

Mail Date: MAR 23 2010

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

IN RE: ACCOUNT OF RICHARD L. VITA  
DOCKET NO. 2009-04  
CLAIM OF RICHARD L. VITA

**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 Findings of Fact, Discussion, Conclusions of Law, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request to elect Class T-D membership after the statutory deadline for making such an election is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: MAR 23 2010

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

LEGAL OFFICE DEC 30 2009

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE: ACCOUNT OF RICHARD L. VITA  
DOCKET NO. 2009-04  
CLAIM OF RICHARD L. VITA

BEFORE: Edward S. Finkelstein, Esquire

HEARING DATE: August 5, 2009

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

Brian D. Gondek, Esquire  
For - Claimant

**OPINION OF THE HEARING EXAMINER**

**FINDINGS OF FACT**

1. Claimant retired from the Philadelphia School District (PSD) on April 2, 2001. (PSERS Exhibit 1; N.T. 51-52).
2. The retirement application that Claimant filed on March 12, 2001 notified him that "the terms of his retirement are binding unless [he] files an *Intent to Change the Terms of the Retirement Plan* within 30 days of the date of [his] initial benefit letter." (PSERS Exhibit 1 at 7; N.T. 53).
3. The 30 days in which to file an intent to change the benefit plan form begins at the time PSERS places a

member on payroll and mails what PSERS calls the initial benefit letter to the retiree. (PSERS Exhibit 2; N.T. 54).

4. The date of termination of April 2, 2001 shown on the initial benefit letter is consistent with the same date shown on the retirement application. (PSERS Exhibit 1 and 2; N.T. 54).

5. The initial benefit letter dated April 3, 2001, about three weeks after Claimant filed his retirement application on March 12, 2001, contained an Intent to Change the Terms of the Retirement Benefit Plan form. This form states that it must be completed and returned to PSERS by May 8, 2001. (PSERS Exhibit 2; N.T. 55).

6. The May 8, 2001 date is critical in that if the member chooses to make any changes under the intent to change regulation, the form must be signed, filed and received at PSERS by the close of business on that deadline. (PSERS Exhibit 2; N.T. 55).

7. In April 2001, Amendments to House Bill 26 were still being considered. (N.T. 63)

8. The May 8, 2001 date is also critical because that is the date that both the House and the Senate signed off on House Bill 26, the legislation that became Act 9 of 2001. (N.T. 55, 63).

9. After House Bill 26 was signed by both the House and Senate, and sent to the Governor on May 8, 2001, PSERS then made an attempt to contact members by telephone whose intent to change period had not yet expired. This was done to alert them of the legislation and to advise them that they could file an intent to change form if their intent to change period had not yet expired. (N.T. 56).

10. The date that PSERS telephone contact commenced following the passage of House Bill 26 by the House and Senate was on May 9, 2001. (N.T. 56).

11. On May 9, 2001, PSERS used its computer system to identify those people who had received an initial retirement benefit and whose intent to change filing period had not yet expired as of May 9, 2001. (N.T. 57-58).

12. PSERS started contacting members on May 9, 2001 (i) who had that day in which to file the intent to change form and (ii) anyone whose intent to change filing date was after May 9, 2001.

13. On that day PSERS attempted to reach members whose intent to change period had not yet expired to inform them that they could elect Class T-D membership if they could get the form in before their intent to change period expired. (N.T. 58).

14. PSERS did not receive an intent to change form from Claimant. (N.T. 58).

15. PSERS sent Claimant a "re-computation of your retirement" (i.e. finalized benefit) letter on April 8, 2002. (PSERS Exhibit 3; N.T.58).

16. Claimant's termination date is listed on the letter as April 2, 2001, consistent with the initial benefit letter and the date given by the Philadelphia School District. (PSERS Exhibit 1 at 8, PSERS Exhibit 2 and PSERS Exhibit 3; N.T. 58).

17. Because Claimant was not an active or inactive member on July 1, 2001, but was an annuitant as of that date, he was not eligible to elect Class T-D membership. (PSERS Exhibit 9; N.T. 59).

18. Claimant did not choose an alternate day of retirement and the last day he worked (i.e. was compensated under his paid leave) was April 2, 2001. (PSERS Exhibit 1 at 7, 8; PSERS Exhibit 9; N.T. 59).

