

Mail Date: AUG 11 2011

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

IN RE: ACCOUNT OF GARY L. JENKINS
DOCKET NO. 2011-04
CLAIM OF GARY L. JENKINS

OPINION AND ORDER OF THE BOARD

The Board has before it a Motion to Quash Administrative Appeal filed by the Public School Employees' Retirement System (PSERS) in the above-referenced administrative appeal, requesting that Claimant's Request for Administrative Hearing be dismissed as untimely filed and, therefore, that this Board lacks jurisdiction to consider the appeal.

After a careful and independent review of the admitted pleadings and PSERS' records, of which the Board may take official notice, the Board makes the following findings of fact:

FINDINGS OF FACT

1. On March 26, 2007, Gary L. Jenkins (Claimant) filed a PSRS-112, "Application to Purchase Credit for an Approved Leave of Absence" (Application), to purchase time spent on a leave of absence in the 1980-1981 school year.
2. By letter dated October 3, 2008, PSERS denied Claimant's Application and provided Claimant with appeal rights to the Executive Staff Review Committee (ESRC).

3. By letter dated October 10, 2008, Claimant timely appealed the denial of his Application to the ESRC.
4. By letter dated October 29, 2008, PSERS acknowledged Claimant's appeal to the ESRC and advised Claimant that it may take up to six to eight months to process his appeal.
5. Eight months after Claimant appealed to the ESRC, the ESRC mailed Claimant a letter dated June 29, 2009 which notified Claimant that his appeal was denied and his Application would not be processed (Determination Letter). A copy of the Determination Letter is attached as Exhibit A.
6. The Determination Letter advised Claimant that if he wished to appeal the decision of the ESRC in denying his request to purchase service credit for the period of time he was on an unpaid leave in 1980-1981, Claimant must file an appeal and request for an administrative hearing within thirty (30) days of the date of the letter.
7. The Determination Letter was sent to Claimant at 110 Russell Road, Phoenixville, PA 19460, via certified mail and a return receipt was requested.
8. The ESRC received a return receipt card signed by the Claimant. A copy of the certified mail receipt and the return receipt card are attached as Exhibit B.
9. Because the letter was mailed July 1, 2009, the deadline for Claimant to file an appeal of the Determination Letter and request an administrative hearing was July 31, 2009.

10. The Article Number on the certified mail receipt is 7007 3020 0002 0731 6529.
11. The Article Number on the return receipt card signed by the Claimant is 7007 3020 0002 0731 6529.
12. Claimant did not file an appeal and request for administrative hearing from the Determination Letter by July 31, 2009.
13. Claimant did not file a request for an extension of time to file an appeal and request for administrative hearing at any time.
14. Claimant filed an appeal of the Determination Letter and request for an administrative hearing on March 22, 2011, approximately one year and eight months after the date of the ESRC Determination Letter. A copy of Claimant's Appeal and Request for Administrative Hearing is attached as Exhibit C.
15. Claimant has not alleged any fraud, deception, coercion or duress.
16. Claimant understood the thirty day time period in which to appeal the Determination Letter. (See Exhibit C at p. 2, ¶ D, 3.)

DISCUSSION

The sole issue before this Board is whether it has jurisdiction to entertain Claimant's appeal when the appeal was not received for filing within the 30-day period prescribed by regulation.¹

¹ Even if Claimant were allowed to proceed on the merits of his claim, he is not eligible to receive credit for his service abroad because the leave does not constitute an approved leave of absence under the Retirement Code; nor does it qualify as non-school service. The Retirement Code permits a member to receive credited service for leaves of absence that are for military

Pertinent to Claimant's appeal, Section 201.4a. of the Board's regulations, 22

Pa.Code § 201.4a., provides as follows:

(a) An adjudicatory benefit appeal² and request for administrative hearing from a denial letter from the ESRC must be in writing and received by the Board within 30 days after the date of the ESRC denial letter.

* * *

(c) If a claimant fails to appeal a decision of the ESRC to the Board within the prescribed time, the decision of the ESRC is deemed final.

Case law has established that an agency regulation that has been properly promulgated consistent with the procedural requirements of the Commonwealth Documents Law, 45 P.S. §§1102-1602, has the force and effect of law and is binding on an agency. *Borough of Bedford v. Commonwealth, Dep't of Env'tl. Prot.*, 972 A. 2d 53 (Pa. Cmwlth. 2009). Thus, an appeal period that has been fixed by regulation is as binding on an agency as a statutory appeal period. When a statute or regulation requires that an appeal be filed within a prescribed period of time, "an untimely filing will not perfect the appeal. Untimely appeals raise a jurisdictional issue." *Strawley v.*

service, sabbatical, exchange teacher, service with a collective bargaining organization or professional study. 24 Pa.C.S. §§ 8302(b) and 8102 (relating to definition of "approved leave of absence.") During the 1980-1981 school year, Claimant was on an unpaid leave of absence for an unspecified reason. Claimant, therefore, does not meet the criteria for an approved leave of absence under the Retirement Code. Further, Claimant's leave does not meet the criteria for non-school service, which under the Retirement Code needs to be provided as an administrator, teacher, or instructor in the field of public school education for any agency or department of the government of the United States. 24 Pa.C.S. §8304(b). Claimant was an employee of the Institute for International Studies and Training in Japan, which is a non-public school and is a Japanese institution, and not part of an agency of the government of the United States.

