

1995

# Joseph W. O'Keefe, Jr. v. Utah State Retirement Board : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOSEPH W. O'KEEFE, JR.,

Appellant,

vs.

UTAH STATE RETIREMENT BOARD,

Appellee.

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Case No. 95-0742  
Priority No. 14

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BRIEF OF THE APPELLEE

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PETITION FOR REVIEW OF ACTION TAKEN BY  
THE UTAH STATE RETIREMENT BOARD ADVERSE TO APPELLANT

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**TABLE OF CONTENTS**

<b>JURISDICTION .....</b>	<b>1</b>
<b>STATEMENT OF ISSUES PRESENTED FOR REVIEW.....</b>	<b>1</b>
<b>STANDARD OF REVIEW .....</b>	<b>2</b>
<b>DETERMINATIVE PROVISIONS .....</b>	<b>2</b>
<b>STATEMENT OF THE CASE .....</b>	<b>4</b>
<b>I. Nature of the Case .....</b>	<b>4</b>
<b>II. Course of Proceedings .....</b>	<b>4</b>
<b>III. Disposition By the Agency Below .....</b>	<b>5</b>
<b>STATEMENT OF FACTS .....</b>	<b>5</b>
<b>SUMMARY OF ARGUMENTS .....</b>	<b>8</b>
<b>ARGUMENT .....</b>	<b>9</b>
<b>Point I</b>	
<b>THE ADJUDICATIVE HEARING OFFICER’S FINDINGS         OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE         IN THE STIPULATION OF FACTS AND SHOULD BE         UPHELD BY THE COURT.....</b>	<b>9</b>
<b>Point II</b>	
<b>THE ADJUDICATIVE HEARING OFFICER’S         CONCLUSIONS OF LAW WITH RESPECT TO THE         BOARD’S INTERPRETATION OF THE TERM “OVERTIME”         ARE REASONABLE AND CONSISTENT WITH STATE AND         FEDERAL LAW.....</b>	<b>10</b>
<b>Point III</b>	
<b>THE ADJUDICATIVE HEARING OFFICER WAS         CORRECT IN CONCLUDING THAT THE BOARD’S         INTERPRETATION OF OVERTIME DOES NOT         INTERFERE WITH O’KEEFE’S EXISTING EMPLOYMENT         CONTRACT.....</b>	<b>14</b>

Point IV	
O'KEEFE HAS NOT MET ANY OF THE REQUIREMENTS PRE-REQUISITE TO ASSERTING AN EQUITABLE ESTOPPEL ARGUMENT.....	16
CONCLUSION.....	19

**TABLE OF AUTHORITIES**

**CASES CITED**

<u>Ager v. Public Employees' Retirement Ass'n Bd.</u> , 1995 Colo. App, Lexis 268, 19 BTR 1393 (Sept. 14, 1995 decided).....	15
<u>Albertsons Inc. v. Dept. of Employment Security</u> , 854 P.2d 570, 575 (Utah App. 1993) .....	2
<u>Anderson v. Public Service Comm'n of Utah</u> , 839 P.2d 822, 824 (Utah 1992) .....	10,18
<u>Celebrity Club, Inc. v. Utah Liquor Control Comm'n</u> , 602 P.2d 689 (Utah 1979) .....	17,18
<u>Eldredge v. Utah State Retirement Bd.</u> , 795 P.2d 671, 675 (Utah App. 1990) .....	16,17,18
<u>Gottfredson v. Utah State Retirement Bd.</u> , 808 P.2d 153 (Utah App. 1991) .....	10
<u>Holland v. Career Services Review Bd.</u> , 856 P.2d 678 (Utah App. 1993) .....	18, 19
<u>Hurley v. Board of Review of Industrial Comm'n</u> , 767 P.2d 524, 526-527 (Utah 1988) ...	2
<u>Morton Int'l Inc. v. Auditing Div. of the Utah State Tax Comm'n</u> , 814 P.2d 581, 587 (Utah 1991) .....	10
<u>Nevada Public Employees Retirement Bd. v. Byrne</u> , 607 P.2d 1351 (Nev. 1980) .....	17,18
<u>Public Employees' Retirement Ass'n v. Stermole</u> , 874 P.2d 444, 446 (Colo. App. 1993) .....	15
<u>Rumford v. Public Employees' Retirement Ass'n</u> , 883 P.2d 614, 616 (Colo. App. 1994) .....	15
<u>Questar Pipeline Co. v. State Tax Comm'n</u> , 850 P.2d 1175, 1178 (Utah 1993) .....	2
<u>Utah State Univ. etc. v. Sutro &amp; Co.</u> , 646 P.2d 715, 718 (Utah 1982) .....	16

Williams v. Public Service Comm'n of Utah, 754 P.2d 41 (Utah 1988) ..... 18

**RULES CITED**

Utah Rules of Appellate Procedure, Rule 14 ..... 1

**STATUTES CITED**

Utah Code Ann. § 49-1-102(2) ..... 12

Utah Code Ann. § 49-1-203(1) ..... 2,10-11,13

Utah Code Ann. § 49-1-603 ..... 14

Utah Code Ann. § 49-1-610(4) ..... 1

Utah Code Ann. § 49-4-102(1) ..... 3,12

Utah Code Ann. § 49-4-103(1) and (3) ..... 3,4,11

Utah Code Ann. § 63-46b-16 ..... 1,2

Utah Code Ann. § 78-2a-3(2)(a) ..... 1

## **JURISDICTION**

Utah Code Ann. § 49-1-610(4) allows a member who is aggrieved by a decision of the Utah State Retirement Board (“Board”) to obtain judicial review by complying with the procedures and requirements of Chapter 46b, Title 63, the Administrative Procedures Act.

Utah Code Ann. § 63-46b-16 confers jurisdiction on the Supreme Court or other appellate court designated by statute to review all final agency action resulting from formal adjudicative hearings.

