

Mail Date: DEC 16 2009

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

IN RE: ACCOUNT OF BARBARA M. AUKER
DOCKET NO. 2008-30
CLAIM OF BARBARA M. AUKER

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Opinion and Recommendation of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request to elect multiple service membership after the December 31, 2003 deadline is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: DEC 16 2009

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: Account of Barbara M. Auker
Claim of Barbara M. Auker

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Docket No. 2008-30

OPINION AND RECOMMENDATION

Date of Hearing: April 22, 2009
Hearing Officer: Jackie Wiest Lutz, Esquire
For the Claimant: Barbara M. Auker, *Pro se*
For PSERS: David W. Speck, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Barbara M. Auker (hereinafter, "Auker" or "Claimant") from a September 18, 2008 decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request to elect multiple service membership after December 31, 2003.

Claimant's appeal was timely filed on October 15, 2008. Thereafter, on October 31, 2008, an answer was filed by Assistant Deputy Chief Counsel, David W. Speck, on behalf of the Public School Employees' Retirement System (PSERS).

On February 20, 2009, Jackie Wiest Lutz, Esquire was appointed by Secretary Jeffrey B. Clay to act as hearing examiner for Claimant's administrative hearing. A hearing notice was subsequently issued on February 27, 2009, which scheduled the hearing on Claimant's appeal for April 22, 2009.

The hearing in this matter was held as scheduled on April 22, 2009 in Harrisburg, PA before the appointed hearing examiner. Claimant was present at the hearing, *pro se*; David W. Speck, Esquire represented PSERS.

Following the close of evidence and receipt of the hearing transcript, a briefing schedule was established by the hearing examiner. Pursuant to the briefing schedule, Claimants' brief was due on or before June 15, 2009; PSERS' brief was due on or before July 15, 2009; and, a reply brief, if any, was due by Claimant no later than July 30, 2009.

Both parties filed timely briefs; however, Claimant opted not to file a reply brief.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. At all relevant and material times, Claimant was an active member of the Public School Employees Retirement System; Claimant has been a public teacher for 35 years. (N.T. 28; Transcript, *passim*)
2. On May 17, 2001, Act 2001-9 was enacted. (Official Notice)
3. Act 2001-9 opened a window for active members of PSERS who were former active members 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 Pennsylvania to elect to become a multiple service member. (Official Notice)
4. Act 2001-9 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. (Official Notice)
5. Under Act 2001-9, the window during which qualified members of PSERS could elect multiple service membership and class T-D membership was between July 1, 2001, the effective date of Act 2001-9, and December 31, 2003. (Official Notice)
6. Following the enactment of Act 2001-9, PSERS sent a "Summary of Legislation" letter to acting contributing members of PSERS, together with a cover letter which included an Act 2001-9 election form, to notify members, *inter alia*, of the new T-D membership class and the new window from July 1,

2001 until December 31, 2003 to elect multiple service membership. (N.T. 11; PSERS Exhibit 2)

7. Claimant was among the acting members of PSERS who was sent the *Summary of Legislation* letter and the additional cover letter which included the Act 2001-9 election form. (N.T. 10-12; PSERS Exhibits 1 and 2)
8. The *Summary of Legislation* letter contained the following information with respect to the extended opportunity to elect multiple service membership:

3. Effective July 1, 2001, the opportunity to elect Multiple Service membership (members who elect to combine benefits in the PSERS and the State Employees' Retirement System) will be expanded.

- a. Current members, who have not already elected Multiple Service membership, will have a window from July 1, 2001 through December 31, 2003, to apply for multiple service membership.
- b. Any payment due for multiple service membership can now be satisfied through the debt plan, which is available for other types of purchase of service credit at PSERS.

