

Mail Date: DEC 13 2011

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF JOSEPH M. KUNDROT
DOCKET NO.: 2010-10
CLAIM OF JOSEPH M. KUNDROT

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board has carefully and independently reviewed the entire record of this proceeding, including the transcript, exhibits, briefs and the Opinion and Recommendation of the Hearing Officer. Neither the Claimant nor PSERS filed exceptions in this matter.

The Board generally finds appropriate the Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Hearing Officer's Opinion attached hereto with the following modification: on page 14, last sentence of the first full paragraph, the Hearing Officer's statement: "Claimant's testimony regarding his current financial situation and his desire to provide financial assistance to an illness stricken child, while compelling and laudable, does not meet the objective test established by the Board for undue hardship" is amended to read "Claimant's current financial situation and his laudable desire to provide financial assistance to an illness stricken child do not meet the objective test established by the Board for undue hardship."

With the above modification we hereby adopt the Hearing Officer's Opinion and Recommendation as our own, and accordingly:

IT IS HEREBY ORDERED that the Claimant's request that the Board waive adjustments made to his account is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: DEC 13 2011

By: Melva Vogler
Melva Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

In Re:

Account of Joseph M. Kundrot

Claim of Joseph M. Kundrot

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Docket No. 2010-10

OPINION AND RECOMMENDATION

Date of Hearing: April 20, 2011
Hearing Officer: Linda Barrett, Esquire
For the Claimant: Joseph M. Kundrot, *pro se*
For PSERS: Jennifer A. Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Joseph M. Kundrot ("Claimant") from a decision of the Executive Staff Review Committee ("Committee") of the Public School Employees' Retirement System ("PSERS") denying Claimant's request to waive a service adjustment made to Claimant's account after his retirement.

Claimant was notified of the Committee's decision by letter dated June 22, 2010. The letter explained that the Committee denied Claimant's request because he did not meet of the qualifications of Act 88 of 1998 – specifically the adjustment did not constitute an undue hardship since Claimant's monthly check difference was less than 5%.

Claimant filed a timely Request for Administrative Hearing dated July 21, 2010. In his appeal, Claimant cited a discrepancy between the Finalized Retirement Benefit document provided to Claimant by PSERS listing his total years of service as 32.47 years versus the subject adjustment to 31.51 years.

On August 9, 2010, PSERS filed an Answer to Claimant's Request for Administrative Hearing. Thereafter, following a continuance granted on December 29, 2010 the Hearing Officer issued an order was issued on February 11, 2011 scheduling a hearing on Claimant's appeal for April 20, 2011, in Harrisburg, Pennsylvania.

The hearing was held as scheduled. Claimant appeared at the hearing *pro se*. David W. Speck, Esquire, represented PSERS.

Following the close of evidence, both parties indicated their wish to file post-hearing briefs in lieu of closing arguments.

Upon receipt of the hearing transcript, the Hearing Officer issued a briefing schedule on May 17, 2011. The order directed Claimant to file his brief no later than June 17, 2011. PSERS filed its brief on July 11, 2011. Following an extension granted July 25, 2011, Claimant filed his reply brief on August 23, 2011.¹

The matter is now before the Board for final disposition.

¹ The Hearing Officer received Claimant's reply brief on August 22, 2011. Claimant's reply brief was received by the Docket Clerk on August 23, 2011.

FINDINGS OF FACT

1. Claimant became a member of PSERS in January 1977 by virtue of his employment with the Wilkes-Barre Area School District ("School District"). (N.T. 22-23; Claimant's Exhibits Nos. 3, 8).²

2. Initial service adjustments made to Claimant's account were the result of a set of recomputations and corrections that begin in 2006:

a. On January 3, 2006, PSERS sent Claimant a "Statement of Amount Due" from PSERS for the purchase of 0.50 years of part-time service provided during the 1973-1974 school year and 0.22 years of non-qualifying part-time service during the 1972-1973 school year. As a result, PSERS gave an additional 0.72 years of credited service to Claimant for school years 1972-1973 and 1973-1974. (N.T. 17, 109-110; Claimant's Exhibit Nos. 1, 2, 8; PSERS' Exhibit No. 3, p. 1)

b. PSERS provided Claimant with an *Early Retirement Estimate* ("Estimate") on May 25, 2006. This estimate was based on a January 27, 2007 projected retirement date with an estimated 31.23 years of credited service. (N.T. 46-47; Claimant's Exhibit No. 9).