Utah Code Ann. § 78-2a-3(2)(a) and Rule 14 of the Utah Rules of Appellate Procedure confer jurisdiction on the Court of Appeals over the final orders and decrees resulting from formal adjudicative proceedings of agencies of the state.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- (1) Were the Adjudicative Hearing Officer’s Findings of Fact and Conclusions of Law, including his conclusions from the Stipulated Facts, supported by substantial evidence?
- (2) Was the Board’s interpretation of the term “overtime” erroneous?
- (3) Did the Board’s interpretation of “overtime” interfere with O’Keefe’s employment relationship with Ogden City?
- (4) May O’Keefe invoke the doctrine of equitable estoppel against the Board under circumstances where he was aware of the conditional nature of the Board’s earlier representations and failed to present any evidence on detrimental reliance or injury suffered from the Board’s representation.

## STANDARD OF REVIEW

O'Keefe may only be granted relief if, on the basis of the factual record, the court determines that he has been prejudiced by Board action that is not supported by substantial evidence when viewed in light of the whole record before the court. Utah Code Ann. § 63-46b-16(4)(g).

The Appellate Court does not conduct a de novo credibility determination or reweigh the evidence. Questar Pipeline Co. v. State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993), nor will an agency's findings of fact be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible Hurley v. Board of Review of Industrial Comm'n, 767 P.2d 524, 526-527 (Utah 1988). It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertsons Inc. v. Dept. of Employment Security, 854 P. 2d 570, 575 (Utah App. 1993).

## DETERMINATIVE PROVISIONS

Pursuant to Utah Code Ann. § 49-1-203(1)(j), (g) and (l), the Board shall:

(j) develop broad policy for the long-term operation of the various retirement systems, plans, and programs and is granted broad discretion and power to perform its policymaking functions;

(g) maintain, in conjunction with participating employers and members, the systems, plans, and programs on an actuarially sound or approved basis, subject to the responsibility of the Legislature to adjust benefits and contribution rates when recommended by the board;

(l) regulate the duties of employing units and other public authorities which are imposed upon them by this title and specify the time, place, and manner in which contributions shall be withheld and paid, and obtain any reports necessary for the administration of this title. (emph. added)

Utah Code Ann. § 49-4-102(1):

The purpose of this chapter is to establish a retirement system for public safety employees which provides the following:

- (1) a uniform system of membership;**
- (2) retirement requirements;
- (3) benefits for public safety employees;
- (4) funding on an actuarially sound basis;**
- (5) contributions by employers and employees; and
- (6) economy and efficiency in public service. (emph. added)

Utah Code Ann. § 49-4-103(1):

(a) "Compensation," "salary," or "wages" means the total amount of payments which are currently includable in gross income made by an employer to an employee covered under the retirement system for services rendered to the employer as base income. Base income shall be determined prior to any salary deductions or reductions for any salary deferral or pretax benefit programs authorized by federal law.

(b) "Compensation" includes performance-based bonuses and cost-of-living adjustments.

(c) "Compensation" does not include:

- (i) overtime;**
- (ii) sick pay incentives;
- (iii) retirement pay incentives;
- (iv) the monetary value of remuneration paid in kind, such as a residence, use of equipment or uniform or travel allowances;

- (v) a lump-sum payment or special payments covering accumulated leave; and
- (vi) all contributions made by an employer under this plan or under any other employee benefit plan maintained by an employer for the benefit of a participant.

(d) "Compensation" for purposes of this chapter may not exceed the amount allowed under Internal Revenue Code Section 401(a)(17). (emph. added)

Utah Code Ann. § 49-4-103(3):

**"Full-time service" means 2,080 hours a year.**

#### **STATEMENT OF THE CASE**

##### **I. Nature of the Case**

This is an appeal from a decision of the Adjudicative Hearing Officer of the Utah State Retirement Board, Judge James L. Barker, Jr., adopted by the Board on October 12, 1995, denying Appellant's request that the Board be required to accept overtime ("GAP") time contributions for a four year period of time.

##### **II. Course of Proceedings**

On May 31, 1995, O'Keefe, Board and Ogden City entered into a written stipulation of facts and appeared before the Adjudicative Hearing Officer of the Board, James L. Barker, Jr. Memoranda of Law were submitted by all parties subsequent to the hearing. The Adjudicative Hearing Officer then issued his decision in favor of the Board on October 12, 1995.

### **III. Disposition By the Agency Below**

The Adjudicative Hearing Officer issued findings of fact and conclusions of law in support of the Board's interpretation of overtime, and against O'Keefe's claims that the Board interfered with his existing employment contract with Ogden City and his claims of equitable estoppel. O'Keefe appeals from these findings and conclusions.

#### **STATEMENT OF FACTS**

On May 31, 1995, O'Keefe, the Board, and Ogden City, Third Party Intervenor, agreed to a statement of facts and historical background which would "serve as the sole factual basis for the determination in this case." (R. 22).

- (1) O'Keefe and other peace officers similarly situated are public safety employees employed by Ogden City, and have been for the entire period of this controversy.
- (2) On July 1, 1985, Ogden City initiated a program whereby its peace officers, under certain prescribed and agreed upon circumstances, could be required to work more than 40 hours per week.
- (3) In 1989, as a result of negotiations held between Ogden City and its employees, including O'Keefe, an agreement was reached whereby any hours worked in excess of 40 hours per week but not more than 43 hours per week could be treated in either of two ways:
  - a. The three (3) hours in question (commonly referred to as GAP time) could be taken later as leave, pursuant to which no compensation would be paid; or
  - b. The GAP time could be treated as regular compensation (paid at regular - not overtime rates), pursuant to which the officer would receive additional compensation on which retirement contributions would be paid.

(4) The effect of the additional compensation and retirement contributions in the final three (3) years of O'Keefe's employment would result in an increase in the monthly retirement allowance of O'Keefe - estimated as follows:

A. Assuming a May 1, 1995 retirement date:

If the URS accepts contributions on GAP time and the additional compensation is used in the calculation of the retirement allowance, the benefit would be \$1,819.68.

If the URS does not accept contributions on GAP time and the additional compensation is not used in the calculation of the retirement benefit, the benefit would be \$1,697.34.

