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2017 Aug 09 PM 5:32  
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT  
CASE NUMBER: 2016-CV-000824



**Court:** Shawnee County District Court  
**Case Number:** 2016-CV-000824  
**Case Title:** Nancy Fritz vs. Kansas Public Employees Retirement System  
**Type:** MDO on Judicial Review

SO ORDERED.

A handwritten signature in cursive script that reads "Evelyn J. Wilson".

/s/ Honorable Evelyn Wilson, District Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION FIVE**

NANCY FRITZ,	)	
	)	
Petitioner,	)	
	)	2016-CV-000824
vs.	)	
	)	
KANSAS PUBLIC EMPLOYEES	)	
RETIREMENT SYSTEM,	)	
	)	
Respondent.	)	

**MEMORANDUM DECISION AND ORDER**

The above captioned matter comes before the Court upon Petitioner Nancy Fritz’s Petition for Judicial Review,<sup>1</sup> filed on October 26, 2016; Petitioner’s Motion for Summary Judgment and Memorandum in Support, filed on February 10, 2017, and Respondent’s Motion for Summary Judgment and Memorandum in Support, also filed on February 10, 2017; Petitioner’s Response in Opposition to Respondent’s Motion and Respondent’s Response to Petitioner’s Motion, both filed on March 10, 2017; and Petitioner and Respondent’s respective Replies, both filed April 10, 2017. The issues presented in the parties’ briefs are ripe for judicial review. After careful consideration, the Court finds and concludes as follows:

**NATURE OF THE CASE**

This case asks the Court to determine the legality of the final agency action by the Kansas Public Employees Retirement System, (“KPERS”). The Petitioner claims that KPERS incorrectly interpreted and applied K.S.A. 74-4932(4) in concluding that she was, while on leave of absence from the district as a professional librarian, not an “employee” of a “participating

employer” as defined in K.S.A. 74-4931 and therefore, not eligible to receive retirement service credit for the time period in dispute. Alternatively, the Petitioner contends that, if the Court should find for the Respondent, that the Respondent should be estopped from denying the Petitioner benefits under the doctrine of waiver and estoppel.

**STATEMENT OF UNCONTROVERTED FACTS**

1. Petitioner was employed by the Shawnee Mission School District (SMSD), from September 21, 1975 through August 31, 1986 and from August 19, 1993 through August 2015 as a Professional Employee.
2. SMSD is an eligible employer as defined in K.S.A. 74-4931.
3. Petitioner enrolled as a member of KPERS when she commenced employment with SMSD in September 1975 and when she left employment in August 1986, she quit contributing to KPERS.
4. Petitioner returned to work for SMSD in August of 1993, and started making contributions to KPERS.
5. Petitioner continued making contributions to KPERS through the date of her retirement in August 2015.
6. Every year that Petitioner was employed with SMSD, she entered into a professional employee contract.
7. Petitioner was continually employed by SMSD during the terms of the professional employee contracts.

8. During contract years 2010-2011 through 2014-2015, Petitioner had the duty of serving as President of NEA-Shawnee Mission (NEA-SM) as part of the services she provided to SMSD.

9. Petitioner and SMSD entered into a professional employee contract each of the five years that Petitioner served as President of NEA-Shawnee Mission.

10. Paragraph 1 of each of the professional employee contracts referred to in Paragraph 6, supra, provides:

1. Nature of Employment. The District agrees to employ said Professional Employee in the public school system operated by the District; and the Professional Employee agrees to well and faithfully perform all duties assigned in the District in compliance with federal and state laws and according to the rules, policies, and regulations established from time to time by the Board of Education of the District.

11. Paragraph 5 of each of the Professional Employee Contracts referred to in Paragraph 6, supra, provides:

5. Professional Employee's Warranties and Obligations.

(a) ...

(b) Obligations subject to the aforementioned Articles of Agreement, the Professional Employee shall:

(i) Devote the Professional Employee's utmost Skill and Endeavor to his/her position;

(ii) Accept any assignment for which the Professional Employee is qualified according to law and the rules and regulation of the Board of Education and which is made under authority of any District administrative officer to whom the Professional Employee is responsible;

(iii) Keep and maintain all records and prepare all reports by the District;

- (iv) Carry out to the best to the Professional Employee's ability the directives, rules, regulations and policies of the Board of Education or its administrative officers; Professional acknowledges that the Board of Education reserves the right, at any time, to issue new policies or amend existing policies, as provided by law, as long as the same are not inconsistent with the aforementioned Articles of Agreement; and
- (v) Report for initial duties to be performed during the school term year (report dated for each year of school).

