

Mail Date: AUG 14 2009

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

IN RE: ACCOUNT OF ELIZABETH A. HARTING
DOCKET NO. 2008-09
CLAIM OF ELIZABETH A. HARTING

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Opinion and Recommendation of the Hearing Examiner; and Claimant's Exceptions to the Opinion and Recommendation of the Hearing Examiner. We note that Claimant's Exceptions provide no additional argument or authority to support her Exceptions to the Hearing Examiner's Opinion. The Board, therefore, denies Claimant's Exceptions.

The Board notes that in her Exceptions, Claimant refers to a request for extension she filed after the 90-day deadline had passed for her to receive a June 20, 2007 retirement date. Claimant questions whether such extensions are granted, and, if so, why her request was not. The answer is that the Public School Retirement Code provides that if a member fails to "file a proper application within 90 days of termination of service," the "annuity will become effective as of the date an application is filed." 24 Pa.C.S. § 8507(i). This provision is mandatory and the Board does not have authority to grant an extension of that time.

The Board also notes that a PSERS representative testified that the 90 days is "most often" etched in stone, but that there have been extensions where there were extenuating circumstances brought to light prior to the end of the 90-day period, involving legal matters between the member and the member's employer. We understand this testimony to relate to a member who required certain information from the member's employer to complete an application for retirement that was being submitted to the employer – as the Retirement Code specifically permits, 24 Pa.C.S. §§ 8505(i), (j), which information was not provided within the 90 days through no fault of the member. That is not the case here.

The Board finds appropriate the Introduction, Proposed Findings of Fact, Discussion, Proposed Conclusions of Law, and Recommendation in the Proposed Opinion and Recommendation. Accordingly, with the above amplification, we hereby adopt the Hearing Examiner's Proposed Opinion and Recommendation as our own.

IT IS HEREBY ORDERED that Claimant's request to change her effective date of retirement from October 31, 2007 to June 20, 2007 is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: AUG 14 2009

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

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

IN RE: Account of Elizabeth A. Harting
Docket No. 2008-09
Claim of Elizabeth A. Harting

BEFORE: Lynne M. Mountz, Esquire
Hearing Examiner

HEARING DATE: December 17, 2008

APPEARANCES: For the Public School Employees' Retirement System:
David W. Speck, Esquire

For the Claimant:
Elizabeth A. Harting, Pro Se

PROPOSED DECISION AND RECOMMENDATION

Introduction

Elizabeth A. Harting (Claimant) appealed the decision of the Public School Employees' Retirement System (PSERS) denying her request to change the effective date of her retirement.

An administrative hearing was convened regarding Claimant's appeal on December 17, 2008. PSERS was present at the hearing and represented by Attorney David W. Speck. Claimant appeared at the hearing, waived her right to counsel and elected to represent herself.

Both Parties were given full opportunity to examine and cross-examine witnesses, introduce documentary evidence and file post-hearing briefs. Claimant declined to file an initial post-hearing brief. PSERS elected to file a brief. Claimant thereafter filed a reply brief.

Based upon the testimony and evidence produced at the hearing and all matters of record, the Hearing Examiner enters the following:

Proposed Findings of Fact

1. Claimant, a public school teacher and active member of PSERS, decided to retire following the 2006-2007 school year in order to take care of her ill husband. (N.T. 12; Claimant Exhibit 2).
2. Claimant requested a retirement estimate in April 2007. (N.T. 26; PSERS Exhibit 4).
3. Claimant received the estimate in late April or early May which contained the following language on the first page: "You are required to file an 'Application for Retirement' within 90 days after your termination date. If you do not file within 90 days, your effective date of retirement will be the date your 'Application for Retirement' is received by PSERS." (N.T. 26-27; PSERS Exhibit 4).
4. Claimant listed June 20, 2007 as the date of retirement for purposes of her retirement estimate. (PSERS Exhibit 4).
5. Claimant filed an Application for Retirement that was received by the PSERS Centraleast Office on October 31, 2007. (N.T. 27; PSERS Exhibit 5).
6. The Application for Retirement explicitly states that: "The Public School Employees' Retirement System (PSERS) must receive this application within 90 days of your termination date. Beyond the 90 days, your retirement date will be the date the application is received by PSERS." (N.T. 27; PSERS Exhibit 5).