B. Assuming a July 1, 1995 retirement date:

If the URS accepts contributions on GAP time and the additional compensation is used in the calculation of the retirement allowance, the benefit would be \$1,842.48.

If the URS does not accept contributions on GAP time and the additional compensation is not used in the calculation of the retirement benefit, the benefit would be \$1,717.80.

Thus, O'Keefe's retirement allowance, if GAP time is determined to be eligible time worked under Utah laws, would increase anywhere between \$122.34 - \$124.68 per month.

(5) In 1990, Ogden City began sending the first employer and employee contributions to the Retirement Systems for those employees who chose to treat the three (3) hour additional time (GAP) worked as "regular compensation." URS received and credited these contributions to the appropriate participating members' accounts, including O'Keefe.

(6) In 1991, due to an administrative oversight, no contributions were sent by Ogden City. In 1992, Ogden City forwarded the required contributions for both 1991 and 1992.

(7) Upon receipt of the 1992 contributions, URS determined that the GAP time contributions were ineligible and refunded the GAP time contributions to Ogden City for the appropriate years.

(8) During the period from 1992 to the present, O'Keefe has taken the position that both the original 1990 contributions and subsequent contributions were eligible and should not have been refunded. URS has taken the position that the Office ruled the contributions ineligible as soon as it had actual knowledge of the GAP time issues. Actual knowledge did not occur until sometime in 1992 when an employee sought to retire with GAP time included as part of compensation.

(9) During this same period, officials from URS, Ogden City, O'Keefe, and others similarly situated met in an attempt to resolve the different interpretations of the law. During these discussions, the Retirement Office agreed to resume its acceptance of GAP time contributions conditionally while an additional study took place on the feasibility of developing a permanent policy covering GAP time contributions. O'Keefe believed a permanent policy had been adopted and the contributions were being accepted unconditionally.

(10) Also during this time another employing unit, Weber County, requested GAP time coverage. All the parties then agreed that the Board's actuary, Wyatt and Associates, should determine any actuarial impact which would result from including GAP time in "compensation" for retirement purposes.

(11) The actuary's assumptions and response was delivered in a letter to M. Dee Williams, Executive Director of URS, on June 2, 1994:

As explained to us, Ogden police officers have a 43-hour work week. However, officers are allowed a choice between (i) taking direct pay for the three hours over 40, or (ii) taking this time as additional comp time. Most officers take the time as comp time,

but as they approach retirement, officers can and do switch to taking this as pay. By doing so, they increase their Average Annual Compensation, resulting in a higher retirement benefit.

This policy increases the employer's contribution rate from 9.8% to 11.7%. Our calculation assumes that all members elect to maximize their retirement benefit - i.e., they will be able to plan well enough in advance to increase their retirement benefits by 7.5% (the ratio of the 3 extra hours to the 40 hours they were being paid for earlier).

(12) As a result of the actuary's findings and conclusions, URS resolved to permanently deny GAP time contributions. An additional reason for denial was forwarded - any administrative, i.e. URS decision to include GAP time would indeed be adding a benefit to the existing system at the cost determined by the actuary. Such an added benefit with a potential cost to all employers and employees, not just to Ogden City and its employees, should be decided by the Legislature, not URS.

(13) O'Keefe has brought to URS' attention that a small number of Ogden public safety officers actually received a retirement allowance with GAP time included. The Retirement Office has agreed to honor those retirements.

(14) There are twenty two (22) Ogden police officers left in this dispute. Ten (10) officers have elected to take their GAP time contribution refunds and are excluded from this dispute.

### **SUMMARY OF ARGUMENTS**

The essence of this controversy is whether a police officer who works more than forty (40) hours a week, but less than forty three (43) hours (called GAP time) may have compensation he earns from that GAP time included in the compensation used for calculating his retirement benefit, when the definition of compensation for retirement purposes specifically excludes compensation

earned from “overtime” work. The Board’s position in this respect is that the Board is empowered to determine what is and what is not overtime. Its interpretation should be afforded great weight by the Court and is clearly reasonable under the circumstances. In no way did the Board’s interpretation of overtime either interfere with O’Keefe’s employment relationship with Ogden City or cause him to suffer injury.

## ARGUMENT

### POINT I

**THE ADJUDICATIVE HEARING OFFICER’S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE STIPULATION OF FACTS AND SHOULD BE UPHeld BY THE COURT.**

O’Keefe argues that the facts clearly indicate that he did not know of the conditional nature of the Board’s acceptance of contributions made on overtime worked. (Brief of Appellant P.20).

However, the findings of fact clearly contradict this assertion. Stipulation No. 9 states:

During this same period, officials from URS, Ogden City, Petitioner, and others similarly situated met in an attempt to resolve the different interpretations of the law. During these discussions the Retirement Office agreed to resume its acceptance of GAP time contributions conditionally while an additional study took place on the feasibility of developing a permanent policy covering GAP time contributions. Petitioner believed a permanent policy had been adopted and the contributions were being accepted unconditionally. (emph. added)

O’Keefe conveniently omits his own involvement in these meetings in his citation of Stipulation No. 9 (Brief of Appellant P.20). The fact is O’Keefe was involved in the discussions over the interpretation of the law on GAP time and overtime. He was in the discussions where the Retirement Office agreed to resume its acceptance of GAP time contributions conditionally, and thus

he knew the conditional nature of the Board's acceptance of the contributions. It is not surprising then, that the Hearing Officer found that he may have "believed" that contributions were being accepted unconditionally, but he "knew" that the Board agreed to accept the contributions only conditionally, and he also knew that the Board had exercised its right under the conditional acceptance arrangement to deny the contributions prior to O'Keefe's retirement date.

