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

IN RE: ACCOUNTS OF KAREN A. HAUGH AND DOLORES PARSIL
DOCKET NOS. 2006-07 AND 2006-14
CLAIMS OF KAREN A. HAUGH AND DOLORES PARSIL

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Opinion of the Hearing Examiner; Claimants' Exceptions to the Opinion of the Hearing Examiner; and PSERS' Brief Opposing the Claimants' Exceptions. Additionally, Claimants' counsel has filed a Reply Brief in Support of Claimants' Exceptions in response to PSERS' Brief Opposing Exceptions.¹

The Board finds appropriate the Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Hearing Examiner's Opinion and Recommendation attached hereto, supplemented by the following and with the correction of the noted typographical errors. The Board hereby notes the following corrections to typographical errors in the Hearing Examiner's Opinion in order to conform to the record in this matter: Page 8, Finding of Fact No. 18, the phrase "Claimant Parsil retired in June of 2006" is corrected to "Claimant Parsil retired on October 14, 2006"; and Page 24, in the last sentence of the Recommendation, "December 31, 2001" is changed to "December 31, 2003."

¹ The General Rules of Administrative Practice and Procedure (GRAPP) do not provide for the filing of a response to a brief opposing exceptions. 1 Pa. Code § 35.211 (relating to procedure to except to proposed report). Section 35.211 states that a participant may file exceptions to a proposed report, as Claimants have done here, and a brief opposing exceptions may be filed by the opposing party, but: "No further response will be entertained unless the agency head, with or without motion, so orders." Here, no motion to file a reply brief to the brief opposing exceptions was filed by Claimants. The Board, however, has decided to exercise its discretion to admit and consider Claimants' Reply Brief in Support of Claimants' Exceptions in order to provide a complete record of the parties' arguments in the event this matter is further appealed.

The Board will address the exceptions raised by the Claimants and the arguments raised in their supplemental Reply Brief on Exceptions, below.

- A. Claimants' Exception that the Hearing Examiner erred in finding that PSERS had no legal duty to provide notice of the Act 2001-9 multiple service election opportunity is denied. Moreover, even if PSERS had a duty to provide notice, the Board finds that it did so.

Only where the Retirement Code specifically mandates that notice of a benefit election period is required, is there a duty for PSERS to provide the notice to enforce the election period. *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999). The Hearing Examiner was correct in finding that *Higgins* involved two *mandatory provisions* of the Retirement Code, i.e., Sections 8506(g) and 8502(g), which impose a requirement upon school employers (and PSERS, if the employer fails to comply with its duties) to advise *new employees* who are former members of the State Employees' Retirement System ("SERS") of their right to elect multiple service membership *within 30 days of entry into the system*. 24 Pa.C.S. §§ 8506(g) and 8502(g).² Opinion and Recommendation of the Hearing Examiner (hereinafter "Proposed Report") at pp. 15-16.

The Hearing Examiner was further correct in finding that, in contrast to section 8506(g), which expressly requires the employer, *upon the employment of a former SERS member* who is not an annuitant of SERS *to advise such employee of his right to elect multiple service membership within 365 days of entry into the system*, the Act 9 amendments to the Retirement Code do not contain such a requirement in Section 29 for existing members regarding the election window. Language comparable to that found in Section 8502(g), which places the responsibility on PSERS to notify such *new employees* of their right to elect multiple service if the

² Now, under Act 2001-9, 365 days.

employer fails to comply with its statutory obligation to do so, is not found within Section 29 of the amendments. PSERS, therefore, had no statutory obligation by the Act 2001-9 amendments to advise *then current* (existing) PSERS' members who were formerly active members in SERS of the new window between July 1, 2001 and December 31, 2003 to elect multiple service membership. Proposed Report at p. 17.

When the Retirement Code mandates notice of an election period, such as is the case for *new* employees of the opportunity to elect multiple service membership if otherwise eligible, Commonwealth Court has found that such notice must be made before the election period begins to run. *Higgins, supra*. The present case is distinguishable from *Higgins* because no notice of the special window, created by Act 2001-9, Section 29 for existing employees on July 1, 2001, was required by the amendment.

Rather, this case is more similar to *Trakes v. Public School Employees' Retirement Board*, 768 A.2d 357 (Pa.Cmwlt. 2001) in which the Court held that a notice requirement that the General Assembly did not see fit to include, cannot be implied or read into the Retirement Code. In *Trakes*, the Retirement Code did not require PSERS to specifically notify its members of the two-year restriction on their inactive status for the purpose of applying for disability retirement benefits. Likewise, in this case, the Retirement Code *does not* require PSERS to notify active members, including the Claimants, about the multiple service window opened for currently employed active members as of July 1, 2001.

With regard to Claimants' argument that Section 29 of Act 2001-9 was remedial legislation and, therefore, would incorporate the notice provisions applicable to new employees, it is the Board's opinion that the notice provision applicable to new employees was intentionally *not* made applicable to existing employees for whom the

special window was created. The General Assembly was on notice of the *Higgins* decision when it opened the limited window for those who may not have received the *Higgins* notice regarding the opportunity to elect multiple service upon employment. It is logical to conclude that it is for that reason that the General Assembly opened a one-time window, which closed on December 31, 2003, as a remedy for those who -- for whatever reason -- failed to make the election when initially employed. The General Assembly cannot reasonably be assumed to have intended to perpetuate the same uncertainty as created by the *Higgins* decision by enlarging the election period beyond the December 31, 2003 deadline set forth in Section 29 of Act 2001-9.³

Claimants were both active members of PSERS on June 30 and July 1, 2001. Section 29 of Act 2001-9 provided a special rule for employees who were currently active members as of the effective date of Act 2001-9, as follows:

Section 29. Notwithstanding the limitation contained in 24 Pa.C.S. § 8507(c), any active member of the Public School Employees' Retirement System who was formerly an active member in the State Employees' Retirement System and whose service credit in the State Employees' Retirement System has not been converted to service credited in another public pension plan or retirement system in this Commonwealth may elect to become a multiple service member on or before December 31, 2003.

