



MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
Saint Paul, Minnesota 55101

Mailing Address:
P.O. Box 64620
St. Paul, Minnesota 55164-0620

Voice: (651) 361-7900
TTY: (651) 361-7878
Fax: (651) 361-7936

July 21, 2010

To All Parties as Listed on the Attached
Service List

**Re: *In the Matter of the PERA Salary Determinations Affecting
Retired and Active Employees of the City of Duluth
Allen Johnson, et al., Petitioners
OAH Docket No. 4-3600-20809-2***

Dear Counsel and Parties:

Enclosed herewith and served upon you as indicated on the Attached Service List is the Administrative Law Judge's Order on Cross-Motions for Summary Disposition in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Bruce H. Johnson".

BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

Telephone: (651) 361-7839

BHJ:nh

Encl.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
600 NORTH ROBERT STREET
ST. PAUL, MN 55101

CERTIFICATE OF SERVICE

Case Title: <i>In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth Allen Johnson, et al., Petitioners</i> Dear Counsel and Parties:	OAH Docket No. 4-3600-20809-2
---	-------------------------------

Nancy J. Hansen certifies that on the 21st day of July, 2010, she served a true and correct copy of the attached Order on Cross-Motions for Summary Disposition, as indicated on the attached Service List.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF TRUSTEES
OF THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Salary
Determinations Affecting Retired and
Active Employees of the City of Duluth
Allen Johnson, et al., Petitioners

**ORDER ON CROSS-MOTIONS
FOR SUMMARY DISPOSITION**

On April 13, 2010, Administrative Law Judge Bruce H. Johnson (the ALJ) conducted a hearing on the parties' cross-motions for summary disposition at 9:30 a.m. at the Duluth City Council Chamber, Third Floor, Duluth City Hall, 411 West First Street, Duluth, MN 55802. By Order issued on May 20, 2010, the ALJ reopened the record until July 16, 2010, for the limited purpose of enabling the parties to submit further evidence regarding the income tax treatment of amounts paid by the City of Duluth (City) to the Petitioners' deferred compensation plans or family health insurance plans during the period 1995 through September 2008. The record on the parties' cross-motions for summary disposition therefore closed on July 16, 2010.

Carla Heyl, Assistant Attorney General,¹ appeared on behalf of the staff of the Public Employees Retirement Association (PERA). Elizabeth Storaasli, Storaasli, Knutson & Pommerville, Ltd., appeared on behalf a group of Petitioners, all retired Duluth firefighters (Represented Petitioners).² Petitioners Bryan F. Brown, John Hall, Mark Wick, Pamela Woods, John Keenan and Claudia Johnson each appeared *pro se* and spoke at the hearing. Petitioners Helen Abbott, James Charbonneau, Thomas Ehle, James Irving, Jeffrey Johnson, Richard Kienzie, Carolyn Luxon, Robert Mills, and Arthur Zylka also appeared *pro se* at the hearing but did not participate in the proceedings. Several other active or retired employees of the City of Duluth, who have not been made parties to this proceeding, were also present.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

¹ Ms. Heyl replaced Assistant Attorney Jon K. Murphy as counsel for PERA after the earlier proceedings on the parties' cross-motions for summary disposition.

² Specifically, Petitioners Paul Ostman, Doug Michog, John Edwards, Mark Behning, Terry Purcell, Doug Belanger, Dave Salvesson, Anne Peterson, L. J. Harvey, William L. Johnson, and Dave Wedin.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Motion of the PERA staff for Summary Disposition is DENIED;
- (2) The Motions of the Represented Petitioners and Petitioner Bryan F. Brown for Summary Disposition are also DENIED;
- (3) Counsel for PERA and the Represented Petitioners and the Petitioner Bryan F. Brown are directed to consult with one another, with the ALJ, and with the Duluth City Clerk for the purpose of scheduling a date for the evidentiary hearing, after which the ALJ will issue an appropriate scheduling order.

Dated this 21st day of July, 2010.


BRUCE H. JOHNSON
Administrative Law Judge

Reported: Digitally recorded. No transcript prepared.

MEMORANDUM

The prior proceedings and uncontested facts in this matter, are set forth in the ALJ's Memorandum of May 20, 2010, and are hereby incorporated by reference.

After considering the record, the ALJ concluded that the evidence was unclear as to whether the Petitioners had previously paid federal and state income taxes on the amounts paid by the City on their behalf for deferred compensation accounts and family medical insurance. The ALJ noted on May 20, 2010, that various affiants characterized the payments as "included in employees' gross salary as part of total compensation,"³ "as wages on the employees' paystubs,"⁴ "part of employees' gross salary"⁵ and "as part of gross compensation subject to social security."⁶ None of the statements made by affiants, nor the various paystubs submitted with affidavits, clearly indicated whether federal or state income taxes were deducted from the payments at the time that the payments were initially made.