## POINT II

### **THE ADJUDICATIVE HEARING OFFICER'S CONCLUSIONS OF LAW WITH RESPECT TO THE BOARD'S INTERPRETATION OF THE TERM "OVERTIME" ARE REASONABLE AND CONSISTENT WITH STATE AND FEDERAL LAW.**

**A. The Board is statutorily empowered to define the term "overtime."**

The Board, acting in its administrative capacity in interpreting a state statute, is entitled to have its interpretation afforded great weight, and should not be overturned unless clearly unreasonable. Anderson v. Public Service Comm'n of Utah, 839 P. 2d 822, 824 (Utah App. 1992), Gottfredson v. Utah State Retirement Board, 808 P.2d 153 (Utah App. 1991). This is especially so where the agency has been granted discretion in defining a specific term. Morton Int'l. Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 587 (Utah 1991). Here the Board has been granted this degree of discretion.

The power, authority and responsibility of the Board to administer each of the retirement systems under its care is clearly and unequivocally established pursuant to Utah Code Ann. § 49-1-203(1)(j), (g) and (l), where the Board is required to:

(j) develop broad policy for the long-term operation of the various retirement systems, plans, and programs and is granted broad discretion and power to perform its policymaking functions;

(g) maintain, in conjunction with participating employers and members, the systems, plans, and programs on an actuarially sound or approved basis, subject to the responsibility of the Legislature to adjust benefits and contribution rates when recommended by the board;

(l) regulate the duties of employing units and other public authorities which are imposed upon them by this title and specify the time, place, and manner in which contributions shall be withheld and paid, and obtain any reports necessary for the administration of this title. (emph. added)

Yet, despite this clear and specific grant of authority, O’Keefe still insists that the Board has no statutory power to interpret the term “overtime.” The Administrative Hearing Officer’s conclusions of law in this respect are not only reasonable under the circumstances, they are the only conclusions he could have drawn.

**B. The Board’s interpretation of the term “overtime” is reasonable and consistent with state and federal law.**

O’Keefe claims that there is no state definition of overtime and points to federal law, the Fair Labor Standards Act (FLSA), as controlling in matters of compensation.

However, it is State law, Utah Code Ann. § 49-4-103(1), which establishes the definition of “compensation” for retirement purposes, but specifically excludes from compensation. . . .

(1)(c)(i) “overtime . . .” While not specifically defining overtime, Utah Code Ann. § 49-4-103(3) defines what is full-time service:

“Full-time service means 2,080 hours a year.”

It certainly appears logical and reasonable for the Board to conclude then that contributions made on compensation for hours worked in excess of 2,080 per year, or 40 hours per week, are

contributions for more than regular full-time work and therefore are contributions made on overtime compensation. Even O'Keefe accepts the Board's assertion that he has a regularly scheduled 40 hour tour of duty during a work period (R. 37).

O'Keefe cites to both state and federal personnel law to justify a different interpretation of overtime. However, his claim that the Board must comply with these laws is simply erroneous. The FLSA and the State's overtime policies for state employees govern the employment relationship between an employer and its employees, not the relationship between the Board and members of the state-created retirement system administered by the Board pursuant to Title 49.

Stated simply, there is no inconsistency with O'Keefe and Ogden City establishing what will be considered overtime for purposes of their relationship and the Legislature and the Board establishing a different and "uniform" requirement for overtime for all members participating in the Public Safety Retirement System. (See Utah Code Ann. § 49-4-102(1)).

O'Keefe's final argument on this point would chastise the Board for its "restrictive" interpretation and for not liberally construing the statutes to provide maximum benefits. But he cites only half of the liberal construction statute. The complete statute reads:

This title shall be liberally construed to provide maximum benefits and protections. Utah Code Ann. § 49-1-102(2). (emph. added)

The maximum benefits O'Keefe seeks must be balanced with the maximum protections to the integrity and funding of the Public Safety Retirement System. He would have the Board pay retirement benefits on overtime compensation as long as the employer paid only regular salary rates for the overtime worked. In Stipulation No. 11, the actuary explained the actuarial and financial consequences of such an interpretation:

The actuary's assumptions and response was delivered in a letter to M. Dee Williams, Executive Director of URS, on June 2, 1994:

As explained to us, Ogden police officers have a 43-hour work week. However, officers are allowed a choice between (i) taking direct pay for the three hours over 40, or (ii) taking this time as additional comp time. Most officers take the time as comp time, but as they approach retirement, officers can and do switch to taking this as pay. By doing so, they increase their Average Annual Compensation, resulting in a higher retirement benefit.

This policy increases the employer's contribution rate from 9.8% to 11.7%. Our calculation assumes that all members elect to maximize their retirement benefit—i.e., they will be able to plan well enough in advance to increase their retirement benefits by 7.5% (the ratio of the 3 extra hours to the 40 hours they were being paid for earlier).

Indeed, taking O'Keefe's analysis to its logical conclusion, as long as regular pay rates are used, the compensation earned for retirement purposes would be unlimited. In the Board's judgment, such an interpretation would violate its fiduciary responsibility under Utah Code Ann.

§ 49-1-203(1)(g) to:

maintain, in conjunction with participating employers and members, the systems, plans, and programs on an actuarially sound or approved basis, subject to the responsibility of the Legislature to adjust benefits and contribution rates when recommended by the board.

It could also unwillingly raise the contribution rates of all other participating employers and employees in the Public Safety Retirement System since the overtime interpretation must be applied uniformly to all members.

Rather than seek inappropriate relief through this Court, O'Keefe should petition the Legislature for a plan benefit change so overtime can be included in the definition of compensation, as it is for the retirement systems covering teachers and other public employees.

### **POINT III**

#### **THE ADJUDICATIVE HEARING OFFICER WAS CORRECT IN CONCLUDING THAT THE BOARD'S INTERPRETATION OF OVERTIME DOES NOT INTERFERE WITH O'KEEFE'S EXISTING EMPLOYMENT CONTRACT.**

Contrary to O'Keefe's allegations, the Board did not "interfere" with negotiations between Ogden City and O'Keefe in the establishment of a policy concerning GAP time. As stated by the Adjudicative Hearing Officer, "no evidence exists on the record that the Board or its agents were in any way involved in the negotiation process" between O'Keefe and Ogden City.

