trust for the payment of benefits to the member or the member’s beneficiaries. (c) All *member* contributions are vested and nonforfeitable.” *Id.* § 49-14-301(5) (emphases added). In contrast, there are no such provisions for employer contributions. It is because of the vested nature of member contributions that, under this section of the Act,

members are provided an elective method for receiving a refund of their member contributions if they terminate employment without retiring. “If a member shall for any cause, except retirement, permanent or temporary disability, or death, terminate employment with a participating employer the member may leave the member contributions in the fund or may receive a refund of the member contributions as provided under this section.” *Id.* § 49-11-501(1). Such a refund, based on the clear language of the statute, causes a forfeiture of the corresponding service credits. *See id.* § 49-11-501(5) (“A member who receives a refund of member contributions forfeits the service credit based on those contributions.”). A member is simply not allowed under the Act to receive service credit based only on employer contributions under a contributory retirement system.

However, the statute clearly provides a remedy to reinstate service credit after a member has taken a refund of member contributions. Once a member has elected to receive an alternative distribution of benefits through a refund rather than a retirement allowance, that member may, with later eligible reemployment, reinstate service credit by redepositing the member contributions, plus interest. “If a member receives a refund of member contributions and is subsequently reemployed in a position covered by a system . . . the member may redeposit an amount equal to the member contributions refunded and interest charged under Section 49-11-503.” *Id.* § 49-11-502(1)(a). “If a redeposit is made, service credit shall be restored to the member’s account” *Id.* § 49-11-502(1)(c).

Pursuant to these clear and unambiguous terms of the statute, Ostler left employment with a participating employer and requested and received a refund of his member contributions. R. 5, 714, 727. He therefore forfeited the corresponding service credit.² He also maintains a clear statutory remedy to receive a retirement benefit for that period of time, namely, by meeting the statutory parameters to redeposit those funds with URS. To date, Ostler has declined to make the redeposit. Instead, rather than follow the statutory provisions for reinstatement of service credit through a redeposit, Ostler seeks a remedy not provided for by the Legislature—he seeks contributory service credit based on the employer contributions alone.

Despite the plain language of the statute read as a whole, Ostler argues that because the refund provision alone states that “a member who receives a refund of member contributions forfeits the service credit based on *those* contributions,” that there is a way to split the service credit accrued and only forfeit the portion attributable to the member contributions. However, he does not point to a single statutory provision, a single Utah case, or even a single case from another jurisdiction that would provide or support a basis or method for doing that. Were this Court to adopt Ostler’s interpretation, it would have to invent its own method for determining what percentage of service credit Ostler should retain after taking a refund. The Board’s Hearing Officer recognized that

² The record demonstrates that Ostler was aware of the consequences of the refund. Not only did he sign a Refund Application that provided notice that service credit would be forfeited, but Ostler has admitted that it was “understood by me that the funds would have to be re-deposited with interest before I would be eligible for those years of retirement service.” R. 655, 679, 727.

the statute does not provide for such a split and that he would have to invent a way to do it. R. 754, Hr'g Tr. 33:7 – 36:2 (discussing ways to calculate Ostler's proposed split benefit and stating, "if that's what . . . the legislature intended, how do I tell them what [is] the legal way to do this? . . . What basis is there for me to tell them which way to do it? . . . So it's just up to me? . . . My whim?"). Such an exercise is outside the bounds of a court's role in statutory interpretation. "The judiciary is obligated to interpret statutes as they are created, not to redesign them." *Aris Vision Inst., Inc.*, 2006 UT 45, ¶ 17 n. 22 (quoting *Platts*, 947 P.2d at 662). "It is one thing for this court to interpret an ambiguous statute and attempt to harmonize the various provisions of an act, but it is another for this court to fashion a statutory rule out of whole cloth without having any idea of the legislature's intentions." *Mariemont Corp. v. White City Water Imp. Dist.*, 958 P.2d 222, 227 (Utah 1998).

In short, Ostler's interpretation ignores substantive provisions that must be read in harmony with the provision under which he took a refund and forfeited service credit. Further, his interpretation would impermissibly create an unfunded, extra-statutory benefit. As such, the Board properly rejected it.

B. Even If the Act Is Found to Be Ambiguous, the Board's Interpretation Should Prevail.

Contrary to Ostler's argument, the plain language of the Act unambiguously provides that both employer and member contributions are required in order to accrue service credit in a contributory system. Just because Ostler attempts to distort the plain language with an alternative interpretation, does not make it ambiguous. Indeed, "words

and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests.” *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 17, 133 P.3d 428. Nevertheless, were this Court to find the language of the Act ambiguous, the Board’s efforts to maintain the tax qualified status of the systems and general actuarial policy support the Board’s interpretation, and thus, any ambiguity should be resolved in favor of the Board.

