IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS OSOWSKI,

Plaintiff, MEMORANDUM AND ORDER

v. 06-C-695-S

STORA ENSO NORTH AMERICA CORP., SENA PENSION PLAN and SENA PENSION PLAN FOR UNION MEMBERS,

Defendants.

Plaintiff Thomas Osowski commenced this action against defendants Stora Enso North America Corp. (SENA), SENA Pension Benefit Plan and SENA Pension Plan for Union Members seeking declaratory judgment to establish his rights to pension benefits under the provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 502(a)(1)(B). The matter is presently before the Court on plaintiff and defendants' cross-motions for summary judgment.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Thomas Osowski is an adult resident of Nekoosa, Wisconsin. Defendant Stora Enso North America Corp.(SENA) is a corporation doing business at 510 High Street, Wisconsin Rapids, Wisconsin. Since August 31, 2000 SENA has been the sponsor and administrator of the SENA Pension Plan (Salaried Plan) and the SENA Pension Plan for Union Members (Union Plan). Prior to that the Plans were administered by Consolidated Papers, Inc. and were known

as the Consolidated Salaried Employees' Retirement Plan and the Consolidated Employees' Retirement Plan.

Plaintiff became an employee of defendant company in 1973 and became a participant in the Union Plan on December 31, 1975. In January 1991 plaintiff became a salaried employee of the company and became a participant in the Salaried Plan. In January 1997 plaintiff returned to union employment with the defendant and because a participant in the Union Plan. Plaintiff retired from the company effective May 31, 2007.

Under the Union Plan an employee receives a normal retirement benefit equal to the greater of a "normal accrued benefit" or a "guaranteed minimum benefit". (§4.1) Under the Salaried Plan an employee receives the greater of a "normal accrued benefit", a "final pay benefit" or a "guaranteed minimum benefit." (§4.1) The amount of benefits is based on years of service together with annual earnings.

Both the Union and Salaried Plans have provisions for participants who transfer between plans.

Section 11.2 of the Salaried Plan, Employees Transferred to Coverage, specifically states as follows:

> If an employee of an employer who is a member of the SENA Pension Plan for Union Members (referred to below as the "Other Plan") is transferred to employment outside of a group or class of employees covered by the Other Plan, such employee shall automatically become a member of this plan as of the date of such transfer, provided he then meets the eligibility requirements of subparagraph

2.1(b). The benefits provided under this plan for such member shall be determined under (a) or (b) below:

(a) the benefits provided in subsection 4.1 for such member shall be determined without regard to subparagraph 4.1(b) and shall be based on the contributions, if any, made by him, his earnings, and credited service for the date of such transfer and while he remains a member of this plan. His credited service accumulated prior to such transfer, however, will be taken into account in determining his eligibility to receive benefits under the plan.

(b) Subject to subsection 11.1, any benefits provided under this plan in accordance with subparagraph 4.1(b) for such member shall be based on his earnings and credited service and determined under the assumption that he had become a member of this plan as of the date he became a member in the Other Plan (or the original plan) and had made all contributions required of him under the plan or plan. The amount of such benefits, however, will be reduced by the amount of retirement benefits that such member may become eligible to receive under the Other Plan.

Such member's retirement benefits will be computed under both (a) and (b) above and the member shall be entitled to receive the greater of the benefits determined under those subparagraphs. The Benefits Administration Manager may establish rules for determining benefits of members who incur multiple transfers, or incur transfers with prior to or subsequent to a break in employment, between this plan and the Other Plan which shall reflect the principles expressed in this subsection and subsections 4.3, 7.5 and 11.1.

The Union Plan at Section 11.2 states as follows:

If an employee of an employer who is a member of the SENA Pension Plan (referred to below as the "Other Plan") is transferred to employment with the employer in a represented unit

> covered by the plan, such employee, irrespective of subsection 2.1, shall automatically become a member of the plan as of the date of such transfer. The benefits provided under this plan for such member shall be based on his earnings and credited service from the date of such transfer and while he remains a member of this plan. The Benefits Administration Manager may establish rules for determining benefits of members who incur multiple transfers, or incur transfers with prior to or subsequent to a break in employment, between this plan and the Other Plan which shall reflect the principles expressed in this subsection and subsections 4.3, 7.5 and 11.1.

