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Not Reported in N.W.2d, 1992 WL 48113 (Minn.App.)
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NOTICE: THIS OPINION IS DESIGNATED AS
UNPUBLISHED AND MAY NOT BE CITED EX-
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480A.08(3).

Court of Appeals of Minnesota.
Arlie NICHOLSON, Relator,

v.

INDEPENDENT SCHOOL DISTRICT # 363, Re-
spondent.
No. CO-91-1404.

March 17, 1992.
Review Denied May 15, 1992.

Certiorari to Independent School District No. 363.
Steven A. Nelson, International Falls, for relator.

Anne F. Krisnik, Frank Madden & Associates, Min-
neapolis, for respondent.

Considered and decided by DAVIES, P.J., and
PETERSON, and FOLEY, ^{FN*} JJ.

FN* Retired judge of the Court of Appeals,
acting by appointment pursuant to Minn.
Const. art. VI, § 2.

UNPUBLISHED OPINION

PETERSON, Judge.

*1 Arlie Nicholson appeals from a school board resolution terminating his teaching contract pursuant to Minn.Stat. § 125.12, subd. 8 (Minn.1990). He argues that the decision was not based upon substantial and competent evidence in the record and that he was denied his due process right to a fair hearing before a neutral hearing officer. We affirm.

FACTS

Prior to termination, Nicholson was a continuing contract teacher for 26 years at Indus High School. During 1968 Nicholson began to tutor Terry Rasmussen, an Indus High School student. Later, Rasmussen moved into Nicholson's home. In January of 1969, Nicholson allegedly began to make unwelcome sexual advances toward Rasmussen including placing his hands on Rasmussen's thigh, buttocks and penis. Most of these alleged incidents occurred in Nicholson's home, but one occurred in a hotel room during a trip to the state hockey tournament. Rasmussen rejected the advances, but they continued through January of 1970.

In September of 1990, Rasmussen reported the incidents to the board and agreed to cooperate in their investigation. Rasmussen called Nicholson to discuss the allegations. During this telephone conversation, which was recorded by the school board, Nicholson made several comments the board found to be incriminating. In response to the allegations, the superintendent and the board's attorney met with Nicholson, his union representative and his attorney. At the meeting, Nicholson was advised of the allegations, heard the tape recording and was asked to resign. Nicholson refused to resign or to respond to the allegations. Two days later, the board adopted a resolution proposing the immediate termination of Nicholson's continuing contract for immoral conduct, conduct unbecoming a teacher requiring immediate removal from the classroom, and willful neglect of duty.

After the board served Nicholson with notice of this proposed termination, he requested a public hearing and the board appointed an independent hearing officer. Nicholson requested discovery, including a deposition and a psychological evaluation of Rasmussen, but these requests were denied. At the hearing, Nicholson was represented by counsel and given the opportunity to present his arguments, to call and question witnesses, to subpoena witnesses,

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and to cross examine adverse witnesses.

Following the hearing, the hearing officer asked the parties to submit proposed findings and conclusions for her consideration. The board's attorney submitted proposed findings and conclusions but Nicholson did not. The hearing officer adopted the board's proposed findings and recommended immediate termination of Nicholson's contract. On June 5, 1991, the board adopted the hearing officer's findings and notified Nicholson that his contract was terminated. Nicholson sought review by writ of certiorari.

DECISION

In deciding to terminate a teacher, a school board acts in an administrative capacity and we will not disturb its decision unless it is fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the board's jurisdiction, or is based on an erroneous theory of the law. *Fisher v. Independent Sch. Dist. No. 622*, 357 N.W.2d 152, 154 (Minn.App.1984). As the finder of fact, the board's decision in teacher termination cases is entitled to considerable deference. *Whaley v. Independent Sch. Dist. No. 11*, 325 N.W.2d 128, 130-31 (Minn.1982). We do not review de novo the board's decision and will not substitute our findings for those of the board. Rather, we view the entire record to determine whether the board's findings are supported by substantial evidence. *Id.* at 130.

*2 Relator claims that the alleged misconduct is completely unrelated to his employment because the misconduct did not occur on school premises or during school hours. We do not believe that conduct must occur in the classroom to be related to the teaching relationship. Here, the record supports the conclusion that relator used his position as a teacher, a coach and a tutor to lure Rasmussen into a situation where he may have been more vulnerable to a sexual touch. These actions are sufficiently related to his position as a teacher to render the acts "conduct unbecoming a teacher." The fact

that the conduct did not occur in the classroom does not place the conduct outside of Nicholson's teaching role.

Relator argues that due process requires that the board make a finding on his current fitness to teach. However, the statute does not require a finding that the alleged immoral conduct adversely affected the teachers' fitness to teach. Rather, the statute permits immediate discharge upon a finding that the teacher has engaged in any of the prohibited conduct. In interpreting this statute, Minnesota courts have declined to follow the line of California cases cited by relator, instead taking the position that some conduct so clearly interferes with an ability to teach that immediate termination is justified. This is particularly so when the conduct involves sexual impropriety with a student. *See In re Etienne*, 460 N.W.2d 109 (Minn.App.1990), *pet. for rev. denied*, (Minn. Nov. 7, 1990); *Downie v. Independent Sch. Dist. No. 141*, 367 N.W.2d 913 (Minn.App.1985), *pet. for rev. denied*, (Minn. July 26, 1985); *Fisher*, 357 N.W.2d 152. In fact, proof of a teacher's sexual acts with a student is uniformly held to be sufficient grounds for dismissal. *Fisher*, 357 N.W.2d at 155 (citing Annot. 78 A.L.R.3d 19, 26 (1977)).

Relator erroneously asserts that, in *Fisher*, this court adopted the reasoning of the California supreme court in *Morrison v. State Bd. of Educ.*, 1 Cal.3d 214, 461 P.2d 375, 82 Cal.Rptr. 175 (1969). In *Fisher*, we specifically refused to apply the tests mandated in *Morrison*, and found that Fisher's conduct had such an adverse effect upon students that he should be immediately terminated, *even if* the *Morrison* test was applied. *Id.* at 156. The statute does not require a specific finding of fitness to teach and we decline relator's invitation to adopt the *Morrison* test or to otherwise change Minnesota statutory and case law to conform to California law.

Relator also argues that the statute is unconstitutionally vague as he was not put on notice of what conduct is prohibited by the phrases "immoral conduct" and "conduct unbecoming a teacher." Relator failed to provide the attorney general with notice of

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his challenge to the statute as required by Minn.R.Civ.App.P. 144. Thus, we cannot consider his challenge to the facial constitutionality of the statute. *State v. Kager*, 357 N.W.2d 369 (Minn.App.1984). We have previously held, however, that in some cases we may consider the constitutionality of the statute *as applied* despite this lack of notice. *Clay v. Clay*, 397 N.W.2d 571, 576 (Minn.App.1986), *pet. for rev. denied*, (Minn. Feb. 17, 1987). To prevail, Nicholson must show that the statute lacks specificity as to his own behavior and not as to some hypothetical situation. *State v. Becker*, 351 N.W.2d 923, 925 (Minn.1984). While the phrases may be vague in some hypothetical cases involving issues of morality and teacher fitness, this is not such a case. Here, a teacher engaged in conduct that is so contrary to all restrictions placed on a teacher that he could not possibly believe that the conduct did not fall under the statutory prohibitions. We have previously held that some conduct is so obviously inappropriate that teachers should know, without warning, that it is unacceptable. *Downie*, 367 N.W.2d at 918. We believe that a teacher's knowing use of his position of authority to engage in sexual misconduct with a minor student is an example of such conduct.

*3 Relator also argues that the nature of the termination proceeding requires that he be granted reasonable discovery in order to have a meaningful opportunity to argue his case. Minn.Stat. § 125.12, subd. 9 (1990) provides teachers with procedures designed to provide a fair hearing. Noticeably absent from the list is the right to conduct any discovery. In the absence of authorization by ordinance or statute, an administrative agency may not establish or adopt discovery procedures. *See Waller v. Powers Dept. Store*, 343 N.W.2d 655 (Minn 1984) (discovery order void because ordinance did not authorize civil rights commission to provide discovery procedures to participants in hearings). The board, as an administrative agency charged with conducting **administrative hearings** pursuant to Minn.Stat. § 125.12, subd. 9, is limited to the procedures specified in that statute. Furthermore, the

board is not held to the same procedural and evidentiary standards as are courts. *See Beranek v. Joint Indep. Sch. Dist. No. 287*, 395 N.W.2d 123, 126-27 (Minn.App.1986) Thus, the board's refusal to permit Nicholson to conduct discovery is not a denial of his due process rights or his statutory right to a hearing.