7. Claimant listed June 20, 2007 as the effective date of her resignation on the Application for Retirement. (PSERS Exhibit 5).
8. Claimant signed and dated a Retirement Exit Counseling Checklist on October 30, 2007 which contained the following language: "Documents not submitted at Exit Counseling should be sent directly to your counselor within 90 days before or after termination date; i.e. last day of paid service. If submitted more than 90 days after your termination date, retirement date becomes the date PSERS receives the application." (N.T. 28; PSERS Exhibit 5A).
9. PSERS annually sent Claimant a Statement of Account based upon information recorded by her school district at the end of each fiscal year. (N.T. 40-41).
10. Inserts are sent with each Statement of Account which provides important information to the member. (N.T. 41).
11. On December 12, 2005, PSERS sent Claimant a Statement of Account as of June 30, 2005. (N.T. 40; PSERS Exhibit 1).
12. An insert which accompanied the June 30, 2005 Statement of Account sent to Claimant stated: "Note: For Normal Retirement Benefits and Early Retirement Benefits, PSERS must receive your *Application for Retirement* within 90 days after your termination date. If you do not file within 90 days, your effective date of retirement will be the date PSERS receives your *Application for Retirement*." (N.T. 41-42; PSERS Exhibit 1).
13. PSERS sent Claimant, as an active member, quarterly Active Member Newsletters containing among other items information regarding filing retirement applications. (N.T. 48-51; PSERS Exhibits 13 and 14).

14. The summer 2007 Active Member Newsletter sent to Claimant contained specific information regarding preparing and applying for retirement. Included in that information was the following language: “PSERS may receive your *Application for Retirement* up to 90 days in advance of your date of retirement. We must, however, receive your retirement application within 90 days of your termination date for your retirement date to be the day after your termination date. Unless a future alternate date of retirement is selected, applications received later than 90-days after termination will result in a retirement date of the day PSERS receives the application.” (N.T. 50; PSERS Exhibit 14).
15. PSERS provided Claimant with an Active Member Handbook that was mailed on June 18, 2007 which contained resources and available programs designed to assist members in applying for retirement benefits. (N.T. 51-53; PSERS Exhibit 16, p.24).
16. Claimant called the PSERS regional office prior to her resignation in June 2007 and received notifications from the office regarding regional seminars. (N.T. 15).
17. Claimant learned from the regional office that she had 90 days following her resignation in which to file her retirement application. (N.T. 15).
18. Claimant did not attend any regional seminars. (N.T. 15, 24).
19. Claimant acknowledged that PSERS provided her with all of the documentation that she should have needed to file her retirement application. (N.T. 35).
20. Claimant admitted that she knew in June 2007 that she had to file her retirement application within 90 days. (N.T. 34).

21. Claimant testified that she did not file an application within 90 days of her resignation because she had been trying to deal with both a difficult classroom situation and her husband's declining health. (N.T. 12-13, 22, 35-36; Claimant Exhibit 1).
22. Claimant realized in October 2007 that she had missed the 90 day deadline for filing her retirement application and placed a call to the regional office. (N.T. 23).
23. Claimant sent a letter to the Appeals Committee dated October 24, 2007 requesting an extension of the 90 day period of time in which to file her retirement application. (PSERS Exhibit 6).
24. Claimant received retirement counseling at her house from the supervisor of the Centraleast office on October 31, 2007 at which time she completed and submitted her retirement application. (N.T. 28; PSERS Exhibits 5 and 5A).
25. By letter dated October 30, 2007, PSERS advised Claimant that they had received her letter of appeal. (PSERS Exhibit 7).
26. In correspondence to PSERS dated October 31, 2007, Claimant wrote in part: "I am so sorry I did not apply before Oct. 1. I knew that was the deadline, somewhere in the back of my head, but my life has been in constant turmoil since May." (PSERS Exhibit 8).
27. By letter dated February 15, 2008, the Executive Director of PSERS informed Claimant that the Executive Staff Review Committee had reviewed and denied her request to change the effective date of her retirement. (PSERS Exhibit 9).

