

**BEFORE THE BOARD OF TRUSTEES
TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS**

In the matter of :)
)
 Roger E. David,)
)
 Petitioner.)

**PROPOSED DECISION RECOMMENDED BY THE CLAIMS HEARING COMMITTEE
IN THE ADMINISTRATIVE REVIEW OF ROGER DAVID**

I. Introduction

Pursuant to 80 Ill. Admin. Code § 1650.610, et seq., an administrative review hearing was held May 20, 1994, in Springfield, Illinois, to consider the appeal of Teachers' Retirement System (TRS) member Roger David challenging the staff determination that Mr. David was ineligible to participate in the Early Retirement Incentive (ERI) Program.

The TRS Board of Trustees (Board), the trier of fact in this matter as provided in TRS Rule 1650.620 (80 Ill. Admin. Code § 1650.620), was represented at hearing by its Claims Hearing Committee comprised of the following Board members: Judy Tucker, Chairperson, James Bruner, and Ray Althoff. The Committee was advised in its deliberations by Ralph Loewenstein, independent counsel to the Board of Trustees. TRS' staff position was presented by Thomas Gray, TRS Assistant General Counsel. Mr. David represented himself. Also present at the hearing was Wilma VanScyoc, TRS General Counsel.

After hearing the presentations of the parties and considering all the hearing exhibits, it was the determination of the Claims Hearing Committee that Mr. David's appeal is not ripe for adjudication.

II. Relevant Statutes and Rules

In the instant case, the Board of Trustees is asked to interpret 40 ILCS 5/16-133.5, Early Retirement Incentives for Teachers, to determine Mr. David's eligibility to retire under the provisions of the ERI Program. Relevant to this inquiry are subsections 133.5(a)(4) and (5) and 133.5(e) of the statute which state:

(a) To be eligible for the benefits provided in this Section, a member must:

(4) be eligible to receive a retirement annuity under this Article (for which purpose any age enhancement or creditable service received under this Section may be used), and elect to receive the retirement annuity beginning not earlier

(than June 1, 1994 and not later than September 1, 1994 (September 1, 1995 if retirement is delayed under subsection (e) of this Section);

(5) have attained age 50 (without the use of any nge enhancement received under this Section) by the effective date of the retirement annuity;

(e) If the number of employees of an employer that actually apply for early retirement under this Section exceeds 30% of those eligible, the employer may require that, for the number of applicants in excess of that 30%, the starting date of the retirement annuity enhanced under this Section may not be earlier than June 1, 1995. The right to have the retirement annuity begin before that date shall be allocated among the applicants on the basis of seniority in the service of that employer. (Emphasis added).

This delay applies only to persons who are applying for early retirement incentives under this Section, and does not prevent a person whose application for early retirement incentives has been withdrawn from receiving a retirement annuity on the earliest date upon which the person is otherwise eligible under this Article.

III. Issue

The issue presented to the Board in the instant appeal is whether:

Under the terms of 40 ILCS 5/16-133.5(a)(4), (5) and (e), is TRS member, Roger E. David, who will not reach age 50 until May 26, 1995, eligible to file an Early Retirement Incentive (ERI) election and participate in the ERI Program in the event Mr. David's employer, the Illinois State Board of Education, has the option to and does make the decision to delay retirements pursuant to the provisions of 40 ILCS 5/16-133.5(e)?

IV. Statement of Facts

The Claims Hearing Committee determines the following to be the facts of this administrative review:

1. Teachers' Retirement System (TRS) member, Roger E. David, is employed as a Legal Counsel at the Illinois State Board of Education.
2. Mr. David's date of birth is May 26, 1945.
3. Mr. David is presently 48 years of age.
4. Mr. David will be 50 years old on May 26, 1995.

5. On January 10, 1994, Mr. David was notified by TRS that, due to his age, he was not eligible to participate in the ERI Program.

6. Due to his age, Mr. David is not eligible to retire under the provisions of the ERI Program during the period June 1, 1994 to September 1, 1994.

7. The State Board of Education has not elected to delay 1994 retirements to 1995, as of the date of the hearing.

8. Mr. David has not made an election to receive a retirement annuity as of the date of the hearing.

9. Mr. David timely filed his ERI application with TRS on January 3, 1994, and fulfilled the election requirement under 40 ILCS 5/16-133.5(a)(3).

V. Position of the Parties

At the present time, Roger David is 48 years of age and will not reach age 50 until May 26, 1995. Mr. David concedes that he is not eligible to retire during the 1994 ERI retirement window period (June 1, 1994 through September 1, 1994) because he will not have reached age 50 by the effective date of his retirement annuity. However, it is Mr. David's position that if his employer, the Illinois State Board of Education, limits the number of employees it allows to retire in 1994 pursuant to the delayed retirement provisions of 40 ILCS 5/16-133.5(e), he would be eligible to participate in the ERI Program. Mr. David reaches this conclusion by interpreting the parenthetical phrase in 40 ILCS 5/16-133.5(a)(4) to extend the ERI option to employees whose retirements have been delayed and who reach age 50 prior to September 1, 1995. TRS has interpreted 40 ILCS 5/16-133.5(a)(4) and (5) to require members to be 50 years of age no later than the last day of the ERI retirement window, September 1, 1994, in order to be eligible for ERI. TRS has determined that 40 ILCS 5/16-133.5(e) does not extend the deadline for meeting the age requirement.

VI. Discussion and Analysis

At hearing, TRS conceded that Mr. David timely filed his application under ERI by February 28, 1994. Mr. David conceded that for him to be eligible to participate in the ERI Program under his interpretation of 40 ILCS 5/16-133.5, his employer, the Illinois State Board of Education, would have to make the decision to delay retirements to June 1, 1995. Also, at hearing, TRS conceded that Mr. David had timely filed his ERI application, prior to February 28, 1994, pursuant to the requirements of 40 ILCS 5/16-133.5(a)(3). As of the date of the hearing, the State Board of Education had not decided to delay any 1994 retirement annuities to 1995. Furthermore, Mr. David had not made an election to receive his retirement annuity under 40 ILCS 5/16-133.5(a)(4). Based upon these concessions, and until both of these actions are complete, the Board has determined that Mr. David's request for administrative review is not ripe for adjudication.

As stated in Board of Trustees v. Stamp, 181 Ill. Dec. 800, 608 N.E.2d 1274 (1993):

The purpose of the ripeness doctrine in the context of challenges to administrative action " 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " (Bio-Medical Laboratories, Inc. v. Trainor (1977), 68 Ill.2d 540, 546, 12 Ill.Dec. 600, 370 N.E.2d 223, quoting Abbott Laboratories v. Gardner (1967), 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691.) The test for ripeness focuses on an evaluation of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. (Big River Zinc Corp. v. Illinois Commerce Comm'n (1992), 232 Ill.App.3d 34, 39, 173 Ill.Dec. 548, 597 N.E.2d 256.) A statute or regulation is ripe for challenge when the challenger must choose between disadvantageous compliance and risk of sanction. (On-Line Financial Services, Inc. v. Department of Human Rights (1992), 228 Ill.App.3d 99, 102, 170 Ill.Dec. 73, 592 N.E.2d 509. (Stamp at p. 809).

In the instant case, Mr. David has protected himself by timely filing an ERI application with TRS by the February 28, 1994, election deadline. However, unless and until it is determined that the State Board of Education is able to delay retirements under the provisions of 40 ILCS 5/16-133.5(c) and the State Board makes the decision to do so, and Mr. David files an application with TRS for a retirement annuity, Mr. David has no justiciable claim against TRS.

The Board further determines that Mr. David is not harmed in any way by its finding that Mr. David's appeal lacks ripeness. Mr. David will have ample time and opportunity to reassert his eligibility arguments in the event his employer elects to delay retirement. (This decision would be made around September 1, 1994, at least nine months prior to the first date Mr. David asserts he would be eligible to retire.) Mr. David cannot meet the concrete harm requirement to proceed with his appeal.

Lastly, there is no provision in the Illinois Pension Code or TRS' rules granting power to the Board of Trustees to render advisory opinions to its membership through the administrative review process. As stated in Homefinders, Inc. v. City of Evanston, 2 Ill. Dec. 565, 357 N.E.2d 785 (1976):

Since an administrative agency is a creature of the legislative body from which it derives its existence and authority, any of its acts or orders which are unauthorized by the enabling statute or ordinance are void. (Homefinders at p. 572).

For the Board to render a decision in Mr. David's case at this time would be an improper exercise of extra-statutory authority by the Board. By this decision the Claims Hearing Committee does not address the issue of eligibility.

VII. Conclusion

Based upon the foregoing, the Board dismisses Mr. David's administrative review without prejudice pending the following: (1) a decision by the Illinois State Board of Education to invoke the delay provisions of 40 ILCS 5/16-133.5(e); (2) an attempt by the State Board to delay Mr. David's retirement in conjunction therewith; and (3) an election by Mr. David to receive a retirement annuity thereunder.

VIII. Notice of Right to File Exceptions

Exceptions to the Claims Hearing Committee's Proposed Decision must be filed within fifteen (15) days of receipt by the Claimant. A Final Decision will be issued by the Board of Trustees after it has considered the Claims Hearing Committee's Proposed Decision and any exceptions filed by the Claimant.