(PSERS Exhibit 2)

9. Page 3 of the cover letter to the Act 2001-9 election form 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)

10. The Act 2001-9 election form 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 separate box to request multiple service information. (PSERS Exhibit 2)
11. Claimant received the Summary of Legislation letter and Act 2001-9 election form and cover letter and made the election to change to T-D Class on June 12, 2001. (PSERS Exhibit 3)

12. Claimant did not check the box on the form to request multiple service information. (PSERS Exhibit 3)
13. When a member, like Claimant, did not check the box on the Act 2001-9 election form to request multiple service information, PSERS did not send additional multiple service information to the member. (N.T. 13-14)
14. On July 9, 2001, PSERS mailed a letter to Claimant to acknowledge receipt of Claimant's Act 2001-9 election form, signifying her intent to elect Class T-D membership. (N.T. 14; PSERS Exhibit 4)
15. A Retirement Chalkboard is a news publication that PSERS sends to all active members of PSERS. (N.T. 15-16)
16. Retirement Chalkboard publications are mailed to PSERS members through presorted standard third class mail, which is a form of bulk mail. (N.T. 16-17)
17. 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 6, 8-10, 12-13)
18. The Summer 2001 Retirement Chalkboard contains a two-page article devoted to an overview of Act 2001-9; 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. 15-16; PSERS Exhibit 6)

19. Records on file with PSERS show that Claimant was among the list of active members of PSERS who was mailed a copy of the Summer 2001 Retirement Chalkboard. (N.T. 16-17; PSERS Exhibit 6)
20. The Spring 2002 and Summer 2002 Retirement Chalkboards also contain an article on the front page entitled "Multiple Service Election Re-Opened;" the articles in each publication contain substantially similar content and information as the article that appeared in the Summer 2001 Retirement Chalkboard. (N.T. 18-20; PSERS' Exhibits 8 and 9)
21. Records on file with PSERS show that Claimant was among the list of active members of PSERS who was mailed a copy of the Spring 2002 and Summer 2002 Retirement Chalkboard. (N.T. 18-20; PSERS Exhibits 8 and 9)
22. The Fall 2002 and Summer 2003 Retirement Chalkboards, likewise, contain similar articles pertaining to "Multiple Service Election Re-Opened." (N.T. 18-20; PSERS Exhibits 10 and 12)
23. Records on file with PSERS show that Claimant was among the list of active members of PSERS who was mailed a copy of the Fall 2002 and Summer 2003 Retirement Chalkboard. (N.T. 18-20; PSERS Exhibits 10 and 12)

24. The Fall 2003 Retirement Chalkboard contains a more urgent article on its front page, entitled, "Deadline Approaching for Multiple Service Election."

This article contains the following information:

Deadline Approaching for Multiple Service Election

Multiple Service allows you to combine Pennsylvania state and school service that will enhance your retirement benefit. 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, employment with the 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 your school employer or by December 31, 2003, whichever is later.**

This is your only opportunity to elect Multiple Service unless you have a break in service. Your contributions and interest will continue to earn interest as long as you remain active in either of the two Systems. Your record of service, contributions, and interest will remain separate in each System until you terminate service in both Systems and apply for a refund or retirement.

If you terminate employment before December 31, 2003, you must submit your request to elect Multiple Service prior to your termination date.

(N.T. 20; PSERS Exhibit 13)

25. Records on file with PSERS show that Claimant was among the list of active members of PSERS who was mailed a copy of the Fall 2003 Retirement Chalkboard. (N.T. 20; PSERS Exhibit 13)
26. In the Winter of 2002 and the Winter of 2003, PSERS also mailed a publication entitled "PSERS Update" to all retired and active members of PSERS; similar to the Retirement Chalkboards, both PSERS Update