28. By letter dated August 4, 2008, Claimant was provided notice of the date, time and place of the administrative hearing scheduled regarding her appeal. (PSERS Exhibit 10).
29. An administrative hearing regarding Claimant's appeal was held on December 17, 2008.
30. Claimant appeared at the hearing and presented testimony in support of her appeal. (N. T. 10-24; Claimant Exhibits 1 and 2).

Discussion

The essential facts in this matter are not in dispute. Sometime during school year 2005-2006 Claimant determined that she would retire in June 2007. Claimant's husband had been in declining health and Claimant wanted to devote her time to helping him find a better treatment program. Accordingly, Claimant requested and received a retirement estimate from PSERS in April 2007 with a projected retirement date of June 20, 2007.

Claimant testified that she had been placed back into the classroom during the 2006-2007 school year after having been a reading specialist for several years. Claimant indicated that this teaching assignment added even more stress to the stress she had been experiencing because of her husband's health problems. (N.T. 12-13).

After receiving her retirement estimate, Claimant contacted the regional office and was advised that she had 90 days following her resignation to file her retirement application. Claimant decided to wait until after the school year was over to focus on her retirement application. (N.T. 15-16).

Claimant admits that PSERS provided her with all of the information she should have needed to fill out her retirement application. (N.T. 35). More importantly, she acknowledged that the retirement estimate and publications sent to her throughout the summer included information about the 90-day deadline for filing the application. (N.T. 26-27, 34-35). When she resigned in June, Claimant clearly knew what her deadline was for filing her retirement application. (N.T. 34).

According to Claimant, her husband's health deteriorated significantly over the summer and required all of her attention. Even though Claimant knew "in the back of her mind" what the deadline for filing her application was she stated that she was so

distracted by her husband's condition that she did not think about it again until October when she felt better about his treatment plan. (N.T. 22-23, 34-36). By mid-October¹ when Claimant called the regional office to request an extension of the 90 day filing period, the deadline had well passed.

Claimant now seeks to have the Public School Employees' Retirement Board (Board) grant her request to change her effective date of retirement from October 31, 2007, the date she filed her retirement application, to June 20, 2007 based upon extenuating circumstances.

Claimant described in detail the difficulties she confronted during the summer of 2007. There is no question that she had great concern for her husband's health and medical treatment and devoted most of her time to the same. Claimant obviously was under a great deal of pressure trying to help her husband and neglected to timely file her retirement application. Notwithstanding Claimant's compelling testimony, however, the Board is without discretion to provide her with the relief she seeks.

The Retirement Code defines "effective date of retirement" as follows:

The first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date or:

- (1) In the case of a member who applies for an annuity subsequent to 90 days after termination of service, the date of filing such application or the date specified on the application, whichever is later . . .

24 Pa.C.S. § 8102.

"Date of termination" in turn is defined as follows:

The last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his employer or two years

¹ Claimant believes she called the regional office on or about October 12, 2007. (N.T. 23).

following the last day of service for which contributions were made, whichever is earliest.

24 Pa.C.S. § 8102.

The Retirement Code additionally provides that if a member fails to “file a proper application within 90 days of termination of service, he shall be deemed to have elected to vest and his annuity will become effective as of the date an application is filed. ...” 24 Pa.C.S. § 8507 (i).

The statutory requirement is clear. In order for a member to have his retirement effective the first day after termination of service he must file a retirement application within 90 days of that date. The Retirement Code contains no exceptions to this requirement.

