

Mail Date: SEP 30 2008

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

IN RE: ACCOUNT OF CATHY J. HING  
DOCKET NO. 2007-21  
CLAIM OF CATHY J. HING

**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 of the Hearing Examiner in the above-referenced matter. We note that neither party filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Hearing Examiner's Opinion. Accordingly, we hereby adopt the Hearing Examiners' Opinion as our own.

IT IS HEREBY ORDERED that Claimant's request to purchase out-of-state school service credit is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: 9/26/2008

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

COMMONWEALTH OF PENNSYLVANIA **LEGAL OFFICE** AUG 07 2008  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE:

ACCOUNT OF CATHY J. HING  
CLAIM OF CATHY J. HING

DOCKET NO. 2007-21

Michael L. Bangs  
Hearing Examiner  
429 South 18<sup>th</sup> Street  
Camp Hill, PA 17011

April 28, 2008

David W. Speck, Esquire  
Counsel for PSERS

Cathy J. Hing  
Pro Se Claimant

**OPINION OF THE HEARING EXAMINER**

**Findings of Fact**

1. Cathy Jane Hing ("Claimant") is a member of the Public School Employees' Retirement System ("PSERS") by virtue of her employment with the Big Spring School District. (N.T. 9-10, 23)

2. At the time of the hearing, Claimant had worked for the Big Spring School District for the past 18 years. (N.T. 9)

3. Prior to that employment, Claimant was employed as a teacher by New York State from 1975 to 1979. (N.T. 9, PSERS Exhibits 1, 2)

4. While a teacher in New York, Claimant was a member of the New York State Teachers' Retirement System ("NYSTRS"). (PSERS Exhibit 2)

5. At the time of Claimant's membership, NYSTRS was a "noncontributory" retirement system, in that the employer, rather than the employee, contributed the funds to the retirement system. (N.T. 18-19; PSERS Exhibits 2, 3 and 4).

6. Due to a change in New York law, Claimant returned to New York for one day of work on June 9, 2003, after which she was reestablished in NYSTRS, and permitted to retire therefrom. (N.T. 30, PSERS Exhibit 5)

7. On October 12, 2006, Claimant retired from NYSTRS, and chose a lump sum pension distribution of \$7,664.97, rather than a monthly pension of \$40.99. (N.T. 21, PSERS Exhibit 4)

8. Claimant received written notification from NYSTRS, dated December 29, 2006, that they had rolled-over her lump sum retirement benefit of \$7,664.97 into her IRA account, as per her wishes. (PSERS Exhibit 4)

9. On January 26, 2007, Claimant filed an incomplete application with PSERS to purchase her five years of New York state service. (PSERS Exhibit 1)

10. PSERS received Claimant's fully completed application to purchase the five years of New York state service on February 16, 2007. (N.T. 24, PSERS Exhibit 2)

11. PSERS denied Claimant's request to purchase her prior New York state service by letter dated March 2, 2007. (PSERS Exhibit 3)

12. Claimant appealed this denial to the PSERS Executive Staff Review Committee on March 18, 2007. (PSERS Exhibit 4)

13. This appeal was denied by letter from the PSERS Executive Staff Review Committee on August 23, 2007. (PSERS Exhibit 6)

14. Claimant filed a Request for Administrative Hearing on the above issue, dated September 20, 2007.

15. On April 23, 2008, a hearing on the above-referenced Administrative Appeal was held before Hearing Examiner Michael L. Bangs, Esquire.

### Discussion

PSERS was created by the legislature and can grant no rights beyond those specifically set forth in the Retirement Code. Hughes vs. PSERS, 622 A.2d 701 (Pa. Commw. 1995); alloc. den. 668 A.2d 1139 (Pa. 1995). While a member is entitled to a liberal construction of the Retirement Code, she has only those rights that were created by the retirement benefit statutes, and none beyond. Cosgrove v. State Employees' Retirement Board, 665 A.2d 870 (Pa. Commw. 1995).

The applicable law governing PSERS' provisions for the purchase of prior service is as follows:

An active member or a multiple service member who is an active member of the State Employees' Retirement System shall be eligible to receive Class T-C service credit for creditable nonschool service...provided that he is not entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits for service under a retirement system administered and wholly or partially paid for by any other government agency or by any private employer, or a retirement program approved by the employer in accordance with section 8301 (a)(1) (relating to mandatory and optional membership), and further provided that such service is certified by the previous employer and the manner of payment of the amount due is agreed upon by the member, the employer, and the board.

24 Pa.C.S. § 8304(a). Accordingly, the question at issue in the instant case is whether Claimant "is entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits," from NYSTRS.

PSERS' interpretation of the Retirement Code is entitled to great deference. Panko v. Public School Employees' Retirement System, 492 A.2d 805 (Pa. Cmwlth. 1985). PSERS interprets § 8304(a) to allow the purchase of creditable prior service if a member of a *contributory* system can prove that he has withdrawn his contributions and interest from that system, and can show valid proof of the refund. If the member belonged to a *noncontributory* system, he must be able to provide proof that he is *not* entitled to a retirement benefit from that system.