Relator asserts that evidence of events occurring twenty one years ago ought not be considered because the events are too remote in time to be meaningfully adjudicated. However, the legislature placed no limitations period in Minn.Stat. § 125.12, subd. 8. Relator's effort to have this court read a **statute of limitations** into this section because the claim would be time barred in a civil or a criminal court is unavailing. The fact that this claim is barred in criminal or civil court is irrelevant in light of the legislature's determination that there be no time restrictions on the evidence a school board may consider in a termination hearing. Therefore, we refuse to create a time limit on our own initiative.

Minnesota courts have permitted similar evidence of long past events in teacher termination hearings. For example, in *Fisher*, we permitted the consideration of evidence concerning events happening 16 years before the hearing noting that

[b]y virtue of the nature of the offense-sexual intercourse with a minor student of the district-it may be considered doubtful whether such conduct could ever be too remote in time.

Fisher, 357 N.W.2d at 156 (emphasis in original). More recently, this court permitted a student to testify about a teacher's sexual misconduct that occurred 13 years prior to the hearing. *Etienne*, 460 N.W.2d 109. We see nothing in this case to support a determination that evidence from 21 years ago is too old while evidence from 16 or 13 years ago is not.

Relator claims that the hearing examiner was biased because she was hired and paid by the board has no

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merit. We rejected the same argument in *Russell v. Special Sch. Dist. No. 6*, 366 N.W.2d 700, 705-06 (Minn.App.1985), and again in *Etienne*, noting that the requirement that the board hire an independent hearing examiner whose recommendations it can adopt or reject fully comports with due process requirements. *Etienne*, 460 N.W.2d at 111-12.

*4 Relator's claim that the school board's attorney's adversary role on behalf of the board created a risk of bias and violated due process. While we have previously found that the board's three part role as prosecutor, judge and jury tainted the teacher's right to be heard in a meaningful and impartial manner, we have also noted that "employing an independent hearing examiner should alleviate the problem." *Schmidt v. Independent Sch. Dist. No. 1*, 349 N.W.2d 563, 568 (Minn.App.1984). Here, the board avoided bias by taking the very step this court recommended in *Schmidt*, appointing an independent hearing examiner. Therefore, we reject relator's argument that the zealous representation of the school board's attorney resulted in a bias.

We conclude that the school board's decision is warranted by the evidence and that relator suffered no deprivation of due process.

Affirmed.

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Nicholson v. Independent School Dist. No. 363

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480A.08(3).

Court of Appeals of Minnesota.
Julie ARCHER-KATH, Relator,

v.

TEACHERS RETIREMENT ASSOCIATION, Re-
spondent.
No. A03-304.

Nov. 18, 2003.
Review Denied January 20, 2004.

Teachers Retirement Association.
Richard A. Williams, Williams & Iversen, P.A.,
Roseville, MN, for relator.

Mike Hatch, Attorney General, Jon K. Murphy, As-
sistant Attorney General, St. Paul, MN, for re-
spondent.

Considered and decided by STONEBURNER,
Presiding Judge, WILLIS, Judge, and SHUMAKER
, Judge.

OPINION

STONEBURNER, Judge.

*1 Relator appeals, by writ of certiorari, a decision of respondent Teacher's Retirement Association (TRA) Board that she is not entitled to service credit for the period during which she was on leave with pay pursuant to a settlement agreement between relator and Independent School District # 13 (ISD 13). Relator argues that because TRA provided an estimate of the value of her pension benefit at the

time of her marriage dissolution, and because she relied on that estimate in entering into a marital termination agreement, TRA is estopped from denying the service credit she seeks. TRA argues that estoppel does not apply because it has no authority under the governing statute to authorize credit for relator's leave. We agree and affirm.

FACTS

TRA administers the pension plan for Minnesota's licensed teachers under the authority of Minn.Stat. ch. 354 (2002) and the fiduciary duties and standards of Minn.Stat. ch. 356A (2002). The TRA pension plan is a tax-qualified "governmental" plan under federal law. *See* 29 U.S.C. § 1002(32); 26 U.S.C. § 414(d); *AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 565-66, n. 5 (Minn.1983), *appeal dismissed*, 466 U.S. 933, 104 S.Ct. 1902, 80 L.Ed.2d 452 (1984). The TRA Board is composed of elected and appointed members and its duties include deciding issues related to TRA service credit and pension benefits. Minn.Stat. §§ 354.06, subd. 1, .07, subd. 1 (2002).

Relator Dr. Julie Archer-Kath was employed by ISD 13 and participated as a beneficiary in the TRA pension program. In 1998, relator settled a discrimination action against ISD 13. The settlement agreement provided that relator would be considered to be on leave with pay for the school years 1998-99 and 1999-2000 and would receive her regular salary and benefits, after which she would be considered to be on an extended leave of absence without pay through June 2005. Relator was required to execute an "irrevocable" letter of resignation to be deposited with the district court that would become effective on the occurrence of certain events, including any attempt by relator to be reinstated to any position with ISD 13. The agreement provided that "[s]aid resignation as provided herein will be immediately accepted by ISD No. 13 at the time of approval of this Settlement Agreement and Release,"

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but ISD 13 retained the right to allow relator to withdraw the letter of resignation.

Under the agreement, ISD 13 was required to provide TRA with a copy of the Board minutes and resolution approving the settlement agreement and file a leave reporting form with TRA reporting relator to be on extended leave without pay from July 1, 2000 through June 30, 2005, and reporting that relator had no reinstatement rights. ISD 13 did not provide the required documents and did not report to TRA that relator was on a leave of absence during the 1998-99 and 1999-2000 school years as required by Minn.Stat. § 354.52, subd. 4a (2002). Through the 1999-2000 school year, ISD 13 continued to report relator's salary and made contributions on her behalf to TRA as if she was still teaching. And relator continued to make contributions to the TRA through the 1999-2000 school year. Relator understood the settlement agreement as permitting ISD 13 to recall her to perform services during the 1998-99 and 1999-2000 school years, if it chose to do so. At some point in the 1999-2000 school year, after obtaining permission from ISD 13, relator became employed by another school district.

*2 Relator's marriage was dissolved in 2001. In connection with the dissolution, she requested information from TRA that would permit her to determine the present value of her pension benefits. TRA responded by letter purporting to set out the pension benefits to which relator was entitled. An actuary verified the information and determined that relator's pension was approximately 90% of the marital value of relator's spouse's pension. Based on this information, relator entered into a marital termination agreement under which she and her spouse each gave up any right in the other's pension benefits. The dissolution decree stated the present value of relator's pension as \$344,781 based on a retirement credit of 30 years of service.

During an audit in July 2002, TRA discovered that two school districts were making contributions for relator for the 1999-2000 school year. TRA then reviewed, for the first time, the "leave with pay" pro-

vision of relator's settlement agreement with ISD 13. TRA staff concluded that the 1998-99 school year and 34% of the 1999-2000 school year did not qualify for service credit because it was paid as part of the settlement agreement terminating relator's employment with ISD 13 and therefore was a "severance" payment, excluded from TRA's statutory definition of "salary" under Minn.Stat. § 354.05, subd. 35a (2002). The remainder of the 1999-2000 school year, when relator was working for another school district, qualified for TRA credit. TRA informed relator of its determination in August 2002.

Relator asked TRA to reconsider the staff's decision. TRA's Executive Director affirmed the staff's decision, informing relator that the leave payments she received were "severance" payments, not "salary" since they were contingent on her termination of employment at the end of the leave period and were not paid for the performance of services. Relator petitioned the TRA Board for review of the Executive Director's decision under Minn.Stat. § 354.071, subd. 3 (2002). After a hearing, the board voted unanimously to affirm the Executive Director's decision on the ground that the law does not provide for service credit for leave-with-pay compensation, which must be considered severance pay. Relator then initiated this appeal by writ of certiorari.