Both plans state at Section 12.10 as follows:

> The Benefits Administration Manager and board shall have sole discretion in interpreting all of the provisions of the plan. Any interpretation of the plan and any decision on a matter within the discretion of the Benefits Administration Manager's and/or the board's discretion made in good faith shall be binding on all persons.

On December 15, 2004 Michelle Bankson sent plaintiff a letter and included a memo entitled "Relevant Plan Language for Benefit Calculation" from Sally Doubet King and Carolyn M. Trenda. It provided in relevant part as follows:

> The Salaried Plan provides in Section 11.2 that a transferred employee will receive a benefit for his service under the Salaried Plan that is the greater of (a) or (b) described as follows:
> (a) The benefit calculated using only his credited service and earnings while he was covered under the Salaried Plan (the Salaried Service Period) or
> (b) The benefit calculated using his total credited service as of the date he lost eligibility under the Salaried Plan (that is, Union Service Period #1 and Salaried Service

> Period) and his earnings relating to that time period, reduced by the retirement benefit to which he is eligible based on the earnings and credited service relating to his Union Service Period #1.
> The employee will receive a benefit from the Union Plan based on his combined credited service and earnings from Union Service Period #1 and Union Service Period #2. He will also be entitled to a benefit from the Salaried Plan, determined in accordance with the preceding paragraph.

On April 17, 2006 Sally Doubet King wrote plaintiff's attorney a letter advising him that because he was retiring under the Union Plan he was entitled to the normal retirement benefit under the Union Plan as well as any retirement benefits under the Salaried Plan according to the rules established by the Committee. The Plan Administrator provided three options for plaintiff's retirement benefits. The first option determined his maximum benefit for union service periods #1 and #3 ($1,340.71) and his maximum benefit under the salaried plan ($396.77) and added them together for a total benefit of $1,737.48.

Option #2 determined his maximum benefit for his salaried plan ($1,707.45) and reduced it by his maximum benefit from his first period of union service ($592.23) to arrive at a benefit of $1,115.22. Then the Administrator added his benefit from his union service period #3 ($703.49) to get a total benefit of $1,818.71.

The third option was to add the normal retirement benefit for union service periods #1 and #3 ($1,340.71) to the final pay benefit under the salaried plan ($481.38) for a total benefit of

$1,822.09. The Administrator advised plaintiff that Option #3 would be used to calculate his retirement benefit. Plaintiff exhausted his administrative remedies under the Plans.

MEMORANDUM

Plaintiff requests summary judgment in his favor declaring that he is entitled to an increased retirement benefit. Defendants oppose this motion and cross move for summary judgment contending that plaintiff's retirement benefit was calculated correctly.

Plaintiff is challenging a denial of a portion of his retirement benefits. When a plan participant challenges a denial of benefits pursuant to the provisions of ERISA the denial is to be reviewed de novo unless the benefit plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-957 (1989). Where an ERISA plan gives the administrator such discretion its decision is reviewed under the arbitrary and capricious standard. Id. at 115, 109 S.Ct. at 957.

In this case Section 12.10 of both plans give the Benefits Administration Manager discretion to interpret the terms of the plan. Sections 11.2 of both plans gives the Benefits Administration Manager discretion to determine benefits of members who incur multiple transfers. Accordingly, review of the Benefits

Administration Manager's decision is reviewed under the arbitrary and capricious standard.

Under the arbitrary and capricious standard it is not the Court's function to decide whether defendant reached the correct conclusion or "even whether it relied on the proper authority." Kobs v. United Wisconsin Ins. Co., 400 F.3d 1036, 1039 (7th Cir. 2005) (citing Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1379 (7th Cir. 1997)). The only question is whether defendant's decision was completely unreasonable. Manny v. Cent. States, Southeast and Southwest Areas Pension and Health and Welfare Fund, 388 F.3d 241, 243 (7th Cir. 2004).

