



H.F. 3567
(Shimanski)

S.F. 3150
(Dille)

Executive Summary of Commission Staff Materials

Affected Pension Plan(s): PERA-General
Relevant Provisions of Law: Special law
General Nature of Proposal: Request to waive break-in-service requirements of Minnesota Statutes, Section 353.01, Subdivision 28
Date of Summary: March 11, 2008

Specific Proposed Changes

- Special law request to waive break-in-service requirements for an individual who returned to PERA-covered employing unit as independent contractor, based on claim of failure by PERA to inform the individual of requirements of law.

Policy Issues Raised by the Proposed Legislation

1. Sufficient evidence of claim that PERA materials and PERA retirement counseling prior to retirement failed to specify break-in-service requirements if employed by a contractor providing service to PERA employing unit.
2. PERA support of bill.
3. Appropriateness of PERA break-in-service requirements as it applies to independent contractor reemployment.

Potential Amendment

H3567-1A Adds a section which revises PERA statute, removing prohibition against commencing a retirement annuity if the individual becomes reemployed within 30 days as an independent contractor or employee of independent contractor.



TO: Members of the Legislative Commission on Pensions and Retirement
FROM: Ed Burek, Deputy Director *EB*
RE: H.F. 3567 (Shimanski); S.F. 3150 (Dille): PERA; Waiving Separation of Service Requirement for a Certain Independent Contractor
DATE: February 28, 2008

Summary of H.F. 3567 (Shimanski); S.F. 3150 (Dille)

H.F. 3567 (Shimanski); S.F. 3150 (Dille) allows Derald Bielke, identified by birth date and employer information, to have his termination from employment covered by the Public Employees Retirement Association (PERA) with the Glencoe/Silver Lake School District treated as a valid separation for retirement purposes, despite becoming employed within 30 days by an independent contractor providing bus service to the school district.

Pension Situation of Derald Bielke

H.F. 3567 (Shimanski); S.F. 3150 (Dille) attempts to address the pension problem of Derald Bielke, who was a school bus driver and later Transportation Director for the Glencoe School District. For this employment, totaling over 39 years, Mr. Bielke was covered by the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General). Mr. Bielke resigned effective the end of September 2003 and applied for a PERA annuity. A few days later, in October, he started employment with an independent contractor providing bus service to the school district. However, PERA law contains a provision specifying that if an individual terminates service but becomes employed within 30 days by an independent contractor providing service to a government subdivision, the termination of service is not considered valid for purposes of commencing the PERA retirement annuity. In 2007, when PERA apparently discovered that Mr. Bielke's 2003 separation was not a valid separation under PERA law, PERA sent Mr. Bielke a request that he repay \$27,335 he received between the end of September 2003 and the end of the 2003-2004 school year.

Mr. Bielke contends he should not have to repay anything, because PERA failed to provide proper written materials and proper retirement counseling about the applicable separation-from-service law. According to an attached document, apparently written by Mr. Bielke's attorney Donald H. Walser, Mr. Bielke reviewed retirement booklets provided by PERA and met with at least one PERA retirement counselor prior to terminating PERA-covered employment and commencing receipt of a PERA-General plan annuity. Mr. Bielke found nothing in the materials to indicate that starting immediate employment with the independent contractor would create any problem for his PERA retirement. Also, a January 17, 2008, letter from PERA to Senator Steve Dill indicates that Mr. Bielke contends he specifically asked the PERA counselor if his intended part-time employment with a company providing service to the school district would raise any problem for him, and he was informed that no problem would arise.

The January 17, 2008, letter from PERA states that while PERA cannot verify the specifics of the discussion between Mr. Bielke and the PERA retirement counselor, PERA stated it has no reason to doubt Mr. Bielke's assertion. Furthermore, the letter states that PERA reviewed the written materials provided to Mr. Bielke and those materials failed to properly cover the requirements of the applicable law.

Mr. Bielke appealed to the PERA Board, requesting that PERA cancel its request for repayment of the approximately \$27,000 Mr. Bielke received in the 2003-2004 school year. The Board, although sympathetic to Mr. Bielke's situation, felt it did not have legal authority to reverse the request for repayment. Mr. Walser's January 17, 2008, letter to Senator Dille suggests that PERA would support special legislation to address Mr. Bielke's situation.

Applicable Laws

The law in question is a portion of Minnesota Statutes, Section 353.01, Subdivision 28, the PERA definition of "retirement." The provision was revised in 2000 (not 2002 as stated in material provided by Mr. Bielke's attorney). A copy of the applicable provision as found in 1998 statutes, and as revised in 2000 by Laws 2000, Chapter 461, Article 3, Section 11, is attached.

