

1995

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH W. O'KEEFE, JR.,           :  
  Appellant,                           :  
  v.   :  
  Case No. 95-0742  
  Priority No. 14  
UTAH STATE RETIREMENT BOARD,   :  
  Appellee.                            :

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**BRIEF OF APPELLANT**

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**JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-16 (1953, as amended) and Rule 14 of the Utah Rules of Appellate Procedure.

**STATEMENT OF ISSUES**

I. THE ADJUDICATIVE HEARING OFFICER ERRED IN CONCLUDING THAT THE UTAH RETIREMENT SYSTEM'S INTERPRETATION OF THE STATUTORY TERM "OVERTIME" WAS REASONABLE.

The Utah Administrative Procedures Act allows this Court to grant relief where the agency has erroneously interpreted or applied the law. §63-46b-16(4)(d) Utah Code Ann.

In reviewing an application or interpretation of law, the appellate court is to use a correction of error standard giving no deference to the hearing officer's conclusion.

Anderson v. Public Service Commission, 839 P.2d 822

(Utah 1992)

Discretion is granted to the agency's application of the law only when there is a grant of discretion to the agency, express or implied, by the statute itself. Stokes v. Board of Review, 832 P.2d 56 (Ut. App. 1992)

This issue has been preserved on appeal because appellant raised the issue in his memorandum submitted to the Hearing Officer following the submission of stipulated facts.

II. THE ADJUDICATIVE HEARING OFFICER ERRED IN FINDING THAT APPELLANT WAS AWARE THAT THE UTAH RETIREMENT SYSTEM HAD ONLY CONDITIONALLY AGREED TO RESUME ITS ACCEPTANCE OF "GAP TIME" CONTRIBUTIONS.

An agency's findings of fact are accorded substantial deference, but may be overturned if not based on substantial evidence or against the clear weight of the evidence. Harley v. Industrial Commission, 767 P.2d 524 (Utah 1988), Cal Wadsworth Const. v. City of St. George, 898 P.2d 1372

(Utah 1995)

This issue has been preserved on appeal because appellant raised the issue in his memorandum submitted to the Hearing Officer following the submission of stipulated facts.

III. THE ADJUDICATIVE HEARING OFFICER ERRED IN CONCLUDING THAT APPELLANT FAILED TO MEET HIS BURDEN OF PROOF FOR APPLYING THE DOCTRINE OF EQUITABLE ESTOPPEL.

This is the same standard of review as stated in Point I.

This issue has been preserved on appeal because appellant raised the issue in his memorandum submitted to the Hearing Officer following the submission of stipulated facts.

IV. THE ADMINISTRATIVE HEARING OFFICER ERRED IN CONCLUDING THAT THE RETIREMENT SYSTEM'S INTERPRETATION OF OVERTIME HAS NOT INTERFERED WITH AN EXISTING EMPLOYMENT CONTRACT AND RESTRICTED THE MEMBERS' RIGHT TO CONTRACT FOR THEIR LABOR.

This is the same standard of review as stated in Point I.

This issue has been preserved on appeal because appellant raised the issue in his memorandum submitted to the Hearing Officer following the submission of stipulated facts.

**DETERMINATIVE STATUTES**

§49-1-102, Utah Code Ann.

- (1) The purpose of this Chapter is to establish a central administrative office and a board to administer the various retirement systems established by the Legislature.
- (2) This title shall be liberally construed to provide maximum benefits and protections.

§49-4a-103(1) thru (3), Utah Code Ann.

As used in this chapter:

(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 for services rendered to the employer as base income for the position covered under the retirement system. Base income shall be determined prior to any salary deductions or reductions for any salary deferral or pre-tax 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, as in a residence, use of equipment or uniform or travel allowances;
- (v) lump-sum payment or special payment 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).

(2) "Final average salary" means the amount computed by averaging the highest three years of annual compensation preceding retirement subject to Subsections (a) and (b).