The Act plainly requires the Board to “ensure that the systems, plans, programs, and funds are administered according to law.” Utah Code Ann. § 49-11-203(1)(c). The Internal Revenue Service (“IRS”) has acknowledged that the Board’s administration of the Act is in compliance with the Internal Revenue Code and regulations for qualified plans, which is needed in order for the members and employers to enjoy favorable tax advantages for their retirement benefits. Specifically, the IRS issued a favorable determination letter on December 17, 2014, affirming the qualified status of the URS Public Safety Retirement Systems. R. 685-86. A second letter was issued confirming the qualified status of the Public Employees’ Noncontributory System. R. 687-88. Thus, the Board’s consistent administration of the systems and interpretation of the Act keep the systems as qualified plans under the Internal Revenue Code.

In addition, the Board is required to “maintain, in conjunction with participating employers and members, the systems, plans, and programs on an actuarially sound basis.” Utah Code Ann. § 49-11-203(1)(g). Contrary to Ostler’s argument that the employer contributions on the system would fund his proposed partial retirement benefit, thus having no financial impact to the system, adopting his interpretation would change a

critical assumption underpinning the calculation of contribution rates and would therefore create an unfunded extra-statutory benefit. Contribution rates are set based on the current benefit costs, actuarial assumptions and methods, the Board's funding policy, valuation of plan liabilities and assets, and reviews of actual plan experience, which are in turn all based on the current statutory language and the Board's interpretations and practices. If Ostler prevails and a "new" benefit is created, the costs would increase and the unfunded liability would need to be paid.

In short, any ambiguity found in the statutory language should be resolved in favor of the Board's interpretation, which is calculated to maintain the qualified plan status and actuarial soundness of the systems.

C. The Board Correctly Rejected Ostler's Other Legal and Policy Arguments.

Ostler's other legal and policy arguments are unpersuasive, and the Board correctly determined that they do not override the plain language of the statute. Ostler makes four other legal and policy arguments against the Board's interpretation that he forfeited all of his contributory service credit when he took a refund: 1) that it is prohibited by the statutory mandate toward liberal construction of the Act, 2) that it would result in a gross injustice to Ostler, 3) that it would result in a windfall to other employers and members of URS at his expense, and 4) that it would result in an unlawful taking. The Board properly rejected these arguments.

First, Ostler contends that a liberal construction of the statute in favor of maximum benefits, as required by the Act, dictates that his interpretation be accepted. *See Utah*

Code Ann. § 49-11-103(2) (“This title shall be liberally construed to provide maximum benefits and protections consistent with sound fiduciary and actuarial principles.”).

However, this mandate for “maximum benefits” still operates within the boundaries of what the plain language of the Act actually allows. Liberal construction does not empower a court to override the plain language of the Act and create a non-existent benefit.

Second, Ostler’s contention that a gross injustice would result from requiring a member to forfeit all service credit when member contributions are refunded is untenable. Ostler misunderstands the law and is incorrect that a member could take a partial refund of their member contributions yet forfeit all of their service credit. URS administers the Act consistent with state and applicable federal law requirements, such that a refund consists of all member contributions—a portion is not provided for. Utah Code Ann. § 49-11-501(1) (“... the member ... may receive a refund of the member contributions . . .”). As such, the amount of service credit forfeited will always be proportional to the amount refunded. Similarly, when a member makes a redeposit of a refund amount, the member must redeposit the full amount of the refund. Utah Code Ann. § 49-11-502(1)(a) (“If a member receives a refund of member contributions and is subsequently reemployed in a position covered by a system . . . the participating employer or the member may redeposit an amount equal to the member contributions refunded and interest charged under section 49-11-503.”). Thus, every member receiving a refund is treated the same way and no “great injustice” results from this action.

Third, the Board's interpretation does not create a windfall to URS and/or other employers. A pension plan is akin to an insurance plan, where some insureds will pay premiums for benefits they never collect, and some insureds will collect benefits in excess of their premiums paid. This is the nature of the employer contributions. The fact that Ostler's employers made contributions to URS which are not used to pay him a benefit does not create a windfall for URS or mean that the retirement systems are overfunded. In contrast, Ostler's interpretation would in effect result in a windfall to Ostler by allowing him to receive a double distribution of retirement benefits. Under the Act, members have access to one of three forms of distributions, each requiring certain statutory conditions be met: (1) a retirement allowance, (2) death benefit, and (3) refund. Ostler chose to receive a refund and is therefore ineligible to receive another form of distribution based on the same period of service. If he can now elect to receive both a refund and a retirement allowance, it would give him a windfall and harm the other members of the system.

Finally, the forfeiture of service credit provision in the Act does not effect an unconstitutional taking. As an initial matter, this Court need not address Ostler's constitutional takings argument because it was inadequately briefed. *See* Utah Rule of Appellate Procedure 24(a)(9) (requiring an appellant's argument to "contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on."); *see also Kramer v. State Ret. Bd.*, 2008 UT App 351, ¶ 22, 195 P.3d 925 (quoting *West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874) ("A brief must go beyond providing

conclusory statements and fully identify, analyze, and cite to its legal arguments. This analysis requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.”) Here, Ostler relies on no supporting case law, nor does he provide any meaningful analysis of how his claim meets the required elements under Utah law.