12. Additionally, paragraph 6 of the Professional Employee Contract provided that the Board of Education could terminate the Petitioner's employment if:

- (a) The terms of this Contract or the Articles of Agreement are breached by the Professional Employee; or
- (b) The District is without adequate funds to make the monthly payments herein provided, or if to make such payments would be a violation of the law; or
- (c) The school to which the Professional Employee is assigned is closed because of reasons beyond the control of the District.

Except where terminated as hereinbefore provided, this Contract shall continue in full force and effect for the next succeeding school year unless written notice of intention not to renew this Contract is served by the District upon the Professional Employee on or before the date designated in K.S.A. 72-5437, or unless the Professional Employee gives written notice to the District on or before the date designated in K.S.A. 72-5437 that the Professional Employee does not desire to continue with this contract. Resignations tendered after the date designated in K.S.A. 72-5437 will be accepted subject to payment of liquidated damages in the sum of \$1,000 to the district.

13. The Petitioner's job title under the professional employee contract was "Professional Employee," her employment was not seasonal or temporary, and her job duties required at least 630 hours of work per year.

14. Under the Association Business Leave policy in the negotiated agreements between SMSD and NEA-SM, Petitioner was granted leave of absence from her classroom duties to perform the duties of the President of NEA-SM position.
15. The Association Business Leave policy in the negotiated agreements remained the same during Petitioner's entire time as President of NEA-SM.
16. Petitioner received a W-2 form from SMSD reporting wages she received each year.
17. Petitioner was eligible to receive all benefits of a full-time Professional Employee of SMSD, including health insurance benefits.
18. Petitioner has access to SMSD's internet service and email, which is available only to Professional Employees and staff of SMSD, and she was given the same technology devices as all other Professional Employees.
19. During the period of employment, Petitioner was issued a building access identification badge by SMSD, which is only issued to Professional Employees and staff.
20. SMSD defined the job duties and descriptions of its Professional Employees.
21. SMSD had the sole right and discretion of assigning Petitioner's job duties.
22. The services provided by Petitioner as President of the NEA-SM were valuable services to SMSD in assisting with employee/employer relations for the district.
23. SMSD was reimbursed by NEA-SM for all of the salary and benefits associated with the President of NEA-SM's position.
24. Petitioner, while serving as President of NEA-SM as a professional employee of SMSD, worked on behalf of district administrators and for the benefit of the District.

25. Petitioner, in each of the five years as President of NEA-SM, was required to and did provide more than 630 hours of paid work per year to SMSD.
26. Dr. Gene Johnson, Superintendent of SMSD from 2008 to 2013, and Dr. Jim Hinson, Superintendent of SMSD from 2013 to the present, submitted affidavits that state, among other things, that the Petitioner was employed by SMSD during contract years 2010–2011 through 2014–2015; that her employment was neither seasonal nor temporary, and that she worked at least 630 hours of work per year for the at-issue years; that SMSD “defines the job duties and descriptions of its Professional Employees”; and that SMSD had the “sole right and discretion of assigning” the Petitioner duties. The affidavits also presented a list of ways in which the Petitioner, “while serving as President of NEA-Shawnee Mission as a contractual employee of” SMSD, “worked on behalf of district administrators and for the benefit of the District[.]” A.R., at 923–32.
27. Petitioner received a letter dated August 28, 2015 from Mary Beth Green, Chief Benefits Officer of KPERS, informing her that KPERS had concluded that, during the five years she served as President of NEA-SM, she was not eligible for KPERS service credit.
28. As a result of KPERS’ decision to take away Petitioner’s service credit for the five years she served as President of NEA-SM, her KPERS benefits, before federal withholdings, have been reduced by \$788.99 per month, for a total of \$9,467.88 per year.
29. Petitioner timely requested a hearing regarding KPERS decision set forth in the August 28, 2015 letter.
30. KPERS assigned an Administrative Law Judge, briefs were submitted, a hearing held, and the Initial Order was issued on September 9, 2016, affirming the KPERS action.

31. On September 20, 2016, Petitioner filed a Petition for Review of the Initial Order with the Board of Trustees of KPERS pursuant to K.S.A. 77-527.

32. The Board of Trustees issued a Final Order on September 30, 2016 adopting the Initial Order in full.

### STANDARD OF REVIEW

The Kansas Act for Judicial Review (“KJRA”) governs the Court’s review of this case. K.S.A. 77-621(c) list eight instances in which a district court may grant a petitioner relief from as agency action:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) The agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in the light of the record as a whole, which included that agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
- (8) the agency action is otherwise unreasonable, arbitrary or capricious.