The provisions excluding overtime from compensation for retirement purposes were in state statute at the time of the negotiations. In any event, representatives from Ogden City deny the existence of employment contracts between O'Keefe and the City. The agreement which is evidenced in the Stipulation simply establishes a policy governing the compensation payable to O'Keefe if he works in excess of 40 but less than 43 hours per week. That part of the agreement is unaffected by the Board's interpretation of overtime. However, by agreeing to pay contributions on the overtime worked, the contributions became subject to the state statute governing compensation which may be used in calculating the retirement benefit. Since the Board determined that GAP time was overtime for retirement purposes, the contributions were made in error under Utah Code Ann. § 49-1-603 and were properly refunded to O'Keefe.

O'Keefe's arguments in this case bear a striking resemblance to those presented to and rejected by three different divisions of the Colorado Court of Appeals.

In the first case, Ager v. Public Employees' Retirement Ass'n Bd., 1995 Colo. App. Lexis 268, 19 BTR 1393 (Sept. 14, 1995 decided), one of the participating employers in the Colorado Retirement System, Colorado State University (CSU) entered into an "accelerated retirement agreement" with certain employees whereby CSU agreed to pay additional compensation in return for the employees' early retirement. CSU also agreed to pay retirement contributions on the additional compensation. However, Colorado Retirement System statutes provided that "bonuses for services not actually rendered, including but not limited to early retirement inducements" were not to be included in compensation for purposes of calculating retirement benefits. The Colorado Retirement Board denied the additional compensation under its interpretation of the statute and the employees appealed under the Colorado Administrative Procedures Act:

"on the basis of an error of law . . . [and] an error of fact," that the Board's action was arbitrary and capricious, that the compensation plaintiffs had received pursuant to the Plan constituted salary for purposes of calculating retirement benefits payable by PERA, and that the Board was estopped from reducing plaintiff's retirement benefits.

Id. at 3.

Yet the court in Ager found for the defendant board, stating that:

The Board's authority to determine salary for PERA [retirement] purposes does not conflict with the university's authority to set the compensation for its faculty. . . . The university may set compensation for its faculty, but the Board must determine whether that compensation . . . meets the statutory definition of salary for PERA purposes.

Id. at 11.

See also Rumford v. Public Employees' Retirement Ass'n, 883 P. 2d 614, 616 (Colo. App. 1994) and Public Employees' Retirement Ass'n v. Stermole, 874 P. 2d 444, 446 (Colo. App. 1993).

Similarly here, the Board's authority to determine compensation for retirement purposes does not conflict with Ogden City's authority to set compensation for its peace officers. The Board however, is entitled to determine whether certain compensation, i.e. overtime compensation, meets the statutory definition or exclusion.

#### **POINT IV**

#### **O'KEEFE HAS NOT MET ANY OF THE REQUIREMENTS PRE-REQUISITE TO ASSERTING AN EQUITABLE ESTOPPEL ARGUMENT.**

Generally, estoppel is not assertable against the state and its agencies. See Eldredge v. Utah State Retirement Bd., 795 P. 2d 671, 675 (Utah App. 1990) and Utah State Univ., etc. v. Sutro & Co., 646 P. 2d 715, 718 (Utah 1982). Even if it could be asserted in this case, O'Keefe must show the following:

(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.

See Eldredge, supra.

#### **A. Statement**

The stipulated facts show that the Board did indeed agree to resume its acceptance of GAP time contributions, but did so "conditionally" pending additional study on the feasibility of developing a permanent policy governing GAP time. (Stipulation No. 9). Therefore, O'Keefe and all others similarly situated were on notice of the potential for the Board to move in a different direction with respect to acceptance of GAP time contributions. Under Stipulation No. 10, all

parties, including O'Keefe, agreed to an actuarial study to determine any actuarial impact. When the Board was informed of the negative actuarial and financial consequences, its decision to permanently deny GAP time contributions was not inconsistent with its earlier position. It was simply a foreseeable result of a study all parties were not only aware of, but approved. (See Stipulation No. 10).

**B. Reasonable Action**

O'Keefe has offered no evidence, either in the Stipulation or in his brief, that he took action or refrained from action in reliance upon the Board's acceptance of the contributions. In fact, he and others similarly situated continued to work, accrued service credit and subsequently controlled their own retirement destiny. The cases cited by O'Keefe to support equitable estoppel are distinguishable from his case.

In Eldredge v. Utah State Retirement Bd., 795 P.2d 671 (Utah App. 1990), Eldredge relied on the representations of the Board and resigned a \$37,000 a year position. In Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689 (Utah 1979), the Club relied upon the representations of the commission and expended about \$200,000. In Nevada Public Employees Retirement Bd. v. Byrne, 607 P. 2d 1351 (Nev. 1980), Byrne resigned a \$23,000 per year position, sold his Las Vegas home and purchased a retirement home in California.

Contrast these acts to those of O'Keefe, who contributed money on the GAP time but who has already received a refund of those ineligible contributions. He now claims in his argument that based upon a projected retirement benefit, he made decisions concerning retirement. Nowhere does the record contain any evidence of his reliance on any projected benefit, or any evidence that he retired in reliance on such representations. To the contrary, he knew long before his effective

retirement date that the Board would deny contributions on overtime compensation. O'Keefe simply did not act to his own detriment.

### C. Injury

Finally, O'Keefe must prove he was injured by the Board's decision to ultimately deny GAP time contributions. Once again the Plaintiffs, in the cases cited by O'Keefe, (Eldredge, Celebrity Club and Byrne), were injured in a specified and certified amount. In O'Keefe's case it was stipulated that, dependent on O'Keefe's projected retirement date, he could receive between \$122.34 - \$124.68 less per month, based on the board's interpretation excluding overtime. O'Keefe might indeed receive more than that amount if he continues to work. In any event, he knew prior to retirement of the possibility that overtime would be excluded and had abundant time to adjust his own retirement plans.

The situations which more closely parallel O'Keefe's situation are found in Holland v. Career Services Review Bd., 856 P.2d 678 (Utah App. 1993), Anderson v. Public Service Comm'n of Utah, 839 P.2d 822 (Utah 1992), and Williams v. Public Service Comm'n of Utah, 754 P.2d 41 (Utah 1988).