Regardless, Ostler could not meet the elements required to demonstrate a constitutional taking. “‘A takings claim presents two distinct inquiries: ‘First, the claimant must demonstrate some [protectable] interest in property. If the claimant possesses a [protectable] property interest, the claimant must then show that the interest has been taken or damaged by government action.’” *Harold Selman, Inc. v. Box Elder County*, 2011 UT 18, ¶ 23, 251 P.3d 804 (quoting *View Condo. Owners Ass’n v. MSICO, L.L.C.*, 2005 UT 91, ¶ 30, 127 P.3d 697) (alterations in original). Ostler fails to meet the first element, because under the Act he had no protectable property interest in the employer contributions that remained with URS after he took a refund of his member contributions. Even if he qualified for a retirement allowance, he has a claim on the fund, but not a property interest in the specific employer contributions. Without a property interest, there can be no taking. Thus, even if this Court deigned to address Ostler’s inadequately briefed argument, a constitutional taking under Utah law could not be established.

In short, the Court should affirm the Board’s Order in this matter because to accept Ostler’s interpretation of the Act would be to create a benefit—contributory service credit based on employer contributions alone—that does not exist in statute. The

Legislature clearly did not intend for such a benefit, and this Court should not go beyond the plain, unambiguous language of the statute to create it.

II. THE BOARD CORRECTLY DISMISSED OSTLER'S CLAIMS AGAINST SLCC AS TIME-BARRED BY THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS OR LACHES.

Ostler's claims against SLCC before the Board, brought approximately 15 years after Mr. Ostler's last day of work with SLCC, were appropriately dismissed by the Board under the applicable statute of limitations and the doctrine of laches.³ The Board specifically held that the statute of limitations on a claim for retirement service credit begins to run at the time the employer should have made retirement contributions to URS but failed to do so. For the following reasons, this Court should affirm the Board's ruling.

A. The Board Correctly Determined the Statute of Limitations Began to Run at the Time Retirement Contributions Should Have Been Made to URS in Accordance with Utah Law.

The Hearing Officer correctly held, and the Board approved, that the three-year general statute of limitations found in Utah Code section 78B-2-305(4) applies to Ostler's claim against SLCC and began to run at the time that SLCC should have made retirement contributions to URS. This Court should affirm the Board's ruling because it is: 1) consistent with the Board's previous rulings, 2) in accordance with Utah law and the best

³ Because the Board determined in summary judgment that Ostler's claim against SLCC was barred, the underlying merits of his claim were never litigated. If Ostler is allowed to bring his claim against SLCC, this Court must remand the issue to the Board for a determination on whether Ostler was actually eligible for service credit through his employment with SLCC.

reasoned cases from other jurisdictions, and 3) in accordance with public policy regarding the statute of limitations.

1. Ostler's Claim for Service Credit Is Consistent with and Informed by Previous Board Rulings.

URS has had several recent cases before the Board, and an additional one presently before this Court, that have informed URS' actions in regards to the statute of limitations in retirement benefit cases and which URS believes will help inform the Court's decision here. Prior to 2013, it had been URS' practice for many years to request and collect past due retirement contributions from employers without any time limitation, believing that any applicable statute of limitations on such claims was tolled under the equitable discovery rule. Consistent with this practice, URS brought several Board Actions against participating employers for past retirement contributions due.

Of most significance, the Board brought an action against Kane County Hospital, a special service district, for its failure to pay retirement contributions to URS for its employees between 1992 and 2009. *See Ramsay v. Kane County Hospital*, Case No. 20150574, Appellant's Br., at 8-9. The Hospital subsequently brought a Motion for Partial Summary Judgment to limit the claims of URS based on the applicable statute of limitations. URS defended its practice, arguing that the statute of limitations should be tolled under the equitable discovery rule until URS discovered the Hospital should have been a participating employer with URS. *Id.* at 9. Nevertheless, the Board's Hearing Officer ruled that the statute of limitations on URS' claims to receive retirement contributions was not tolled under the equitable discovery rule because URS had not

proven either “concealment” or “exceptional circumstances” as required by common law.

Id. at 9-10; *see also Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, 108 P.3d 741.

Given the clarification by the Hearing Officer regarding the equitable discovery rule, URS accepted and did not appeal the decision. However, two of the employees of Kane County Hospital have pursued an appeal that is currently before this Court in *Ramsay v. Kane County Hospital*, with oral argument on August 31, 2016. *See* Appellate Case No. 20150574.

Following the Hearing Officer’s ruling in the Kane County Hospital matter, the Board clarified the application of the Hearing Officer’s decision to URS by passing Board Resolution 2013-04. *See* Addendum 1. The Resolution was not an attempt to change the law (something the Board has no power to do here), but rather clarified for URS staff how to treat employer retirement contributions under the applicable statute of limitations. The Resolution affirmed the application of the three-year statute of limitations found in Utah Code section 78B-2-305 for claims brought before the Board and established that such a claim arises “when a payment is or should have been paid, service credit is or should have been granted, notice is or should have been provided, or a claim is or should have been made.” *Id.* Thus, since 2013, even if URS has believed that it was owed more contributions under Utah law, URS has only requested three years of retirement contributions from employers pursuant to the applicable statute of limitations.

