BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

IN THE MATTER OF	)	EXCISE POLICE OFFICERS' AND
THOMAS L. WILLIAMS,	)	CONSERVATION OFFICERS'
	)	RETIREMENT PLAN
Petitioner.	)	

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

This matter was assigned to me for adjudication of Thomas Williams' appeal from the PERF Board's determination that he is entitled to 30 years of creditable service in calculation of his retirement allowance under the Excise Police and Conservation Enforcement Officers' Retirement Plan (E & C Plan). Officer Williams contends that he is entitled to 32 years of creditable service. The two-year difference between the parties is a period when Officer Williams was off duty and receiving disability benefits.

The PERF Board has filed a motion for summary judgment. Officer Williams has also filed papers which are construed as a motion for summary judgment. The motions are fully briefed and ready for decision.

Evidence and Objections

Both parties have submitted documents labeled as exhibits, none of which are authenticated. In addition, Officer Williams' opening submission includes first-hand factual statements as would be made in an affidavit, but it is not in the form of an affidavit. With one exception (discussed below), neither party has objected to the admissibility of the other party's evidence, and in particular neither party has objected that the materials are inadmissible under Ind. Code § 4-21.5-3-23(b). Therefore, any such objection is deemed waived and all evidence submitted by the parties will be considered to the extent material and relevant.

The one exception is the PERF Board's objection to Officer Williams' Exhibit 1, a letter from the Director of the Department of Natural Resources (DNR) thanking Officer Williams for his "thirty-two years of dedicated service to the department as a Conservation Officer." The PERF Board contends that this letter is inadmissible hearsay. Whether it is or not, I find that it carries no weight, and is therefore irrelevant, to the question of whether Officer Williams had 32 years of creditable service under the E & C Plan. It is clear that the Director did not write the letter with the intent to find or certify years of creditable service. Furthermore, a finding by the DNR Director would not carry any weight on the legal question

of whether Officer Williams is entitled to credit for the time he was on disability. The PERF Board's objection is sustained and Exhibit 1 will not be considered.

The PERF Board also objects to Officer Williams' response brief on the ground that it may not have been timely filed. Documents in an administrative adjudicatory proceeding are deemed filed when postmarked. I.C. § 4-21.5-3-1(f)(2). Officer Williams' response to the PERF Board's motion for summary judgment was postmarked on November 27, 2006, before the November 29 deadline. His reply was postmarked December 21, 2006, before the December 22 deadline. Both documents were timely filed. The PERF Board's objection is overruled.

Findings of Undisputed, Material Facts

1. Officer Williams began his employment by DNR as a conservation officer on July 1, 1973.

2. Upon employment, Officer Williams automatically became a member of the E & C Plan. I.C. § 5-10-5.5-5(b).

3. Every E & C Plan participant is required to contribute three percent of the first $8,500 of annual salary (i.e., up to $255) to the participants' savings fund, in the form of payroll deductions. I.C. § 5-10-5.5-8.

4. Officer Williams contracted Lyme Disease in 2000. According to a letter from DNR, his first day off work for disability purposes was January 31, 2000.

5. Officer Williams remained on standard payroll, taking sick leave, through February 19, 2000. Through that date, he contributed $243.73 to the E & C Plan participants' savings fund.

6. For the pay period starting February 20, 2000, Officer Williams used six days of sick leave and then began receiving short-term disability benefits under the State of Indiana's disability benefit plan created pursuant to I.C. § 5-10-8-7(d). See also 31 IAC 3-1-1 et seq. (State Personnel Department rules creating disability plans).[1]

7. Thereafter, Officer Williams augmented his benefit (from 60 percent of salary to 80 percent) by using one day of paid leave each week. 31 IAC 3-1-4.

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[1] Under the State plan, an employee begins receiving short-term benefits after being absent from work for 30 consecutive calendar days. 31 IAC 3-1-2. Therefore, Officer Williams would have become eligible for short-term disability benefits on or about March 1, 2000.

8. Based on his pre-illness contributions and contributions deducted from his pay for sick leave days, Officer Williams contributed the maximum $255 to the E & C Plan participants' fund in 2000.

9. Officer Williams become eligible for and began receiving long-term disability benefits on July 23, 2000.[2] He continued to augment his benefit (from 50 percent of salary to 70 percent) by using one day of paid leave each week. 31 IAC 3-1-11(a).

10. During calendar year 2001, Officer Williams contributed the maximum [redacted] to the E & C Plan participants' fund, through payroll deductions from the paid leave days he used.

11. Officer Williams states that while on disability, he continued to respond to correspondence and answer questions from the public as a conservation officer, but he would direct poaching or enforcement issues to the district or region.

12. Officer Williams returned to work on February 4, 2002.

13. Officer Williams signed an application for retirement benefits under the E & C Plan on April 12, 2005, stating that his last day in pay status would be July 29, 2005, so the effective date of retirement benefits would be August 1, 2005.