In Anderson, the Public Service Commission revoked Anderson's certificate of convenience and necessity as a common carrier. Anderson argued that certain representations were made during negotiations that should estop the Commission from revoking his certificate. The court held Anderson's estoppel claim fails because it does not meet the high standard of proof required for estoppel against the government. Anderson at 827. Citing the Celebrity Club and Eldredge decisions, the court distinguished these cases because they "involved very specific written representations by authorized government entities." Id.

The Holland decision applied the same rational in refusing to apply estoppel in a case involving a state employee's eligibility for automatic reappointment to a position within the State Office of Education.

In O'Keefe's case the stipulation clearly establishes the GAP time contributions would only be honored pending further study on the issues. This hardly meets the standard of the specific written representation favored by the court.

O'Keefe simply has failed to show the standards required to invoke estoppel.

### CONCLUSION

While the Board is committed to maximizing retirees' benefits to the extent permitted by law, it is equally committed to administering the systems in a uniform manner consistent with the underlying actuarial assumptions governing the systems. To do otherwise would both violate the financial integrity of one of the few retirement systems in the U.S.A. that remain funded on an actuarial sound basis and blur the distinction between the Legislature's right to decide the benefit structure for public employees and the Board's fiduciary duty to protect and maximize the benefits thus granted. O'Keefe should simply ask the Legislature to change the definition of compensation to allow for this increase in benefit.

Also, it is appropriate to comment on what is becoming a disturbing trend in the public pension community and is evident in this and the Colorado cases. Under the guise of maximizing benefits, an employee may seek to increase the compensation received in the final few years preceding retirement for the purpose of enhancing the retirement benefit (which is usually calculated on the basis of the final three (3) to five (5) years of compensation earned in a career). The problem with this strategy is that it undermines the actuarial assumptions upon which the retirement systems

are funded, in particular the assumption that the employee will receive compensation increases during his career and will pay contributions on those increases over his career. When an employee is able to avoid paying these contributions during almost all of his career, but then pays them only during the last three (3) to five (5) years, the System is short-changed and all remaining members and employees are left to pick up the additional costs.

The Administrative Hearing Officer's Findings of Fact and Conclusions of Law are sound, based on substantial evidence contained in the Stipulation of Facts and are reasonable under the circumstances. The Board respectfully requests that this Court affirm the Findings of Fact, Conclusions of Law and Recommended Order of the Adjudicative Hearing Officer.

DATED this 13th day of March, 1996.

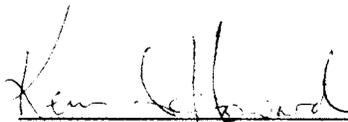


\_\_\_\_\_  
KEVIN A. HOWARD  
Attorney for Appellee

#### CERTIFICATE OF SERVICE BY MAIL

I, Kevin A. Howard, certify that on the 13th day of March, 1996, I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEE upon the following counsel by mailing, by first class mail with sufficient postage prepaid to the following address:

Brian R. Florence  
FLORENCE AND HUTCHISON  
818-26th Street  
Ogden, UT 84401



\_\_\_\_\_  
KEVIN A. HOWARD  
Attorney for Appellee



(3) hour period worked by Petitioner over and above the regular 40 hour pay period. The URS position is that this additional time worked is "overtime" and is excluded from coverage under Utah law. The Petitioner's position is that this time should be treated as regular time and URS should be ordered to accept the contributions paid since 1990 and include "GAP" time in the final average salary component used to calculate Petitioner's retirement allowance. Both sides agree that if the decision of the Hearing Officer is in favor of Petitioner, the decision will be applied both prospectively and retroactively to cover contributions paid on behalf of Petitioner and others similarly situated since 1990.

The following Stipulation of Facts is intended to serve as the sole factual basis for the determination in this case. Accompanying memoranda of law will be supplied in accordance with the schedule established by the Hearing Officer.

#### STIPULATION OF FACTS

1. Petitioner, Joe O'Keefe and other peace officers similarly situated are public safety employees employed by Ogden City, and have been for the entire period of this controversy.
2. On July 1, 1985, Ogden City initiated a program whereby its peace officers, under certain prescribed and agreed upon circumstances, could be required to work more than 40 hours per week.
3. In 1989, as a result of negotiations held between Ogden City and its employees, including Petitioner, an agreement was reached whereby any hours worked in excess of 40 hours per week but not more than 43 hours per week could be treated in either of two ways:
  - a.) The three (3) hours in question (commonly referred to as "GAP" time) could be taken later as leave, pursuant to which no compensation would be paid; or
  - b.) The "GAP" time could be treated as regular compensation (paid at regular - not

overtime rates), pursuant to which the officer would receive additional compensation on which retirement contributions would be paid.

4. The effect of the additional compensation and retirement contributions in the final three (3) years of Petitioner's employment would result in an increase in the monthly retirement allowance of Petitioner - estimated as follows:

**A.** Assuming a May 1, 1995 retirement date:

If the URS accepts contributions on GAP time and the additional compensation is used in the calculation of the retirement allowance , the benefit would be \$1,819.68.

If the URS does not accept contributions on GAP time and the additional compensation is not used in the calculation of the retirement benefit, the benefit would be \$1,697.34.

**B.** Assuming a July 1, 1995 retirement date:

If the URS accepts contributions on GAP time and the additional compensation is used in the calculation of the retirement allowance , the benefit would be \$1,842.48.

If the URS does not accept contributions on GAP time and the additional compensation is not used in the calculation of the retirement benefit, the benefit would be \$1,717.80.

Thus, Petitioner's retirement allowance, if GAP time is determined to be eligible time worked under Utah laws, would increase anywhere between \$122.34 - \$124.68 per month.

5. In 1990, Ogden City began sending the first employer and employee contributions to the

retirement systems for those employees who chose to treat the 3 hour additional time (GAP) worked as "regular compensation." URS received and credited these contributions to the appropriate participating members' accounts, including Petitioner.