DECISION

The scope of review of the TRA Board's quasi-judicial decisions is limited to determining whether the decision was arbitrary, oppressive, unreasonable, fraudulent, under erroneous theory of law, or without supporting evidence. *McDermott v. Minn. Teachers Ret. Fund*, 609 N.W.2d 926, 928 (Minn.App.2000); *Stang v. Minn. Teachers Ret. Ass'n Bd. of Trustees*, 566 N.W.2d 345, 347 (Minn.App.1997). The interpretation of statutes is a question of law reviewed de novo. *Brookfield Trade Ctr. Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn.1998); *In re Twedt*, 598 N.W.2d 11, 12

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(Minn.App.1999).

Relator argues that promissory estoppel prevents the TRA Board from denying service credits from ISD 13 through the end of the 2000 school year. Relator relies on *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, in which the supreme court stated that a public employee's interest in a pension is best characterized in terms of promissory estoppel. 331 N.W.2d 740, 747 (Minn.1983). *Christensen* held that Minn.Stat. § 422A.156 (1982), imposing a minimum age requirement for pension eligibility, is invalid as an unconstitutional impairment of contractual obligations to the extent that it applied to persons already retired at the time of its enactment. *Id.* at 752. In this case, however, there has not been a legislative change that affects relator's entitlement to service credit.

*3 We conclude that this case is governed by the much more analogous case of *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297 (Minn.1996). In that case, the TRA led Axelson to believe that he could purchase service credit for a leave for Peace Corps service, but when he attempted to do so, the TRA said it was without authority to allow service credit for such a leave. *Id.* at 298-99. Axelson sued the TRA basing his claim on promissory estoppel. *Id.* at 299. The supreme court noted the *Christensen* holding that the protectable right of a public employee to an offered pension is determined by applying promissory estoppel but went on to note that "[i]his court has held, however, that '[w]here an agency has no authority to act, agency action cannot be made effective by estoppel.'" *Id.* at 299-300. Therefore before analyzing whether relator has established the elements of promissory estoppel, we would first need to conclude that the TRA has authority to grant the service credits relator seeks.

The types of leave for which service credit can be granted are set out in Minn.Stat. §§ 354.092-.096 (2002). Under the statute, only sabbatical leave, parental leave, extended leave of absence without salary, medical leave, and family leave may result

in service credit, and even in these types of leave, service credit may only be granted if the school district certifies the leave to the TRA on forms specified by the executive director, and the teacher must have the unconditional right to full reinstatement at the end of the leave. *See id.*

The next issue is whether relator has the type of salary/leave under which she is eligible for service credits. The TRA Board affirmed the TRA Executive Director's determination that the payments received by relator must be characterized as "severance" payments which are specifically excluded from TRA's definition of salary and therefore ineligible for service credits. *See* Minn.Stat. § 354.05, subd. 35(b)(5). Relator objects to this characterization of the payments, relying on *Rosinski v. Teachers Ret. Ass'n Bd. of Trustees*, 495 N.W.2d 14 (Minn.App.1993). In that case, a school principal was placed on an unrequested leave of absence for the 1989-90 school year based upon a medical evaluation. *Id.* at 15. The school district and *Rosinski* executed a settlement agreement extending his paid leave of absence until July of 1991. *Id.* at 16. Under the agreement, he received full salary but waived all rights to reinstatement and the school district retained the exclusive discretion to determine whether *Rosinski* would be allowed to return to work. *Id.* In June 1991, *Rosinski* submitted a letter of resignation to the District and applied for retirement benefits the following month. *Id.* The TRA classified the payments as severance pay and denied *Rosinski* service credit for the 1990-91 school year. *Id.* This court reversed the TRA, concluding that the payments did not constitute severance pay under Minn.Stat. § 454.05, subd. 35, but instead should be characterized as sick-leave benefits. *Id.* at 18. *Rosinski* does not support relator's argument because *Rosinski's* payments were held to be for a type of leave, medical leave, for which service credit is authorized by the governing statute. In this case, even if the payments to relator do not constitute severance payments, relator has not shown that they constitute payments for any type of leave for which the statute authorizes service credit.

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*4 Relator argues that because the statute does not expressly address the type of leave she was granted, the TRA has the discretion to develop a policy about how to treat this type of leave. But *Axelson* holds otherwise. *Axelson v. Minneapolis Teachers Ret. Fund Ass'n*, 544 N.W.2d at 301. *Axelson* also argued that the TRA board had discretionary authority to allow him to purchase service credits under its general authority to determine benefit eligibility, arguing that pension and retirement acts are "entitled to a liberal construction to insure the beneficial purposes intended." *Id.* (quoting *Mattson v. Flynn*, 216 Minn. 354, 361 13 N.W.2d 11, 15 (1944)). The supreme court rejected this argument concluding that "where there is no express authority permitting a member to purchase retirement service credits for leaves of this kind, we will not without more find the authority implied." *Id.* For the same lack of express authority to award service credit for relator's type of leave, we conclude that the TRA is without discretion to award such credit.

Relator's is not among the types of leave listed for which service credit may be granted, the leave was not certified to the TRA by ISD 13, and relator did not have the unconditional right to full reinstatement at the end of the leave. Therefore, we agree with the TRA that the governing statute does not give TRA authority to grant credit for relator's leave and therefore the issue of promissory estoppel cannot apply.

Affirmed.

Minn.App.,2003.
Archer Kath v. Teachers Retirement Ass'n
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Court of Appeals of Minnesota.
In the Matter of the Retirement Benefits of Robert
W. LARSON.
No. C7-95-2512.

June 11, 1996.

Bruce P. Grostephan, Peterson, Engberg &
Peterson, 700 Title Insurance Building, Minneapoli-
s, MN 55401-6743 (for relator).

Hubert H. Humphrey, III, Attorney General, Jon K.
Murphy, Assistant Attorney General, 445 Min-
nesota Street, Suite 900, St. Paul, MN 55101-2127
(for respondent).

Considered and decided by Klaphake, P.J., and
Randall and Foley, J. ^{FN*}

FN* Retired judge of the Minnesota Court
of Appeals serving by appointment pursu-
ant to Minn. Const. art. VI, section 2.

UNPUBLISHED OPINION

RANDALL, Judge.

*1 Relator appeals the decision of the Board of
Trustees of the Public Employees Retirement Asso-
ciation to reduce his monthly pension payments.
The Board determined that payments for unused
sick leave did not fall within the statutory definition
of "salary" for the purposes of calculating PERA
benefits. We affirm.

FACTS

This is an appeal of the administrative decision of
the Public Employees Retirement Association's
Board of Trustees (Board) reducing the monthly re-
tirement benefit paid to relator Robert Larson. Re-
lator served as the business agent and recording
secretary/treasurer for School Service Employees
Union, Local 284 (Local 284), and retired on March
29, 1991. Relator had been a member of the Public
Employees Retirement's Association (PERA) for
nearly 28 years and at one time served on its Board
of Trustees both as a trustee and as president.

In 1994, PERA discovered that during the last year
of relator's employment he received payments for
unused sick leave that were reported to PERA as
salary. PERA determined that these payments
should have been excluded from relator's salary be-
cause they represented lump sum payments for un-
used sick leave and were a form of severance pay-
ment, both specifically excluded from the statutory
definition of salary. A hearing was held before an
administrative law judge, who concluded: (1)
PERA had the authority to reduce relator's benefits;
(2) the sick leave payments in question were ex-
cluded from the statutory definition of salary in ef-
fect at the time; (3) relator had not shown a basis
for promissory estoppel to prevent the reduction of
his benefits; and (4) PERA should reduce relator's
benefits to the correct amount and recover the over-
payment that resulted from the inclusion of the un-
used sick leave. PERA informed relator of its de-
cision and relator appealed to the PERA Board of
Trustees. In September 1995, the parties appeared
before the Board and presented their respective pos-
itions. On October 4, 1995, the Board adopted the
ALJ's decision, with several amendments. Relator
now appeals. We granted relator's petition for re-
view by writ of certiorari on November 29, 1995.

DECISION

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Relator filed a writ of certiorari with this court seeking review of the PERA Board's decision to reduce his pension. Review by certiorari is

confined to questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.

Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn.1992). Where an administrative board has heard the views of opposing parties presented in the form of both oral and written testimony, has examined the record, and has made findings of fact, this court is to review the board's decision under the substantial evidence test. *Application of Allers*, 533 N.W.2d 646, 651 (Minn.App.1995), review denied (Minn. Aug. 30, 1995). Substantial evidence is defined as

*2 1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. More than a scintilla of evidence; 3. More than some evidence; 4. More than any evidence; and 5. Evidence considered in its entirety.