The Board's decision in the instant matter came after the Ramsay decision, Ostler having filed his claim on July 30, 2013.⁴ The Board therefore applied the three-year statute of limitations from the time that the payments should have been made on Ostler's behalf. Given this background, the Board in this matter, through its Hearing Officer, consistently applied the statute of limitations in accordance with the precedent set in previous cases.

2. Utah Case Law Is Consistent with the Board's Order on the Statute of Limitations.

Utah Appellate Courts have not directly ruled on when the statute of limitations begins to run in a claim for retirement service credit. However, the Board's holding that the statute begins to run at the time retirement contributions are due is consistent with Utah Court's previous rulings on the applicability of the statute of limitations.⁵

"As a general rule, a statute of limitations begins to run 'upon the happening of the last event necessary to complete the cause of action.'" *Russell Packard Dev., Inc.*, 2005 UT 14, ¶ 20. More recently, the Utah Supreme Court has held, "... a cause of action

⁴ Although not specifically applicable in this case, the Legislature passed HB 25 in 2016, which created a specific four-year statute of limitations for a claim brought under the Retirement Act, defined when such a cause of action accrues, and provided for statutory tolling in certain circumstances. See Utah Code Ann. § 49-11-613.5, attached as Addendum 2.

⁵ The statute of limitations for liability based on a statute states, "An action may be brought within three years . . . for a liability created by the statutes of this state" Utah Code Ann. § 78B-2-305(4). The parties appear to be in agreement that this three-year statute of limitations applies to Ostler's claims. See, e.g., Appellant's Br., at 15-17 (failing to dispute the Hearing Officer's specific finding that the three-year statute of limitations based on liability under a statute applies). Based on the lack of argument to the contrary, the Board presumes that Ostler is in agreement that the application of this particular statute of limitations is correct.

accrues when ‘it becomes remediable in the courts’ – or, in other words, when ‘all of the elements that must be proved at trial under the statute allegedly creating liability on the part of the defendant are existing and may be established.’” *Flowell Elec. Ass’n, Inc. v. Rhodes Pump*, 2015 UT 87, ¶ 12, 361 P.3d 91 (quoting *State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, ¶ 24, 52 P.3d 1257). In this matter, all of the elements to determine whether Ostler was eligible and qualified for retirement service credit due to his employment with SLCC existed and could be proved or disproved during Ostler’s employment with SLCC.

In order to be eligible for service credit in the Public Employees’ Noncontributory Retirement System, the retirement system potentially applicable to Ostler’s employment with SLCC, he must have worked in a position averaging 20 or more hours per week and received benefits normally provided to other employees. *See* Utah Code Ann. § 49-13-102(5)(a) (defining a “regular full-time employee”). If Ostler was eligible for service credit for his employment with SLCC, SLCC would have been required to report his salary to URS and remit employer contributions to URS within 60 days of each pay period. *See id.* § 49-11-601 and -603. When retirement contributions for any given pay period were received, URS would then have granted service credit for the fraction of a year reflecting that pay period. *See id.* § 49-11-102(50) (defining “service credit”). Whether Ostler worked the number of hours to be eligible for service credit or whether SLCC made the required retirement contributions to URS are all facts that were existing

at the time of Ostler's employment with SLCC.⁶ The last event creating a cause of action for service credit would be the payment or non-payment of retirement contributions by SLCC after each pay period. Thus, the statute of limitations began to run for Ostler at the time SLCC would have been required to make retirement contributions to URS, but did not make those payments.

3. The Board's Ruling That on a Claim for Service Credit the Statute of Limitations Begins to Run Upon Retirement Contributions Being Due Is Consistent with the Better Reasoned Decisions from Other Jurisdictions.

Although Utah Courts have yet to address the statute of limitations in the state retirement context for accrual of service credit, the Board's ruling is consistent with the better reasoned decisions of other jurisdictions and should be affirmed. Despite Ostler's implications to the contrary, Courts from other jurisdictions are split on this issue—whether the statute of limitations begins to run at the time retirement contributions should have been paid to the retirement system (typically these are paid every pay period), or whether it only begins to run when an employee meets all the criteria to retire and receive a benefit. In South Dakota, Missouri, Louisiana, and Tennessee, courts have found that the statute of limitations begins to run before retirement either at the time the retirement contributions are or should have been made to the applicable retirement system—typically each pay period—or when the employee is otherwise on notice.⁷ In particular,

⁶ These are also facts that were not decided by the Board. R. 568-72. Were this Court to determine that Ostler's claim against SLCC is not barred, the claim would need to be remanded for a determination of whether he actually met the requirements for eligibility.