- publications contained articles entitled "Multiple Service Election Re-Opened." (N.T. 47; PSERS Exhibits 7 and 11)
27. Records on file with PSERS show that Claimant was among the list of retired and active members of PSERS who was mailed a copy of the Winter of 2002 and Winter of 2003 PSERS Update. (N.T. 19-20; PSERS Exhibits 7 and 11)
 28. Claimant's current address is identical to the address on file with PSERS where Retirement Chalkboard publications and PSERS Updates were mailed to Claimant. (N. T. 59; PSERS Exhibits 6-13)
 29. Claimant has lived at her current address for 32 years; during the course of those 32 years, her mail delivery has been regular. (N.T. 59)
 30. Claimant recalls receiving Retirement Chalkboards and PSERS Updates in the mail; however, she did not read them. (N.T. 57-58)
 31. Claimant acknowledges that she did not check the box requesting multiple service information when she completed her Act 2001-9 election form. (N.T. 56-57)
 32. On August 22, 2007, Claimant filed an Application for Multiple Service Membership with PSERS to request multiple service with the Department of Labor and Industry for the period between March 1976 and August 1976 when Claimant worked as a clerk steno in the unemployment office within that Department. (N.T. 20-21, 30; PSERS Exhibit 14)
 33. On September 18, 2007, and September 18, 2008, respectively, the Member Service Center of PSERS and the Executive Staff Review Committee of PSERS sent notification to Claimant that her request to elect multiple service

membership was untimely and, therefore, denied. (N.T. 21-22; PSERS Exhibits 15 and 16)

34. Claimant was notified of her right to appeal the denial of her request to elect multiple service membership by requesting an administrative hearing.

(PSERS' Exhibit 16)

35. An administrative hearing on Claimant's appeal was held on April 22, 2009.

(PSERS Exhibits 17 and 18; Transcript, *passim*)

36. Claimant was present at the hearing, *pro se*, and had the right to testify and present evidence in support of her appeal and to cross examine witnesses.

(Transcript, *passim*)

CONCLUSIONS OF LAW

1. Claimant was afforded an opportunity to be heard in connection with her appeal. (Findings of Fact Nos. 33-36)
2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
3. As an active member of PSERS on July 1, 2001, Claimant had until on or before December 31, 2003 to elect to become a multiple service member. (Findings of Fact Nos. 1-5; 24 Pa. C.S. §8507(c)).
4. Claimant's Application for Multiple Service Membership was not filed until August 22, 2007 and is, therefore, untimely. (Findings of Fact No. 32)
5. Claimant is not entitled to elect multiple service membership at this time. (Findings of Fact Nos. 1-33)

DISCUSSION

As the preceding findings of fact disclose, Act 2001-9 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.¹ Under Act 2001-9, qualified members of PSERS could elect multiple service membership between July 1, 2001 and December 31, 2003.

Claimant's appeal centers on what Claimant characterizes as "lack of communication." (N.T. 30) Claimant testified that the reason she did not request multiple service membership prior to August 22, 2007 is because she was under the wrong assumption that *she* had to provide documentation to corroborate that she worked for the Department of Labor and Industry for six months in 1976. Claimant testified that everyone that she called - PSERS, the Pennsylvania State Education Association and the State Employees Retirement System – told her that they did not have a record of her employment. Thus, Claimant *believed* that she was precluded from applying for multiple service until she could show proof of her employment.

In her brief, Claimant reiterates this same claim:

¹ Section 29 of Act 2001-9, as it applies to Claimant and others similarly situated provides:

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.

Previous to Act 2001-9, section 8507(c) of the Retirement Code only allowed such members 30 days to make this election.

In 2001, Barbara M. Auker called PSERS to ask about buying retirement time for the six months that she worked as a Clerk/Steno for the Unemployment Office, Bureau of Labor and Industry, Commonwealth of PA. She was told at that time that there was no record of her employment. No one gave her any assistance as to how she could prove her State service time. Also, no one offered to send her a multiple service form to fill out explaining that PSERS would search for her employment records.

Every summer from 2001 through 2007, Barbara M. Auker called PSEA, PSERS, SERS, and Social Security trying to find a record of her employment. Again, no one at any of these offices told her that she did not need proof of her employment but should file a request for multiple service form. Finally in August of 2007, Barbara M. Auker contacted Mr. Dominic A. Corso, PSERS Central – West Regional Office, and he sent her the multiple service form that she submitted (PSERS Exhibit 14). Mr. Corso told her that PSERS would send her a Social Security form that would trace her employment. Instead, PSERS sent a denial for her request for multiple services.