- Minnesota Statutes 1998. Under the 1998 version of this statutory provision, to be eligible to start receiving a retirement benefit the individual had to terminate public service and have a complete and continuous separation from employment as a “public employee” for at least 30 days (Minnesota Statutes 1998, Section 353.01, Subdivision 28, Paragraph (a)). PERA provides pension coverage for “public employees” as defined in PERA law, but excludes independent contractors and employees of independent contractors (Minnesota Statutes, Section 353.01, Subdivision 2). Public employees are employees of public employers (government subdivisions). Therefore, under the 1998 version of the law a public employee can terminate service, come back as an independent contractor or employee of an independent contractor providing service to a public employer, and be eligible to commence receipt of a retirement annuity (if other age and service requirement for an annuity are met). By coming back as an independent contractor, the individual is not coming back as a public employee, and the requirement that the individual not return within 30 days as a “public employee” does not apply.
- 2000 Revisions. Laws 2000, Chapter 461, Article 3, Section 11, made it no longer possible to come back as an independent contractor within 30 days and commence receipt of the annuity. As revised in 2000, a right to start receiving a retirement annuity requires “a complete and continuous separation for 30 days from employment as a public employee and from the provision of paid services to that employer.” The provision further states, “An individual who separates from employment as a public employee and who, within 30 days of separation, returns to provide public service to a government subdivision as an independent contractor or as an employee of an independent contractor, has not satisfied separation requirements...” The applicable provision was effective on July 1, 2000.

As of July 1, 2000, PERA should have revised the information booklets and related materials that it was providing to those seeking information about retirement. The provided documents, including the letter from PERA, suggest that PERA failed to do so. As late as 2003, the materials had not been revised to indicate that if an individual terminated but came back to provide service to a public employer as an independent contractor within 30 days, the individual would not be considered to have met separation requirements and would not be eligible to commence receipt of an annuity.

Discussion and Analysis

H.F. 3567 (Shimanski); S.F. 3150 (Dille) would waive a general law requirement and allow Mr. Bielke to have his termination from PERA-covered employment with the Glencoe/Silver Lake School District treated as a valid separation for retirement purposes, despite starting employment within 30 days with an independent contractor providing bus service to that school district.

H.F. 3567 (Shimanski); S.F. 3150 (Dille) raises several pension and related public policy issues for Commission consideration and discussion, as follows:

1. Need for Consideration. The issue is whether there is sufficient need to consider this legislation given other matters which may take up the Commission’s time. If no action is taken, the applicable individual will be significantly impacted by PERA’s request to repay nearly \$30,000.
2. Process Questions. As part of its effort to gain sufficient understanding of this situation, the Commission may wish to seek testimony from PERA about how it determined what date to use as the end date of the invalid separation period (the end of the 2003-2004 school year). Also, the separation problem occurred in 2003, but the request for repayment apparently was not made until some time in 2007. The Commission may also wish to request testimony from PERA concerning the reasons for the delay and what event or information triggered PERA’s action.
3. Fairness/Equity Issues. A justification for waiving the general law requirements for this individual is the contention of harm caused by PERA, through a failure to update its written materials provided to those contemplating retirement to reflect current law requirements and a failure to provide counseling which properly reflects those laws. The Commission may wish to review the attached materials and to hear testimony from the various parties on this matter.
4. Scope. The issue is scope. There may be other individuals who are in a situation somewhat similar to the individual covered by the proposed legislation, individuals who can contend they were misled by materials provided by PERA that did not accurately reflect the revised separation requirements relating to independent contractors. It may not be possible to identify all individuals. The Commission should be aware that it may receive requests in the future from similar individuals.
5. PERA Support. The issue is whether the PERA Board supports the proposed legislation. Attached materials contend that it does, but the Commission may wish to seek verification through testimony.

6. Appropriateness of PERA Separation Requirements. The issue is whether a general reconsideration of PERA separation requirements regarding independent contractor employment would be justified. If the Commission were to conclude that the policy reflected in current law is not the best model and ought to be changed, that conclusion may further support permitting relief to the individual covered by these bills. Under current law, PERA would declare a separation to be invalid for purposes of commencing an annuity if the individual returned as an independent contractor to provide service to a PERA employing unit within 30 days. This prohibition was added to PERA law in the 2000 omnibus pension bill. Prior to being rolled into the omnibus bill, the language was part of the PERA administrative bill. The Commission may wish to hear brief testimony from PERA why it felt the change in the independent contractor policy that occurred in 2000 was needed. Commission staff can find no comparable requirements in law for similar plans (the plans in the Minnesota State Retirement System (MSRS) or the Teacher Retirement Association (TRA)).

Potential Amendment for Commission Consideration

Amendment H3567-1A adds a section which revises PERA's definition of retirement by removing the prohibition against commencing a retirement annuity if the individual becomes employed within 30 days as an independent contractor or employee of an independent contractor, within 30 days, who provides service to any PERA-covered employing unit.