⁷ See *Jiricek v. Woonsocket School District #55-4*, 489 N.W.2d 348 (S.D. 1992) (finding statute of limitations begins to run when retirement contributions should have been paid

the *Lane v. Non-Teacher School Employee Retirement System of Missouri*, 174 S.W.3d 626, 638 (Mo. Ct. App. 2005), decision follows the federal ERISA rule that the statute of limitations begins to run when there is a “clear repudiation” of benefits that is made known to the beneficiary, regardless of whether the benefit was actually paid or denied. See *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520-21 (3d Cir. 2007) (holding that beneficiary clearly knew his benefits had been reduced when he did not receive full payment and was therefore barred by statute of limitations). Although URS is not governed by ERISA, the Board believes that the applicable state cases and the ERISA “clear repudiation” rule reflect the best policy here. The clear repudiation rule would allow an individual an opportunity to discover the harm before acting on it, but not allow an individual to delay resolution of disputes or wait until evidence is lost or distorted prior to filing a claim.

by employer as meeting the policy purposes of statute of limitations); *Lane v. Non-Teacher School Employee Retirement System of Missouri*, 174 S.W.3d 626, 638 (Mo.App. W.D. 2005) (statute of limitations begins to run at retirement, “unless the claimant knew or should have known from an event or circumstance that a clear repudiation of those benefits or rights has occurred.”); *Fishbein v. State ex rel. Louisiana State Univ. Health Sciences Center*, 898 So.2d 1260, 1266 (La. 2005) (finding that employee could only recover three years of retirement contributions from pension plan because statute of limitations prescriptive period began to run in each pay period when salary was not reported and retirement contributions were not made); *Bailey v. Shelby County*, 2013 WL 2149734 (Tenn. Ct. App. 2013) (finding statute of limitations began to run when employees were on reasonable notice of claims prior to retirement).

In contrast to the clear federal ERISA rule and the well articulated state cases, California, Ohio, and New Hampshire courts have held that regardless of any knowledge of a repudiation of benefits, the statute of limitations does not begin to run until the benefit is actually payable, i.e. the date of retirement or death.⁸ These cases are similar to Ostler's argument that an individual must have suffered actual damages prior to the statute of limitations beginning to run.⁹ In addition to these cases, state courts in

⁸ See *Cal. Teachers' Ass'n v. Governing Bd.*, 169 Cal.App.3d 35, 44 (Cal. Ct. App. 1985) ("We hold that teachers' entitlement to service credits would not accrue until retirement benefits became payable upon retirement and, since service credits are dependent in part upon employer contributions, teachers' right to compel District to make additional contributions to the Teachers' Retirement Fund likewise accrues only upon retirement."); *State ex rel. Teamsters v. City of Youngstown*, 364 N.E.2d 18, 20 (Ohio 1977) (finding statute of limitations did not begin to run until employee's right to receive a benefit was actually infringed at time of retirement); *Wagner v. B.F. Goodrich Co.*, 1991 WL 184489 (Ohio Ct. App. 1991) (holding statute of limitations begins to run on the date of retirement); *State Employees' Ass'n v. Belknap Cnty.*, 448 A.2d 969 (N.H. 1982) (determining that statute of limitations begins to run at the time of retirement or death when benefits become payable). Of note, the most recent of these cases is 1991, approximately 25 years ago, and it certainly seems as if the common law has been refined since the time of these cases.

⁹ Although Ostler correctly stated that the Utah Supreme Court found that a statute begins to run when a plaintiff has suffered "damages," it also appears that the requirement of "damages" to be found prior to the limitations period beginning run is specifically qualified by the word "generally." See *State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, ¶ 24, 52 P.3d 1257. Most Utah courts have applied the more common maxim that the statute begins to run when there is "actual harm" or a clear case in controversy. See, e.g., *Seale v. Gowans*, 923 P.2d 1361, 1364 (Utah 1996) ("Until a plaintiff suffers actual harm or damages, the limitations period will not accrue.") For example, Utah Courts have allowed a statute of limitations to run in declaratory actions, even where no damages have accrued but when the facts are known and there is a clear case in controversy. See, e.g., *Quick Safe-T Hitch, Inc. v. RSB Sys., L.C.*, 2000 UT 84, ¶ 15, 12 P.3d 577 (determining four-year general statute of limitations applied to declaratory action seeking to quiet title in patent license). Thus, the Court has recognized times when damages may not have accrued, but the statute would begin to run. A request

Oklahoma and Washington, including several cases cited by Ostler, have held that the statute of limitations begins to run at retirement *for benefits which were calculated at retirement*. These cases are clearly distinguishable from the “service credit” cases because in the Oklahoma and Washington cases, the claim was not known until the time of retirement and could not have accrued before that time when the facts were unknown.¹⁰

Despite the split in state jurisdictions, the Board was correct in applying the statute of limitations from the time retirement contributions should be paid by the employer so long as the employee is or should reasonably have discovered the payment (or nonpayment) of retirement contributions.¹¹ Not only is it consistent with the Utah rule of

for retirement service credit is a similar type exception to the general maxim that damages are required prior to the statute running.

¹⁰ See *Bordwine v. Okla. Firefighters Pension and Ret. Sys.*, 99 P.3d 703, 705 (Okla. Civ. App. 2004) (“The statute of limitations on such a claim against OFPRS begins to run when a member acquires the right to sue, that is, when the pensioner knew or should have known that OFPRS failed to pay the benefits required to be paid at the time of retirement when the right to benefits became fixed.”); *Steelman v. Okla. Police Pension and Ret. Sys.*, 128 P.3d 1090, 1096 (Okla. Civ. App. 2005) (holding that statute of limitations begins to run upon vesting of retirement benefits, which is when employee retires, but may accrue in certain circumstances when employee first acquires notice of facts to support claim); *Wash. Educ. Ass’n v. Wash. Dep’t of Ret. Sys.*, 332 P.3d 439, 446 (Wash. 2014) (finding statute of limitations starts at the latest at the time of retirement when requesting additional retirement benefits); *Bowles v. Wash. Dept. of Ret. Sys.*, 847 P.2d 440 (Wash. 1993) (holding statute of limitations runs at retirement for increased benefits, but in the context of including lump sum payments for unused vacation and sick leave it runs at time of retirement calculation).

¹¹ Whether and which discovery rule might apply to toll the statute of limitations in a claim for retirement service credit is also an open question that is the subject of the *Ramsay v. Kane County Hospital* matter before this Court. Here, Ostler has not argued that a discovery rule should toll the statute of limitations because he sued SLCC in

law and federal ERISA cases on statutes of limitations, but the policy reasons undergirding a statute of limitations, as established by Utah law, are best accomplished by encouraging the employee to promptly act on a claim rather than sitting on it, despite knowledge thereof, until retirement.

In addition, holding that the statute of limitations does not begin to run until retirement could lead to inconsistent appellate decisions because Utah Courts have previously decided such issues in advance of retirement. Although Utah Courts have not addressed the statute of limitations issue in a retirement service credit context directly, the URS administrative hearing process has determined multiple actions over the years regarding employees' benefits prior to retirement, and this Court and the Utah Supreme Court also have ruled on multiple retirement benefit cases prior to an employee being eligible to retire. *See, e.g., Whitaker v. Utah State Ret. Bd.*, 2008 UT App 282, 191 P.3d 814 (holding employee could not earn more than one year of service credit during one calendar year); *O'Keefe v. Utah State Ret. Bd.*, 929 P.2d 1112 (Utah Ct. App. 1996) (finding GAP time payment should not be included in final average salary for public safety officer), *aff'd*, 956 P.2d 279 (Utah 1998); *McLeod v. Utah State Ret. Bd.*, 2011 UT App 190, 257 P.3d 1090 (affirming Board determination of process to calculate retirement benefits under statute for public safety officer); *Horton v. Utah State Ret. Bd.*, 842 P.2d 928 (Utah Ct. App. 1992) (finding employee required to participate in

district court in 1999 requesting service credit. R. 224, 420. This suit makes it clear that Ostler was on reasonable notice of a potential claim. As the discovery rule was not argued by Ostler, URS will not discuss the potential application of a discovery rule here.

noncontributory retirement system rather than contributory retirement system after changing employers); *Epperson v. Utah State Ret. Bd.*, 949 P.2d 779 (Utah Ct. App. 1997) (holding retiree's former spouse would be eligible for death benefit if retiree died regardless of whether retiree was remarried at time of death). URS allowed these cases at the time, rather than arguing they were not ripe for appeal, in furtherance of the policy behind the statutes of limitation, which, as the U.S. Supreme Court has stated, "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), *followed by Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981). If this Court determines that a cause of action for service credit does not accrue until retirement, it follows that the claims would not have been ripe for decision. If so, the effect of finding that the statute of limitations had not run is that the Board and Utah courts, by implication, should not have ruled on the previous retirement claims decided prior to retirement.

According to this logic, accepting Ostler's argument would also lead to the absurd result of not only allowing, but potentially requiring an employee with full knowledge of an issue to wait in uncertainty on their retirement benefits, being unable to bring a claim until their benefits "might" come due. Allowing employees to bring claims in advance of retirement was also an effort by URS and Utah courts to give the employee some certainty concerning their retirement benefits so that they would not make irrevocable decisions concerning their employment based on incorrect assumptions regarding their

retirement benefits. *See Eldredge v. Utah State Ret. Bd.*, 795 P.2d 671, 676 (Utah Ct. App. 1990) (requiring URS to provide correct retirement information to employees). Thus, allowing an employee to wait until retirement for a service credit claim to become ripe would lead to an unjust and impractical result.

While it is true that there is not case law in Utah that is directly applicable, the Board was correct in holding that the limitations period commences when retirement contributions are due. This holding is consistent with Utah law and the better reasoned cases of other jurisdictions and will protect the public employees by giving greater certainty to retirement benefits going forward. This Court should thus affirm the Board's ruling that the statute of limitations in a request for retirement service credit begins to run from the time that the employer failed to pay the required retirement contributions.

B. The Board Also Correctly Determined That Ostler's Claims Are Barred by the Doctrine of Laches.

The Board correctly ruled that to the extent there are equitable claims brought by Ostler against SLCC, they are barred by the doctrine of laches. This Court need not reach the issue of laches because the statute of limitations is dispositive of all claims against SLCC before the Board. However, if the Court does reach the laches issue, it should affirm the Hearing Officer's ruling.