Cable Communications Bd. v. Nor-west Cable Communications Partnership, 356 N.W.2d 658, 668 (Minn.1984).

Deference is given to an agency decision, especially where the agency's expertise or special knowledge is involved. *Id.* However, this court is not bound by the agency's decision on questions of statutory interpretation. *Arvig Tel. Co. v. Northwestern Bell Tel. Co.*, 270 N.W.2d 111, 114 (Minn.1978).

I.

PERA is a pension plan for public employees, administered by a board of trustees. Minn.Stat. § 353.03 (1994). However, certain private employees like relator are allowed to participate in PERA. Minn.Stat. § 353.017 (1994). Such a situation

presents the PERA Board with an atypical situation and one where, under its fiduciary duty to the members of the plan, the taxpayers of the state, and the State of Minnesota, the Board is "to be even more diligent in policing the salary reports of the limited number of private employees within its purview." *Allers*, 533 N.W.2d at 651-52.

PERA pension benefits are calculated based upon a formula utilizing age, years of service, and the average highest salary paid for any five successive years of allowable service. Minn.Stat. § 353.29 (1994). Under this formula, any increase in salary during the last year of employment will result in an increased pension. Minn.Stat. § 353.29, subd. 3 (1994). During the last year of his employment, relator received payments for accrued unused sick leave that were added to his regular paychecks and reported to PERA as wages by his employer, Local 284. Relator argues that these payments were allowed under the 1990 statutory definition of "salary" and that the 1991 amendment excluding periodic payments for unused sick leave infers that such payments were previously allowed. We disagree.

In 1990, when relator began cashing out his unused sick leave, the PERA statute provided that "[l]ump sum annual or lump sum sick leave payments" were not to be considered salary. Minn.Stat. § 353.01, subd. 10 (1989). Effective June 5, 1991, this section was amended, in part, to read, "[u]nused annual sick leave payments, in lump sum or periodic payments, are not considered salary." 1991 Minn. Laws ch. 341, § 3. PERA maintains that the 1991 amendment was merely a clarification of its long standing policy to exclude unused sick leave from the definition of salary and not a substantive change in the law.

The ALJ found, and we agree, that the evidence shows a clear and consistent approach by PERA that payments for unused sick leave are excluded from salary in calculating pension benefits. Allen Eldridge, a manager of a benefits division at PERA, and Arlen Enstad, the PERA counselor with whom

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relator consulted prior to his retirement, both testified that payments for unused sick leave were not considered salary by PERA. In addition, the payroll reporting forms provided by PERA to Local 284 during 1990 and 1991 stated that "PERA DEDUCTIONS SHOULD NOT BE TAKEN FROM UNUSED VACATION, UNUSED SICK PAY OR ANY OTHER SEVERANCE PAY."

*3 This case is like *Allers*, where this court held that "income reserve" payments based on accumulated unused sick leave did not constitute "salary" for the purposes of PERA deductions. *Allers*, 533 N.W.2d at 653. In that case, another official of the same union, Local 284, received periodic "income reserve" payments as part of his regular bi-weekly paychecks. *Id.* 648-49. This payment method was devised to raise the recipient's "highest and best five." *Id.* Because the "income reserve" payments had a direct causal relationship to the accumulated unused sick leave, this court held the payments constituted *lump sum payments of unused sick leave* and were excluded from the statutory definition of salary. *Id.* at 653 (emphasis added). In examining the nature of sick leave payments, we observed that

[t]he concept of sick leave recognizes that an employee who misses work due to illness should not be penalized financially. Days missed due to sickness in a year are compensated through the use of sick leave, thus providing the employee with a steady income unimpaired by health interruptions. In this manner, used sick leave is rationally considered as salary.

Id. See also *Michigan State Police Command Officers' Ass'n v. State, Dep't of Pub. Safety*, 263 N.W.2d 47, 48 (Mich.1978) ("salary" is paid for service, not sick leave). The court noted that any sick leave funds drawn when work is not interrupted due to illness is in excess of the employee's annual wage and not "salary" for the purposes of calculating PERA pension benefits. *Id.* at 653-54.

It is our view the statutory change simply made clear that the exclusion applied to unused sick

leave. The pre-1991 wording referred to annual lump sum *or* lump sum payments. This means the legislature intended that PERA deductions were not to be taken from annual lump sum payments or similar but more frequent lump sum payments; otherwise, the legislature would not have used the word "or." A contrary construction would render the language following "or" meaningless. The legislature was guarding against relator's conduct in 1989.

Even if we were to decide that the payments received by relator were not specifically excluded as lump sum payments under the pre-1991 statutory language, we conclude the payments constitute severance pay, an item specifically excluded from the statutory definition of salary. Minn.Stat. § 353.01, subd. 10 (1989).

Pursuant to the language of the union resolution and according to relator's own testimony, relator was permitted to cash out his unused sick leave payments only if he was anticipating retirement and notified the union in writing within twelve months of his retirement date. Because these payments could only be paid if an employee anticipated retirement, they constitute "severance" pay. The payments are directly related to one's retirement package of severance benefits. Relator's cash out of unused sick leave in this instance was a form of concealed severance pay specifically excluded from the definition of salary.

*4 Relator also argues that the PERA Board's decision to recover benefits from him based on Minn.Stat. §§ 353.27, subd. 7(b), (c) (1994), retroactively expands its jurisdiction. We disagree.

Minn.Stat. § 353.27, subd. 7b, (1994) mandates that the executive director of PERA has an affirmative duty to recover any overpaid benefit amounts made to a member. Prior to May 9, 1990, any erroneously taken deduction had to be refunded within three years or the contribution was deemed valid. Minn.Stat. § 353.27, subd. 7 (1988). This language was amended, effective May 9, 1990, to allow erro-

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neously taken deductions to be refunded "at any time." 1990 Minn. Laws ch. 570, Art. 11, § 5.

Relator contends that pursuant to Minn.Stat. § 353.27, subd. 7 (1988), PERA had until sometime in 1993 to return any erroneously taken deductions or else they were deemed valid. According to relator, to apply the amendment removing the three year statute of limitations for recovery of erroneous contributions taken before May 9, 1990, violates Minn.Stat. § 645.31 and Minn.Stat. § 645.21. These sections provide that no laws shall be applied retroactively unless clearly and manifestly intended by the legislature, and that any amendments to an existing statute shall become effective only from the time of their first enactment. Minn.Stat. §§ 645.21, 645.31 (1994). PERA counters arguing that an amendment to a statute of limitations period enlarging the time period within which an action can be brought is not retroactive legislation.

A statute of limitations is a matter of remedy, not a matter of substantive right. *Wschola v. Snyder*, 478 N.W.2d 225, 226 (Minn.App.1991), *review denied* (Minn. Feb. 2, 1992). Accordingly, the legislature has the power to expand a limitations period for a cause of action accrued but not yet time-barred. *Id.* Here, the amendment enlarging the statute of limitations period for recovery of erroneous contributions occurred before PERA's authority to recover those amounts had run under the old statute of limitations period. Thus, PERA's reliance on Minn.Stat. § 353.27, subd. 7(c) (1994), does not constitute retroactive application of the statute. *See Minnesota Landmarks v. M.A. Mortenson Co.*, 466 N.W.2d 413, 416 (Minn.App.1991) (amendment applied because original claim not yet barred on effective date), *review denied* (Minn. May 10, 1991).

II.

Next, relator contends that the doctrine of promissory estoppel should apply on these facts to prevent the PERA Board from reducing his monthly pension benefits. We disagree.