19. By letter dated April 3, 2001, PSERS informed Claimant of his initial retirement benefit and his eligibility to file an intent to change form. Filing an intent to change form would have allowed Claimant to change the effective date of his retirement until after July 1, 2001, which would have made him eligible to elect Class T-D

membership after that date as an inactive member. (PSERS Exhibit 9; N.T. 59-60).

20. The intent to change form allows the rescission of a retirement, among other things. (N.T. 60).

21. PSERS will allow the rescission of the retirement application even if the member has no job to go back to. (N.T. 62).

22. If the member wants to change the effective date of retirement, however, the employer school district must authorize that change, because the employer is required to tell PSERS what the official date of termination is for the employee. (N.T. 65-66).

23. In order for the school district to authorize a change in the effective date of retirement, the member must still be within the intent to change the terms of retirement plan period of 30 days after the initial benefit letter. (N.T. 66).

24. Claimant's intent to change period expired on May 8, 2001. (PSERS Exhibit 2 at 4).

25. Claimant maintains that three co-workers -- David Ferrier, Donald Small and Gerard Discher -- were able to elect Class T-D membership even though they initially retired around the same time as Claimant. (Claimant Exhibit 4; N.T. 20-21).

26. The facts established at the administrative hearing show that these three members retired after the April 3, 2001 effective date of Claimant's retirement.

27. Ferrier's last day of service was on April 6, 2001. (Claimant Exhibit 3).

28. Ferrier's initial benefit letter from PSERS is dated April 9, 2001, which gave him until May 14, 2001 to submit an Intent to Change the Terms of the Retirement Plan Form. (Claimant Exhibit 3).

29. Ferrier filed his intent to change form by facsimile on May 11, 2001, thus allowing him to select a retirement date later than July 1, 2001. (Claimant Exhibit 3).

30. Ferrier filed an Act 2001-9 Class T-D election form by facsimile on June 22, 2001 and revised the effective date of his retirement with the Philadelphia School District to July 2, 2001. (Claimant Exhibit 3).

31. Small's last day of service was on May 4, 2001. (Claimant Exhibit 1).

32. Small's initial benefit letter from PSERS is dated May 24, 2001, which gave him until June 27, 2001 to submit an Intent to Change the Terms of the Retirement Plan Form. (Claimant Exhibit 1).

33. Small filed his intent to change form by facsimile on May 30, 2001, thus allowing him to select a retirement date later than July 1, 2001. (Claimant Exhibit 3).

34. Small revised the effective date of his retirement with the Philadelphia School District to July 2, 2001. (Claimant Exhibit 3).

35. Discher's last day of service was on April 27, 2001. (Claimant Exhibit 2).

36. Discher's initial benefit letter from PSERS is dated May 3, 2001, which gave him until June 6, 2001 to submit an Intent to Change the Terms of the Retirement Plan Form. (Claimant Exhibit 2).

37. Discher filed his intent to change form by facsimile on May 17, 2001, thus allowing him to select a retirement date later than July 1, 2001. (Claimant Exhibit 2).

38. Discher filed an Act 2001-9 Class T-D election form by facsimile on June 19, 2001 and revised the effective date of his retirement with the Philadelphia School District to July 2, 2001. (Claimant Exhibit 3).

39. In the cases of Ferrier, Small and Discher, each of them initially had a termination date and retirement



date after Claimant's April 2, 2001 termination date and April 3, 2001 retirement date.

40. The date the intent to change forms were due for Ferrier, Small and Discher were all after the May 8, 2001 date that Claimant's intent to change form was due.

41. Small was sent a letter from PSERS dated May 25, 2001 explaining the higher benefit under the Class T-D multiplier under the Act 2001-9 legislation that had then been enacted into law. (Claimant Exhibit 1 at 8; N.T. 70).

42. No similar letter was sent to Claimant because he was then an annuitant of PSERS and no longer an active or inactive member eligible to elect Class T-D membership. (PSERS Exhibit 9; N.T. 70).

43. The law allows the member 30 days to file an intent to change the benefit plan form after the date of the initial benefit letter, plus three business days to allow for mailing, effectively giving the member 33 days in which to file the intent to change form. (N.T. 74).