"In Utah, laches traditionally has two elements: (1) the lack of diligence on the part of the plaintiff and (2) an injury to defendant owing to such lack of diligence." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Home*, 2012 UT 66, ¶ 29, 289 P.3d 502 (quotation and citation omitted). The Hearing Officer correctly determined

that Ostler had a lack of diligence in pursuing his claim, and that SLCC would be injured by his lack of diligence.

First, Ostler knew in at least 2001 when he filed a 2nd Amended Complaint for service credit in Utah District Court that SLCC had not paid his retirement contributions and he had not been granted service credit for his employment. R. 253. He did not file his Request for Board Action in this matter until 2013, approximately 12 years after that date. R. 1. There is nothing in the record to provide any reasonable explanation as to why it took so long to file this action.

Second, if SLCC is found to be liable for Ostler's service credit, SLCC would be required to repay URS retirement contributions, plus interest and penalties under Utah Code section 49-11-601(3) which states,

- (3). . . if a participating employer does not make the contributions required by this title within 30 days of the end of the pay period, the participating employer is liable to the office . . . for:
- (a) delinquent contributions;
 - (b) interest on the delinquent contributions . . . ; and
 - (c) a penalty equal to the greater of:
 - (i) \$250; or
 - (ii) 50% of the total contributions for the employees for the period of the reporting error."

Therefore, the harm to SLCC would be the interest calculation at the actuarially assumed rate of return for retirement funds, and the penalties associated with those contributions. Although the specific dollar amount of the harm has not been calculated, this Court must recognize that there would be a harm. As such, the Board correctly determined that the doctrine of laches would apply to Ostler's claims and correctly dismissed his action against SLCC before the Board.

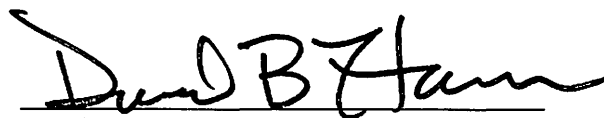
In sum, this Court should apply the three-year statute of limitations to Ostler's claim against SLCC as having run from the date SLCC should have paid contributions on his behalf, rather than allowing him to sit on his claim until retirement. Also, to the extent his claims are equitable in nature, the doctrine of laches was properly found to bar his claim. In any event, the underlying merits of Ostler's claim have not been litigated, and should Ostler be allowed to bring a claim against SLCC, that claim would be properly remanded to the Board for a determination of Ostler's eligibility under the Act.

CONCLUSION

This Court should affirm the Board's Order denying Ostler a benefit which does not exist under Utah law. The plain language of the Act does not allow Ostler to receive service credit based solely on employer contributions in a contributory retirement system. Further, Ostler has a remedy to receive retirement benefits if he qualifies and redeposits the funds that he has withdrawn from URS.

Additionally, this Court should also affirm the Board's conclusions that Ostler failed to bring a timely claim against SLCC for retirement contributions. Ostler's claims against SLCC, brought approximately 15 years after Ostler's last day of work with SLCC, were appropriately dismissed by the Board under the applicable statute of limitations and laches.

DATED this 6th day of September, 2016.



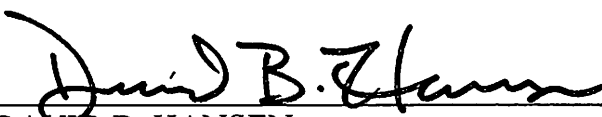
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CERTIFICATE OF COMPLIANCE

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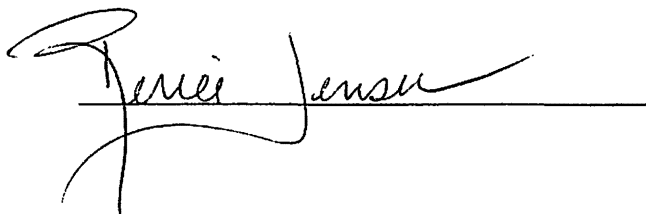
DAVID B. HANSEN
Associate General Counsel
Utah State Retirement Systems

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of September, 2016, I mailed two (2) true and correct copies of the above **Brief of Appellee Utah State Retirement Board** to each of the following:

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A handwritten signature in black ink, appearing to read "Terrie Jensen", is written over a horizontal line.