Under 11.2 of the Salaried Plan the benefit is to be the greater of the calculations (a) or (b). Subsection (a) calculates the benefit based on the years of plaintiff's salaried service. The calculation under (b) is based on all plaintiff's years of service in both plans. The language of the salaried plan specifically states in 11.2(b) that the salaried benefit will be reduced by the amount of retirement benefits that such member may become eligible to receive under the Other Plan. This section also states that the Benefits Administration Manager may establish rules for determining benefits of members who incur multiple transfers, or incur transfers with prior to or subsequent to a break in employment, between this plan and the Other Plan which shall reflect the principles expressed in this subsection and subsections 4.3, 7.5 and 11.1.

The Plan Administrator in Option #1 used 11.2(b) to calculate plaintiff's benefits. She determined the total Union Plan benefit for both his periods of service. She then determined his salaried benefit based on his total 21 years of service in both plans and reduced it by his total benefit under the Union plan. In the second option she also used 11.2(b) to calculate his benefit but figured his Union plans separately for each of his periods of service. She then subtracted only the benefit for the first period of service to get the salaried benefit and then added the benefit for his final period of service. This was a greater amount than Option #1.

In determining plaintiff's benefit under Option #3 the Administrator determined the benefits based on 11.2(a) of the Union Plan. She found that for both periods of his union service his normal accrued benefit was $1,340.71. She then determined his Salaried benefit based on his six years of salaried service finding that the final pay benefit ($481.38) was the greater of the three calculations. She then added them together to get a benefit of $1,822.09. Since Option #3 as calculated under 11.2(a) was the greater benefit that was the benefit she provided to plaintiff.

Plaintiff argues that his salaried benefit should be determined as the Administrator did in Option #1 reduced only by his first period of union service which would give him a benefit of $1,115.22 and then added to his benefit under the Union Plan for both periods of union service ($1,340.71) which would give him a

total benefit of $2,455.93. Plaintiff contends that this was the calculation that the December 15, 2004 memo from Sally Doubet King and Carolyn M. Trenda provided him.

The Administrator changed her interpretation of the Plans between December 15, 2004 and April 17, 2006. Courts have held that interpretations of ERISA plans may change. Hess v. Reg-Ellen Machine Tool Corp., 423 F.3d 653, 662 (7th Cir. 2005).

Plaintiff appears to be arguing that the defendants are estopped from disputing the interpretation set forth in the memo, "Relevant Pan Language for Benefit Calculation" attached to the December 15, 2004 letter to him. An estoppel claim requires the following four elements: (1) a knowing misrepresentation; (2) made in writing (3) with reasonable reliance on that misrepresentation; (4) to his detriment. Krawcyzk v. Harnischfeger Corp., 41 F.3d 276, 280-81 (1994).

Plaintiff has not shown that there was a knowing misrepresentation or that he relied on it to his detriment. Defendants are not estopped from changing their prior interpretation.

Pursuant to the plans the Administrator of the Plans has the discretion to determine benefits for members who incurred multiple transfers. On April 17, 2006 she determined plaintiff's benefits by determining his benefit under the Union plan based on his total years of service in that plan and determined his Salaried Benefit based on the years of service in that plan.

Although there are other reasonable interpretations of the plan including a prior determination of the Administrator, the current interpretation of the Administrator must be given deference unless it is completely unreasonable. Morton v. Smith, 91 F.3d 867, 872 (7th Cir. 1996).

The Court finds that the Administrator's interpretation that a person who had multiple transfers between plans is entitled to a benefit calculated on years of service in each plan is not completely unreasonable. See Manny, 388 F.3d 241, 243 (7th Cir. 2004. Since the Administrator's interpretation of the plan in Option #3 of the April 17, 2006 letter is not completely unreasonable, the Court cannot conclude that defendants' decision to provide plaintiff a retirement benefit of $1822.09 was arbitrary and capricious. Krawcyzk, 41 F.3d at 279.

Accordingly, defendants are entitled to judgment in their favor as a matter of law and their motion for summary judgment will be granted. Plaintiff's motion for summary judgment will be denied.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 26th day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge