

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD GERMOND,

Plaintiff-Appellant,

v

LENAWEE COUNTY BOARD OF  
COMMISSIONERS RETIREMENT INCOME  
PLAN and WILLIAM R. BACON,

Defendants-Appellees.

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UNPUBLISHED

April 19, 2005

No. 250238

Lenawee Circuit Court

LC No. 02-000693-CE

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

This case involves a dispute over the amount of retirement benefits to which plaintiff is entitled under a county retirement plan. The facts are largely uncontested.

Plaintiff served as the sheriff of Lenawee County from 1964 through 2000. When plaintiff retired on December 31, 2000, he was entitled to a pension benefit from defendant, Lenawee County Board of Commissioners Retirement Income Plan ("the plan").<sup>1</sup> Under the plan, plaintiff's pension benefit is computed using the average of the sixty greatest consecutive months of his monthly earnings.<sup>2</sup>

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<sup>1</sup> This plan was approved by the Lenawee County Board of Commissioners pursuant to 1851 PA 156, § 12a, as amended, MCL 46.12a.

<sup>2</sup> Section I of the Plan defines Average Monthly Earnings:

AVERAGE MONTHLY EARNINGS – the average of a Participant's greatest consecutive months of Monthly Earnings as shown below, or of all Monthly Earnings if there are fewer than the applicable number shown below.

(continued...)

Shortly before plaintiff retired, he requested that the plan use sixty months between 1988 and 1992 to determine his pension benefit and also requested that monthly earnings be computed by considering both his wages and the “net fees” he received from operating a jail food service. The plan administrator, defendant William R. Bacon (“the administrator”), denied plaintiff’s claim in a letter dated April 25, 2001:

Your claim for additional benefits is hereby denied. The reason for the denial is that the payments made to you to supply meals to the prisoners do not constitute compensation under Section 2.1(c) of the plan as then in effect. Your “profits” claimed as the result of providing such meals were never reported to the County as compensation from the County for income tax purposes. To the contrary, you operated the meals for prisoners program as a separate, independent business without reporting your profits to the County.

Your claim is also denied under Section 1 – Definition of Participant – which provides that an employee who is compensated on a basis that is not subject to Federal Income Tax withholding or FICA taxes by County shall not be a participant in the Plan. The business you engaged in, feeding prisoners, was not a position compensated on a basis subject to Federal Income Tax withholding or FICA taxes by County. As such, such business activities are not covered for purposes of your being a participant in the Plan.

Additionally, beginning in 1994 you were provided with pension benefit information which reflected benefits calculations and projection based on your actual earnings. The benefits calculation/projections were made based upon your County W-2 earnings. At no time did you ever advise the County of your claimed additional compensation or earnings. As such, you failed to provide necessary participant data as required by Section 10.06 of the Plan in order to allow a timely determination of whether your profits from operating your prisoner meal business were compensation or to allow the County to properly fund the level of benefits you are currently claiming.

Plaintiff’s pension benefit was thus computed without considering the “net fees.” The administrator also drew plaintiff’s attention to section 10.07 of the plan, which permits the participant to seek the administrator’s review within ninety-days of receipt of the written notice of the denial of the claim.

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MONTHLY EARNINGS – a Participant’s monthly compensation from the Employer including overtime, longevity pay, Picked-up Contributions, shift differentials, bonuses, termination pay, payments in consideration of unused vacation and sick leave, and other non-recurring compensation, but excluding allowances for clothing, equipment, cleaning and travel, and reimbursement of expenses.

Rather than seek such review, plaintiff filed an action for declaratory relief. Plaintiff sought a declaration that his “food service profit” must be included in the calculation of the pension benefit, as well as requesting other relief as the circumstances warrant.

Defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10) on the ground that the only procedural mechanism for challenging the administrator’s decision was a petition for writ of mandamus. Further, defendants argued that plaintiff was not entitled to a writ of mandamus because the administrator did not fail to perform a clear legal duty. Defendants suggested that the administrator’s decision should be reviewed under an arbitrary and capricious standard. Ultimately, defense counsel argued at the motion hearing that “however the Court believes the case is properly framed, whether it’s in mandamus or declaratory judgment, . . . the matter is essentially on administrative appeal . . . .”

In opposition to the motion, plaintiff claimed a constitutional right to a pension benefit. Plaintiff argued that the trial court had jurisdiction to declare his contract rights, but that a writ of mandamus would also be an appropriate remedy. He also claimed that genuine issues of material fact precluded summary disposition. But during the motion hearing, the only disputed fact identified by plaintiff’s counsel was whether plaintiff’s profits should be adjusted for his wife’s participation in the foodservice business.

The trial court treated plaintiff’s claim as an administrative appeal. The trial court determined that the administrator had sole responsibility for resolving any dispute under the plan and that the administrator had reviewed plaintiff’s claim. The trial court further determined that the administrator did not abuse his discretion, that the administrator’s decision was well founded on the facts and circumstances, and that the administrator’s decision with regard to plaintiff’s food service profits was correct. The trial court concluded that, if it were called upon to do so, it would affirm the administrator’s decision, but in terms pertinent to the case at bar, it was granting defendants’ motion for summary disposition.