Addendum 1

Board Resolution 2013-04

RESOLUTION #2013-04 GRANTING SERVICE CREDIT AFTER EMPLOYMENT DISPUTES
(Clarifies Resolution #2004-11)

September 13, 2013

WHEREAS, Utah Code Annotated § 49-11-401(3)(c) provides that the Utah Retirement and Insurance Benefit Act allows the Utah State Retirement Board ("Board") to fix the minimum time per day, per month, and per year upon the basis of which one year of service and proportionate parts of a year shall be credited toward qualification for retirement; and

WHEREAS, employers participating with Utah Retirement Systems will occasionally take incorrect employment action in terminating or otherwise limiting employment; and

WHEREAS, the Board desires to clarify Resolution 04-11 in regards to granting service credit or other adjustments or contributions made to the Utah State Retirement Office under a judgment or settlement agreement in an employment dispute; and

WHEREAS, Utah Code Annotated § 49-11-401(4) allows the Utah State Retirement Office ("Office") to estimate the amount of service credit, compensation, or age of any member participant, or alternate payee, if information is not contained in the records; and

WHEREAS, the Board desires to clarify and update the requirements needed in a judgment or settlement agreement from an employment dispute in order for the Board to grant service credit for time not actually worked, or to make other adjustments for contributions made to the Office.

NOW, THEREFORE, BE IT RESOLVED, that in order to both protect the actuarial soundness of the retirement systems and to allow for benefits to be granted when an employee is involved in an employment dispute, the Board makes the following rules. A member may qualify for service credit following a judgment or settlement agreement in an employment dispute only when all of the following requirements are met:

1. The judgment or settlement agreement must contemplate that the employee would have actually worked during a specific period of time in the past and include those dates;
2. The judgment or settlement agreement must require payment of retirement contributions in full, as determined by the Office, for that specific period of time, which must be in the past;

**RESOLUTION #2013-04 GRANTING SERVICE CREDIT AFTER EMPLOYMENT DISPUTES
(CONTINUED)**
(Clarifies Resolution #2004-11)

3. The Office shall calculate the retirement contributions to be paid on:
 - a. Salary that is the greater of:
 - i. the most recent hourly rate; or
 - ii. the highest hourly rate earned in the last full calendar year the employee actually worked; and
 - b. The number of hours worked that is the greater of:
 - i. the most recent number of hours the employee was scheduled to work each pay period (i.e. 80 hours per pay period); or
 - ii. the highest number of hours worked by the employee in the last full calendar year the employee actually worked;
4. The employer, employee, or the employer and employee combined have paid all the required retirement contributions as determined by the Office;
5. The employer is adjudicated or admits to some error or fault in the employment action, and any settlement is not merely a release of claims; and
6. The service credit requested otherwise meets all the other legal requirements for service credit. (i.e. an individual cannot receive more than one year of service credit during any one-year period.)

NOW, THEREFORE, BE IT FURTHER RESOLVED, that any adjustments or contributions made to a Defined Contribution Plan due to a settlement agreement must be in accordance with both state and federal law, including any regulations promulgated thereby, and the rules set forth in the Plan's governing document.

This resolution shall take effect on September 13, 2013

Addendum 2

Utah Code Ann. § 49-11-613.5

West's Utah Code Annotated

Title 49. Utah State Retirement and Insurance Benefit Act (Refs & Annos)

Chapter 11. Utah State Retirement Systems Administration

Part 6. Procedures and Records

U.C.A. 1953 § 49-11-613.5

§ 49-11-613.5. Limitation of actions--Cause of action

Currentness

(1) Subject to the procedures provided in Section 49-11-613 and except as provided in Subsection (3), an action regarding a benefit, right, obligation, or employment right brought under this title may be commenced only within four years of the date that the cause of action accrues.

(2)(a) A cause of action accrues under this title and the limitation period in this section runs from the date when the aggrieved party became aware, or through the exercise of reasonable diligence should have become aware, of the facts giving rise to the cause of action, including when:

(i) a benefit, right, or employment right is or should have been granted;

(ii) a payment is or should have been made; or

(iii) an obligation is or should have been performed.

(b) If a claim involves a retirement service credit issue under this title:

(i) a cause of action specifically accrues at the time the requisite retirement contributions relating to that retirement service credit are paid or should have been paid to the office; and

(ii) the person is deemed to be on notice of the payment or nonpayment of those retirement contributions.

(3) If an aggrieved party fails to discover the facts giving rise to the cause of action due to misrepresentation, fraud, intentional nondisclosure, or other affirmative steps to conceal the cause of action, a limitation period prescribed in this section does not begin to run until the aggrieved party actually discovers the existence of the cause of action.

(4) The person claiming a benefit, right, obligation, or employment right arising under this title has the burden of bringing the action within the period prescribed in this section.

(5) Nothing in this section relieves a member, retiree, participant, alternative payee, covered individual, employer, participating employer, or covered employer of the obligations under this title.

(6) The office is not required to bring a claim on behalf of a member, retiree, participant, alternative payee, covered individual, employer, participating employer, or covered employer.

§ 49-11-613.5. Limitation of actions--Cause of action, UT ST § 49-11-613.5

(7)(a) A limitation period provided in this section does not apply to actions for which a specific limit is otherwise specified in this title or by contract, including master policies or other insurance contracts.

(b) For actions arising under this title, this section supersedes any applicable limitation period provided in Title 78B, Chapter 2, Statutes of Limitations.

Credits

Laws 2016, c. 251, § 2, eff. May 10, 2016.

U.C.A. 1953 § 49-11-613.5, UT ST § 49-11-613.5
Current through 2016 Third Special Session

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