(Claimant's Brief, p. 1)

However, as the record reflects Claimant was sent numerous communications/publications from PSERS that explained the requirements to elect multiple service. The first communication that Claimant was sent was the "Summary of Legislation" letter and Act 2001-9 election form and its accompanying cover letter, which explained the window for multiple service membership. These two communications explain what multiple service membership is, and provide information to members about the window, between July 1, 2001 and December 31, 2003, to elect multiple service membership. The Act 2001-9 election form, which accompanied these mailings, contained a specific section for members to "check" if they *believed* they had service under the State Employees' Retirement System. The section of the form specifically states:

Multiple Service Information Request (Optional)

Check this block if you believe you have or had service under the State Employees' Retirement System (SERS), for example, Health and Welfare, Department of Labor and Industry, PennDOT. PSERS will mail additional information about combining your PSERS and SERS service to become a Multiple Service member.

If you are currently a Multiple Service Member, do not request this information.

(PSERS Exhibit 3)

Claimant acknowledged that she received and signed the Act 2001-9 election form to elect to change to T-D class; Claimant also acknowledged that she did not check the block on this form to request multiple service information. Since Claimant did not request multiple service information, PSERS did not send additional multiple service information to Claimant. But, the record reflects, indisputably, that PSERS sent Retirement Chalkboard publications and PSERS Updates to members, including Claimant, throughout the 18-month window to remind members of their opportunity to elect multiple service membership.

The evidence reveals that commencing with the Summer 2001 edition of the Retirement Chalkboard and continuing throughout the 18-month window to elect multiple service membership, PSERS mailed at least eight separate communications/publications to Claimant (PSERS Exhibits 6-13). Every one of these communications/publications contained an article devoted to multiple service membership and the deadline for electing multiple service membership. Claimant does not deny receiving these publications; in fact, she testified, "I do get them in the mail." (N.T. 57-58) However, she candidly admits, "whether I read them is another issue." *Id.*

The statutory window to elect multiple service membership under Act 9 was from July 1, 2001 through December 31, 2003. PSERS provided both actual and constructive

notice of the new election period to Claimant through various means. It is unfortunate that Claimant mistakenly believed that the burden was on her to produce documentation to prove that she had prior state employment before she could apply for multiple service membership; however, none of the communications/publications that PSERS sent to Claimant contained such information or instruction. Claimant was provided with the necessary information to timely elect multiple service membership. Claimant simply did not avail herself of the information or the opportunity to do so.²

Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). Claimant has not proffered sufficient evidence to support her appeal.

The following recommendation will therefore be made:

² In his post-hearing brief, counsel for PSERS explains the duty of the school employer to notify a *new school employee*, with previous state service, of the right to elect multiple service; the standard enunciated under *Higgins v. Public School Employees' Retirement System*, 736 A. 2d 745 (Pa. Cmwlth. 1999) for doing so; and, why that duty does not apply to already employed active members, such as Claimant. However, Claimant does not argue that she never received the Act 2001-9 election form and accompanying cover letter and *Summary of Legislation* letter. Also, Claimant does not deny that she received the Retirement Chalkboard publications or the PSERS Updates. Claimant's sole contention is "it took two appeals and a hearing for someone to explain to Barbara M. Auker that she could have requested multiple services without proof of her employment." (Brief of Claimant, p. 1)

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

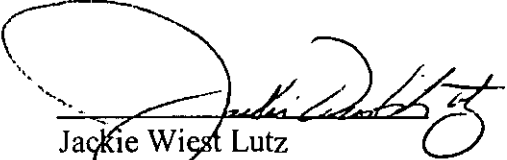
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Docket No. 2008-30

RECOMMENDATION

AND NOW, this 1st day of September 2009, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the hearing examiner for the Public School Employees' Retirement System recommends that Claimant's request to elect multiple service membership after the December 31, 2003 deadline for doing so should be denied, as untimely.


Jackie Wiest Lutz
Hearing Examiner

Date of Mailing: September 1, 2009