³ Bass Aff., ¶ 4.

⁴ Stark Aff., ¶ 2.

⁵ Morris Aff., ¶ 11.

⁶ Hall Aff., ¶ 13.

The ALJ therefore concluded that the tax treatment of those payments at the times those payments were made was a material fact that none of the parties had adequately addressed in their submissions on the motions for summary disposition. Because the ALJ has a responsibility to the PERA Board to compile a complete and accurate record in these proceedings, the ALJ took the parties' motions for summary disposition under advisement. Moreover, the ALJ gave the parties until July 16, 2010, to submit additional evidence regarding the income tax treatment of amounts paid by the City to the Petitioners' deferred compensation plans or family health insurance plans during the period 1995 through September 2008.

Between May 20 and July 16, 2010, counsel for the Represented Parties submitted affidavits executed by five of the Petitioners. Petitioner James Charbonneau stated it was his belief that the City had "reported the Insurance Supplement as wages to the State and Federal governments using the year end check stubs, and the W2 information,"⁷ attaching documents tending to substantiate that belief. Petitioner William L. Johnson stated that "the Health Insurance Supplement [was] included in wages on form W2 and [was] taxed,"⁸ also attaching documents to substantiate that belief. Although Petitioner John Keenan was unable to discern from his payroll documents whether the deferred compensation payments made on his behalf were taxed when made, it was his belief that payments made as an insurance supplement were included in wages and taxed when made.⁹ It was also the belief of Petitioner Joe Churchya that payments made as an insurance supplement were included in wages and taxed when made.¹⁰ Petitioner Art Zylka stated that his tax preparer had analyzed his payroll records and had concluded that "deferred wages were paid by the City and included in gross wages which were subjected FICA federal and state taxes."¹¹ Finally, by letter dated July 12, 2010, former City Administrator John E. Hall corrected his affidavit of February 10, 2010, as follows:

The third paragraph on page 6 reads "When the City was negotiating its 1995-1996 CBA with the CDSA, John Hall, the President of the CDSA, asked Karl Nollenberger, who was the City's Chief Administrative Officer and who was negotiating the contract for the City, whether the payments for either deferred compensation or family medical coverage that the City was offering would be considered salary for purposes of PERA." That is not the case. I only asked Mr. Nollenberger if the deferred compensation he was offering was PERA salary. We did not discuss these funds in relation to hospital medical coverage.

⁷ Affidavit (Aff.) of James Charbonneau dated June 22, 2010.

⁸ Aff. of William Johnson dated June 23, 2010.

⁹ Aff. of John Keenan dated July 7, 2010.

¹⁰ Aff. of Joe Churchya dated June 14, 2010.

¹¹ Aff. of Art Zylka dated July 9, 2010.

On the other hand, the only supplemental evidence submitted by PERA was the Affidavit of Mary Most Vanek.¹² Attached to Ms. Vanek's affidavit was an email dated May 24, 2010, from Duluth City Auditor Wayne Parson expressing his opinion that no federal or state income taxes were paid on the Petitioners' Deferred Compensation or Insurance Supplement payments. The ALJ notes that Mr. Parsons' opinion was not a sworn statement and that he failed to indicate during what period or periods of time those payments were made as pre-tax payments. Mr. Parsons also cited no records or other documentation to support his opinion, nor did he address the apparent inconsistencies between his opinion and those of the Represented Petitioners' affiants. Finally, Mr. Parson's opinion does not address how he arrived at his opinion, given that the City has apparently had to "reconstruct" its payroll records for the periods at issue.¹³ Standing alone, this message is insufficient to establish that the PERA staff is entitled to summary disposition.

The evidence submitted by both the Represented Petitioners and PERA between May 20 and July 16, 2010, only confirms that a genuine issue of dispute fact exists regarding the tax treatment of amounts that the City paid on the Petitioners' behalf for deferred compensation accounts or for family medical insurance. The probative value of evidence that the parties have presented on that issue will depend upon the competence and credibility of the declarants and the strength of the foundation on which their statements and opinions are based. The ALJ therefore concludes that an evidentiary hearing on this limited issue is necessary in order to provide both the ALJ and the PERA Board with an adequate record for decision. Given the large number of parties and participants, it will again be necessary to arrange for the use of the Duluth City Council Chamber as a hearing site. The ALJ is therefore directing counsel for the parties to consult with one another, the ALJ, and the City Clerk to schedule a date or dates for the hearing. When those arrangements have been completed, the ALJ will issue an appropriate scheduling order.

B. H. J

¹² Aff. of Mary Most Vanek dated July 15, 2010.

¹³ Aff. of Jackie Morris dated February 8, 2010, at ¶ 16.