² An "Adjudicatory benefit appeal" is defined by regulations to mean: "An appeal from the ESRC to the Board in which a formal hearing is requested and in which an adjudication of the Board is issued under 2 Pa. C.S. §§501-508 and 701-704 (relating to Administrative Agency Law) and 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure)." 22 Pa. Code §201.2a.

Unemployment Compensation Board of Review, 358 A. 2d 145, 147 (Pa. Cmwlth. 1976) (citing, *Luckenbach v. Luckenbach*, 281 A. 2d 169 (Pa. 1971)).

Claimant received the notice at his residence prior to the expiration of the appeal period.³ PSERS records show unambiguously that Claimant received the notice on July 10, 2009 when he signed for the certified letter, twenty-one (21) days *prior* to the deadline to file an appeal. If Claimant needed more time to file an appeal, Claimant could have requested an extension of time to do so. A request for extension would have had to be made, however, within the original time period. If made after the expiration of the time period, reasonable grounds must be established for the failure to act. Section 31.15 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.15, which have been adopted by this Board at 22 Pa. Code §201.1, states:

(1) Except as otherwise provided by law, whenever by these rules or by a regulation or order of an agency, or a notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the agency head or the presiding officer, for good cause be extended upon motion made before expiration of the period originally prescribed or as previously extended; and upon motion made after the expiration of the specified period, the act may be permitted to be done where reasonable grounds are shown for the failure to act.

Claimant argues that his administrative appeal was late because he was “away for the 30 day period” and “had no way of knowing of the denial and the 30 day period until after the time had expired.” (See Exhibit C at p. 2, ¶ D, 3.) Even if Claimant would have received the Determination Letter after the thirty day time period, Claimant waited

³ Only one timely notice is necessary for the administrative appeal period to run. *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745, 752-53 (Pa. Cmwlth. 1999). The *Higgins* Court held that, for administrative actions such as that here, due process notice requirements “are satisfied when proper notice of the action is mailed to an interested party’s last known address.” *Higgins* at 753.

one year and eight months after the due date to file an appeal and made no attempt to cure his lateness prior to March 22, 2011. Courts of this Commonwealth have been consistent in their strict application of statutory appeal periods and have been adamant about their powerlessness to extend an appeal period unless there is a showing of fraud, deception, coercion or duress. *Wise v. Cambridge Springs Borough*, 104 A. 863 (Pa. 1918); *Tankin, Inc. v. Williams*, 277 A. 2d 835 (Pa. Cmwlth. 1971); *Yeager v. United Natural Gas Company*, 176 A. 2d 455 (Pa. Super. 1961); *Powell v. Sonntag*, 48 A. 2d 62 (Pa. Super. 1946); Absent a showing of fraud, deception, coercion or duress, failure on the part of a Claimant to file an appeal within the time period fixed by statute or regulation mandates dismissal of the appeal. *Strawley, supra*, 358 A. 2d at 147. Hardship or neglect does not justify an extension of time for an appeal. *Id.*

Claimant has made no claim of fraud, deception, coercion or duress that would justify his delay. This Board, therefore, is without jurisdiction to consider Claimant's appeal. Because Claimant failed to appeal the decision of the ESRC within the prescribed time, the decision of the ESRC is deemed final.

Accordingly, PSERS' Motion to Quash Administrative Appeal must be granted, and Claimant's administrative appeal must be dismissed.

CONCLUSIONS OF LAW

1. PSERS regulations provide that

(a) An adjudicatory benefit appeal and request for administrative hearing from a denial letter from the ESRC must be in writing and received by the Board within 30 days after the date of the ESRC denial letter.

* * *

(c) If a claimant fails to appeal a decision of the ESRC to the Board within the prescribed time, the decision of the ESRC is deemed final.

22 Pa. Code § 201.4a (relating to adjudicatory benefit appeal and request for administrative hearing).

2. Claimant failed to appeal the decision of the ESRC within the prescribed 30-day period, and the decision of the ESRC is deemed final.

3. Only one timely notice is necessary for the administrative appeal period to run. *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745, 752-53 (Pa. Cmwlth. 1999).

4. The Board may take official notice of documents on file with PSERS. 1 Pa.Code §§ 33.164, 35.173.

5. Claimant has failed to meet the regulatory requirement that his request for administrative hearing be filed within 30 days of the date of the ESRC Determination Letter.

DETERMINATION

For the above stated reasons, the Motion to Quash Administrative Appeal filed by PSERS is granted and Claimant's Request for an Administrative Hearing is denied for

Claimant's failure to file the request within the period prescribed by 22 Pa.Code §
201.4a(a).

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF GARY L. JENKINS
DOCKET NO. 2011-04
CLAIM OF GARY L. JENKINS

ORDER

AND NOW, upon consideration of PSERS' Motion to Quash
Administrative Appeal;

IT IS HEREBY ORDERED, that PSERS' Motion to Quash Administrative
Appeal is GRANTED, and Claimant's Request for Administrative Hearing is
DISMISSED in compliance with 22 Pa.Code § 201.4a(a) as Claimant failed to file his
appeal within the prescribed period.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 8/11/2011

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