14. A PERF Board representative informed Officer Williams, in a telephone conversation on June 19, 2006, that his retirement allowance was based on an average annual salary of [redacted] and 30 years of creditable service.

15. On the same date, Officer Williams wrote a letter to the PERF Board appealing from this determination and arguing that he should be credited with 32 years of service.

16. On July 20, 2006, the PERF Board, by attorney Linda Villegas, issued a decision affirming the determination of 30 years of creditable service. The letter stated that DNR had indicated that "you were off work on January 31, 2000 and returned on February 4, 2002." The letter went on to state that in order to receive service credit under the E & C Plan, the participant must have contributed three percent of the first [redacted] of annual salary.

17. Officer Williams timely appealed from the PERF Board's decision by letter dated August 1, 2006, and received by the PERF Board on August 3, 2006.

18. At a prehearing conference, the PERF Board conceded that Officer Williams contributed three percent of his salary when he was on disability, but contended that its determination of 30 years of creditable service is still correct. (See Order of October 5, 2006.)

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[2] An employee becomes eligible for long-term disability benefits after six months of continuous absence from work. 31 IAC 3-1-8(3).

Conclusions of Law

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b). This mirrors T.R. 56(C). The standard for summary judgment under that rule is well-established:

> A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. . . . A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.

McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. App. 2006).

The material facts of this case are undisputed:

- Officer Williams was employed as a conservation officer from July 1, 1973, through July 29, 2005, a period of 32 years and 28 days.
- He was off duty from January 31, 2000, until February 4, 2002.
- Through February 29, 2000, he used paid leave to receive his full salary.
- From March 1, 2000, until February 4, 2002, he received disability benefits but also used at least one day of paid leave each week.
- He contributed the maximum [redacted] to the E & C Plan participants' savings fund each year that he received disability.

On these facts, the legal question is how many years of "creditable service" should be used to calculate Officer Williams' retirement allowance under I.C. § 5-10-5.5-10(b), which provides:

> (b) The annual retirement allowance of a participant, payable in equal monthly installments beginning on his normal retirement date, shall be a percentage of his average annual salary, such percentage to be twenty-five percent (25%) increased by one and two-thirds percent (1 2/3%) of his average

annual salary for each completed year of creditable service more than ten (10) years and one percent (1%) of his average annual salary for each completed year of creditable service more than twenty-five (25) years.

(Emphasis added.)

In arguing that the period of his disability should be counted as "creditable service," Officer Williams relies primarily on a provision of the State's disability plan, 31 IAC 3-1-21(e), which states, "Time spent on short or long term disability is credited as service for retirement fund purposes." He also relies on two provisions of the E & C Plan statute. The first, I.C. § 5-10-5.5-7, states that creditable service "under this chapter" shall be computed in the same manner and amount as under the public employees' retirement law. The second, I.C. § 5-10-5.5-19, states that the E & C Plan shall be governed by the law creating the public employees' retirement fund (PERF) "in all respects and to the extent applicable and except as otherwise specifically enumerated in this chapter." Under the statutes governing PERF, a state employee "is entitled to service credit for the time the member is receiving disability benefits under a disability plan established under IC 5-10-8-7." I.C. § 5-10.2-3-1(f).

The PERF Board contends that time spent on disability is not "creditable service," but is unable to point to any specific statutory authority for its position. Instead, the PERF Board relies on the absence of a provision for service credit while a participant is on disability. The PERF Board notes that the General Assembly specifically dealt with time on disability in the PERF statute, specifically citing I.C. § 5-10.2-3-1(f), but that the E & C Plan statute is silent on the question. The PERF Board also argues that the inclusion of a disability benefit in the E & C Plan indicates legislative intent that officers will be "removed from active service" while on disability.

The first step in interpreting a statute is to look to the plain and ordinary meaning of the language used. Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941, 947-48 (Ind. 2001). If statutes are ambiguous or facially inconsistent, they must be construed pursuant to several well established guidelines, with the ultimate goal of determining and implementing the intent of the General Assembly. Id.

In determining what the legislature meant by "creditable service," we start with the E & C Plan statute itself. Among its provisions is I.C. § 5-10-5.5-7, which appears to define creditable service:

Transfer of creditable service

Sec. 7. Upon election to become a participant by any officer who is a member of the public employees' retirement fund, the board shall transfer all creditable service standing to the credit of the electing officer under the public employees' retirement fund to the credit of the electing officer under the retirement plan created by this chapter.

> Creditable service under this chapter, including credit for military service, shall accrue and be computed and credited to participants in the same manner and in the same amount as creditable service accrues, is computed and credited under the public employees' retirement law.

(Emphasis added.)