The Act of May 17, 2001, P.L. 26, No. 9, Section 29, effective July 1, 2001. Section 29 of Act 2001-9 opened a *limited and final window* for existing members who failed to elect multiple service under any earlier period of eligibility. Under the Act 2001-9, Section 29

³ The General Assembly can be presumed to have known the judicial construction of the multiple service notice provision for *new employees* set forth in *Higgins* when it amended the Retirement Code to open a window for existing active employees to make the election, when, for one reason or another, they had not done so when they originally became school employees. 1 Pa. C.S. § 1922(4); *Trakes, supra*. This exception for existing employees contained in Act 2001-9, § 29 cannot be broadened as the Claimants argue to include already employed active members in the notice required only for newly-hired school employees. The failure of the General Assembly to change a law, here to amend the duties of school employers and PSERS to notify *current active members* as well as *new employees* about multiple service *upon employment* under 24 Pa. C.S. §§ 8506(g), (h) and 8507(c), creates the presumption that the General Assembly intended to require notice only to new employees *upon employment* and not to extend the notice to *active members* about the window. *Kenney v. Jeanes Hosp.*, 769 A.2d 492 (Pa. Super. 2001), *appeal den.*, 567 Pa. 726 (2001).

window, a current member had to request multiple service no later than the earlier of the date of termination of service or December 31, 2003. Consequently, they are not eligible to make the election after the statutory window closed. See *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa.Cmwlth. 2001) (PSERS is not authorized to extend the time for statutory election periods). The particular clause governing the election of multiple service for *existing* active members under Act 2001-9, Section 29 controls the election period for Claimants, rather than the general multiple service election rule for *new* employees under 24 Pa.C.S. § 8507(c). 1 Pa.C.S. § 1933.

This election period was also far longer than the requirement that multiple service membership be elected within 30 days of employment as was the requirement under 24 Pa.C.S § 8507(c) prior to its amendment by Act 2001-9, Section 29, or the 365 days under the amendment. Claimants were active members on June 30 and July 1, 2001, and therefore, were covered by the special rule set forth in Section 29 of Act 2001-9.

Further, the Board agrees with the Proposed Report that this issue is moot because even if notice were required of the special window to elect multiple service under Act 2001-9, Section 29, nevertheless, PSERS provided adequate legal notice to Claimants. As explained by the Hearing Examiner:

Notwithstanding the absence of a specific notice requirement under Section 29, the record reveals that PSERS did, in fact, notify active members of PSERS, including Claimants, of the new window from July 1, 2001 to December 31, 2003 to elect multiple service membership. Indeed, PSERS provided notice to its members of the new multiple service election window through various means. Claimants simply did not avail themselves of this information.

Proposed Report at 18.

B. The Hearing Examiner's finding that Claimants were provided adequate legal notice of the Act 2001-9 § 29 multiple service election window is supported by substantial evidence.

1. The record supports the Hearing Examiner's recommendation that Claimants, in fact, were provided notice of the requirements for existing members to elect multiple service membership by December 31, 2001.

The record shows unequivocally that Claimants returned the very election form that contained notice of the opportunity to elect multiple service membership.

Moreover, the record shows that a cover letter containing more detailed information about the multiple service election was sent with the Class T-D election form (which both Claimants signed and returned to PSERS). The Board adopts the Hearing Examiner's analysis of this issue at 18-21 of the Proposed Report, which the Board incorporates by reference herein, in response to Claimants' second exception.

Consequently, Claimants' Exceptions on the basis of lack of notice to Claimants of the opportunity to elect multiple service under Act 2001-9, Section 29 are dismissed.

PSERS provided sufficient evidence as to its custom regarding the sending of the Class T-D election form and enclosed letter explaining multiple service rights. Evidence of a regularly conducted and uniform business custom, as present here, is reliable evidence even without the corroborating evidence of the employee who actually mailed the letter. *Id.* at 166-67. Even without resorting to the "mailbox rule," the Hearing Examiner's analysis of the evidence refutes any contention that the Claimants did not receive the Class T-D election form, with its multiple service information check box, and accompanying explanatory letter.

The fiduciary duty arguments made by Claimants at 22-24 of their Brief to the Hearing Examiner are adequately addressed by the Proposed Report, as follows:

There is no question that PSERS stands in a fiduciary relationship to its members regarding the investments and disbursements of any of the moneys of the fund, 24 Pa. C.S. §8521(e). As such, PSERS has a fiduciary duty to its members to

follow the requirements of applicable state law for its members' benefit. However, "[PSERS] has no authority to grant rights beyond those specifically set forth in the retirement code." *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001) (citing *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth.), petition for allowance of appeal denied, 542 Pa. 678, 668 A.2d 1139 (1995)).

Here, the window to elect multiple service membership under Act 9 was from July 1, 2001 through December 31, 2003. Although PSERS had no statutory obligation to notify members of this new election period, the record reveals that PSERS provided both actual and constructive notice of the new election period to its members, including Claimants, through various means. Claimants need only be notified once under the Retirement Code. *Higgins*, at 752.

Proposed Report at 22-23.

2. Claimants received notice from PSERS of the Act 2001-9, Section 29 provision to elect multiple service for the exact types of service they had in SERS.

Claimants completely ignore the explanatory letter sent to them by PSERS, which contained the following information about the types of previous school-related service that may have been credited at SERS, and which could form the basis of multiple service membership. That letter provided as follows:

Multiple Service membership combines non-concurrent service credited with SERS and PSERS. Examples of SERS' service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor and Industry), a state owned educational institution, Pennsylvania State University, or a community college.