A governmental agency may be estopped when justice requires, but estoppel is not loosely applied against the government. *Brown v. Minnesota Dept. of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn.1985). A party seeking to invoke equitable estoppel against a government agency bears a "heavy burden of proof." *Id.* The party asserting estoppel against a government agency must prove the following five elements: 1) that representations or inducements were made to claimant; 2) that there has been reasonable reliance on those representations or inducements by the claimant; 3) that the representations or inducements involve some element of fault or wrongful conduct by the government agency; 4) that the claimant will be harmed if estoppel is not allowed; and 5) the equities of the case outweigh any public interest frustrated by the estoppel. *Id.*

*5 Here, the record supporting relator's argument on estoppel is weak. Absent relator's cryptic testimony, there is no evidence to support the claim PERA made any representation to relator that he could include unused sick leave in his PERA salary. Arlen Enstad, the PERA counselor with whom he met to discuss various retirement options, testified that unless sick leave were actually used by an employee, it could not be included as salary for the purposes of PERA. It seems unlikely that Enstad made any representations to relator that he could include unused sick leave in his salary. Next, if there were such a conversation, reliance by relator was unreasonable. The conversation between relator and Arlen Enstad occurred nearly a year and a half before the union resolution authorizing the cash out of unused sick leave. This fact renders claimed reliance by relator unreasonable. The documents used by PERA and Local 284 clearly made it known that unused sick leave was not to be considered salary. The reverse side of the payroll reporting forms completed by Local 284, forms that went to relator, said:

REMEMBER, PERA DEDUCTIONS SHOULD NOT BE TAKEN FROM UNUSED VACATION,

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UNUSED SICK PAY, OR ANY OTHER SEVERANCE PAY. A lump sum payment for unused vacation or sick leave is not considered salary. If, however, a member uses sick leave or vacation prior to termination; that is receives full payment for each day used and it appears on the payroll with these earnings, such salary is subject to PERA deductions and service credit. The effective date of termination is advanced.

Given his experience on the PERA Board, both as trustee and as president, relator knew or should have known that unused sick leave was not considered salary.

Relator made no showing of fault or wrongful conduct on the part of Enstad or PERA. Absent such a showing, relator's claim of promissory estoppel is defective. *Id.*; *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292-93 (Minn.1980)(where there is no wrongful governmental conduct, equitable estoppel does not apply). Further, because relator was not entitled to the benefit amount initially awarded him, he suffers no recognizable harm. *See Department of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 118 (Minn.App.1989), *review denied* (Minn. Apr. 26, 1989) (no legal harm is incurred where an individual is compelled to return payments that he was not entitled to in the first place). It is no detriment not to retain money that should never have been received. *Id.* (quoting *Heckler v. Community Health Servs.*, 467 U.S. 51, 61, 104 S.Ct. 2218, 2225 (1984)). Lastly, the equities in this case do not lie in favor of relator. PERA is not estopped from collecting erroneous overpayments that were paid to relator.

After reviewing the record, we conclude that substantial evidence exists to support the ALJ's findings of fact as adopted by the Board. Further, relator has failed to prove the elements required for promissory estoppel.

III.

*6 Finally, relator argues that the Board's decision to reduce his monthly pension benefits constitutes an impairment of contract in violation of both the United States and Minnesota Constitutions. We disagree.

Under both the federal and state constitutions, it is unlawful for the state to pass any law impairing the obligation of contracts. U.S. Const. art. 1, § 10; Minn. Const. art. 1, § 11. Here, the payments received by relator constituted lump sum payments for unused sick leave and severance pay. Both are specifically excluded from the statutory definition of salary whether, one applies the pre-1991 statutory language or the amended language. Although relator may have the right to receive a pension, this right does not include the right to receive a pension based on erroneously reported salary.

Affirmed.

Minn.App.,1996.
In Matter of Larson
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(Minn.App.)

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C

Court of Appeals of Minnesota.
 Donald STANG, Relator,

v.

MINNESOTA TEACHERS RETIREMENT ASSO-
 CIATION BOARD OF TRUSTEES, Respondent.
 No. C7-96-2410.

July 15, 1997.

College teacher brought action challenging decision of Minnesota Teachers Retirement Association Board of Trustees to exclude \$3,810 from his 1992-93 salary for pension purposes. The Court of Appeals, Huspeni, J., held that payment made to all teachers under collective bargaining agreement that could or could not be spent on health insurance coverage was not made in lieu of employer paid group insurance and had to be included in teacher salaries for purposes of calculating pension contributions.

Reversed.

West Headnotes

[1] **Administrative Law and Procedure** ⚡763
 15Ak763 Most Cited Cases

[1] **Administrative Law and Procedure** ⚡788
 15Ak788 Most Cited Cases

On certiorari appeal from a quasi-judicial agency decision that is not subject to Administrative Procedure Act, Court of Appeals reviews whether termination was arbitrary, oppressive, unreasonable, fraudulent, under erroneous theory of law, or without any evidence to support it. M.S.A. § 14.01 et seq.

[2] **Administrative Law and Procedure** ⚡749
 15Ak749 Most Cited Cases

[2] **Administrative Law and Procedure** ⚡760
 15Ak760 Most Cited Cases

Decisions of administrative agencies enjoy a pre-

sumption of correctness, and deference should be shown by a reviewing court to the area of agency's expertise.

[3] **Administrative Law and Procedure** ⚡796
 15Ak796 Most Cited Cases

Reviewing court is not required to defer to an agency's decision with respect to questions of law.

[4] **Schools** ⚡146(5)

345k146(5) Most Cited Cases

Payment made to all teachers under collective bargaining agreement that could or could not be spent on health insurance coverage was not made in lieu of employer paid group insurance and had to be included in teacher salaries for purposes of calculating pension contributions. Minn.St.1992, § 354.05, subd. 35(b)(3).

[5] **Schools** ⚡146(7)

345k146(7) Most Cited Cases

Construction of teachers' retirement statutes is a question of law, fully reviewable by Court of Appeal. M.S.A. § 354.045 et seq.

[6] **Schools** ⚡146(7)

345k146(7) Most Cited Cases

Court reviewing Minnesota Teachers Retirement Association (TRA) Board of Trustees' decision must first look to applicable statute and resolve any questions of interpretation before applying it to facts of a case, and a collective bargaining agreement (CBA) between teachers and employers is relevant to the extent that it is consistent with the law as contracting parties may not override controlling law.

[7] **Schools** ⚡146(1)

345k146(1) Most Cited Cases

Because teachers' retirement statutes are remedial in nature, they are entitled to liberal construction to insure beneficial purposes intended. M.S.A. § 354.045 et seq.

*346 *Syllabus by the Court*

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1. An appellate court reviewing a decision of the Teachers Retirement Association Board of Trustees resolves any questions of statutory interpretation before applying the teachers retirement statutes to the facts of the case.

2. A collective bargaining agreement between teachers and their employer is relevant in determining a matter under the teachers retirement statutes to the extent that the agreement is consistent with the law.

3. A payment made to all teachers under a collective bargaining agreement that may or may not be spent on health insurance coverage is not made "in lieu of employer paid group insurance" as described in Minn.Stat. § 354.05, subd. 35(b)(3) (1992), and must be included in the teachers' salaries for the purposes of calculating pension contributions.

Rebecca H. Hamblin, Minnesota Education Association, St. Paul, Anthony R. Battles, Kelly, Hannaford & Battles, P.A., Minneapolis, for relator.

Hubert H. Humphrey III, Attorney General, Jon K. Murphy, Assistant Attorney General, St. Paul, for respondent.

Considered and decided by HUSPENI, P.J., and WILLIS and SCHULTZ [FN*], JJ.

FN* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

HUSPENI, Judge.

Relator Donald Stang challenges the decision of respondent Minnesota Teachers Retirement Association Board of Trustees to exclude \$3,810 from Stang's 1992-93 salary for pension purposes. Because the \$3,810 should not have been excluded from Stang's salary under Minn.Stat. § 354.05, subd. 35 (1992), we reverse.

FACTS

Stang worked as an accounting instructor for Central Lakes College in Brainerd, Minnesota, and its predecessors for 29 years. He is a participating member of the Minnesota Teachers Retirement Association (TRA) and is considering retirement in 1997.

In 1991, the Brainerd Technical College (BTC) and the Staples Technical College (STC) merged to form the Brainerd Staples Technical College (BSTC), now Central Lakes College. The employees negotiated a new collective bargaining agreement (CBA) with BSTC. Before the merger, health benefits for the respective schools varied, and this disparity became a focal point in negotiation. BTC had paid \$3,810 per employee per year to provide a health insurance package, and STC had paid \$2,828 per employee to provide a health insurance pack- age.

During the 1991-92 school year, the CBA for the merged schools provided that BSTC employees remain in their previous school district's group coverage for that year. BSTC paid the same premiums the former schools had paid before the merger. To compensate for the disparate benefits, BSTC paid the former STC employees an additional \$982.

For the 1992-93 school year, however, the contract established a "flexible benefit plan," as follows:

During the 1992-93 contract year, District 2190 [BSTC] will add \$3,810 to the scheduled salary of each full-time faculty member *347 for flexible benefits. (Section 9.5). The faculty member must estimate the amount he/she wishes to redirect for health and/or dental insurance premium reimbursement, health expense reimbursement, dependent care, or other expenses allowable under the IRS code.