6. In 1991, due to an administrative oversight, no contributions were sent by Ogden City. In 1992, Ogden City forwarded the required contributions for both 1991 and 1992.

7. Upon receipt of the 1992 contributions, URS determined that the GAP time contributions were ineligible and refunded the GAP time contributions to Ogden City for the appropriate years.

8. During the period from 1992 to the present, Petitioner has taken the position that both the original 1990 contributions and subsequent contributions were eligible and should not have been refunded. URS has taken the position that the office ruled the contributions ineligible as soon as it had actual knowledge of the GAP time issues. Actual knowledge did not occur until <sup>SOMETIME IN 1992 WHEN</sup> an employee sought to retire with GAP time included as part of compensation.

9. During this same period, officials from URS, Ogden City, Petitioner, and others similarly situated met in an attempt to resolve the different interpretations of the law. During these discussions the retirement office agreed to resume its acceptance of Gap time contributions <sup>CONDITIONALLY</sup> while ~~an~~ additional study took place on the feasibility of developing a permanent policy covering Gap time contributions. <sup>PETITIONER BELIEVED A PERMANENT POLICY HAD BEEN ADOPTED AND THE CONTRIBUTIONS WERE BEING ACCEPTED UNCONDITIONALLY.</sup>

10. Also during this time another employing unit, Weber County, requested Gap time coverage. All the parties then agreed that the board's actuary, Wyatt and Associates, should determine any actuarial impact which would result from including GAP time in "compensation" for retirement purposes.

11. The actuary's assumptions and response was delivered in a letter to M. Dee Williams,

Executive Director of URS, on June 2, 1994:

“As explained to us, Ogden police officers have a 43-hour work week. However, officers are allowed a choice between (i) taking direct pay for the three hours over 40, or (ii) taking this time as additional comp time. Most officers take the time as comp time, but as they approach retirement, officers can and do switch to taking this as pay. By doing so, they increase their Average Annual Compensation, resulting in a higher retirement benefit.

This policy increases the employer’s contribution rate from 9.8% to 11.7%. Our calculation assumes that all members elect to maximize their retirement benefit - i.e., they will be able to plan well enough in advance to increase their retirement benefits by 7.5% (the ratio of the 3 extra hours to the 40 hours they were being paid for earlier).”

12. As a result of the actuary’s findings and conclusions, URS resolved to permanently deny GAP time contributions. An additional reason for denial was forwarded - any administrative, i.e. URS decision to include GAP time would indeed be adding a benefit to the existing system at the cost determined by the actuary. Such an added benefit with a potential cost to all employers and employees, not just to Ogden City and its employees, should be decided by the Legislature, not URS.

13. Petitioner has brought to URS’ attention that a small number of Ogden Public Safety officers actually received a retirement allowance with Gap time included. The retirement office has agreed to honor those retirements.

14. These are twenty two (22) Ogden police officers left in this dispute. Ten (10) officers have elected to take their Gap time contribution refunds and are excluded from this dispute.

These facts constitute the entire background and facts upon which Petitioner and Respondent seek an adjudication. All parties are prepared and desire to submit memoranda of law in support of their respective positions, including Ogden City, which will be in accordance with the following schedule:

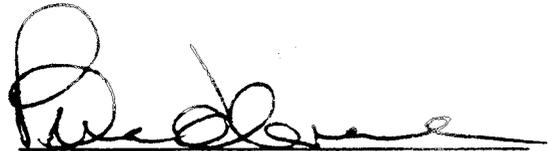
Petitioner's Brief - 30 days from the filing of the Stipulation of Facts with the Hearing Officer.

Respondent's Brief - 30 days from the receipt of Petitioner's Brief.

Third Party Intervenor's Brief - 30 days from the receipt of Petitioner's Brief.

Petitioner's Reply Brief - 10 days from the receipt of Respondent's and Third Party Intervenor's Briefs, whichever is later.

Agreed to this 31<sup>st</sup> day of <sup>May</sup> ~~March~~, 1995.



Brian Florence  
Attorney for Petitioner



Kevin A. Howard  
Attorney for Respondent



Buck Froerer  
Attorney for Ogden City

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**BEFORE THE UTAH STATE RETIREMENT BOARD**

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JOSEPH W. O'KEEFE, JR.,	:	
	:	
Petitioner,	:	FINDINGS OF FACT, CONCLUSIONS
	:	OF LAW, AND ORDER TO DISMISS
	:	
	:	
<b>vs.</b>	:	
	:	
UTAH STATE RETIREMENT BOARD,	:	
	:	
Respondent.	:	

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Based upon the evidence received at the evidentiary hearing in this matter and the legal memoranda submitted by both parties, the Adjudicative Hearing Officer makes the following Findings of Fact, Conclusions of Law and Order:

**FINDINGS OF FACT**

1. Petitioner, Joe O'Keefe and other peace officers similarly situated are public safety employees employed by Ogden City, and have been for the entire period of this controversy.
  
2. On July 1, 1985, Ogden City initiated a program whereby its peace officers, under certain prescribed and agreed upon circumstances, could be required to work more than 40 hours per week.

3. In 1989, as a result of negotiations held between Ogden City and its employees, including Petitioner, an agreement was reached whereby any hours worked in excess of 40 hours per week but not more than 43 hours per week could be treated in either of two ways:

**A.** The three (3) hours in question (commonly referred to as "Gap" time) could be taken later as leave, pursuant to which no compensation would be paid; or

**B.** The "Gap" time could be treated as regular compensation (paid at regular - not overtime rates), pursuant to which the officer would receive additional compensation on which retirement contributions would be paid.

4. The effect of the additional compensation and retirement contributions in the final three (3) years of Petitioner's employment would result in an increase in the monthly retirement allowance of Petitioner - estimated as follows:

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6. In 1991, due to an administrative oversight, no contributions were sent by Ogden City. In 1992, Ogden City forwarded the required contributions for both 1991 and 1992.