K.S.A 77-621(c)(1)-(8)



This Court may grant relief if it finds that “the agency has erroneously interpreted or applied the law [.]” K.S.A. 77-621(c)(4). If the issue turns on an interpretation of a statute or another question of law, the Court reviews the agency decision anew, without deference to the ruling of the agency. *Redd v. Kansas Truck Center*, 291 Kan. 176, 187–88, 239 P.3d 66 (2010); *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010). A court may set aside an agency decision that rests on an error of law.

Judicial review is more limited when an agency's findings of fact have been challenged. A reviewing court may reject a factual finding only if it lacks substantial support in the evidence considering “the record as a whole” in light of the governing standard of proof. In turn, K.S.A.77–621(d) describes how the reviewing court must view the record as a whole in evaluating a particular finding:

[T]he adequacy of the evidence ... shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record ... cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

K.S.A.77-621(d). Courts must determine whether the evidence supporting the agency's factual findings is substantial when considered in light of all the evidence. Substantial evidence is such evidence as a reasonable person might accept as being sufficient to support a conclusion. *Clawson v. State, Dept. of Agric, Div. of Water Res.*, 49 Kan.App.2d 789, 797, 315 P.3d 896 (2013)

### CONCLUSIONS OF LAW

This case comes to the Court following an Initial Order by the Administrative Law Judge and a subsequent Final Order by the KPERS Board of Trustees, which affirmed the Initial Order. The KJRA allows for judicial review of any “final agency action”, defined as “the whole or a part of any agency action other than nonfinal agency action. An agency’s final order is generally considered to be “an action which determines the legal rights and duties of the parties”. *Clawson*, 49 Kan. App. at 906. In this case, the parties do not contest that the order denying service credit was a final order.

The order rests on the reasoning that the Petitioner was actually an employee of NEA-SM, who only masqueraded as an SMSD employee. The fundamental issue in this case requires the Court to determine whether the Petitioner’s employment contract with SMSD made her an “employee” of the district and, therefore, eligible to receive KPERS service credit for the final 5 years prior to retirement. The parties cite K.S.A. 74-4932(4) as the governing statutory provision.

“Employee” means any employee of a participating employer which is an eligible employer, as specified in K.S.A. 74-4931, and amendments thereto, whose employment is not seasonal or temporary and whose employment requires at least 630 hours of work per year or 3.5 hours of work per day for at least 180 days or any employee who is concurrently employed by two or more eligible employers, as specified in K.S.A. 74-4931, and amendments thereto, whose combined employment is not seasonal or temporary and whose combined employment requires at least 630 hours of work per year or 3.5 hours of work per day for at least 180 days.

K.S.A. 74-4932(4).

**A. The agency misapplied the statute and erroneously withheld the service credit from the Petitioner.**

SMSD entered in to a professional services contract with Petitioner in 2011 to provide services to the district in assisting with employee/employer relations, in accordance with an agreement between SMSD and NEA-SM. The Petitioner contends that, when she entered into the professional contract for the position created for the President of the NEA-SM, she qualified to receive service credit, as her contract and duties were with the school district. The Respondent, however, determined that, when Petitioner took a leave of absence from her classroom duties, the subsequent position she took was actually with the NEA-SM, and, therefore, she was not a true “employee” of SMSD. This case requires the Court to determine whether the Petitioner’s subsequent employment contract with SMSD made her an employee as defined by K.S.A. 74-4932(4), thereby making her eligible for KPERS service credit.

Under the SMSD/NEA-SM Agreement, the NEA-SM is to reimburse the district for all salary and benefits associated with the president’s compensation. Respondent argues that the “pass-through” arrangement that was negotiated by the school district to fund this position would bar the holder of that position from earning KPERS service credit.

K.S.A. 74-4932(4) defines “employee,” for purposes of the present issue, as:

[A]ny employee of a participating employer which is an eligible employer, as specified in K.S.A. 74-4931, and amendments thereto, whose employment is not seasonal or temporary and whose employment requires at least 630 hours of work per year or 3.5 hours of work per day for at least 180 days or any employee who is concurrently employed by two or more eligible employers, as specified in K.S.A. 74-4931, and amendments thereto, whose combined employment is not seasonal or temporary and whose combined employment requires at least 630 hours of work per year or 3.5 hours of work per day for at least 180 days. Employee shall not

include:

(a) Any employee who is covered by or eligible for or who will become eligible for retirement benefits under any retirement plan or system provided by K.S.A. 74-4925, and amendments thereto;

(b) any employee who is a contributing member of the United States civil service retirement system;

(c) any employee or class of employees specifically exempt by law, except those persons who were formerly employees of one or more of the participating employers which are eligible employers as specified in K.S.A. 74-4931, and amendments thereto, who are covered by and have contributions on deposit with the state school retirement system and who have not retired under that system on the day next preceding entry date;

(d) any employee who on entry date is covered by or eligible for or will become eligible for retirement benefits under a separate retirement system authorized or established under K.S.A. 72-1758 to 72-1769, inclusive, and amendments thereto or K.S.A. 72-6780, and amendments thereto, except that this paragraph (d) shall not include any employee, who before September 1, 1974, elects to become a member of the Kansas public employees retirement system as provided in K.S.A. 74-4935a, and amendments thereto; or

(e) on and after July 1, 1975, no person who is otherwise eligible for membership in the Kansas public employees retirement system shall be barred from such membership by reason of coverage by, eligibility for or future eligibility for a retirement annuity under the provisions of K.S.A. 74-4925, and amendments thereto. However, no person shall receive service credit under the Kansas public employees retirement system for any period of service for which benefits accrue or are granted under a retirement annuity plan under the provisions of K.S.A. 74-4925, and amendments thereto;

The manner in which the position came into existence and the source of funding is irrelevant to the defining factors of an "employee" under the above statute. The record shows that the Petitioner was paid by SMSD to perform work and services on behalf of the district

administrators to aide in employee/employer relations. Specifically, the work performed was contractually controlled by the professional employment contract, which placed the Petitioner's employment subject to the authority of the school district, not NEA-SM. The funding agreement does not make the position any less valid, as it was voluntarily agreed to by SMSD for its purposes. Here, the Petitioner served in a position analogous to that of an endowed professor: her salary was indirectly paid for by external revenue streams, but her job duties were wholly incorporated within the framework of the educational institution.

More importantly, the Respondent's decision was based on a criterion that does not exist in the statute. K.S.A. 74-4932(4)'s definition of "employee" does not consider how an employee becomes an employee, so long as they meet the requirements laid out in the statute when they do so. The evidence set forth in the affidavits of Dr. Hinson and Dr. Johnson conclusively establish that the Petitioner satisfied the requirements to be considered an "employee" of SMSD for purposes of K.S.A. 74-4932(4). Therefore, regardless of any side agreement between the SMSD and the NEA-SM, the Petitioner remained "employed" by the SMSD as a matter of law and, therefore, qualified under K.S.A. 74-4919a and K.S.A. 74-4932(4). In looking beyond the statutory requirements for a basis to deny the Petitioner service credits, the Respondent incorrectly interpreted the law and, pursuant to K.S.A. 77-621(c)(7), the matter must be reversed and remanded.

Furthermore, there is no dispute that the Petitioner's employment satisfied the remaining prong of the statute—namely, that the employee "must be in a position that is not seasonal or temporary and that the employment requires at least 630 hours of work per year or 3.5 hours of work per day for at least 180 days . . ." K.S.A. 74-4932(4). Moreover, the Agency Record

demonstrates that the Petitioner satisfied each of these remaining criteria, once the initial hurdle—the identification of her employer—has been established.

**B. The leave of absence taken from the classroom position has no effect on the ability of the Petitioner to earn service credit in another position.**

An employee cannot earn service credit for a time period when they are on a leave of absence. Respondent claims that, because Petitioner was on a leave of absence from the district, therefore, she became ineligible to continue earning KPERS service credit toward retirement. This argument would be better suited if the Petitioner were trying to claim credit for the librarian position, which she was on a leave of absence. The agreement between SMSD and the NEA-SM states that, for a period of up to six years, the holder of the position is relieved from performing those duties, in this case, as a librarian. The petitioner was on a leave of absence from her position; however, this is not dispositive of all opportunities to earn KPERS service credit.

The second half of K.S.A. 74-4936(4) lays out the possibility that a person can simultaneously hold two positions within state government and have the ability to combine those years of service, as long as they meet the eligibility requirements. K.S.A. 74-4936(4). The context of the agreement, in this case, was to establish the understanding that, upon completion of service of the NEA-SM President's position, the district was contractually required to assign the person to the same position, if available, or, if not, to a substantially equivalent position. As noted in the Agency Record, the Petitioner subsequently entered into other employment contracts with the district, thereby continuing her opportunity to gain KPERS service credit as an "employee" of a "qualified employer".