Faculty members shall remain in their respective health insurance programs during 1992-93.

Stang participated in the negotiating process for

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this contract. He submitted an affidavit claiming that the employees and the school intended the \$3,810 to be salary. He stated that the language in the CBA requiring faculty members to remain in their health insurance programs for 1992-93 was incorrect and, in fact, teachers had the option, not the obligation, of continuing with their group coverage through their previous employers. [FN1]

FN1. The 1993-94 contract allowed employees to participate in the state health plan, and the school paid those premiums for all employees. The \$3,810 increase was removed from the employee contracts.

The record indicates that under the 1992-93 contract each teacher could choose to deposit money into the flexible plan for various types of pre-tax expenses. Teachers wishing to buy group health insurance could direct funds from this plan to purchase the coverage through their previous school's program. Teachers could purchase additional insurance coverage to supplement those policies. Some teachers chose not to put any money into the flexible plan, and the employer paid them the \$3,810 as regular salary. Other teachers put less than \$3,810 into the flexible plan for insurance and received the difference as salary in their paychecks.

Stang chose to put a total of \$4,900 into the flexible benefit plan for 1992- 93. He used the money to purchase health and dental insurance from his previous employer, BTC, and to cover other medical expenses. TRA initially treated the additional \$3,810 Stang received under the contract for year 1992- 93 as salary for pension purposes and deducted pension contributions based on a salary including that sum. Pursuant to an inquiry made in 1995, however, the TRA executive director, Gary Austin, informed the BSTC business manager that TRA would only count the \$3,810 as "salary" to the extent that it was not used to purchase health and dental insurance premiums.

In April 1996, TRA notified Stang that he would receive an overpayment refund for erroneous con-

tributions calculated on the \$3,810 during the 1992-93 school year. Stang objected to the refund and requested it not be issued. [FN2] On May 13, 1996, the executive director denied Stang's request. Stang petitioned the TRA Board of Trustees (Board) for review of that decision. The Board heard the petition and affirmed the executive director's action. Stang filed for a writ of certiorari seeking this court's review.

FN2. It is undisputed that an increase in Stang's income during the last five years of service would affect his pension amount. An employee's "high five salary," i.e., the salary from the highest five successive years of service, impacts an employee's TRA pension benefits. See Minn.Stat. § 354.44, subd. 6 (1996).

ISSUE

Did the Teachers Retirement Association Board of Trustees err in ruling that \$3,810 of Stang's 1992-93 compensation was not "salary" for TRA pension purposes?

ANALYSIS

[1][2][3] On certiorari appeal from a quasi-judicial agency decision that is not subject to the Administrative Procedures Act, this court reviews whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under erroneous theory of law, or without any evidence to support it. *Rodne v. Commissioner of Human Serv.*, 547 N.W.2d 440, 444-45 (Minn.App.1996); see also *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n.*, 544 N.W.2d 297, 299 (Minn.1996). "[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown" by a reviewing court to the area of the agency's expertise. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn.1977); *348 *Rosinski v. Teachers Retirement Ass'n Bd. of Trustees*, 495 N.W.2d 14, 16 (Minn.App.1993). A reviewing court is not required, however, to defer to an agency's decision with respect to questions of law. *St. Otto's Home v. Minnesota Dept. of Human Servs.*, 437 N.W.2d 35,

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39-40 (Minn.1989).

[4] The Board determined that the \$3,810 Stang received in 1992-93 was not salary but "payments in lieu of any employer paid group insurance coverage" under Minn.Stat. § 354.05, subd. 35 (1992). Stang contends the TRA Board erred in excluding the \$3,810 from his salary and that amount should have been included for the purposes of calculating his TRA retirement contributions.

The parties dispute the role of the statute, the CBA, and their contractual intent in resolving the issue raised in this case. We conclude that our analysis must begin with application of the statutory language. The legislature created the TRA to provide a retirement fund for Minnesota's teachers. *See* Minn.Stat. ch. 354 (1996). The TRA Board manages the retirement fund and may only act according to its statutory authorization. *See* Minn.Stat. § 354.06, subd. 1 (1996) (management of teachers retirement fund is vested in TRA Board); *cf. Axelson*, 544 N.W.2d at 299-300 (reversing Board of Trustees for Minneapolis Teachers' Retirement Fund decision to allow member to purchase retirement service credits for years spent on leave of absence because it did not have statutory authority).

[5][6] Construction of the teachers retirement statutes is a question of law, fully reviewable by this court. *See Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985). A court reviewing a TRA Board decision must first look to the statute and resolve any questions of interpretation before applying it to the facts of a case. A CBA between teachers and their employers is relevant to the extent that it is consistent with the law; the contracting parties may not override controlling law. *See Axelson*, 544 N.W.2d at 300-01 (agreement between Minneapolis Teachers' Retirement Association and teacher could not provide authorization for action that Association had no statutory authority to take).

The Teachers Retirement Act states that "salary" means

the compensation, upon which member contributions are required and made, that is paid to a teacher before any allowable reductions permitted under the federal Internal Revenue Code of 1986, as amended through December 31, 1988, for employee selected fringe benefits, tax sheltered annuities, deferred compensation, or any combination of these items.

Minn.Stat. § 354.04, subd. 35(a) (1992). Among other things, "salary" does not include payments in lieu of any employer paid group insurance coverage, including the difference between single and family premium rates, that may be paid to a member with single coverage Minn.Stat. § 354.04, subd. 35(b)(3).

The TRA Board argues that subdivision 35(b)(3) excludes the \$3,810 paid to the teacher in this case because the employer paid the money pursuant to the CBA in place of employer paid insurance coverage. We find this interpretation both too broad for the plain meaning of the statutory exclusion and inconsistent with the remedial nature of the statute.

The plain language of the statute, we believe, compels an exclusion of payments from salary in those situations where an employer provides group insurance to all employees, but an employee declines to accept such coverage, and the employer compensates that employee with payments representing the cost differential. In such situations, an employee who receives the additional funds because he declined coverage should not be able to have a higher salary for the purposes of calculating retirement than those employees who accepted group insurance from the employer. Thus, the employee who declines group insurance coverage offered by an employer receives payments "in lieu of" an employer paid group insurance policy and is prohibited by subdivision 35(b) from including these payments as salary.

While the parties here agree that the additional salary was paid in 1992-93 as a means of compensating for insurance coverage, we *349 do not believe that the payments fit within the meaning of

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the statutory exclusion. In 1992-93, the employer did not provide employer paid group insurance coverage to all of its employees. The contract did not, in application, require all employees to have insurance, nor did it offer one insurance plan to all employees. Rather, the employees were given their salary (including the additional \$3,810) and allowed to apply any amount or no amount toward approved expenses in a pre-tax plan. Although many of the employees used all or some of the \$3,810 to purchase health insurance, several took the compensation in cash. Those employees did not receive the \$3,810 as an offset for declining an employer paid group insurance program; they merely chose not to use their compensation to purchase insurance that year.

It appears to this court that the TRA Board implicitly recognized the interpretation we make here when it categorized as "salary" whatever portion of the \$3,810 an employee chose not to apply toward an insurance plan. Moreover, we believe that the interpretation of the TRA Board regarding the \$3,810 created an untenable result. It punished those who used the additional money to purchase insurance (by restricting or eliminating retirement contributions on those amounts) and rewarded those who failed to purchase insurance (by permitting all of the \$3,810 to enhance retirement contributions). See Minn.Stat. § 645.17(1) (1996) (presumption that legislature does not intend unreasonable result).

[7] Our strict interpretation of the exclusion is also consistent with the purpose of the statute. In *Mattson v. Flynn*, 216 Minn. 354, 359, 13 N.W.2d 11, 14 (1944), the supreme court clarified that teachers retirement statutes are for benefit of teachers who render "long and faithful service" and to support the public interest of "making the occupation of 'teacher' in this state more attractive to qualified person[s]." Because the teachers retirement statutes are remedial in nature, they are entitled to liberal construction to insure the beneficial purposes intended. *Id.* at 361, 13 N.W.2d at 15.

DECISION

We conclude that Minn.Stat. § 354.05, subd. 35(b)(3), does not apply to exclude the \$3,810 Stang received in compensation during the 1992-93 school year. Therefore, the TRA Board should have included those funds in Stang's salary when determining his TRA pension contributions. We reverse the TRA Board's decision.

Reversed.

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480A.08(3).

Court of Appeals of Minnesota.
In the Matter of: The Appeal of Roger **OGREN** to
the Board of Trustees of the State of Minnesota
Teachers Retirement Association.
No. CO-96-1390.

March 18, 1997.

Minnesota Teachers Retirement Association File
No. 62262

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MN 55408 (for Relator)

Hubert H. Humphrey III, Attorney General, Jon K.
Murphy, Assistant Attorney General, 525 Park
Street, Suite 200, St. Paul, MN 55103 (for Re-
spondent)

Considered and decided by SHORT, Presiding
Judge, AMUNDSON, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

AMUNDSON, Judge.

*1 Relator Roger **Ogren** challenges the decision of
the Teachers Retirement Association, arguing that
the doctrines of promissory and equitable estoppel
preclude alteration of his retirement benefit from
the amount calculated in his pre-retirement estimate
statement. We affirm.

FACTS

Relator Roger **Ogren** worked as an administrator
and teacher in the Minnesota public school system
for 35 years. Fully tenured, **Ogren** was a member
of the Teachers Retirement Association (retirement
association) and a participant in the retirement pro-
gram administered by its board of trustees under
Minn.Stat. § 354.06. Upon retirement, retirement
association members are entitled to a monthly an-
nuity, which is based on their "high-five average
salary," i.e., the average of the participant's highest
five salary years. The member's "high-five average
salary" is multiplied by a percentage determined ac-
cording to years of service to determine the retire-
ment benefit. Minn.Stat. § 354.44, subd. 6 (1994).

Anticipating possible retirement, **Ogren** had a pre-
retirement counseling interview with a retirement
association representative on April 23, 1993. At
that meeting, he was provided with a "Monthly Re-
tirement Annuity Estimate," which estimated a
"Life E-2" annuity benefit for him to be \$4,893 per
month. This estimate was based on **Ogren's**
"high-five average salary" of \$76,461. On February
7, 1994, **Ogren** submitted his resignation to the
school district to be effective on June 30, 1994.

On April 4, 1994, **Ogren** received a letter from the
retirement association that estimated a "Life Plan
E-2" annuity benefit for him to be \$4,873.00 per
month. This estimate was based on **Ogren's**
"high-five average salary" of \$76,142.00. Sub-
sequently, **Ogren** filled out an application for his
retirement annuity, indicating his selection of the
"Life Plan E-2" annuity benefit.

On September 28, 1994, before receiving his first
annuity payment, **Ogren** received a call from a re-
tirement association representative stating that his
projected retirement annuity benefit had been incor-
rectly calculated. This discussion was followed by a
letter that informed **Ogren** that his retirement annu-
ity benefit would be reduced because the previous
estimates of his annuity were based on an erroneous
calculation of his salaries. The letter said the salar-

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ies used to calculate his "high-five average salary" erroneously included certain fringe benefits that should have been excluded. Therefore, according to the statutory definition of "salary," which excludes the value of certain fringe benefits, the retirement association recalculated **Ogren's** benefit by subtracting the fringe benefits that could not be used. See Minn.Stat. § 354.05, subd. 35. The retirement association determined **Ogren's** "high-five average salary" to be \$71,303.45, which equates to a monthly benefit of \$4,815.41.

Upon notification of the reduction in his retirement benefit, **Ogren** appealed to the retirement association's executive director. His appeal was rejected. He then appealed that decision to the retirement association board of trustees and a hearing on the matter was held. The board denied **Ogren's** appeal, stating that the benefit estimates provided to **Ogren** were only projections, not final calculations. This appeal followed.

DECISION

*2 A public retirement fund is analogous to an administrative agency. *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn.1996). Decisions by the fund's board will be reversed if they are "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Id.* (quoting *Dokmo v. Independent Sch. Dist. No. 11*, 459 N.W.2d 671, 675 (Minn.1990)).

Ogren argues that the doctrines of promissory and equitable estoppel bar the retirement association from reducing his retirement annuity benefit. He contends that regardless of whether the estoppel is characterized as promissory or equitable, the retirement association should be estopped from modifying his retirement benefit after he retired from the amount calculated in his pre-retirement estimate statement. We disagree.

But before analyzing the elements of promissory

and equitable estoppel, the first issue to be addressed is whether the retirement association had the authority to act. If the retirement association had no authority to act, its action cannot be made effective by estoppel. See *Axelson*, 544 N.W.2d at 299-300. Thus, the threshold issue that must be addressed is whether the retirement association had the authority to pay **Ogren** the benefit amount calculated in the pre-retirement benefit estimates.

The retirement association is a state-created board that administers a pension plan for Minnesota's public school teachers, administrators, and principals in accordance with the provisions of the Teachers Retirement Act. See Minn.Stat. ch. 354. In chapter 354, the Minnesota legislature mandated how the retirement association is to calculate members' retirement benefits. The retirement association must refer to specific sections of chapter 354 when calculating a "high-five average salary" and ultimately determining a monthly annuity. The law in force when a claim to the pension arises governs the right to that pension. *Axelson*, 544 N.W.2d at 300.

Here, **Ogren** had a right to recover benefits (a claim to pension) from the retirement association on June 30, 1994, when his retirement became effective. At that time, "salary" was defined as:

the compensation, upon which member contributions are required and made, that is paid to a teacher before any allowable reductions permitted under the federal Internal Revenue Code of 1986, * * * for employee selected fringe benefits, tax sheltered annuities, deferred compensation, or any combination of these items.

Minn.Stat. § 354.05, subd. 35(a) (1992). "Salary" did not include, among other things:

(3) payments in lieu of any employer paid group insurance coverage, including the difference between single and family premium rates, that may be paid to a member with single coverage;

*3 (4) any form of payment made in lieu of any

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other employer paid fringe benefit or expense.

Id., subd. 35(b).

Thus, the retirement association must calculate **Ogren's** "high-five average salary" using this definition of "salary." The salaries used to produce his pre-retirement estimates included payments in lieu of "employer paid group insurance coverage" and "employer paid fringe benefits." Thus, the estimates were calculated improperly and cannot be used to determine **Ogren's** monthly annuity. *See id.* The retirement association does not have the authority to calculate **Ogren's** "high-five average salary" by using a different definition of "salary" from that provided in Minn.Stat. § 354.05, subd. 35, so neither promissory nor equitable estoppel can be employed to vouchsafe the pre-retirement estimate provided by the association calculating **Ogren's** retirement benefit.

Affirmed.

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In Matter of Ogren
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 480A.08(3).

Court of Appeals of Minnesota.
 John WOHLWEND, Relator,

v.

DULUTH TEACHERS' RETIREMENT FUND AS-
 SOCIATION, Respondent.
 No. C6-01-1913.

June 4, 2002.

Duluth Teachers' Retirement Fund Association.
 Duluth Teachers' Retirement Fund Association David
M. Johnson, Thibodeau, Johnson & Feriancek, PLLP,
 Duluth, MN, for relator.

Joseph V. Ferguson III, Joseph M. Fischer, Clure,
 Eaton, Ferguson, Bray & Tierney, P.A., Duluth, MN,
 for respondent.

Considered and decided by LANSING, Presiding
 Judge, RANDALL, Judge, and STONEBURNER,
 Judge.

UNPUBLISHED OPINION

LANSING, Judge.

*1 The Duluth Teachers' Retirement Fund Association denied John Wohlwend's petition to add 19 years to his 12-year service credit. The association found that a contribution refund Wohlwend received in 1982, after 19 years of teaching, was not a loan dischargeable in bankruptcy and that promissory estoppel did not preserve Wohlwend's right to repay the refund after retirement. The decision denying the petition is reasonable, supported by substantial evidence, and consistent with the law. We affirm.

FACTS

As a result of declining enrollment, the Duluth school board, in May 1982, notified John Wohlwend that he would not be reemployed the following school year. Wohlwend, who had been a teacher in the Duluth schools since 1963, was given a termination date of August 1, 1982.