PSERS Exhibit 1 (emphasis added); N.T. 38-39. Thus, contrary to Claimants' arguments that they were not notified, both Claimant Haugh (who had previous service for Penn State University [N.T. 24]) and Claimant Parsil (who had previous service for Millersville State University [N.T. 8-9] -- a state-owned university) were provided specific notice of the opportunity to elect multiple service for the specific type of previous state service that each had. Specific reference was made in the PSERS

cover letter sent with the Class T-D and multiple service inquiry form regarding both of the kinds of service that Claimants are seeking. *Id.*

The gravamen of Claimants' legal sufficiency of notice argument, other than disputing PSERS' proof of delivery of the cover letter sent with the admittedly received (because returned by both Claimants) Class T-D election and multiple service notice form, is that the contents of the cover letter should have been placed on the form itself. See Claimants' Brief on Exceptions at 21 and supplemental exceptions brief at 3-4. Claimants admit in their brief on exceptions that the letter "includes a succinct, thorough, and efficient explanation of multiple service." *Id.* Claimants received exactly the same information, and are entitled to no more nor no less, than other similarly situated members. PSERS cannot be faulted for Claimants' failure to read or understand what they admit is clear notice of the requirements to elect multiple service membership in the cover letter. That letter gave specific examples of the kinds of service for which Claimants now seek multiple service credit years after the December 31, 2003 election deadline expired. Act 2001-9, Section 29.

3. Claimants also received notice sent by bulk mail that was sent to similarly situated members notifying them of the opportunity to elect multiple service.

Claimants' argument that the additional newsletters sent by bulk mail to Claimants were insufficient notice of the multiple service election opportunity under Act 2001, Section 29 also fails. No statutory notice requirements were included in the Act 2001, Section 29 multiple election period for existing members as are contained in 24 Pa.C.S. § 8507(c).

Even though Claimants received notice through the Class T-D election and multiple service inquiry form, as evidenced by the return of the election form by both Claimants Haugh and Parsil, they also received information

from the same subjects via various newsletters and other information. The

Hearing Examiner was correct in finding that:

In addition to providing PSERS' members with an individualized Act 9 election form and cover letter, which provided a detailed explanation of the window for active members to elect multiple service, the record reveals that throughout the window period - during the Summer and Fall of 2001, the Spring, Summer and Fall of 2002 and the Summer and Fall of 2003 - PSERS sent Retirement Chalkboard newsletters to all active members of PSERS. Every one of these newsletters contained an article that was devoted to multiple service and the deadline for electing multiple service membership. [Footnote omitted.]

In addition to these publications, during the Winter of 2002, PSERS mailed a publication entitled "PSERS UPDATE" to all retired and active members. This publication, likewise, contained an article on multiple service entitled, "Multiple Service Election Re-Opened." Although Claimants rely on *Higgins* for the proposition that these newsletters were insufficient to provide actual and/or constructive notice to Claimants of their option to elect multiple service membership, *Higgins* is distinguishable. [Footnote omitted.] Moreover, unlike *Higgins*, here, both Claimants admit that they have received PSERS' Retirement Chalkboard publications; they simply opted not to read them.

Proposed Report at 21-22.

With the above supplemental comments and modifications, we hereby adopt the Hearing Examiner's Opinion as our own, and accordingly:

IT IS HEREBY ORDERED that the Claimants' request to seek eligibility for multiple service membership after the December 31, 2003 deadline, is DENIED

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 9/28/2007

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: Account of Karen A. Haugh
Claim of Karen A. Haugh

Docket No. 2006-07

AND

Account of Dolores Parsil
Claim of Dolores Parsil

Docket No. 2006-14

OPINION AND RECOMMENDATION

Date of Hearing: December 13, 2006
Hearing Officer: Jackie Wiest Lutz, Esquire
For the Claimants: Michelle F. Duggan, Esquire
For PSERS: David W. Speck, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on a consolidated appeal filed by Karen A. Haugh (hereinafter, "Haugh" or "Claimant Haugh") and Dolores Parsil (hereinafter, "Parsil" or "Claimant Parsil") (collectively, "Claimants") from decisions of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimants' requests to elect multiple service membership after December 31, 2003.¹

Claimants' filed timely appeals from the decisions of the ESRC on January 30, 2006 and May 22, 2006, respectively. On February 16, 2006 and June 7, 2006, answers to Claimants' requests for hearing were filed by Assistant Deputy Chief Counsel, David W. Speck, on behalf of the Public School Employees' Retirement System (PSERS).

On July 18, 2006,² an Order of Consolidation was issued by the Board, directing that Claimants' appeals be consolidated for purposes of one administrative hearing to be held on August 9, 2006.

On July 24, 2006, Michelle F. Duggan, Esquire, counsel for Claimants, requested an unopposed continuance of the hearing. By Order dated July 25, 2006, the hearing was re-scheduled for December 13, 2006.

The hearing in this matter was held as scheduled on December 13, 2006 in Harrisburg, PA before Hearing Officer, Jackie Wiest Lutz, Esquire. Claimants were present at the hearing and were represented by Michelle F. Duggan, Esquire. David W. Speck, Esquire represented PSERS.

¹ Claimant Haugh was notified of the decision of the ESRC by letter dated December 29, 2005; Claimant Parsil was notified of the decision of the ESRC with respect to her claim on April 25, 2006.

² The Order of Consolidation is dated July 18, 2004; however, this appears to be a typographical error. The mail date of the Order is July 19, 2006.

Following the close of evidence, both attorneys requested the right to file post-hearing briefs.

Upon receipt of the hearing transcript on January 2, 2007, the hearing officer issued a briefing schedule. Pursuant to the briefing schedule, Claimants' brief was due on or before February 2, 2007; PSERS' brief was due on or before March 5, 2007; and, a reply brief was due on behalf of the Claimants no later than March 20, 2007.

On January 31, 2007, Attorney Duggan requested a thirty-day extension of the briefing schedule. The request was granted by Order dated January 31, 2007. Under the terms of the extended briefing schedule, Claimants' brief was due March 5, 2007; PSERS' brief was due April 4, 2007; and, a reply brief was due on behalf of the Claimants on or before April 19, 2007.

Both parties filed timely briefs.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. The Act of May 17, 2001, P.L. 26, No. 9 (Act 9) opened a window for any active member of PSERS who was formerly an active member in the State Employees' Retirement System (SERS) and whose service credit in SERS had not been converted to service credited in another public pension plan or retirement system in the Commonwealth to elect to become a multiple service member; Act 9 also provided an opportunity for PSERS members to elect a new class T-D membership class in order to enhance their benefit levels, and reduced the number of eligibility points for an active or inactive member to become vested in PSERS from 10 years to 5 years. (N.T. 38; Official Notice)
2. Under Act 9, qualified members of PSERS could elect multiple service membership and class T-D membership between July 1, 2001, the effective date of the Act, and December 31, 2003. (N.T. 38; Official Notice)
3. Following the enactment of Act 9, PSERS sent a 4-page letter to acting contributing members of PSERS to notify members of the new T-D membership class, of the new window from July 1, 2001 – December 31, 2003, to elect multiple service membership, of the reduced vesting period and of other important information pertinent to those members who were retiring in 2001. (N.T. 38; PSERS' Exhibit 1)
4. The letter contained the following information with respect to the extended opportunity to elect multiple service membership:

Window for Multiple Service Membership

Multiple Service membership combines nonconcurrent service credited with SERS and PSERS. Examples of SERS service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor

and Industry), a state owned educational institution, Pennsylvania State University, or a community college.

- If you are an **active** member of PSERS on July 1, 2001, and are not a Multiple Service member, although you had or have SERS covered service, Act 9 provides a window to elect Multiple Service membership. PSERS must receive your request for Multiple Service membership between July 1, 2001 and December 31, 2003. **If you terminate employment before December 31, 2003, you must submit your request *prior* to the date of termination.** Also, if you are retiring this year and wish to elect multiple service, you must remain in **active** service on or after July 1, 2001, to take advantage of the new window.
- If you need to purchase prior service to gain multiple service credit, you may now use the actuarial debt plan as a payment plan. The debt is applied to the equity in your retirement account. It does not affect your current contributions and interest. When you retire, your monthly retirement payment will be adjusted to pay for the purchase over the lifetime of the benefit. Although a portion of your monthly benefit pays the debt, adding service credit to your account usually increases the amount of your monthly retirement benefit.

If you have or had employment covered under SERS and you want to combine state and school service credit, you should use the enclosed *PSERS Membership Class Election Form* to request further information on Multiple Service membership. PSERS will mail additional information about becoming a Multiple Service member to you.

(PSERS Exhibit 1)

5. Enclosed with the letter was an "Act 2001-9 PSERS Membership Class Election Form" (Act 9 election form) which contained a box for members to either elect to change to T-D Class or elect Not to Change From T-C Class and a box to request multiple service information. (PSERS' Exhibits 2 and 3)
6. A "Second Notice," consisting of the Act 9 election form and a letter containing identical information that was sent to acting contributing members of PSERS following

the enactment of Act 9, was sent by PSERS to members who, as of August 31, 2001, had not completed the election form. (N.T. 40-41; PSERS' Exhibit 4)

7. A Retirement Chalkboard is a news publication that PSERS sends to all active members of PSERS. (N.T. 42)

8. Retirement Chalkboard publications are mailed to PSERS members through Permit No. 254, which is a billing permit that is provided by the U.S. Post Office to PSERS for presorted standard third class mail, which is a form of bulk mail. (N.T. 44)

9. Every Retirement Chalkboard that was published during the 18-month window to elect multiple service membership contained an article devoted to multiple service and the deadline for electing multiple service membership. (PSERS' Exhibits 14-15, 17-21)

10. The Summer 2001 Retirement Chalkboard contains a two-page article devoted to an overview of Act 9; page two of the article contains a section entitled "Multiple Service Election Re-opened" and explains, in pertinent part:

Multiple Service membership combines service credited with SERS and PSERS. Examples of SERS service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor and Industry), a state owned educational institution, Pennsylvania State University, or a community college.

If you are an active member of PSERS on July 1, 2001, and had SERS covered service and did not previously elect Multiple Service, Act 9 provides a window to elect Multiple Service membership. PSERS must receive your request for Multiple Service membership between July 1, 2001 and December 31, 2003. . . .

(N.T. 43; PSERS' Exhibit 14)

11. The Fall 2001 Retirement Chalkboard contains reminder-type articles on the first page of the publication regarding the Class T-D Membership election, the window period

to elect multiple service membership under Act 9 and the new vesting provisions. (N.T. 46; PSERS' Exhibit 15)

12. In the Winter of 2002, PSERS sent a publication entitled "PSERS UPDATE" to all retired and active members of PSERS under Permit Number 254; page 7 of this publication contains "News for Active Members" and includes an article on "Multiple Service Election Re-Opened." (N.T. 47; PSERS' Exhibit 16)

13. Similar to Retirement Chalkboard publications, PSERS' UPDATES are also mailed to PSERS retired and active members through Permit No. 254. (N.T. 47)

14. The Spring 2002 Retirement Chalkboard contains another article on page 1 of the publication regarding the new window period to elect multiple service membership.

Similar to the Summer and Fall 2001 articles, this article explains, in pertinent part:

Multiple Service Election Re-Opened

If you were an active member of PSERS on July 1, 2001, and had SERS (State Employees' Retirement System) covered service and did not previously elect Multiple Service, Act 9 provides a window period to elect Multiple Service membership.

Multiple Service membership combines service credited with SERS and PSERS. Examples of SERS service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor and Industry), a state-owned educational institution, Pennsylvania State University, or a community college.

For members hired before January 1, 2003, PSERS must receive your request for Multiple Service membership by December 31, 2003. . . .

(PSERS' Exhibit 17)

15. The Summer 2002 Retirement Chalkboard contains an identical article on page 1 of the publication regarding the new window period to elect multiple service membership. (N.T. 49-50; PSERS' Exhibit 18)

16. The Fall 2002 Retirement Chalkboard contains an article on page 2 pertaining to multiple service. In pertinent part, this article states: "If you became a member of PSERS after October 2, 1975, and wish to combine this service with State Employees' Retirement System (SERS) service (for example, Department of Public Welfare, Department of Labor and Industry, Department of Transportation, etc.) you must request Multiple Service in writing within 365 days of employment with the school employer or by December 31, 2003, whichever is later. . . ." (PSERS' Exhibit 19)

17. The year 2003 was the last year of the open window for the multiple service election; as a result, the lead articles in both the Summer 2003 and Fall 2003 Retirement Chalkboards are entitled "Multiple Service Election Re-Opened" and "Deadline Approaching for Multiple Service Election," respectively. (N.T. 50-51; PSERS' Exhibits 20 and 21)

Dolores Parsil:

18. Claimant Parsil retired in June of 2006 after having been employed as a teacher for seventeen and a half years with the Lancaster City School District. (N.T. 8)

19. In addition to her employment with the Lancaster City School District, Parsil taught for one year at Frostburg State College in Frostburg, Maryland and for three years at Millersville State University, in Millersville, PA. (N.T. 8-9)

20. Parsil was enrolled in the State Employees' Retirement System from 1969 to 1972 when she was employed at Millersville University. (N.T. 19)

21. Parsil *does not recall* if she ever received notice from the Lancaster City School District of her opportunity to elect multiple service membership upon the commencement of her employment in 1988. (N.T. 9)

22. In July 2001, Parsil was an active contributing member of PSERS who, under Act 9, was extended an opportunity to elect multiple service membership until December 31, 2003. (N.T. 39)

23. Parsil was among the many active contributing members of PSERS who, in June 2001, was sent information, including a four-page cover letter and an Act 9 election form to elect class T-D membership and to request multiple service information. (N.T. 13; Claimant Exhibit 2; PSERS' Exhibit 3)

24. Parsil does not recall *today* having received the cover letter with the Act 9 election form, but assumes there would have been a cover letter with the election form; Parsil agrees that the template letter depicted in PSERS' Exhibit 1 "certainly appears to be the cover letter that came with it." (N.T. 17-18)

25. Parsil received the Act 9 election form and, on November 12, 2001, elected to change her membership class from T-C to T-D; Parsil did *not* check the box on the election form to request multiple service information from PSERS. (N.T. 13; Claimant Exhibit 2; PSERS' Exhibit 3)

26. Parsil did not check the box to request multiple service information from PSERS because she was not sure what multiple service was; although Parsil had worked for Millersville State University and was in its retirement system, she withdrew her funds when she ended her employment with Millersville and, therefore, did not think that multiple service applied to her. (N.T. 13-14).

27. Although PSERS does not have access to all printouts showing PSERS members' names and addresses that were sent to PSERS' vendor for the mailing of the Retirement Chalkboards, Business records of PSERS do indicate that Parsil's name and address was

forwarded to the vendor and included on the distribution list to receive the Summer 2001, Summer 2003 and Fall 2003 Retirement Chalkboards; Parsil's name and address was also forwarded to the vendor for distribution of the Winter 2002 PSERS UPDATE publication. (N.T. 45-47, 52-53; PSERS' Exhibits 14, 16, 20 and 21)

28. Parsil recalls receiving Retirement Chalkboards from PSERS in the Summer and Fall of 2001, the Winter, Spring, Summer and Fall of 2002 and the Summer and Fall of 2003; however, she just placed the newsletters in a file thinking that, at some point, she would look at them and sort through them. (N.T. 15-16; PSERS' Exhibits 14-15, 17-21)

29. In 2004/2005, Parsil began thinking about retiring and attended some retirement meetings that PSERS held; Parsil became interested in multiple service at that time and shortly thereafter requested to become a multiple service member. (N.T. 12, 15)

30. By letters dated October 28, 2005 and April 25, 2006, respectively, Parsil was notified of the decisions of PSERS' staff and of the ESRC to deny her request to elect multiple service membership on the basis that the final date to have made such election was December 31, 2003. (PSERS' Exhibits 9 and 12)

31. Parsil was notified of her right to appeal the denial of her request to elect multiple service membership by requesting an administrative hearing. (PSERS' Exhibit 12)

32. An administrative hearing on Parsil's appeal was held on December 13, 2006. (PSERS' Exhibit 13; Transcript, *passim*)

33. Parsil was present at the hearing and was represented by counsel. (Transcript, *passim*)

Karen A. Haugh:

34. Claimant Haugh is a teacher with the Pennsbury School District, where she has taught full-time for 14 years and part-time for two years. (N.T. 23)

35. In addition to her employment with the Pennsbury School District, Haugh taught for five years for the Bensalem School District and for one year at the Abington Campus of Penn State University. (N.T. 24)

36. Haugh withdrew the contributions she made to the State Employees' Retirement System (SERS) on account of her Penn State University service and a check was mailed to her on November 6, 1975. (Claimant's Exhibit No. 6)

37. Haugh does not recall receiving notice from the Pennsbury School District in 1989 or from the Bensalem School District upon commencement of her employment there of her opportunity to elect multiple service membership. (N.T. 24)

38. In July 2001, Haugh was an active contributing member of PSERS who, under Act 9, was extended an opportunity to elect multiple service membership until December 31, 2003. (N.T. 39)

39. Haugh was among the many active contributing members of PSERS who, in June 2001, was sent information, including a four-page cover letter and an Act 9 election form to elect class T-D membership and to request multiple service information. (N.T. 28-29; Claimant Exhibit 8; PSERS' Exhibit 2)

40. Haugh received the Act 9 election form and, on June 13, 2001, elected to change her membership class from T-C to T-D; Haugh hand wrote "N/A" adjacent to the box on the election form to request multiple service information from PSERS. (N.T. 29; Claimant Exhibit 8; PSERS' Exhibit 2)