(a) Except as provided in Subsection (b), the percentage increase in annual compensation in any one of the years used may not exceed the previous year's salary by more than 10% plus a cost-of-living adjustment equal to the decrease in the purchasing power of the dollar during the previous year, as measured by the Consumer Price Index prepared by the United States Bureau of Labor Statistics.

(b) In cases where the employing unit provides acceptable documentation to the board, the limitation in Subsection (a) may be exceeded if:

- (i) the member has transferred form another employing unit;
- (ii) the member has been promoted to a new position; or
- (iii) the years used are not consecutive.

(3) "Full-time service" means 2,080 hours a year.

#### STATEMENT OF THE CASE

##### I. NATURE OF THE CASE.

This is a Petition for Review of an Adjudicative Hearing Officer's Findings of Fact and Conclusions of Law relative to a decision of the Utah State Retirement System adverse to appellant, Joseph W. O'Keefe, Jr., hereinafter O'Keefe.

##### II. COURSE OF PROCEEDINGS.

On July 12, 1994, the Utah Retirement System notified O'Keefe, that the Retirement Board would not accept contributions for "GAP time" work of Ogden City police officers. O'Keefe filed a Request for Board Action appealing that decision.

A hearing was conducted on May 31, 1995, before James L. Barker, Adjudicative Hearing Officer. The parties entered into a written Stipulation of Facts which were submitted to the hearing officer. After Memorandums were filed, the hearing officer issued his decision on October 12, 1995, finding for the Retirement Board. O'Keefe then timely filed this Petition for Review.

III. DISPOSITION AT AGENCY LEVEL.

The Adjudicative Hearing Officer issued Findings of Fact and Conclusions of Law concluding that the Retirement Board had correctly interpreted the statutory term of "overtime" and that "GAP time" would not be eligible for retirement contributions. O'Keefe's Request for Board Action was dismissed.

STATEMENT OF FACTS

On July 12, 1994, the Utah Retirement System notified O'Keefe, through his counsel, that any hours over 40 per week would be considered overtime and ineligible for retirement compensation benefits. O'Keefe filed a Request for Board Action and the matter was assigned to an Adjudicative Hearing Officer for determination.

At the hearing, the parties entered into a written Stipulation of Facts. That Stipulation was:

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 contribution 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 contribution 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, 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:

"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 3 hours over the 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 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.

The Administrative Hearing Officer requested the parties to file memorandums. They were submitted and on October 12, 1995, the AHO issued his decision. He concluded

that the Retirement Systems' interpretation of the term "overtime" was reasonable. He dismissed O'Keefe's action. This appeal was taken.

#### SUMMARY OF ARGUMENT

The AHO failed to use the standard methods for resolving disputes concerning the meaning of a statutory term. Had he done so, he would have concluded that the URS's interpretation of the term "overtime" was in error. He did not harmonize his conclusions with the legislature's intent in passing relative statutes. Rather, the AHO merely acquiesced to the URS's interpretation of the term. The URS's interpretation imparts an uncommon meaning to the term and results in an unreasonable interference in existing employment contracts. Moreover, the AHO was clearly erroneous in his finding that O'Keefe and other members similarly affected failed to carry their burden of proof in invoking the Doctrine of Estoppel.

#### ARGUMENT

##### POINT I

THE ADJUDICATIVE HEARING OFFICER ERRED IN CONCLUDING THAT THE UTAH RETIREMENT SYSTEM'S INTERPRETATION OF THE STATUTORY TERM "OVERTIME" FOUND IN UTAH CODE ANN. §49-4-103(1)(c) WAS REASONABLE.

The AHO concluded that "The Board's interpretation (of the term "overtime") was not unreasonable".

A correction of error standard should be used when an appellate court reviews an agency's interpretation of the law. Anderson, supra.

An agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. Morton Int'l, Inc. v. Auditing Div. of the State of Utah Tax Comm'n, 814 P.2d 581 (Utah 1991). An express statutory grant of discretion occurs when the legislature directs the agency to interpret a given statutory term by rule. Employer's Reinsurance Fund v. Industrial Comm'n of Utah, 856 P.2d 648 650 (Utah App. 1993); Chevron v. State Tax Comm'n, 847 P.2d 418, 419 (Utah App. 1993).

There is no statutory provision which grants the URS the authority or direction to interpret the term "overtime." The AHO seems to suggest that since "full time service is defined as 2080 hours", anything in excess is overtime. O'Keefe has contended that the 2080 hours is only a minimum number of hours that an employee must work in order to be considered full time and therefore eligible for inclusion in the retirement system. It is not a term that imposes a maximum limitation on qualifying hours.

The AHO also appears to have based his decision in part on Utah Code Ann. §49-1-203 which requires the URS to maintain the system on an actuarial sound basis. He concludes that since GAP time would result in increased contribution rates for employers and employees, it would therefore cause some actuarial unsoundness in the plan. The AHO has failed to consider the explicit legislative intent stated in Utah Code Ann. §49-1-102(2) providing that the provisions of the Act should be liberally construed to provide maximum benefits. While he admits that the inclusion of "GAP time" contributions would result in substantial increased benefits for the members, he ignores that statutory mandate of Utah Code Ann. §49-1-102(2). The conclusion that the inclusion of "GAP time" contributions would somehow cause the URS to be maintained on an actuarial unsound basis has no factual basis. Nothing in the undisputed facts of this case supports this conclusion and it is illogical.

This action is confined to approximately 22 officers of the Ogden Police Department who were or had been, at the time this action was initiated, participating in the established "GAP time" policy of that police department.

The actuary's statement found in Fact 11 of the Stipulations applies only if all Ogden Police officers participate in the then existing process. Even then, it would

only necessitate a rate increase to the employer, not disrupt the soundness of the plan.

Although the AHO acknowledged that the term overtime lacked statutory definition, he held that the URS's interpretation was reasonable rather than employing traditional rules of statutory construction. (Findings of Fact, Conclusions of Law, and Order to Dismiss, page 6 para. 1.)

In Morton, supra, the Court enunciated three rules for statutory interpretation if the term or phrase was in dispute:

1. A statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute. At page 590.

2. The rule of noscitur a sociis provides that the meaning of questionable words and phrases in a statute be ascertained by reference to the words or phrases associated with them. At page 590-591.

3. The terms of a statute are to be interpreted as a comprehensive whole and not in piecemeal fashion.

At page 591.

The application of any one of these rules would result in a determination favorable to O'Keefe.

RULE 1. A statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute.

Utah Code Ann. §67-19-6.7(1)(j), Overtime policies for state employees, defines the term "overtime" as "actual time worked in excess of the employee's defined work period".

Section 1(n) provides that "work period" means:

"(iii) for nonexempt law enforcement and hospital employees, the period established by each department by rule for those employees according to the requirements of the FLSA."

Utah Code Ann. §67-19-6.7(2) provides that each department shall compensate each state employee who works overtime by complying with the requirements of this statute.

Section (3) provides that:

- (a) each department shall negotiate and obtain a signed agreement from each nonexempt employee.
- (b) In the agreement, the nonexempt employee shall elect either to be compensated for overtime by:
  - (i) taking time off work at the rate of one and one half hour off for each overtime hour worked; or
  - (ii) being paid for the overtime worked at the rate of one and one half times the rate per hour that the state employee receives for nonovertime work.

In 1985, the U.S. Supreme Court held, that state and local governmental agencies must comply with the provisions of 29 U.S.C. 201, The Fair Labor Standards Act (FLSA). Garcia v.

San Antonio Metropolitan Transit Authority et al., 83 L Ed 2d 1016, (1985). The FLSA was amended and permitted public agencies employing law enforcement personnel to define work periods that would result in 43 hour work weeks without paying overtime. 29 U.S.C. 207.