On July 5, 1982, Wohlwend sent a letter to the association requesting a refund of his retirement-account contributions. The association sent Wohlwend a check for \$15,295, the amount that Wohlwend had contributed to his retirement account during his 19 years of service as a teacher. Two days after Wohlwend received his refund, and almost a month before Wohlwend's effective termination date, the Duluth school board notified Wohlwend of an available position for the 1982-83 school year, created by teacher turnover. The association did not receive notice of Wohlwend's rehire before distributing the refund to him, and Wohlwend did not return the refund or independently notify the association that he had been rehired.

At least twice during the 1990s, the association notified Wohlwend by letter that he had to repay the refund in order to reinstate his 19 year service credit. One of the letters stated that upon retirement, "the refund must be paid at least 30 days prior to [Wohlwend's] first annuity check." Wohlwend made no repayment.

Wohlwend retired from the Duluth public schools on July 31, 1999. The following December, Wohlwend filed for bankruptcy, listed the association as a creditor, and obtained a discharge from indebtedness in a Wisconsin bankruptcy court. Wohlwend then applied for retirement benefits from the association including a service credit for 19 years before his 1982 refund. The association notified him that repayment of the refund was not a debt dischargeable in bankruptcy and calculated Wohlwend's retirement benefits based only on the 12-year service credit that accrued after his 1982 refund.

On November 12, 2000, Wohlwend offered to repay the refund if the association would reinstate the addi-

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tional 19-year service credit. The association declined to accept the repayment because Wohlwend had terminated his teaching service the previous year and was no longer a coordinated member eligible to make a repayment.

Seven months later, Wohlwend filed a petition with the association board of trustees for review of the denial of the 19-year service credit. The board affirmed the denial, and Wohlwend appeals by writ of certiorari.

DECISION

*2 Judicial review of a decision by a teachers' retirement fund board is analogous to review of a decision by an administrative agency. Axelsson v. Minneapolis Teachers' Ret. Fund Ass'n, 544 N.W.2d 297, 299 (Minn.1996). We will reverse the decision only if it is "fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within [the board's] jurisdiction, or based on an error of law." *Id.* (quoting Dokmo v. Indep. Sch. Dist. No. 11, 459 N.W.2d 671, 675 (Minn.1990)).

I

Wohlwend's primary contention throughout this proceeding has been that the retirement fund distribution, made at his request in 1982, was not authorized by statute because his teaching position was reinstated before termination in 1982. Because it was unauthorized, Wohlwend maintains it was a loan rather than a distribution and that he could discharge the loan in bankruptcy and still receive service credit for those years. Alternatively, he contends that if it was not dischargeable in bankruptcy, it is a loan on which the statute of limitations has run. We are not persuaded by either argument.

Wohlwend's 1982 eligibility for a refund from the teachers' retirement fund is governed by Minn.Stat. § 354A.37, subd. 1 (1982). See Axelsson, 544 N.W.2d at 300 (stating that law governing right to pension is law in force when claim arises). That subdivision states, "Any coordinated member who ceases to render teaching service for the school district in which the teachers retirement fund association is located shall be entitled to a refund in lieu of any other annuity or benefit from the teachers retirement fund association." Minn.Stat. § 354A.37, subd. 1 (1982) (em-

phasis added). "Teaching service" is "any service as a teacher performed by any person included within the definition of a teacher." Minn.Stat. § 354A.011, subd. 28 (1982). "Teacher" is defined as "any person who renders service in a public school district * * * as * * * a full time employee in a position for which a valid license from the state board of education is required." Minn.Stat. § 354A.011, subd. 27(a) (1982).

Wohlwend was reinstated to teaching service almost a month before his effective date of termination and, therefore, arguably never "ceased to render teaching service." But Wohlwend cannot claim that he is not obligated to repay the retirement fund distribution when the refund was based on information about his termination that he provided and failed to correct. See Minn.Stat. § 354A.37, subd. 1 (stating "application for the refund shall not be made prior to 30 days after the cessation of teaching services if the coordinated member has not resumed active teaching services for the district").

Even if Wohlwend were not precluded from benefiting from the self-created error, we find no authority for his claim that an improper refund would constitute a loan. Nothing in the 1982 version of Chapter 354A or the association's articles of incorporation or by-laws gives the association the authority to make loans to teachers. The remedy for an improper distribution would be no different from the remedy for a proper distribution: it must be repaid within the prescribed time to count as service credit. Minnesota law provides that if a member "applies for and accepts a refund pursuant to section 354A.37," then all service credit is terminated. Minn.Stat. § 354A.38, subd. 1 (1982). The loss of the service credit is the direct result of Wohlwend's applying for and accepting the refund.

*3 The board properly denied Wohlwend's request to have his 19 year service credit reinstated because the refund was not a loan and the termination of the service credits occurred as a result of Wohlwend's application for and acceptance of the refund.

II

Wohlwend offered to repay the refund on November 12, 2000. At that time, Wohlwend had been retired for over a year. Repayment eligibility is restricted to coordinated members Minn.Stat. § 354A.38, subd. 2

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(1982). (“A coordinated member * * * shall be entitled to repay the refund.”).

The statute defines “coordinated member” as “any member of the teachers retirement fund association who is covered by the coordinated program of the association.” Minn.Stat. § 354A.011, subd. 11 (1982). The statute further defines “member” for the purposes of annuities or benefits as “every teacher who joins and contributes to the respective teachers retirement fund association who has not retired or terminated teaching service.” Minn.Stat. § 354A.011, subd. 15 (1982). The statute defines retirement as “the time after the date of cessation of active teaching service by a teacher who is thereafter entitled to an accrued retirement annuity.” Minn.Stat. § 354A.011, subd. 21 (1982).

In short, the teacher retirement statute requires that, in order to repay the refund, Wohlwend must not be retired or have terminated his teaching service. Wohlwend requested that his retirement be effective July 31, 1999. It is undisputed that he had terminated his teaching service on or before that date. Wohlwend was then eligible for accrued annuity retirement under Minn.Stat. § 354A.31, subd. 1 (1998) because he had ceased to provide teaching services, was older than 55 years old, and had more than 3 years of service credit. Therefore, he met the statutory definition of retired and was no longer a coordinated member who was eligible to repay the refund.

The association's articles of incorporation state, “A person's membership in the Association shall terminate whenever he has been paid all benefits to which he is, or may become, entitled.” This definition of membership appears to conflict with the statutory definition because it provides that Wohlwend would continue to be a member until he has been paid all benefits to which he is entitled. Because Wohlwend is relying on the statute to establish his eligibility to repay the refund, however, the statute's definition of “member” controls. The board did not err in applying the statutory definition of member and in holding that Wohlwend was not entitled to make repayment because he was no longer a member.

Wohlwend also argues that the association is estopped from denying his offer to repay the refund, and thereby restoring his service credit, because he relied on a letter the association sent him in July

1994, that stated that the refund must be repaid 30 days before he received his first annuity check. Wohlwend claims that had he known that he would be required to repay the refund before that time, he would have done so. He invokes promissory estoppel to prevent the association from denying his request to repay the refund.

*4 Even if Wohlwend were able to show that he reasonably relied on the language in the letter to mean that he could extend his repayment right until thirty days before he requested an annuity check, his estoppel argument still fails. The refund repayment option is a “creature of statute,” and the association only has the authority to take action that is authorized by statute. Minneapolis Bd. of Educ. v. Sand, 227 Minn. 202, 211, 34 N.W.2d 689, 695 (1948). The only way the association can honor a request for repayment is if the requestor meets the statutory requirements for repayment. *Id.* at 211-12; *see also Axelson*, 544 N.W.2d at 299-300 (denying teacher's request to have two years during which he was in Peace Corps added to his service credit years because promissory estoppel will not lie “where an agency has no authority to act”); Spaulding v. Board of County Comm'rs, 306 Minn. 512, 515, 238 N.W.2d 602, 604 (1976) (“The county cannot be bound by estoppel to make unauthorized payments.”).

Only “members” are permitted to repay the refunds, Minn.Stat. § 354A.38, subd. 2; consequently, Wohlwend's retirement prevents him from repaying the refund. In both *Sand* and *Axelson*, the association was determined to have no statutory authority to accept repayment from a non-member. Therefore, Wohlwend cannot rely on the doctrine of promissory estoppel to force the association to honor his untimely request to repay the refund.

Because we hold that the board did not err in denying Wohlwend's request to repay the refund and that promissory estoppel cannot be used to require the board to take action that is not statutorily authorized, we affirm. Because we affirm, we decline to reach the issue of the appropriate interest rate to be charged upon repayment.

Affirmed.

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