41. Haugh marked "N/A" on the form because she was not sure if she qualified for multiple service. (N.T. 29, 31)
42. Haugh *does not recall* if she received a cover letter along with her Act 9 election form. (N.T. 31-32)
43. Business records of PSERS indicate that Haugh's name and address was forwarded to the vendor and included on the distribution list to receive the Summer 2001, Summer 2003 and Fall 2003 Retirement Chalkboards; Haugh's name and address was also forwarded to the vendor for distribution of the Winter 2002 PSERS UPDATE publication. (N.T. 45-47, 52-53; PSERS' Exhibits 14, 16, 20 and 21)
44. Like Parsil, Haugh recalls receiving Retirement Chalkboards in the mail from PSERS from 2001 forward; however, Haugh admits she, most likely, did not read the publications. (N.T. 35)
45. On May 6, 2005, Haugh filed an Application for Multiple Service Membership. (N.T. 26; Claimant's Exhibit 5; PSERS' Exhibit 7)
46. By letters dated July 27, 2005 and December 29, 2005, respectively, Haugh was notified of the decisions of PSERS' staff and of the ESRC to deny her request to elect multiple service membership on the basis that the final date to have made such election was December 31, 2003. (PSERS' Exhibits 8 and 11)
47. Haugh was notified of her right to appeal the denial of her request to elect multiple service membership by requesting an administrative hearing. (PSERS' Exhibit 11)
48. An administrative hearing on Haugh's appeal was held on December 13, 2006. (PSERS' Exhibit 13; Transcript, *passim*)

49. Haugh was present at the hearing and was represented by counsel. (Transcript, *passim*)

CONCLUSIONS OF LAW

1. Claimants were afforded an opportunity to be heard in connection with their appeal. (Findings of Fact Nos. 30-33, 46-49)
2. Claimants have the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
3. Claimants have failed to proffer convincing evidence or arguments to support their appeal. (Findings of Fact Nos. 1-30, 34-44)
4. Claimants are not entitled to elect multiple service membership at this time. (Findings of Fact Nos. 1-30, 34-44)

DISCUSSION

Claimants request the opportunity to elect multiple service membership *today* despite the December 31, 2003 deadline for electing multiple service under Act 9 on the basis that they were not provided with legally-sufficient notice of their right to elect multiple service during the window between July 1, 2001 and December 31, 2003.

In support of their position, Claimants rely largely upon *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999), for the proposition that actual and/or constructive notice of their right to elect multiple service under Act 9 was required to be provided to them. However, Claimants' reliance upon *Higgins* is misplaced.

Higgins involved two *mandatory provisions* of the Retirement Code, i.e., sections 8506 (g)³ and 8502 (g),⁴ which impose a requirement upon school employers (and PSERS, if the employer fails to comply with its duties) to advise *new employees* who are

³ 24 Pa. C.S. §8506. Section 8506 (g) provides, in pertinent part, as follows:

§8506. Duties of employers.

(g) Former State employee contributors. - - The employer shall, upon the employment of a former member of the State Employees' Retirement System who is not an annuitant of the State Employees' Retirement System, advise such employee of his right to elect multiple service membership within 365 days of entry into the system. . . . The employer shall advise the board of such election.
24 Pa. C.S. §8506.

When *Higgins* was decided in 1999, an employee had only *30 days* from his/her entry into the system to elect multiple service membership.

⁴ 24 Pa. C.S. §8502. Section 8502 provides, in pertinent part, as follows:

§8502. Administrative duties of board.

(g) Performance of employer duties. - - In the event the employer fails to comply with the procedures as mandated in section 8506 (relating to duties of employers), the board shall perform such duties and bill the employer who shall pay for the cost of same. . . .

former members of SERS of their right to elect multiple service membership *within 30 days of entry into the system.*⁵

Here, unlike *Higgins*, Claimants produced *no reliable evidence*⁶ that the school district or PSERS failed in the first instance to provide them with notice of their right to elect multiple service *upon their entry into the system*. In fact, included as Claimant's Exhibit 1 is a template of the letter that PSERS sent to Claimant Parsil upon receiving Claimant's enrollment application; the letter clearly explains multiple service, Claimant's right to elect multiple service and the deadline for doing so.

⁵ The facts in *Higgins* are important because they are distinguishable from this case:

When *Higgins* was initially hired by the school district in 1976, the school district was not aware of its statutory responsibility to provide notice to new employees of the right to elect multiple service within 30 days of entry into the system; as a result, the school district never informed *Higgins* of her right to elect multiple service. Compounding this error, the enrollment application that PSERS provided to school districts for new employees in 1976 also failed to contain any notice to new enrollees of a 30-day right to elect multiple service. In fact, PSERS failed to implement procedures to provide notice of the 30-day election requirement prior to 1983.

Upon realizing its error, PSERS attempted to cure its failure to ensure that *new employees* were provided with requisite notice of their right to elect multiple service by extending two successive grace periods - between 1983 and 1985 - to *all members* to elect multiple service, even those who failed to do so within the first 30 days of their entry into the system. PSERS elected to notify its members of this important right through articles appearing in newsletters that were sent to members via bulk mail.

When *Higgins* was contemplating retirement, she sought to combine her prior state service with school service *at that time* in order to provide an earlier retirement date. *Higgins* testified that she did not remember receiving any newsletters; even if she did, she never read the newsletter articles. In addition, the School District by its own admission testified that it failed to provide *Higgins* with any type of individual notice of her right to elect multiple service at any time. Notwithstanding this evidence, PSERS denied *Higgins* the right to elect multiple service on the ground that her request was made more than 30 days following her entry into the system and was not made within the grace period that was offered between 1983 and 1985.

Following an appeal, the court reversed PSERS and ordered the Board to grant *Higgins* multiple service membership because there was no proof in the record that *Higgins* had actual notice of the 30-day statutory period to elect multiple service. Because the newsletters were sent by bulk mail, as opposed to first class mail, and were not individually addressed, the court held that the newsletters were not sent in a manner that would constitute sufficient legal notice.

⁶ Claimant Parsil does not recall receiving notice from the school district or the letter from PSERS; however, PSERS' record of mailing indicates that Parsil was sent the letter in October of 1988. Thus, it is more likely than not that the passage of time has simply clouded Claimant's memory. Claimant Haugh, likewise, does not recall receiving notice from the school district or a letter from PSERS similar to the template letter; however, Claimant's testimony, standing alone, is not credible.

In addition, the window that was opened by Act 9 pertains to section 8507 of the Retirement Code – not section 8506 (relating to *duties of employers*). Section 8507 imposes rights and duties upon school employees and PSERS members. Pertinent to Claimants' appeal, section 29 of Act 9 provides:

Notwithstanding the limitation contained in 24 Pa. C.S. §8507(c),⁷ any member of the Public School Employees' Retirement System who was formerly an active member in the State Employees' Retirement System and whose service credit in the State Employees' Retirement System has not been converted to service credited in another public pension plan or retirement system in this Commonwealth may elect to become a multiple service member on or before December 31, 2003.

In contrast to section 8506(g), which expressly requires the employer, *upon the employment of a former SERS member* who is not an annuitant of the SERS *to advise such employee of his right to elect multiple service membership within 365 days of entry into the system*, the Act 9 amendments to the Retirement Code do not contain such a requirement in section 29. Similarly, language comparable to that found in section 8502(g), which places the responsibility on *PSERS* to notify such employees of their right to elect multiple service if the employer fails to comply with its statutory obligation to do so, is not found within section 29 of the amendments. Thus, PSERS had no statutory obligation by the Act 9 amendments to advise PSERS members who were formerly active members in SERS of the new window between July 1, 2001 and December 31, 2003 to elect multiple service membership.

⁷ Section 8507(c) of the Retirement Code provides as follows:

§8507. Rights and duties of school employees and members

(c) Multiple Service Membership. -- Any active member who was formerly an active member in the State Employees' Retirement System may elect to become a multiple service member. Such election shall occur no later than 365 days after becoming an active member in this system.

Nonetheless, Claimants argue that since Act 9 also amended section 8507(c) by extending the date by which new employees have to elect multiple service,⁸ the two provisions share the same common characteristic, i.e., the right of an election to multiple service. According to Claimants, this right of an election imposes a corresponding statutory obligation on PSERS to provide actual notice to Claimants of their right to elect multiple service under Act 9. However, to accept Claimants argument as valid would require the Board to add language to the amendments that the legislature chose not to include. As the Commonwealth Court observed in *Trakes v. Public School Employees' Retirement System*, 768 A.2d 357 (Pa. Cmwlth. 2001):

If the General Assembly had intended to require specific notice of all Retirement Code provisions impacting a member's benefits it easily could have done so. See Section 1921 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1921. It is not for the courts to add, by interpretation, to a statute, a requirement which the General Assembly did not see fit to include. *Hanna v. Public School Employees' Retirement System/Board*, 701 A.2d 800 (Pa. Cmwlth. 1997)

Trakes, at 367.

Notwithstanding the absence of a specific notice requirement under section 29, the record reveals that PSERS did, in fact, notify active members of PSERS, including Claimants, of the new window from July 1, 2001 to December 31, 2003 to elect multiple service membership. Indeed, PSERS provided notice to its members of the new multiple service election window through various means. Claimants simply did not avail themselves of this information.

The evidence reveals that upon the enactment of Act 9, PSERS sent the Act 9 election form along with a 4-page letter to all acting contributing members of PSERS to

⁸ Act 9 amended section 8507(c) of the Retirement Code by extending the date that any active member who was formerly an active member in SERS may elect to become a multiple service member, from 30 days after becoming an active member in the system to 365 days after becoming an active member in the system.

notify members, *inter alia*, of the new T-D membership class and of the new window to elect multiple service membership.

The election forms were bar coded and personally addressed to Claimants. The cover letter, which was very explanatory, highlighted in bullet fashion the Act 9 amendments on the first page, and then provided particulars about each of the amendments, including the new window to elect multiple service membership, in subsequent pages. With respect to the new window to elect multiple service membership, the cover letter contained the following information:

Window for Multiple Service Membership

Multiple Service membership combines nonconcurrent service credited with SERS and PSERS. Examples of SERS service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor and Industry), a state owned educational institution, Pennsylvania State University, or a community college.

- If you are an **active** member of PSERS on July 1, 2001, and are not a Multiple Service member, although you had or have SERS covered service, Act 9 provides a window to elect Multiple Service membership. PSERS must receive your request for Multiple Service membership between July 1, 2001 and December 31, 2003. **If you terminate employment before December 31, 2003, you must submit your request *prior* to the date of termination.** Also, if you are retiring this year and wish to elect multiple service, you must remain in **active** service on or after July 1, 2001, to take advantage of the new window.
- If you need to purchase prior service to gain multiple service credit, you may now use the actuarial debt plan as a payment plan. The debt is applied to the equity in your retirement account. It does not affect your current contributions and interest. When you retire, your monthly retirement payment will be adjusted to pay for the purchase over the lifetime of the benefit. Although a portion of your monthly benefit pays the debt, adding service credit to your account usually increases the amount of your monthly retirement benefit.

Members who were interested in combining state and school service credit were instructed as follows:

If you have or had employment covered under SERS and you want to combine state and school service credit, *you should use the enclosed PSERS Membership Class Election Form to request further information on Multiple Service membership*. PSERS will mail additional information about becoming a Multiple Service member to you.⁹

Claimants do not dispute that they received the Act 9 election form from PSERS. Haugh signed and dated her form on June 13, 2001; Parsil signed and dated her form on November 12, 2001. Rather, Claimants argue that PSERS failed to produce the necessary evidence to prove that the *cover letter* was actually sent and received by Claimants. This argument is disingenuous.

The testimony of both Parsil and Haugh is that they do not *recall* receiving the cover letter along with the election form. However, the inability to recall receiving a letter does not mean that the letter was not received.

Here, the cover letter is actually the document that explains the purpose of the *enclosed election form*. The cover letter clearly indicates that an election form *was enclosed with it*. The first sentence reads: “[t]his letter explains the urgent need for you to *complete the enclosed election form* to take advantage of the recent changes to your retirement plan.” When shown a copy of the cover letter, Parsil agreed that the letter “certainly would” appear to be the letter that was sent with the election form. (N.T. 17)¹⁰

⁹ The cover letter also instructed PSERS members to *complete the enclosed election form* in order to change their PSERS membership class. A detailed explanation about the new T-D class membership was provided so that members were able to make an informed election.