In *Forman v. Public School Employees’ Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001), a case relied upon by PSERS, the Commonwealth Court declined to provide *nun pro tunc* relief in the nature of modifying a retirement application for an individual who had untimely filed a claim for early retirement.

Forman, supra, is particularly apposite to the instant case. The petitioner in *Forman* argued that during the window of opportunity to file her retirement application, she had been concerned with her struggle with breast cancer and the fear that she would lose health insurance benefits post-retirement. She contended that her agitation over these two issues rose to a level of mental incapacity which inhibited her ability to file the application.

In reaching their decision in the case, the Court held that the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code.² The Court noted that the Public School Employees' Retirement System is a creature of the legislature and its members have only those rights created by the retirement benefit statute.³ For this reason, the Board was precluded from taking an untimely filed retirement application and "deem[ing] it" timely filed.

The holding in *Forman* is clearly applicable in this case. Claimant is seeking to have the Board essentially open the statutorily created 90 day time period and "deem" her untimely retirement application to be timely filed. There is no authority under the Retirement Code which grants the Board such authority. Thus, even if Claimant succeeded in establishing that she was mentally incapacitated during the summer of 2007, there is no legal authority upon which the Board can grant the relief requested.⁴

Claimant filed her retirement application on October 31, 2007, more than 90 days after her termination date. In accordance with the Retirement Code and as a matter of law her effective retirement date is properly set at October 31, 2007 and cannot be made retroactive to June 2007.

² 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).

³ Citing, *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995).

⁴ The Court in *Forman* also held that even if the Board had the authority to grant the petitioner's requested relief, she had failed to substantiate her claim of mental incapacity under the standards set forth in *Estate of McGovern v. State Employees' Retirement Board*, 512 Pa. 377, 517 A.2d 523 (1986). The Court observed that the only supporting evidence provided by the petitioner was her own testimony and while that testimony might be credible, it was insufficient as a matter of law to establish a claim of mental incompetence.

While this issue need not be decided in this case, it is noted that Claimant similarly testified to very stressful conditions following her resignation from the school district and prior to filing her retirement application. However, she clearly understood that she had 90 days in which to file the application, knew how to contact the regional office and acknowledged that PSERS provided her with all of the information required to file the application, factors which would dictate against a finding of mental incompetence under *McGovern, supra*.

Proposed Conclusions of Law

1. The “effective date of retirement” under the Retirement Code is the first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date or if the member applies for an annuity subsequent to 90 days after termination of service, the date of filing the application or the date specified on the application, whichever is later. 24 Pa.C.S. § 8102.
2. A member’s “date of termination of service” is the last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his employer or two years following the last day of service for which contributions were made, whichever is earliest. 24 Pa.C.S. § 8102.
3. If a member does not file a proper application within 90 days of termination of service, he shall be deemed to have elected to vest and his annuity will become effective as of the date an application is filed. 24 Pa.C.S. § 8507 (i).
4. The Public School Employees’ Retirement System is a creature of the legislature and its members have only those rights created by the Retirement Code. *See, Forman v. Public School Employees’ Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001).
5. The Public School Employees’ Retirement Board has no authority to grant rights to members beyond those specifically set forth in the Retirement Code. *Id*

6. Claimant filed her Application for Retirement more than 90 days after her date of termination of service on June 20, 2007; her effective date of retirement is October 31, 2007, the date she filed her Application.
7. Claimant has not presented a legal basis upon which the Board can deem her application to have been filed within 90 days of June 20, 2007 when she did not file the application until October 31, 2007.
8. The Board has no authority to “deem” Claimant’s untimely filed Application as timely and change her effective date of retirement.

RECOMMENDATION

Insofar as there is no legal basis upon which to grant the request by Elizabeth A. Harting to change the effective date of her retirement, it is hereby recommended that the Public School Employees' Retirement Board DENY the appeal of Elizabeth A. Harting.

Respectfully submitted,



Lynne M. Mountz
Hearing Examiner

Dated: June 29, 2009