44. Ferrier had 33 days from the April 9, 2001 initial benefit letter to file an intent to change form. (N.T. 73, 74).

45. PSERS sent a memo to the PSD listing the retirees who were eligible through the "intent to change" process to request a change in termination date so as to be eligible

to elect Class T-D membership. (Claimant Exhibit 5; N.T. 81).

46. The PSD sent a list to PSERS of names of people they believed had retired recently or would be retiring. (Claimant Exhibit 5; N.T. 82)

47. PSERS advised PSD who on the list had retired and whether they were still in their intent to change period and filed the form as well as some people who had not yet filed their retirement applications. If the effective date of retirement had not yet passed, PSERS would allow the PSD to adjust the member's termination date. Once the termination date has passed, however, the only way it can be changed under the law is by the member within the deadline under the intent to change process. (N.T. 82).

48. Only when the retirement date passes can PSERS send the initial benefit letter and with it, the intent to change form with the filing deadline for the member. (N.T. 83).

49. Because Claimant's retirement date of April 3, 2001 had already passed, and he did not file an intent to change form by the May 8, 2001 due date, Claimant was ineligible to have the PSD adjust his termination date from April 2, 2001 to July 2, 2001. (N.T. 88).

50. Claimant retired before the effective date of Act 2001-9. (N.T. 92).

51. One of the changes a member can make on the intent to change form is to change their termination date but with the agreement of the school district. The termination date is established by the school district. The member cannot unilaterally select the termination date. (N.T. 96).

52. The agreement to end a contract record -- an employment record -- is between the member and the school district. (N.T. 46).

53. PSERS only accepts from the employer what the termination date is and then bases the retirement date upon that. (N.T. 96).

54. Claimant is not on the list of eligible PSD retirees to have his termination date moved to July 2, 2001 because he did not file an intent to change form, unlike Small, Discher and Ferrier. (Claimant Exhibit 5, N.T. 99).

#### ISSUE

IS CLAIMANT ENTITLED TO ELECT CLASS T-D MEMBERSHIP?

## DISCUSSION

### A. Were Claimant's equal protection rights violated by PSERS in not notifying him of an opportunity to elect Class T-D Membership?

The Act of May 17, 2001, P.L. 26, No. 9 ("Act 2001-9"), codified, in part, in the Public School Employees' Retirement Code ("Retirement Code") at 24 Pa.C.S. § 8305.1, requires that a person who was an active or inactive member on June 30 and July 1 of 2001 must elect Class T-D membership in writing by the earlier of December 31, 2001 or the date of termination of service. Claimant retired from the PSD on April 2, 2001. (PSERS Exhibit 1; N.T. 51-52) and thus was no longer an active or inactive member on July 1, 2001.

An "active member" is defined as "a school employee for whom pickup contributions are being made to the fund." 24 Pa.C.S. § 8102. Here, Claimant ceased being an active member as of April 2, 2001, when he terminated service and elected to receive a retirement benefit. If Claimant had filed the intent to change form, he could have rescinded his retirement application and become an inactive member until July 2, 2001. An "inactive member" is defined as:

A member for whom no pickup contributions are being made. . . who has accumulated deductions standing to

his credit in the fund and for whom contributions have been made within the last two school years or a multiple service member who is active in the State Employees' Retirement System. *Id.*

Because Claimant's retirement application was unchanged, he became an annuitant effective April 3, 2001, defined as "any member on or after the effective date of retirement until his annuity is terminated." *Id.* "Effective date of retirement," in turn, is defined as "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." *Id.* Only an active or inactive member on July 1, 2001 could elect Class T-D membership. 24 Pa.C.S. § 8305.1. Claimant was an annuitant on July 1, 2001 - not an active or inactive member - and therefore ineligible to elect Class T-D membership.<sup>1</sup>

The retirement application that Claimant filed on March 12, 2001 notified him that "the terms of his retirement are binding unless [he] files an *Intent to Change the Terms of the Retirement Plan* within 30 days of

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<sup>1</sup> Annuitant, inactive, active and vestee are mutually exclusive classes of membership under the Retirement Code. 24 Pa. C.S. § 8102 (definition of "member").

the date of [his] initial benefit letter. (PSERS Exhibit 1 at 7; N.T. 53). The 30 days in which to file an intent to change the benefit plan form begins at the time PSERS places a member on payroll and mails what PSERS calls the initial benefit letter to the retiree. (PSERS Exhibit 2; N.T. 54). PSERS regulations regarding the intent to change the retirement benefit plan provide as follows:

§ 213.45. Change in benefit payment plan

(a) Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan, an annuitant may declare an intent to change the final terms of the benefit payment plan by filing a written intent with the System within 30 days of the annuitant's receipt of the initial benefit letter sent to the annuitant by the System. The letter will be deemed to be received by the annuitant 3 business days after the date of mailing.