¹⁰ When asked specifically whether she recalled receiving the letter, Parsil responded: “[w]ell, let’s put it this way: I’m assuming that the election form would have had some kind of cover letter with it, and this certainly appears to be the cover letter that came with it.” (N.T. 18)

The cover letter similarly instructs members who are interested in combining state and school service credit to “use the enclosed PSERS Membership Class Election Form” to request further information on Multiple Service membership.

The *fact* that Claimants returned the election form to PSERS is evidence that they received the actual election form. The additional *fact* that the cover letter makes two separate and specific references to the *enclosed election form* supports the inference that the cover letter and the election form were mailed together. In addition, Elizabeth Eichelberger who works with the benefits processing unit in PSERS testified that the cover letter and the Act 9 election form were mailed together. (N.T. 38, 56) It is reasonable to conclude from these proven facts that since Claimants received the election form, Claimants also received the cover letter that accompanied the election form. “An administrative agency may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.” *Pennsylvania Labor Relations Board v. Sand’s Restaurant Corporation*, 429 Pa. 479, 486, 240 A.2d 801, 805 (1968).¹¹

In addition to providing PSERS members with an individualized Act 9 election form and cover letter, which provided a detailed explanation of the window for active

¹¹ In *Commonwealth of Pennsylvania v. Whitman*, 186 A.2d 632 (1962), the Superior Court of Pennsylvania explained:

Inference is a process of reasoning by which a fact or proposition sought to be established . . . is deducted as a logical consequence from other facts, or a state of facts, already proved or admitted. *Simon v. Fine*, 167 Pa. Super. 386, 391, 74 A.2d 674 (1950). It has also been defined as ‘a deduction of an ultimate fact from other proved facts, which proved facts, by virtue of the common experience of man, will support but not compel such deductions.’ *In re Dilios’ Will*, 156 Me. 508, 167 A. 2d 571, 578 (1960). The right inference or conclusion in point of fact, is itself a matter of fact, and to be ascertained by the jury or fact finder. *Simon v. Fine*, *supra.*, 167 Pa. Super. P. 391, 74 A.2d at p. 676; *Neely v. Provident Life and Accident Insurance Co.*, 322 Pa. 417, 423, 185 A. 784 (1936). *Whitman*, at 634.

members to elect multiple service, the record reveals that throughout the window period - during the Summer and Fall of 2001, the Spring, Summer and Fall of 2002 and the Summer and Fall of 2003 - PSERS sent Retirement Chalkboard newsletters to all active members of PSERS. Every one of these newsletters contained an article that was devoted to multiple service and the deadline for electing multiple service membership.¹²

In addition to these publications, during the Winter of 2002, PSERS mailed a publication entitled "PSERS UPDATE" to all retired and active members. This publication, likewise, contained an article on multiple service entitled, "Multiple Service Election Re-Opened." Although Claimants rely on *Higgins* for the proposition that these newsletters were insufficient to provide actual and/or constructive notice to Claimants of their option to elect multiple service membership, *Higgins* is distinguishable.¹³ Moreover, unlike *Higgins*, here, both Claimants admit that they have received PSERS' Retirement Chalkboard publications; they simply opted not to read them.

There is no question that PSERS stands in a fiduciary relationship to its members regarding the investments and disbursements of any of the moneys of the fund, 24 Pa. C.S. §8521(e). As such, PSERS has a fiduciary duty to its members to follow the requirements of applicable state law for its members' benefit. However, "[PSERS] has no authority to grant rights beyond those specifically set forth in the retirement code."

Forman v. Public School Employes' Retirement Board, 778 A.2d 778 (Pa. Cmwlth. 2001)

¹² Retirement Chalkboard publications are mailed to PSERS members through Permit No. 254, which is a form of bulk mail. Although PSERS does not have access to all printouts showing the names and addresses of PSERS members that were sent to PSERS' vendor for the mailing of the Retirement Chalkboards, business records of PSERS indicate that both Claimants' names and addresses were forwarded to the vendor and included on the distribution list to receive the Summer 2001, and Summer and Fall 2003 publications. In addition, both Claimants' names and addresses were forwarded to the vendor for distribution of the Winter 2002 PSERS UPDATE publication.

¹³ See, footnote 5.

(citing *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth.), petition for allowance of appeal denied, 542 Pa. 678, 668 A.2d 1139 (1995)).

Here, the window to elect multiple service membership under Act 9 was from July 1, 2001 through December 31, 2003. Although PSERS had no statutory obligation to notify members of this new election period, the record reveals that PSERS provided both actual and constructive notice of the new election period to its members, including Claimants, through various means. Claimants need only be notified once under the Retirement Code. *Higgins*, at 752.

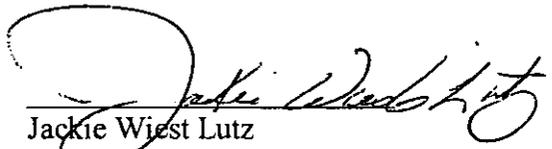
Claimants have the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). Claimants have not proffered sufficient evidence to support their appeal. The following recommendation will therefore be made to the Board:

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: Account of Karen A. Haugh	:	Docket No. 2006-07
Claim of Karen A. Haugh	:	
	:	
	:	
AND	:	
	:	
Account of Dolores Parsil	:	Docket No. 2006-14
Claim of Dolores Parsil	:	

RECOMMENDATION

AND NOW, this 10th day of July, 2007, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the hearing officer for the Public School Employees' Retirement System recommends that the Board **affirm** the decisions of the Executive Staff Review Committee dated December 29, 2005 and April 25, 2006 that denied Claimants' respective requests to elect multiple service membership after the December 31, 2001 statutory deadline.


Jackie Wiest Lutz
Hearing Officer

Date of Mailing: July 10, 2007.