The Board's interpretation of "overtime" as any hours worked in excess of 2080 per year, cannot be squared with the definition for other state employees found in Utah Code Ann. §67-19-6.7 or the definition of work period proscribed by the FLSA and applicable to cities.

The AHO's conclusion with respect to the term "overtime" is therefore unreasonably confused or in blatant contradiction to the other statutory uses of that term for all other state employees.

RULE 2. The rule of noscitur a sociis provides that the meaning of questionable words and phrases in a statute be ascertained by reference to the words or phrases associated with them.

The Adjudicative Hearing Officer erred by ignoring other statutory terms associated with the term "overtime".

Utah Code Ann. §49-4-103(1)(a) and (b) define what the legislature has determined to be "compensation" for the purposes of the Public Safety Retirement Act. Section (1)(c) defines what "compensation" is not.

Compensation is defined as "the total amount of payments . . . made by the employer to an employee . . . as base income." Compensation includes "bonuses and cost of living increases." It is not in any way tied to a specific number of hours. Section (1)(c) provides that compensation is not, (i) overtime, (ii) sick pay incentives, (iii) retirement pay incentives, (iv) the monetary value of remuneration paid in kind . . . , (v) a lump-sum payment or special payment . . . , (vi) all contributions made by an employer . . . .

All terms associated with the term "overtime" are concerned with the payment of monetary sums, not hours worked. The statute clearly refers to "overtime compensation." This definition is a common interpretation of the term, it is in line with the federal interpretation of the term, and it complies specifically with the definition found in Utah Code Ann. §67-19-6.7(3)(ii) applicable to state employees.

RULE 3. Interpretation of the term "overtime" should be in relationship to the comprehensive whole of the Statute.

Utah Code Ann. §49-1-102(1) provides that the purpose of legislature in passing the Utah State Retirement Act was to establish a central administrative office and board to administer the various retirement systems established by the legislature. Section (2) provides that the provisions of the

Title "shall be liberally construed to provide maximum benefits. . ." (emphasis added).

The AHO's conclusion that although the inclusion of contributions stemming from "GAP time" hours would provide members with a substantial benefit, the URS need not consider those contributions contradicts this express intention of the legislature. The whole of the Act is intended for the benefit of its members, that is, the public safety employees who will be the retirees of the future. There is no reason to apply such a restrictive meaning to the term "overtime". There is no reason not to provide the greatest benefit to the members.

#### POINT II

THE ADJUDICATIVE HEARING OFFICER ERRED IN FINDING THAT APPELLANT WAS AWARE THAT THE UTAH RETIREMENT SYSTEM HAD ONLY CONDITIONALLY AGREED TO RESUME ITS ACCEPTANCE OF "GAP TIME" CONTRIBUTIONS.

In his memorandum, submitted after the AHO received the stipulated facts, O'Keefe contended that URS's agreement to accept the GAP time contributions and his reliance thereon, equitably estopped the Board from later rejecting those contributions.

In denying O'Keefe's claim of equitable estoppel, the AHO stated O'Keefe was aware the Board agreed to resume its acceptance of "GAP" time contributions only conditionally.

This conclusion is simply not supported by the Stipulation of Facts. That Stipulation specifically provides in paragraph 9:

"During this same period, officials from URS, Ogden City, 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 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." (Emphasis added)

These are the only facts presented relating to O'Keefe's knowledge as to the reason the URS started re-accepting contributions for GAP time.

Even more confusing is the AHO's finding that O'Keefe's awareness of the conditional nature of the URS's reacceptance of "GAP time" contributions "while an additional study took place on the feasibility of developing a permanent policy" somehow equated to foreknowledge that the URS might in the future discontinue the acceptance of those contributions.

If, however, as O'Keefe argues, the additional contributions were not prohibited but rather permitted by statute and the study was merely to determine whether the then current contribution rate was sufficient, then contributions rightly should have been accepted and any adjustments could

easily have been made at a later date to satisfy actuarial needs.

The only evidence in this case are stipulated facts, and those facts clearly indicate that O'Keefe did not know of the conditional nature of the URS's acceptance of the contributions. Nor do the facts support the finding that an ongoing study being conducted by the URS was determinative of the continued acceptance of the contributions. Rather, the facts clearly show that O'Keefe believed the contributions were being accepted unconditionally.

### POINT III

THE ADJUDICATIVE HEARING OFFICER ERRED IN CONCLUDING THAT PETITIONER FAILED TO MEET HIS BURDEN OF PROOF FOR APPLYING THE DOCTRINE OF EQUITABLE ESTOPPEL.

The elements essential to invoke equitable estoppel are: (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the act, or failure to act. Eldridge v. Utah Retirement System, 795 P.2d 671 (Ut. App. 1990). In Eldridge, the Court said that while as a general rule, the doctrine of

estoppel may not be asserted against the state and its agencies, there are some unusual cases where they cannot reasonably escape the doctrine. Utah courts have, in fact, carved out an exception to this general rule where it is plain that the interests of justice so require. Utah State Univ. v. Sutro & Co., 646 P.2d 715, 720 (Utah 1982); See, e.g., Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689 (Utah 1979).

The undisputed facts of this case are that URS agreed to accept all contributions that had previously been rejected and re-apply those contributions to the individual affected members' accounts and O'Keefe believed that a permanent "GAP time" policy had been embraced as a result. (Element number one) He contributed a percentage of his wages to the URS for over four years for his GAP time hours. (Element number two)

Based upon a projected retirement benefit, O'Keefe made decisions concerning retirement. The decision of URS to subsequently reject the contributions has injured O'Keefe since his retirement pay is approximately \$120 per month lower for the rest of his life. (Element number three)

The elements of equitable estoppel have been met. The hearing officer's decision should be reversed.

POINT IV

THE ADMINISTRATIVE HEARING OFFICER ERRED IN  
CONCLUDING THAT THE RETIREMENT SYSTEM'S  
INTERPRETATION OF OVERTIME HAS NOT  
INTERFERED WITH AN EXISTING EMPLOYMENT  
CONTRACT AND RESTRICTED THE MEMBERS' RIGHT  
TO CONTRACT FOR THEIR LABOR.

The Utah State Personnel Management Act (§67-19-1 et. seq., Utah Code Ann.) provides that it is the policy of the state "to ensure its employees opportunities for satisfying careers and fair treatment. . ." §67-19-2(6), Utah Code Ann.

While this Act specifically applies to state employees, it requires (and permits) employees and departments to negotiate contracts regarding work periods and overtime compensation. §67-19-6.7, Utah Code Ann.

The State of Utah has adopted statutory provisions defining and authorizing collective bargaining. §34-20-1, et. seq., Utah Code Ann. Employees of political subdivisions are authorized to self-organize and to bargain collectively for their mutual protection. §34-20-7, Utah Code Ann.

Furthermore, cities are authorized to bind themselves to bargaining agreements provided they do not "contract beyond the scope of its power".

Park City Educ. Ass'n v. Board of Educ., 879 P.2d 267  
(Ut. App. 1994)

Following the July 1, 1985 ruling of Garcia, Ogden City changed its work period policy for police officers to take advantage of the extra hours exemption created by FLSA amendments. Instead of a 40 hour work week, it adopted a seven day work period in which an officer could be required to work 43 hours before overtime compensation was required.

Negotiations between Ogden and its police officers continued during the following 4 years in order to establish a comp-time policy. In 1989, employees of the Ogden Police Department sought to utilize these three hours referred to as "GAP time" towards their retirement. These negotiations ultimately resulted in an agreement to provide "GAP time" alternatives. Employees were given the choice of electing comp time or being paid at regular time and having the pay count towards their retirement benefits. Those who elected the latter would have their contribution withheld and the employer's contribution would be added and sent to the Retirement System. This process went into effect in April of 1990. They have negotiated for their own mutual benefit. The City has not exceeded its authority. The Retirement System should not be able to interfere with these negotiations.

#### CONCLUSION

The AHO's Findings of Fact and Conclusions of Law should

be reversed. The meaning of the term "overtime" found in Utah Code Ann. §49-4-103(1)(c) should not include the GAP time these police officers are required to work without overtime compensation. The Utah Retirement System should be estopped from refusing to include contributions based upon "GAP time" hours worked since it was aware of the detrimental reliance its acceptance of these contributions had upon O'Keefe and similarly affected members. The system should not interfere with the contractual negotiations of the City and its employees so long as the actuarial soundness of the plan is maintained.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of January, 1996.

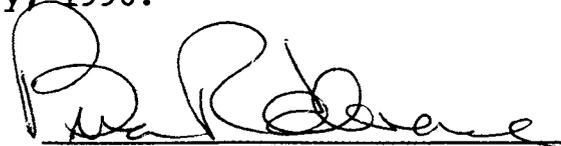
FLORENCE AND HUTCHISON

A handwritten signature in black ink, appearing to read "Brian R. Florence", written over a horizontal line.

BRIAN R. FLORENCE  
Attorney for Appellant  
818-26th Street  
Ogden, UT 84401

**MAILING CERTIFICATE**

I hereby certify that I mailed four copies of the foregoing Brief of Appellant, postage prepaid, to Kevin Howard, Attorney for Appellee, 560 East 200 South #230, Salt Lake City, UT 84102 and Buck Froerer, Ogden City Attorney, 2484 Washington Blvd. #320, Ogden, UT 84401-2319, on this 26<sup>th</sup> day of January, 1996.

  
BRIAN R. FLORENCE

**ADDENDUM**

July 12, 1994 Notice of Denial

Stipulation and Agreement by Petitioner and Respondent  
(Stipulation of Facts)

Findings of Fact, Conclusions of Law and Order to Dismiss

UTAH STATE RETIREMENT BOARD  
**UTAH RETIREMENT SYSTEMS**  
540 East 200 South  
Salt Lake City, UT 84102-2099  
(801) 366-7700  
1-800-365-8772 TOLL FREE  
(801) 366-7705 FAX

M. DEE WILLIAMS  
EXECUTIVE DIRECTOR

July 12, 1994

Mr. Brian R. Florence  
Florence and Hutchison  
Attorneys at Law  
818 - 26th Street  
Ogden, UT. 84401

Dear Mr. Florence:

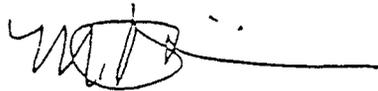
Regarding your letter of July 1, 1994 concerning gap time for Ogden City police officers.

The Board has always administered the statute governing the public safety employees retirement plan with a full-time basis. Full-time being 40 hours per week. All overtime beyond 40 hours was and is ineligible for compensation definitions or inclusion in computing the final average salary figure.

If you do not agree, you may appeal to our Adjudicative Hearing Officer, Mr. James L. Barker. The materials needed for the appeals process are enclosed.

Sincerely,

UTAH RETIREMENT SYSTEMS



M. Dee Williams  
Executive Director

MDW:sbc

Enclosures





(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 Intervenors 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
	:	
	:	
vs.	:	
	:	
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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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.

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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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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.

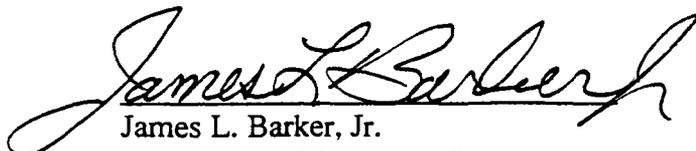
3. The final argument forwarded by Petitioner is based on the doctrine of estoppel. That doctrine, as Petitioner properly states requires (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken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

  
By E. Thomsen