## II. Analysis

Plaintiff argues that the trial court erred in holding that the administrator did not have a clear legal duty to interpret his claim consistent with the language of the plan. However, plaintiff has misconstrued the nature of the trial court’s ruling. The “clear legal duty” standard would have been applicable if the trial court had considered whether to issue a writ of mandamus for the purpose of ordering the administrator to perform some duty. *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001). But the trial court treated the substance of the plaintiff’s claim as an administrative appeal. A court is not bound by the label a plaintiff gives to his or her action because this would exalt form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Plaintiff’s private (contractual) right to pension benefits was adequate to invoke an administrative standard of review. Const 1963, art 6, § 28; *Martin v Stine*, 214 Mich App 403; 542 NW2d 884 (1985).

Generally, we review a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews a circuit court’s review of an agency’s decision for clear error. *Glennon v State Employees’ Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). A decision is clearly erroneous when this Court is left with a definite and firm conviction that a mistake was made. *Id.* An agency’s decision is not authorized by law if it violates a statute or constitution, exceeds the agency’s statutory authority or jurisdiction, is made upon unlawful procedure resulting in

material prejudice, or is arbitrary and capricious. *Northwestern Nat'l Casualty Co v Comm'r of Ins*, 231 Mich App 483, 488-489; 586 NW2d 563 (1998).

After reviewing the record, we conclude that the court reached the correct result in finding no basis for disturbing the administrator's decision to deny plaintiff's claim.<sup>3</sup> *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 17; 672 NW2d 351 (2003).

Regardless of the nature of the relief sought by plaintiff, it is clear from section 10.02 of the plan that the administrator had the "sole right to reconcile, determine, interpret, and construe any question or dispute arising in connection with rights, status, or classification of Employees or any other dispute arising under the Plan." Plaintiff's reliance on Const 1963, art 9, § 24, is misplaced because that provision merely establishes that public employee pensions are contractual obligations and the funding requirements for such pensions. See *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 255-256; 475 NW2d 249 (1991), and *Ass'n of Professional & Technical Employees v Detroit*, 154 Mich App 440, 444; 398 NW2d 436 (1986). The constitutional provision does not establish how the pension plan is administered, who might interpret its terms, or any means of judicial review.

We also reject plaintiff's argument that the administrator's consideration of the definition of "compensation" in section 2.1(c) of the plan, in effect when plaintiff earned his food service profits, provides any basis for relief. If nothing else, by considering this definition, the administrator effectively ruled out any claim that contractual rights to pension benefits were unlawfully eliminated by later amendments to the plan.

We also disagree with plaintiff's argument that the administrator was required to apply the "compensation" definition in section 9.01 of the plan in effect when he retired in 2000 and, in particular, its reference to 26 CFR 1.415-2(d)(2)(i), for purposes of determining his pension benefit. Had this been the result intended by the plan, it would have adopted the income tax regulation in the "monthly earnings" definition or as a general "compensation" definition for the plan as whole in section I of the plan. Because the tax regulation unambiguously applies only to the limitation of benefits section, it is unnecessary to address plaintiff's claim that his food service profits constituted compensation within the meaning of the tax regulation.

Moreover, plaintiff's cursory claim that he was a participant is insufficient to establish any basis for disturbing the administrator's decision. Under ordinary contract principles, a contract is ambiguous if it is susceptible of two reasonable interpretations. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). A latent ambiguity exists if the language employed suggests a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings. *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 206; 220 NW2d 664 (1974). Because a person can have more than one relationship with an employer, the existence of plaintiff's dual

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<sup>3</sup> Although referenced by the administrator, the trial court did not address whether judicial review was precluded because plaintiff failed to request review by the administrator within ninety days after written notice to plaintiff that his claim was denied. Nor have the parties raised this issue on appeal. Therefore, we do not address it.

relationship with defendant, although both arising from his position as sheriff, created such a latent ambiguity. The administrator's construction of the "participant" definition as not applying to plaintiff when engaged in his food service business was reasonable.

Plaintiff has failed to establish that the administrator's decision was not authorized by law and, treating this case as an administrative appeal, the trial court correctly granted defendants' motion.<sup>4</sup> Stated in terms of the motion made by defendants in the trial court, plaintiff did not show a genuine issue of material fact.

Affirmed.

/s/ Helene N. White  
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ William B. Murphy

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<sup>4</sup> Although unnecessary to the resolution of this case, we conclude that plaintiff has also failed to establish support for his claim that the administrator misapplied section 10.06 of the Plan when denying his claim on the ground that he was provided with projected benefit calculations beginning in 1994, but at no time responded by supplying information regarding any additional compensation or earnings. Plaintiff's mere assertion that he was not asked to furnish information does not suggest that the administrator incorrectly applied the Plan. Potentially, the benefit information that was provided beginning in 1994 asked for any inaccuracies.