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**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF EVELYN CORTEZ
DOCKET NO. 2017-04
CLAIM OF EVELYN CORTEZ

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Evelyn Cortez's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact and PSERS is entitled to summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on January 4, 2019 and served a copy by First-Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated January 4, 2019, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. Claimant did not file a response.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. *See Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. *See Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa.

1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984). “Summary judgment may be entered against a party who does not respond.” Pa.R.C.P. 1035.3(d).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying “(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.” Pa.R.C.P. No. 1035.3(a). “An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.” Pa.R.C.P. No. 1035.3(b).

Claimant did not respond to PSERS’ motion and, therefore, she has not disputed any of the facts set forth therein. Nor has Claimant identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board. Consequently, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve whether Claimant’s retirement benefit with PSERS was forfeited pursuant to the Public Employee Pension Forfeiture Act (“Forfeiture Act”), 43 P.S. §§ 1311-1315.¹

FINDINGS OF FACT

Based on the record, the Board finds the following relevant facts not in dispute:

1. Evelyn Cortez (“Claimant”) was first enrolled in PSERS in September 1979, by virtue of her full-time, salaried employment with the Chester-Upland School

¹ The Forfeiture Act was amended on March 28, 2019, for crimes committed on or after that date. Because Claimant committed her crimes prior to March 28, 2019, this Board addresses Claimant’s appeal based on the law in place at the time her crimes were committed.

District (“Chester-Upland”), a reporting unit of PSERS. (PSERS’ Memorandum of Facts, ¶ 2).

2. Claimant subsequently worked in a full-time, salaried position with the School District of Philadelphia (“District”), from October 1998 until May 2, 2014, which was her last day actively employed. (PSERS’ Memorandum of Facts, ¶ 3).

3. Following her last day of employment, on June 30, 2014, Claimant submitted an *Application for Retirement* to PSERS. (PSERS’ Memorandum of Facts, ¶ 4; PSERS-1).

4. Claimant’s effective date of retirement with PSERS was May 3, 2014. (PSERS’ Memorandum of Facts, ¶ 5).

5. Claimant began receiving a monthly annuity effective May 3, 2014, and she received a rollover of her total contributions and interest. (PSERS’ Memorandum of Facts, ¶ 5; PSERS-1; PSERS-2).

6. In September 2014, criminal charges were brought against Claimant due to alleged misconduct during the Pennsylvania System of School Assessment exams from 2007 through January 10, 2014. (PSERS’ Memorandum of Facts, ¶ 6; PSERS-3).

7. The criminal charges were brought against Claimant in her capacity as principal of the Cayuga Elementary School. (PSERS’ Memorandum of Facts, ¶ 6).

8. On February 23, 2016, Claimant admitted to committing and pled guilty to one count of conspiracy to tamper with public record/information (18 Pa.C.S. § 903), one count of perjury (18 Pa.C.S. § 4902), and one count of tampering with public record/information (18 Pa.C.S. § 4911). (PSERS’ Memorandum of Facts, ¶ 7; PSERS-3 (*Colloquy for Plea of Guilty/Nolo Contendere* and Claimant’s *Written Guilty Plea Colloquy*)).

9. By letter dated February 26, 2016, PSERS informed Claimant that, due to her guilty plea, her pension benefits were forfeited pursuant to the Forfeiture Act, and

the retirement benefits she was receiving would be terminated. (PSERS' Memorandum of Facts, ¶ 8; PSERS-4).

10. After receiving two extensions, on June 27, 2016, Claimant appealed PSERS' February 26, 2016 determination to the Executive Staff Review Committee ("ESRC"). (PSERS' Memorandum of Facts, ¶ 9; PSERS-5).

11. The ESRC, by letter dated March 8, 2017, denied Claimant's appeal on the basis that forfeiture is triggered upon a guilty plea, regardless of whether a member argues they are innocent, knew the consequences of the plea, were employed at the time of the plea, or are challenging the plea or seeking a pardon. (PSERS' Memorandum of Facts, ¶ 10; PSERS-6).

12. On March 29, 2017, Claimant filed an Appeal and Request for Administrative Hearing. (PSERS' Memorandum of Facts, ¶ 11; PSERS-7).

13. On April 18, 2017, PSERS filed an Answer. (PSERS' Memorandum of Facts, ¶ 12; PSERS-8).

14. On January 4, 2019, PSERS filed a Motion for Summary Judgment.

15. Claimant did not file a response to PSERS' motion.

16. The matter is ripe for Board Adjudication.

DISCUSSION

The Forfeiture Act disqualifies public officials and public employees from receiving retirement benefits if they have been convicted of or pled guilty or no contest to any of the "crimes related to public office or public employment" enumerated in 43 P.S. § 1312. The Forfeiture Act defines the terms "public official" and "public employee" as "any person who is elected or appointed to any public office or employment ... including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits. . . ." 43 P.S. § 1312. The term includes "all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision." *Id.* The Forfeiture Act mandates forfeiture once a triggering conviction or

guilty plea to a covered offense occurs; it leaves no discretion to an administrative agency. 43 P.S. § 1313(b); *see Agpar v. State Employees' Ret. Sys.*, 655 A.2d 185, 189 (Pa. Cmwlth. 1994); *Account of Cynthia Wilson*, Docket No. 2011-23 (PSERB April 30, 2012) (citing *Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29 (Pa. Cmwlth. 1999)).

Claimant does not dispute that the crimes to which she pled guilty are covered by the Forfeiture Act. 43 P.S. § 1312 (defining “crimes related to public office or public employment” to include perjury (18 Pa.C.S. § 4902) and tampering with public records or information (18 Pa.C.S. § 4911)); *Luzerne County Ret. Bd. v. Seacrist*, 988 A.2d 785, 787 (Pa. Cmwlth. 2010) (concluding that conspiracy to tamper with public records or information (18 Pa.C.S. § 903) is a forfeitable offense). In addition, Claimant does not dispute that the criminal charges to which she pled guilty were based on allegations of the criminal activity she committed in her capacity as the principal of Cayuga Elementary School between 2007 and January 10, 2014. Rather, Claimant argues that her pension should be reinstated because she was innocent of the crimes; she was no longer actively employed for the District when she pled guilty; she was not aware that her plea would result in the loss of her pension; and she is challenging the plea and seeking a Gubernatorial pardon. None of these arguments, however, change the Forfeiture Act’s mandate that Claimant’s pension with PSERS be forfeited.

The Forfeiture Act compels the forfeiture of a public employee’s pension at the time she enters a guilty plea regardless of actual guilt or innocence. 43 P.S. § 1313(a), (b). Accordingly, in this forum, Claimant is bound by her plea. *See id*; *see also Account of Cynthia Wilson*, Docket No. 2011-23, *4 (PSERB April 30, 2012) (citing *Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29 (Pa. Cmwlth. 1999)). Moreover, contrary to her assertion of innocence here, she admitted to another tribunal that she “committed the crime(s).” PSERS-3 (*Written Guilty Plea Colloquy*).

The Forfeiture Act also compels the forfeiture of Claimant’s pension regardless of her employment status at the time she entered the guilty plea. 43 P.S. § 1313(a). Indeed, the Forfeiture Act is clear that forfeitable crimes are those that are committed in the member’s public position or those that are committed when the member’s public employment placed her in a position to commit the crimes. *See* 43 P.S. § 1312. A

guilty plea to any such crime is, by law, “deemed to be a breach of a public officer’s or public employee’s contract with his employer.” 43 P.S. § 1313(c). Claimant was employed by the District when she committed the forfeitable offenses. It is irrelevant, therefore, that she did not plead guilty to those crimes until after her employment with the District ended. 43 P.S. § 1312; *see also Shiomos v. Commonwealth State Employees’ Ret. Bd.*, 626 A.2d 158 (Pa. 1993) (forfeiting pension when conviction occurred after annuitant left public position); *Roche v. State Employees’ Ret. Bd.*, 731 A.2d 640 (Pa. Cmwlth. 1999) (forfeiting pension when guilty plea occurred after termination); and *Miller v. State Employees’ Ret. Sys.*, 137 A.3d 674, 680 (Pa. Cmwlth.), *appeal denied*, 2016 Pa. LEXIS 2404 (Pa. Oct. 25, 2016) (holding that annuitant’s pension was forfeitable because he was a “public official and/or public employee . . . at the time he committed the crime”).

Furthermore, the Forfeiture Act contains no exceptions or allowance for delay:

The benefits shall be forfeited upon entry of a plea of guilty or no defense or upon initial conviction and no payment or partial payment shall be made during the pendency of an appeal. If a verdict of not guilty is rendered or the indictment or criminal information finally dismissed, then the public official or public employee shall be reinstated as a member of the pension fund or system and shall be entitled to all benefits including those accruing during the period of forfeiture if any.

43 P.S. § 1313 (b) (emphasis added). Claimant’s knowledge as to the consequence of her guilty plea on her pension with PSERS, therefore, is immaterial. *See* 43 P.S. § 1313(a), (b); *see generally Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012). Similarly, Claimant’s assertion that she has filed an appeal of her criminal case or requested a Gubernatorial pardon does not merit any delay. The Board, in fact, is prohibited from reinstating Claimant’s pension at this time. 43 P.S. § 1313 (b); *see Account of Joseph C. Abraham*, Docket No. 2009-02 (PSERB Oct. 7, 2015) (denying claimant’s request for a stay pending pursuit of a Gubernatorial pardon). If Claimant’s circumstances subsequently change, however, Claimant may notify PSERS at that time and the facts can be reviewed. *See id.*

In connection with her appeal, Claimant also has requested “a return of all contributions that she made to the pension.” (PSERS-5, § D, ¶ 23). Claimant, however, has already received a return of her total contributions and interest; therefore, no action is needed on the part of PSERS. (PSERS’ Memorandum of Facts, ¶ 5; PSERS-1; PSERS-2).

CONCLUSION

For the above-stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant’s pension benefits with PSERS can be reinstated, or in the alternative, that the Board delay making a final determination on the status of Claimant’s benefits. Accordingly, PSERS’ Motion for Summary Judgment is GRANTED, and Claimants’ Appeal and Request for Administrative Hearing is DENIED.

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF EVELYN CORTEZ
DOCKET NO. 2017-04
CLAIM OF EVELYN CORTEZ

ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request that PSERS reinstate Claimant's pension benefits that have been forfeited by operation of law under the Public Employee Pension Forfeiture Act, and denies her request to delay making a final determination as to the forfeiture.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: May 23, 2019

By: Melva S. Vogler
Melva S. Vogler, Chairman