LAW OFFICES

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January 17, 2008

Senator Steve Dille
100 Rev. Dr. Martin Luther King, Jr., Blvd.
State Office Building, Room 103
St. Paul, MN 55155-1206

In re: Derald Bielke and PERA

Dear Senator Dille:

Thank you for agreeing to meet with me and my client, Derald Bielke, to discuss his situation and the possibility of special legislation. We will meet you at the Hutchinson Event Center at 12:30 p.m. on Tuesday, January 29, 2008.

Enclosed is an explanation of the situation we wish to discuss.

As I mentioned, Mary Vanek, Executive Director of PERA, has offered her support of legislation. We have asked that she contact you directly to confirm that before we meet.

Very truly yours,

KRAFT, WALSER, HETTIG,
HONSEY & KLEIMAN

BY: 
Donald H. Walser

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Enclosure

cc: Derald M. Bielke

Derald Bielke – Public Employees Retirement Association Matter

Derald Bielke resides in rural Glencoe. He was employed as a bus driver, later as transportation director, by the Glencoe School District for 39 years. He became eligible for retirement in 1997.

In 2003, he decided to retire. To cover the expense of medical insurance, he obtained a part-time job with a private bus company. The company contracts with the Glencoe-Silver Lake School to transport students.

Before retirement, Derald obtained and read several PERA brochures, and he had a meeting with a PERA representative. He explained his plans to drive school bus part-time.

Derald retired on September 30, 2003, and went to work for the bus company.

All of the literature he received and relied on from PERA (five brochures; a checklist at the personal meeting; and two letters) informed him that: "To be considered retired by PERA, you must terminate your public service and remain out of PERA-covered employment for at least 30 days."

Unfortunately, that was not a correct statement of the law. Although that was the law prior to 2002, at the request of PERA, the statute had been changed so that a separation of 30 days is required, not only from public service and PERA employment, but also from providing service to a governmental subdivision "as an independent contractor or as an employee of an independent contractor." Minnesota Statutes, §53.01, Subd. 28(b). PERA had failed to change their literature or advice.

On October 2, 2007, PERA wrote to Derald indicating that he would not be considered retired on September 30, 2003, because he returned to work as an employee of an independent contractor providing services to a governmental subdivision without a 30-day separation. He was informed that he must return \$27,335.39 of benefits which were paid between the date of his retirement and 30 days from the end of the school year in 2004.

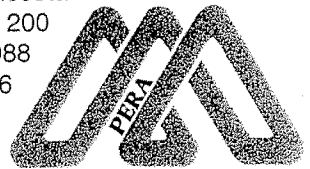
We appealed. PERA held a hearing on December 13, 2007. The Board was sympathetic and acknowledged that the problem was created by them. Board Member/State Auditor Rebecca Otto shared the feelings of many Board Members by stating, "This is our fault."

However, the Assistant Attorney General told the Board that they had no choice. The Board voted to follow staff recommendations and require repayment, with some dissenting votes.

A few days after the hearing, I was contacted by the Assistant Attorney General. He indicated that the Board felt badly about this and the Executive Directive would support special legislation to exempt Derald from the statute. He indicated that we should take the steps to initiate such legislation.

The most unfortunate thing about this is that Derald did not get any benefits he was not entitled to, and PERA did not pay any benefits they would not have had to pay. If he had been properly advised, he would have just taken 30 days off before going back to work. He has not gained any financial advantage.

Public Employees Retirement Association of Minnesota
60 Empire Drive, Suite 200
Saint Paul, Minnesota 55103-2088
Member Information Services: 651-296-7460 or 1-800-652-9026
Employer Response Lines: 651-296-3636 or 1-888-892-7372
PERA Fax Number: 651-297-2547
PERA Website: www.mnpera.org



January 17, 2008

The Honorable Steve Dille
Minnesota State Senate
103 State Office Building
St. Paul, MN 55155

Dear Senator Dille:

It is my understanding that Donald Walser, an attorney representing Derald Bielke, a PERA retiree and your constituent, is scheduled to meet with you sometime this month. The issue before you is one that, we believe, requires a legislative remedy for Mr. Bielke.

Derald Bielke devoted 39 years and 2 months of service to Glencoe, now consolidated with Silver Lake, school district. As we understand it, before leaving his position Mr. Bielke diligently checked out his options for part-time employment he could assume after he retired from his job with the school district. From what we understand, Mr. Bielke was aware of the rules associated with returning to work for an employer whose employees are required to participate in PERA. If he returned to a PERA-covered position while collecting a retirement annuity from us, his earnings would be monitored and his annuity possibly reduced or suspended, depending on his re-employment earnings. If he went to work for a private sector employer, or an independent contractor, his earnings would not be monitored and there would be no offset.

While our records do not include specific conversations that Mr. Bielke had with PERA staff benefit counselors, we have no reason to doubt Mr. Bielke's assertion that he did ask if he could work for a bus service providing independently contracted services to the school district. Upon reviewing our publications, and with additional verification through Mr. Walser of the informational material Mr. Bielke received while preparing to retire, we found that our written documentation did not fully disclose the rules associated with going to work for an independent contractor. Specifically, our law states that in order to be entitled to receive retirement benefits, an individual must terminate public employment and remain out of paid service to a governmental employer for a full 30 calendar days. The 30-day break also applies to providing paid services as an independent contractor or as an employee of an independent contractor providing services to a PERA-covered employer. However, our publications in 2003 only referred to returning to work for a PERA-covered employer but did not include more detail on work as an independent contractor or employee of an independent contractor working with a PERA-covered employer.

Draft legislative remedy

(a) Notwithstanding any provision of Minnesota Statutes, 2008, section 353.01, subdivision 28, to the contrary, a person described in paragraph (b) must be considered by the public employees retirement association to have retired on September 30, 2003, even though the person rendered service in October 2003 as an employee of an independent contractor, who was contracted to provide services to the same governmental subdivision from which the individual terminated service on September 30, 2003.

(b) A person to whom paragraph (a) applies is a person who:

- (1) was born on November 13, 1944;
- (2) was hired on August 17, 1964 by independent school district #422, Glencoe, predecessor of now consolidated independent school district #2859, Glencoe/Silver Lake;
- (3) terminated employment as manager of the grounds and transportation for the school district on September 30, 2003;
- (4) became an employee in October 2003 of the independent contractor providing bus service for the same school district.

(c) A person described in paragraph (b) must not be required to repay any public employees retirement association retirement annuity amount received before the date of enactment.

Laws 2000, Chapter 461, Article 3, Section 11

34.26 Sec. 11. Minnesota Statutes 1998, section 353.01,
34.27 subdivision 28, is amended to read:
34.28 Subd. 28. [RETIREMENT.] (a) "Retirement" means the
34.29 commencement of payment of an annuity based on a date designated
34.30 by the board of trustees. This date determines the rights under
34.31 this chapter which occur either before or after retirement. A
34.32 right to retirement is subject to termination of public service
34.33 under subdivision 11a ~~or termination of membership under~~
34.34 ~~subdivision 11b, the earlier of which will determine the date~~
34.35 ~~membership and coverage cease.~~ A right to retirement ~~must not~~
34.36 ~~accrue without~~ requires a complete and continuous separation for
35.1 30 days from employment as a public employee ~~under subdivision 2~~
35.2 ~~and from the provision of paid services to that employer.~~
35.3 (b) An individual who separates from employment as a public
35.4 employee and who, within 30 days of separation, returns to
35.5 provide service to a governmental subdivision as an independent
35.6 contractor or as an employee of an independent contractor, has
35.7 not satisfied separation requirements under paragraph (a).
35.8 (c) A former member of the basic or police and fire fund
35.9 who becomes a coordinated member upon returning to eligible,
35.10 nontemporary public service, terminates employment before
35.11 obtaining six months' allowable service under subdivision 16,
35.12 paragraph (a), in the coordinated fund, and is eligible to
35.13 receive an annuity the first day of the month after the most
35.14 recent termination date shall not accrue a right to a retirement
35.15 annuity under the coordinated fund. An annuity otherwise
35.16 payable to the former member must be based on the laws in effect
35.17 on the date of termination of the most recent service under the
35.18 basic or police and fire fund and shall be retroactive to the
35.19 first day of the month following that termination date or one
35.20 year preceding the filing of an application for retirement
35.21 annuity as provided by section 353.29, subdivision 7, whichever
35.22 is later. The annuity payment must be suspended ~~or reduced~~
35.23 under the provisions of section 353.37, if earned compensation
35.24 for the reemployment equals or exceeds the amounts indicated
35.25 under that section. The association will refund the employee
35.26 deductions made to the coordinated fund, with interest under
35.27 section 353.34, subdivision 2, return the accompanying employer
35.28 contributions, and remove the allowable service credits covering
35.29 the deductions refunded.
35.30 ~~(b)~~ (d) Notwithstanding the 30-day separation requirement
35.31 under paragraph (a), a member of the defined benefit plan under
35.32 this chapter, who also participates in the public employees
35.33 defined contribution plan under chapter 353D for other public
35.34 service, may be paid, if eligible, a retirement annuity from the
35.35 defined benefit plan while participating in the defined
35.36 contribution plan.