It is beyond question that Claimant was both a member of a noncontributory system, and entitled to receive retirement benefits from the NYSTRS, which she did in the form of a lump sum payment in October of 2006. According to the Commonwealth Court, the question of whether an employee is "eligible to receive [retirement benefits] now or in the future," only disqualifies those people who are currently eligible to receive benefits from an out-of-state-system, regardless of whether they are currently being received or will be received in the future.<sup>1</sup> Cook v. Public School Employees' Retirement Bd., 96 Pa. Commw. 328, 331, 507 A.2d 911, 912 (1986). While Claimant could argue that she had already received her benefits, and thus is not *currently* eligible to receive them now or in the future, such an argument would be nonsensical. The purpose of the prohibition against buying prior service where the employee is already entitled to a retirement is obvious...to prevent a double benefit from the same service. See, e.g., Barcus v. State Employees' Retirement Board, 76 Pa. Commw. 62, 65, 463 A.2d 490, 491 (1983). While Claimant asserts that she did not receive retirement benefits, but rather a withdrawal of contributions, this argument is incorrect; as a member of a noncontributory

system, upon her retirement she received the benefits that her employer contributed. As such, the money she received can only be considered a retirement benefit.

There is some indication that Claimant is also trying to argue a form of estoppel, in as much as she presents evidence that she was never informed of the consequence of receiving the funds from her New York State retirement. The essential elements of a claim of estoppel are the inducement of another to believe that certain facts exist, and a justifiable reliance on this belief, resulting in detriment to the other. Finnegan v. Public School Employee's Retirement Board, 126 Pa. Commw. 584, 588, 569 A.2d 848, 850 (1989), affirmed per curiam, 527 Pa. 362, 591 A.2d 1053 (1991) (further citation omitted). Claimant has failed to present sufficient evidence to make out a claim for estoppel.

Assuming, arguendo, that Claimant was able to establish a claim of estoppel, in this context it must fail. The Commonwealth Court has held that "where a retirement system employee gives a member misinformation, which misinformation is contrary to the positive law appearing in a statute, there can be no recovery." Lawrie v. Public School Employees' Retirement Board, 595 A.2d 753, 758, 141 Pa. Commw. 366, 374 (1991), alloc. den. 608 A.2d 32 (1992) citing, Finnegan. The Court went on to add that as in Lawrie, where the retirement system employee had provided no information, rather than the incorrect information, the situation was even less egregious. Id. Similarly, even if Claimant can prove that she was never informed of the consequences of withdrawing her New York retirement, or, worse yet, that she was incorrectly advised, she is not entitled to recovery under Lawrie and Finnegan.

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<sup>1</sup> This was the holding where the Board attempted to argue that the Cook could resume her employment in the other state, redeposit funds she had withdrawn, and then eventually qualify for retirement in that state. Id.

### Conclusions of Law

1. PSERS was created by the legislature and can grant no rights beyond those contained in the Retirement Code. Hughes vs. PSERS, 622 A.2d 701 (Pa. Cmwlth. 1995); *alloc. den.* 668 A.2d 1139 (Pa. 1995).

2. Claimant bears the burden of establishing those facts upon which she relies in order to prevail. Wingert v. State Employees' Retirement Board, 138 Pa. Commw. 43, 589 A.2d 269 (1991).

3. PSERS' interpretation of the Retirement Code is entitled to great deference. Panko v. Public School Employees' Retirement System, 492 A.2d 805 (Pa. Cmwlth. 1985).

4. Section 8304 of the Public School Employees' Retirement Code states:

An active member or a multiple service member who is an active member of the State Employees' Retirement System shall be eligible to receive Class T-C service credit for creditable nonschool service...provided that he is not entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits for such service under a retirement system administered and wholly or partially paid for by any other governmental agency or by any private employer, or a retirement program approved by the employer in accordance with section 8301(a)(1) (relating to mandatory and optional membership), and further provided that such service is certified by the previous employer and the manner of payment of the amount due is agreed upon by the member, the employer, and the board.

24 Pa.C.S. § 8304(a).

5. Claimant's receipt of a lump-sum return of her employers' contributions to a noncontributory retirement system when she retired from NYSTRS on October 12, 2006 constitutes the receipt of retirement benefits, thus foreclosing her from the purchase of that same service under 24 Pa.C.S. § 8304(a).

6. In order to successfully establish a claim of estoppel, Claimant must show that she was induced to believe certain facts and justifiably relied on those facts which resulted in a detriment to her. Claimant has not met her burden of proof. Finnegan v. Public School Employee's Retirement Board, 126 Pa. Commw. 584, 588, 569 A.2d 848, 850 (1989), affirmed per curiam, 527 Pa. 362, 591 A.2d 1053 (1991) (further citation omitted)

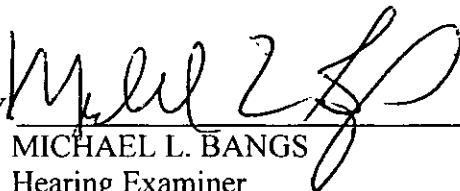
7. Even if Claimant was able to prove that she was misinformed, or not informed of the consequences of receiving her New York retirement benefits, such as to rise to the level of estoppel, the claim would likewise fail in that PSERS cannot be estopped from enforcing its statutory provisions. Lawrie v. Public School Employees' Retirement Board, 595 A.2d 753, 758, 141 Pa. Commw. 366, 374 (1991), alloc. den. 608 A.2d 32 (1992) citing, Finnegan.

**Recommendation**

This Hearing Examiner recommends that Claimant's request to purchase her prior New York State service, pursuant to 24 Pa.C.S. § 8304(a), be DENIED.

Respectfully submitted,

BY:

  
MICHAEL L. BANGS  
Hearing Examiner

Date: \_\_\_\_\_

8-6-08