c. On August 15, 2006, PSERS received a revised *Application to Purchase Credit for Part-Time Service* explaining that the January 3, 2006 request to purchase .50 years of part-time service was incorrect because the service was rendered not in the 1973-1974 school year but 1972-1973. Claimant also

² N.T. refers to Notes of Testimony contained in the Transcript prepared from the April 20, 2011 hearing.

sought credit for four more days than was previously reported. (N.T. 17-21, 81-89, 110-111; Claimant's Exhibit Nos. 1, 8; PSERS' Exhibit No. 3, p. 3).

d. On March 26, 2007, PSERS supplied a second *Early Retirement Estimate* ("Second Estimate") to Claimant. This Second Estimate was based on a retirement date of January 26, 2008 and 31.51 years of credited service. The Second Estimate specifically advised Claimant that it "includes working 92 days in the 07-08 school year". (PSERS' Exhibit No. 2).

e. On April 19, 2007, PSERS provided Claimant with an *Early Retirement Estimate* ("Third Estimate") using a projected date of retirement of June 9, 2007 and 31.72 years of credited service. (N.T. 47-48; Claimant's Exhibit No. 10).

f. The Third Estimate stated in pertinent part:

This document is intended to provide you with an ESTIMATE of your retirement benefits. The calculations are based on a combination of information from you and PSERS as it appears above, and is subject to final audit. Changes to your final average salary, years of service, retirement date, and debts against your account will change your benefit amount. (Claimant's Exhibit No. 10).

g. On April 20, 2007, PSERS provided Claimant with an *Early Retirement Estimate* ("Fourth Estimate") using a projected date of retirement of January 23, 2008 and 32.21 years of credit service. (N.T. 48-50; Claimant's Exhibit No. 11).

h. The Fourth Estimate stated in pertinent part:

This document is intended to provide you with an ESTIMATE of your retirement benefits. The calculations are based on a combination of information from you and PSERS as it appears above, and is subject to final audit. Changes to your final average salary, years of service, retirement date,

and debts against your account will change your benefit amount. (Claimant's Exhibit No. 11).

- i. The Fourth Estimate further stated: "ASSUMING YOU WORK 92 DAYS IN 2007-2008 SCHOOL YEAR." (Claimant's Exhibit No. 11).

3. On two occasions, beginning in 2006, Claimant was granted requests for sabbatical leave:

- a. On March 8, 2006, the School District through its School Board granted Claimant sabbatical leave for the first semester of the 2006-2007 school year (N.T. 25-28; Claimant's Exhibit No. 4, p. 4).
- b. On December 13, 2006, the School District through its School Board granted Claimant an additional sabbatical leave for the second semester of the 2006-2007 school year. (N.T. 28-29; Claimant's Exhibit No. 5, p. 3).

4. In both instances, both sabbatical leaves were related to Claimant's recovery from injuries sustained to his left knee requiring aggressive therapy and home rest. (Claimant's Exhibit No. 4, pp. 2-3; Claimant's Exhibit No. 5, p. 2).

5. Immediately prior to the start of the 2007-2008 school year, Claimant contacted PSERS and was advised that he did not have to return to school service if a medical condition prevented him from returning. (N.T. 30, 36; PSERS' Exhibit No. 1, p. 2).

6. Claimant returned to service with the School District in the 2007-2008 school year following his sabbatical leave during the 2006-2007 school year. (N.T. 29-30; Claimant's Exhibit Nos. 3, 8).

7. At the time Claimant returned to service in the fall of 2007, Claimant was feeling better and intended to return to service during the entire 2007-2008 school year. (N.T. 30).

8. Claimant rendered a total of 0.59 years of school service for the 2007-2008 school year. (N.T. 35-36; Claimant's Exhibit No. 8).

9. Claimant filed an application for retirement with PSERS with a termination date of February 15, 2008 and an effective date of retirement as February 16, 2008. (N.T. 21, 25, 50, 85-86; Claimant's Exhibit No. 6, p. 2).

10. On October 7, 2008, PSERS notified Claimant that his finalized monthly retirement benefit was \$3,863.30 gross based on 32.47 years of credited school service. (N.T. 34-35; Claimant's Exhibit No. 6).

11. On March 10, 2009, PSERS discovered that, although Claimant's account was corrected to reflect 0.52 years of credited service in the 1972-1973 school year, the original 0.50 years of service credited to Claimant as of January 3, 2006 had not been removed. (N.T. 89-90; Claimant's Exhibit No. 8; PSERS' Exhibit No. 3, p. 4).

12. By letter dated April 2, 2009, PSERS advised Claimant that an adjustment was made to his retirement account to reflect 32.47 years of credited service because his total years of credited service was overstated for the 1972-1973 school years. (N.T. 37-38; Claimant's Exhibit No. 7).

13. Upon reading the April 2, 2009 letter, Claimant noticed that his "adjusted" years of credited service listed in the letter were the same as the years of credited service stated in the October 7, 2008 letter. (N.T. 37-38).

14. Claimant filed a written appeal with PSERS seeking a waiver of service adjustment under an undue hardship exception based on Claimant's financial obligation and to contest the service adjustment related to the 2006-2007 sabbatical leave. (N.T. 38; PSERS' Exhibit No. 1).

15. By letter dated June 22, 2010, the Committee notified Claimant that it had denied his request for a waiver of service adjustment because Claimant did not meet the undue hardship test. (N.T. 51-54; Claimant's Exhibit No. 12).

16. Specifically, Claimant was informed that the Committee denied his request because the difference in the amount of Claimant's monthly check, after the adjustment was less than five percent, which did not constitute an undue hardship under Pennsylvania law. (N.T. 51-55; Claimant's Exhibit No. 12).

17. After Claimant retired, PSERS made two pertinent adjustments to Claimant's years of credited service that resulted in a deduction of 0.91 years of credited service: 1) the original 0.50 years of credited service credited as of January 3, 2006 was removed; and 2) 0.41 years of service was removed from the 2006-2007 school year because Claimant only returned for part of the 2007-2008 school year following his sabbatical. (N.T. 35-37, 41, 45, 86-93, 97; Claimant's Exhibit No. 8).

18. After applying all the required adjustments, Claimant's correct years of service with PSERS are 31.56. (N.T. 33-36, 88-93; Claimant's Exhibit No. 8).

19. Claimant's monthly check was reduced by \$55.31 or 1.43% of his monthly annuity. (Claimant's Exhibit No. 12).

20. To receive a full year of credit for the year Claimant was on a sabbatical leave, Claimant had to have returned to work for a period of one school year immediately following the sabbatical unless prevented by illness or physical disability. (Claimant's Exhibit No. 12; 24 P.S. § 1168, *see also*, 24 Pa.C.S. § 8302).

21. Claimant introduced no medical evidence to establish that he was prevented from completing his entire year of service for the 2007-2008 school year. (N.T., *passim*).

22. Claimant introduced no evidence or testimony that the adjustment to his credited years of service resulted in him losing eligibility for a benefit other than his annuity. (N.T., *passim*).

23. Claimant would have continued working if he knew he only had 31.51 years of credited school service. (PSERS' Exhibit No. 1, p. 2).

24. Claimant timely filed an appeal and request for an administrative hearing. (PSERS' Exhibit No. 1).

25. An administrative hearing was held on April 20, 2011. (N.T., *passim*, PSERS' Exhibit No. 4).

26. Claimant was present at the hearing and represented himself. (N.T., *passim*).

CONCLUSIONS OF LAW

1. Claimant was afforded an opportunity to be heard in connection with his appeal. (Findings of Fact Nos. 24-26).

2. PSERS and the Board derive their authority from the provisions of the Public School Employees' Retirement Code ("Code"). 24 Pa.C.S. § 8101, *et. seq.*

3. The Board has no authority to grant rights to members beyond those specifically set forth in the Retirement Code. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001).

4. Claimant bears the burden of proof. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).

5. The burden is upon the member to be certain that PSERS' records are accurate before the member retires. *Hughes v. Public Sch. Employees' Retirement Bd.*, 662 A.2d 701, 707 (Pa. Cmwlth. 1995).

6. A member's awareness of his total years of service coupled with knowledge of purchases of service is enough to make a member aware of the years of service he should have.

Hughes v. v. Public Sch. Employees' Retirement Bd., 662 A.2d 701, 706 (Pa. Cmwlth. 1995).

7. A governmental agency's interpretation of its enabling legislation is entitled to great deference. *Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741 (Pa. 1998); *Laurito v. Pub. Sch. Employees' Ret. Bd.*, 606 A.2d 609 (Pa. Cmwlth. 1992).

8. Section 8302(b) of the Retirement Code, 24 Pa.C.S. § 8302, permits a member to receive credit for an approved leave of absence if: (1) the member returns to the school district which granted his leave for a period at least equal to the length of the leave or one year, whichever is less, unless such condition is waived by the employer; and (2) the proper contributions are made by the member and the employer. 24 Pa.C.S. § 8302; 22 Pa. Code § 213.2(b).

9. An "approved leave of absence" is defined under the Retirement Code as including a sabbatical leave. 24 Pa.C.S. § 8102.

10. To receive full credit for a sabbatical, the Public School Code of 1949, 24 P.S. §§ 11-116 – 11-1171, requires a member to return to service unless the member cannot return because of illness or physical disability. 24 P.S. § 11-1168.

11. Claimant is not entitled to receive a full year of credit for the year he was on a sabbatical leave because Claimant did not return to work for a period of one school year immediately following the sabbatical and he was not prevented from returning due to an illness or physical disability. (Findings of Fact Nos. 3, 7-8, 20-21).

12. If any change or mistake in records results in a member receiving more or less than the member would have been entitled to had the records been correct, the Board must

correct the error and pay the corrected benefit. 24 Pa.C.S. § 8534(b). *White v. Public School Employees' Retirement Board*, 11 A.3d 1, 11 (Pa. Cmwlth. 2010).

13. The Board may waive an adjustment if all of the following are satisfied: (1) the adjustment will cause an undue hardship; (2) the adjustment was not the result of erroneous information supplied by the member; (3) the member had no knowledge or notice of the error prior to the adjustment and member took action based on the erroneous information provided by the system; and (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1.

14. Section 213.3a of the Board's regulations defines "undue hardship" for purposes of Section 8303.1(a)(1) as an adjustment that either (1) causes a reduction in excess of 5% of the monthly annuity; or (2) results in the member losing eligibility for a benefit other than an annuity. 22 Pa. Code § 213.3a.

15. Claimant has not demonstrated how a service adjustment, resulting in a reduced gross monthly benefit payment of \$55.31 (less than 2%), has caused undue hardship to him. (Findings of Fact Nos. 1-23).

16. Claimant is not entitled to a waiver under Section 8303.1 of the Retirement Code because Claimant does not meet all of the statutory requirements. (Findings of Fact Nos. 1-23).

DISCUSSION

The sole issue before the Board is whether sufficient evidence exists to waive the service adjustment made to Claimant's account on the basis that the adjustment will cause undue hardship to him. The record does not support a finding in Claimant's favor.

Fourteen months after Claimant retired from the Wilkes-Barre School District, with what Claimant believed to be 32.47 years of service; Claimant was notified by PSERS that his gross monthly benefit had been reduced. Claimant appealed that decision to the Executive Staff Review Committee. The Committee denied Claimant's appeal of that adjustment explaining that he did not meet the requirements for a waiver of adjustment. The Committee also explained that he was not entitled to a full year of credit for the year he spent on sabbatical because he did not return for a full school year following the sabbatical nor was he prevented from doing so due to injury or illness.

A. Claimant is Not Entitled to a Full Year of Credit for the 2006-2007 Sabbatical Year

Claimant's entitlement to credit for his sabbatical leave is governed by the applicable provisions of the Public School Code of 1949, 24 P.S. §§ 11-1166 – 11-1171 ("School Code") and the Retirement Code, 24 Pa.C.S. § 8101, *et. seq.* A member may receive credit for an "approved leave of absence" if: (1) the member returns to the school district which granted his leave for a period at least equal to the length of the leave or one year, whichever is less, unless such condition is waived by the employer; and (2) the proper contributions are made by the member and the employer. 24 Pa.C.S. § 8302(b), *see also*, 22 Pa. Code § 213.2(b). A sabbatical leave is included within the Retirement Code's definition of an "approved leave of absence." 24 Pa.C.S. § 8102. To receive full credit for a sabbatical, however, the School Code requires a

member to return to service unless the member cannot return because of illness or physical disability.³

Accordingly, a member who fails to complete at least one school term following a sabbatical is liable for a pro-rata share of all benefits received during the sabbatical. Credit, therefore, is limited to the length of the return.

In this case, the record establishes that Claimant was able to return to work at the conclusion of his sabbatical. It is undisputed that Claimant returned to service because he was feeling better at the beginning of 2007-2008 school year. Claimant maintains that he was unable to finish the year due to an illness, however, Claimant presented no competent medical testimony of any illness or disability that may have existed during the 2007-2008 school year. Claimant merely testified that he did not feel able to continue working (N.T. 30-31, 36). However, his testimony alone does not establish that an illness or injury actually prevented him from returning to work which is the standard under which his ability to receive full credit is measured. Indeed, the evidence establishes the opposite. Moreover, the credibility of Claimant's testimony must be

³ Section 11-1168 of the School Code states:

§ 11-1168. Return to employment

(a) No leave of absence shall be granted unless such person shall agree to return to his or her employment with the school district for a period of not less than one school term immediately following such leave of absence.

(b) No such leave of absence shall be considered a termination or breach of the contract of employment, and the person on leave of absence shall be returned to the same position in the same school or schools he or she occupied prior thereto.

(c) If the employe fails to return to employment unless prevented by illness or physical disability, the employe shall forfeit all benefits to which said employe would have been entitled under the provisions of this act for the period of the leave.

(d) If such employe resigns or fails to return to his employment, the amount contributed by the school district under section 1170 of this act to the Public School Employees' Retirement Fund shall be deducted from the refund payable to such employe under existing law and the amount so deducted shall be refunded to the school district by which it was paid.

weighed against Claimant's prior statement contained in his request for an administrative hearing that he "would have continued working if I knew I only had 31.51 yrs" (PSERS' Exhibit No. 1, p. 2). Claimant had the obligation to verify the accuracy of his years of service prior to retirement. *Hughes, supra*. And in fact, Claimant's own records establish that he filed an application for retirement on February 16, 2008 after receiving a retirement estimate for a January 26, 2008 retirement date showing 31.51 years of service.

Claimant was also aware at the time he returned to work at the beginning of the 2007-2008 school year that he had the option not to return to work at all if his physical condition prevented him from doing so. He could have supplied the appropriate medical documentation and elected this option. He did not make that selection. Claimant did not return for the full school year following his sabbatical and he has not established that he was prevented from returning due to an illness or injury.

B. Claimant Does Not Meet All of the Statutory Requirements for an Undue Hardship Waiver

If any change or mistake in records results in a member receiving more or less than the member would have been entitled to had the records been correct, the Board must correct the error and pay the corrected benefit. 24 Pa.C.S. § 8534(b). *White v. Public School Employees' Retirement Board*, 11 A.3d 1, 11 (Pa. Cmwlth. 2010). The Board *may* waive an adjustment in certain specific circumstances: (1) the adjustment will cause an undue hardship; (2) the adjustment was not the result of erroneous information supplied by the member; (3) the member had no knowledge or notice of the error prior to the adjustment and member took action based on the erroneous information provided by the system; and (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24

Pa.C.S. § 8303.1. The decision to waive an adjustment is discretionary and in order to be eligible for a waiver of adjustment, Claimant must meet all four elements of Section 8303.1.⁴

The Board has adopted an objective test to measure "undue hardship." "Undue hardship" is defined as an adjustment that either (1) causes a reduction in excess of 5% of the monthly annuity; or (2) results in the member losing eligibility for a benefit other than an annuity. 22 Pa. code § 213.3a. Claimant does not contest PSERS' adjustment of his years of credited service from 32.47 years to 31.56 years or that the adjustment reduces his monthly annuity by 1.43% or \$55.31 per month. Nor did Claimant introduce evidence that PSERS' adjustment has caused him to lose eligibility for a benefit other than an annuity. Claimant's testimony regarding his current financial situation and his desire to provide financial assistance to an illness stricken child, while compelling and laudable, does not meet the objective test established by the Board for undue hardship.

Because Claimant has not met the first element to establish waiver, a discussion of the other elements is unnecessary. Therefore, the following recommendation is made:

RECOMMENDATION

AND NOW, this 20th day of October 2011, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the undersigned hearing officer recommends that Claimant's request for a waiver of an account adjustment be **DENIED**.



Linda C. Barrett
Hearing Officer

Dated mailed: October 20, 2011

(continued next page)

⁴ Claimant did not dispute the service adjustments (N.T., *passim*).