7. Upon receipt of the 1992 contributions, URS determined that the “Gap” time contributions were ineligible and refunded the “Gap” time contributions to Ogden City for the appropriate years.

8. During the period from 1992 to the present, Petitioner has taken the position that both the original 1990 contributions and subsequent contributions were eligible and should not have been refunded. URS has taken the position that the Retirement Office ruled the contributions ineligible as soon as it had actual knowledge of the “Gap” time issues. Actual knowledge did not occur until some time in 1992 when an employee sought to retire with “Gap” time included as part of compensation.

9. During this same period, officials from URS, Ogden City, Petitioner, and others similarly situated met in an attempt to resolve the different interpretations of the law. During these

discussions the Retirement Office agreed to resume its acceptance of "Gap" time contributions conditionally while an additional study took place on the feasibility of developing a permanent policy covering "Gap" time contributions. Petitioner believed a permanent policy had been adopted and the contributions were being accepted unconditionally.

10. Also during this time another employing unit, Weber County, requested "Gap" time coverage. All the parties then agreed that the Board's actuary, Wyatt and Associates, should determine any actuarial impact which would result from including "Gap" time in "compensation" for retirement purposes.

11. The actuary's assumptions and response was delivered in a letter to M. Dee Williams, Executive Director of URS, on June 2, 1994:

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This policy increases the employer's contribution rate from 9.8% to 11.7%. Our calculation assumes that all members elect to maximize their retirement benefit - i.e., they will be able to plan well enough in advance to increase their retirement benefits by 7.5% (the ratio of the 3 extra hours to the 40 hours they were being paid for earlier).

12. As a result of the actuary's findings and conclusions, URS resolved to permanently deny "Gap" time contributions. An additional reason for denial was forwarded - any administrative, i.e. URS decision to include "Gap" time would indeed be adding a benefit to the existing system at the cost determined by the actuary. Such an added benefit with a potential cost to all employers and employees, not just to Ogden City and its employees, should be decided by the legislature, not URS.

13. Petitioner has brought to URS' attention that a small number of Ogden Public Safety officers actually received a retirement allowance with "Gap" time included. The Retirement Office has agreed to honor those retirements.

14. There are twenty two (22) Ogden police officers left in this dispute. Ten (10) officers have elected to take their "Gap" time contribution refunds and are excluded from this dispute.

### CONCLUSIONS OF LAW

Petitioner's appeal for inclusion of "Gap" time as compensation for retirement purposes and for the Board to accept contributions thereon is based on a number of theories -- each of them will be discussed herein.

1. Petitioner seeks a determination that federal law be used to define "overtime." Petitioner is certainly correct that "overtime compensation" is subject to federal law. The stipulated facts (No. 3) show that Petitioner and his employer, Ogden City, were aware of federal requirements when negotiating the treatment of "Gap" time. However, just because federal law is applicable to the treatment of "Gap" time between Petitioner and his employer does not mean that federal law governs the operation of Utah's statutory retirement systems. In fact, public pension plans are specifically exempt from the federal Employee Retirement Income Security Act ("ERISA") which controls pension activities in general. Petitioner has not demonstrated that federal law controls. The legislature is still free to establish what compensation is includable for retirement purposes.

The more persuasive argument is that state law controls. Under state retirement statutes, Utah Code Ann. § 49-4-103(1)(c)(I) specifically excludes overtime. No definition of overtime appears under Title 49. However, Utah Code Ann. § 49-4-103(3) does provide that "full-time service means 2,080 hours per year." Petitioner claims that should only be interpreted to establish

a minimum requirement for membership. However, the definition itself carries no such limited application. The Board's interpretation does not appear to be unreasonable, especially when coupled with the actuary's conclusion that the adoption of Petitioner's position would result in a substantial increase both in benefits and in contribution rates for employers and/or employees. This appears to be within the Board's mandate "to maintain, in conjunction with participating employers and members, the systems, plans and programs on an actuarially sound or approved basis. . . ." Utah Code Ann. § 49-1-203.

Therefore, this court concludes that state law, not federal law applies to this matter.

2. Petitioner's second major contention is that the Board's interpretation of overtime unreasonably interfered with an existing employment contract between Petitioner and his employer and restricted the member's right to contract for labor. No evidence exists on the record that the Board or its agents were in any way involved in the negotiation process between Petitioner and his employer. Indeed, the statutes governing compensation were in existence in 1989 at the time of these negotiations. Petitioner and his employer should have known this. The brief submitted by Ogden City appears to support the Board's position in this case.

Therefore, this court concludes that the Board did not interfere with any contract right of Petitioner.

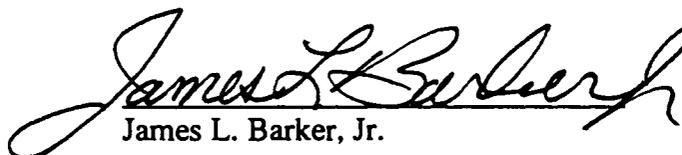
3. The final argument forwarded by Petitioner is based on the doctrine of estoppel. That doctrine, as Petitioner properly states requires (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken 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 act, or failure to act.

Petitioner has not met his burden of proof for applying the doctrine. The stipulation states that he reasonably believed that a permanent policy had been adopted and that contributions were being accepted unconditionally. But, the stipulation also states that he was aware that the Board agreed to resume its acceptance of "Gap" time contributions only conditionally, and that on June 2, 1994, prior to retiring, that the actuary had recommended raising the employer's contribution rate, and that the Board had resolved to deny the "Gap" contributions. Therefore, this court concludes Petitioner has not met the elements required to invoke the doctrine of estoppel.

Based on the foregoing, it is hereby **ORDERED ADJUDGED AND DECREED** that:

Petitioner's request that the Board be required to accept "Gap" time contributions during the last four years is denied.

Dated this 12<sup>th</sup> day of October, 1995.

  
James L. Barker, Jr.  
Adjudicative Hearing Officer

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

DATED this 12<sup>th</sup> day of October, 1995.

**UTAH STATE RETIREMENT BOARD**