The second paragraph of Section 7 (underlined above) plainly adopts the definition of "creditable service" under the public employees' retirement law. That law clearly states:

> **Creditable service**
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> * * *
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> (f) A member who is a state employee is entitled to service credit for the time the member is receiving disability benefits under a disability plan established under IC 5-10-8-7.
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> * * *

I.C. § 5-10.2-3-1(f).

The PERF Board argues that I.C. § 5-10-5.5-7 applies only to the situation described in the first paragraph, transfer of service credit by an officer who elected to become a participant in the E & C Plan, and that this election was available only to officers who were employed as such on September 2, 1971, I.C. § 5-10-5.5-5(a). But this argument ignores that the second paragraph defines creditable service "under this chapter," not merely under Section 7. The chapter is Chapter 5.5 of Title 5, Article 10, which chapter is the entire E & C Plan. There is no inherent inconsistency between the first and second paragraphs—the first applies to officers who were employed when the plan was created, and the second applies to all creditable service under the plan.[3]

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[3] The PERF Board makes reference to the title of Section 7, "Transfer of creditable service," as potentially limiting the scope of the statute. The statute as originally enacted, 1972 Ind. Acts P.L. 1, § 1, contained no title, so the title must have been added by subsequent codifiers. (In the Burns edition of the Indiana Code, the title of the section is "Creditable service standing – Transfer.") A title added by codifiers cannot be the basis for construing the statute. In any event, using the title of a statute to determine legislative intent is unnecessary where the language of the statute itself is clear. Miles v. Department of Treasury, 199 N.E. 372, 377 (Ind. 1935); Grave v. Kittle, 101 N.E.2d 830, 832-33 (Ind. App. 1951).

Removing any doubt on the question is I.C. § 5-10-5.5-19:

Public employees retirement fund law; applicability

> Sec. 19. The [E & C] retirement plan created by this chapter shall, in all respects to the extent applicable and except as otherwise specifically enumerated in this chapter, be governed by the law creating the public employees' retirement fund, and for that purpose, the provisions of IC 5-10.3 are hereby incorporated into this chapter by reference.

Here again, the legislature has provided that details of administration of the E & C Plan not specifically addressed by Chapter 5.5 shall be governed by the PERF statutes. As Officer Williams points out, I.C. § 5-10.3-7-4 provides that creditable service for PERF is determined as specified in I.C. § 5-10.2-3-1, quoted above.

The PERF Board attempts to limit Section 19 to the "creation" or initiation of the plan. The plain language of the statute does not support this interpretation. It does not say, "The creation of the retirement plan created by this chapter" shall be governed by the PERF statutes. Instead, it says, "The retirement plan created by this chapter" shall be so governed.[4]

The language of I.C. § 5-10-5.5-7 and I.C. § 5-10-5.5-19 is unambiguous in adopting the equally unambiguous definition of creditable service contained in I.C. § 5-10.2-3-1(f). Thus there is no need to resort to guidelines of statutory construction in determining its meaning. In particular, because the meaning of the statutes is plain and not ambiguous, there is no need to determine whether the PERF Board's interpretation should be given any particular weight or deference. LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000) (agency's interpretation of statute is not entitled to deference if inconsistent with statute); Parkview Hospital v. Roese, 750 N.E.2d 384, 389 (Ind. App. 2001) (courts will not defer to agency regulation that conflicts with authorizing statute or underlying policies). Nor is it necessary to determine the possible effect of the Personnel Department regulation at 31 IAC 3-1-21(e), which is completely consistent with the statutes discussed above.

Having determined that creditable service includes time spent on disability, the result in this case is straightforward. When the time he spent on disability is included, Officer Williams is entitled to 32 completed years of creditable service.

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[4] It is interesting to note in this regard that the E & C Plan is silent on the procedure by which a participant can claim that an error has been made in calculating his or her retirement allowance. Such a procedure is provided for PERF. I.C. § 5-10.3-8-5. This very appeal, therefore, appears to be authorized by Section 19's incorporation of the PERF statutes.

Conclusion

There is no genuine dispute of material fact and Officer Williams is entitled to judgment as a matter of law. Officer Williams' motion for summary judgment is GRANTED and the PERF Board's motion for summary judgment is DENIED. The PERF Board's calculation of Officer Williams' retirement allowance based on 30 years of creditable service is REVERSED, and the PERF Board shall recalculate his retirement allowance based on 32 years of creditable service. Officer Williams shall also be paid retroactively for the resulting difference in monthly retirement allowance since his retirement.

DATED: January 4, 2007.

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
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STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

> (b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:
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> (1) affirming;
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> (2) modifying; or
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> (3) dissolving;
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> the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.
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> (c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.
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> (d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

(1) identifies the basis of the objection with reasonable particularity; and

(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service Priority Mail, postage prepaid, certified mail, return receipt requested, on January 4, 2007:

Thomas L. Williams

[redacted]

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Wayne E. Uhl
Administrative Law Judge