**C. The Petitioner has failed to establish that the doctrines of equitable estoppel or waiver apply.**

The Petitioner raises the question of when contractual concepts, if applied, would require the agency to act contrary to its statutory authority. Kansas courts have held that the relationship between KPERS and its members constitute a contract: "under KPERS system employees of the state and another political subdivisions make monthly contribution in exchange for promised pensions and survivor benefits upon the death or retirement of the member . . . The statutory provisions for pensions and survivor benefits constitute a contract between the system and its members." *Shapiro v. KPERS*, 216 Kan. 353, 354-55, 532 P. 2d 1081 (1975).

By statute KPERS was created a 'body corporate' and was given the status of a distinct legal entity which can sue and be sued in its official name. K.S.A. 74-4903-4. It has been granted broad powers to carry out the purposes and intentions of the act including the power to contract both with the state and with others. K.S.A. 74-4909. The statute provides that a member's rights in the system shall become vested after ten years credited service. K.S.A. 74-4917(2). In view of these provisions, it obvious that the legislature has given its consent that KPERS may be sued on contracts made in relation to performing its powers, duties, and responsibilities under the pertinent statutes. *Shapiro*, 216 Kan. at 355. The Kansas Supreme Court held that, where the state legislature has consented that one of its agencies may be sued on its express contracts, the waiver of sovereign immunity should extend to every aspect of its contractual liability . . . . *Shapiro*, 216 Kan. at 357.

Generally, a contract entered into by a governmental agent is binding on the governmental entity. However, the binding nature of governmental contracts is limited by the agency's statutory authority. A contract entered

into by a governmental entity which was beyond the scope of the entity's power is unlawful; the actions of an agency in entering into such a contract are void, and the contract is unenforceable as an *ultra vires* act. A person entering into a contract with a governmental entity is obligated to inquire into the agency's power and be aware of the limits of its powers.

*Templeton v. Kansas Parole Bd.*, 27 Kan.App.2d 471, 473-474, 6 P.3d 910 (2000).

Petitioner makes three arguments to show how her claims for waiver and equitable estoppel would be supported. However, The Kansas Court of Appeals, in an unpublished opinion, addressed the issue of equitable estoppel when applied to a state agency action. Though not binding on this Court's decision, the court of appeals' decision is persuasive.

Courts have variously stated that estoppels asserted against a governmental entity or agency requires a stronger showing than when asserted against an individual. The doctrine cannot be raised to prevent a governmental agency from discharging its statutory duties and does not apply against a governmental unit exercising governmental functions. In recognition of the heavy burden borne by one seeking to estop the government, the courts have held that the doctrine of estoppels may be raised against the government only if, in addition to the traditional elements of estoppels, the party raising the estoppels proves affirmative misconduct or wrongful conduct by the government or a government agency.

In general, estoppels cannot be asserted against a government entity based on mistaken statements of law, nor should a public officer's failure to enforce a statute correctly inhibit correct enforcement of the statute or estop more diligent enforcement.

*Bullwinkles of Lawrence, Inc. v. Hummert*, No. 84,041, unpublished opinion filed July 7, 2000.

The Court finds this reasoning persuasive.

The Petitioner has argued that the Respondent should be estopped from denying the benefit. However, there is not enough evidence to prove affirmative misconduct or wrongful conduct by the Respondent. Additionally, the only remedy that could be provided by the Court



would be to direct the agency to provide service credit for the time Petitioner did not meet the definition of employee, which the Respondent is not authorized by statute to do.

Because the Court has determined that the Petitioner met the definition of employee at the time in question, however, the Respondent's decision is hereby reversed. The Court remands the matter back to the Respondent in order for the Respondent to enter an order granting the Petitioner service credit for the years of eligible service in a manner not inconsistent with this Memorandum Decision and Order. Additionally, the Respondent is ordered to reimburse the Petitioner in the amount of any funds which were unlawfully withheld since the time Petitioner was eligible to receive benefits.

The Petitioner's arguments concerning waiver and estoppel are rendered moot by this finding.

#### CONCLUSION

For the reasons stated above, the Court GRANTS Petitioner Fritz's Motion for Summary Judgment and Reverses the Final Order of the KPERS Board of Trustees. The Court remands the matter back to the Respondent for further proceedings in accordance with the ruling set out in this Memorandum Decision and Order. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

**This Order is effective on the date and time shown on the electronic file stamp.**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

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**/s/ Louann Davis**

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Administrative Assistant