22 Pa. Code § 213.45(a).

PSERS sent Claimant an initial benefit letter dated April 3, 2001, about three weeks after Claimant filed his retirement application on March 12, 2001. PSERS initial benefit letter contained an Intent to Change the Terms of the Retirement Benefit Plan form. This form states that it must be completed and returned to PSERS by May 8, 2001. (PSERS Exhibit 2; N.T. 55).

The May 8, 2001 date is critical in that if the member chooses to make any changes under the intent to change regulation, the form must be signed, filed and received at

PSERS by the close of business on that deadline. (PSERS Exhibit 2; N.T. 55). The May 8, 2001 date is also critical because that is the date that both the House and the Senate signed off on House Bill 26, the legislation that became Act 9 of 2001. (N.T. 63).

After House Bill 26 was passed by both the House and Senate, and sent to the Governor on May 8, 2001, PSERS made an attempt to contact members by telephone whose intent to change period had not yet expired. This was done to alert them of the pending legislation and to advise them that they could file an intent to change form if their intent to change period had not yet expired. (N.T. 56).

PSERS started contacting members on May 9, 2001 (i) who had that day in which to file the intent to change form and (ii) anyone whose intent to change filing date was after May 9, 2001. (N.T. 57) On that day PSERS attempted to reach members whose intent to change period had not yet expired to inform them that they could elect Class T-D membership if they could get the form in before their intent to change period expired. (N.T. 58).

PSERS did not receive an intent to change form from Claimant. (N.T. 58). Because Claimant was not an active or inactive member on July 1, 2001, but was an annuitant as of that date, he was not eligible to elect Class T-D

membership. (PSERS Exhibit 9; N.T. 59). Claimant did not choose an alternate day of retirement and the last day he worked (i.e. was compensated under his paid leave) was April 2, 2001. (PSERS Exhibit 1 at 7, 8; PSERS Exhibit 9; N.T. 59).

By letter dated April 3, 2001, PSERS informed Claimant of his initial retirement benefit and his eligibility to file and intent to change form by May 8, 2001. Filing an intent to change form would have allowed Claimant to change the effective date of his retirement until July 2, 2001, which would have made him eligible to elect Class T-D membership as an inactive member. (PSERS Exhibit 9; N.T. 59-60). The intent to change form allows the rescission of a retirement, among other things. 22 Pa. Code § 213.45; N.T. 60. PSERS will allow the rescission of the retirement application even if the member has no job to go back to. (N.T. 62).

Claimant's intent to change period expired on May 8, 2001 (PSERS Exhibit. 2 at 4, however, and Claimant was no longer able to rescind his retirement application after that date.

Claimant argues that he was told by PSERS that it knew of the bill which became Act 2001-9, and therefore "PSERS should have advised [him] of what information they knew,



which was the substance of the bill including retirement date cutoffs, or in the alternative how he could preserve his rights to elect to participate in Act 9 until everything was sorted out." Claimant's Brief at 10.

Contrary to Claimant's argument, the courts have held that only when there is a statutory mandate for PSERS to advise members about a particular benefit, or about all benefits available, is there an enforceable duty for PSERS to provide the notice to affected members. These limited notice requirements applicable to PSERS were extensively analyzed in *Cardella v. Public School Employees' Retirement Board*, 827 A.2d 1277 (Pa. Cmwlth. 2003), as follows:

With regard to this notice issue, several recent cases are important. In *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999), this Court held that where a section of the Retirement Code mandated that newly hired employees be given notice within thirty days of beginning employment their option to elect "multiple service", thereby enabling the employee to receive credit for prior state employment, notice by first class mail to the employee's last know address was required. Because the employee was never provided with this proper notice, we reversed the order of the Board and ordered that the employee be granted multiple service membership in the retirement system. See also *Tyson v. Pennsylvania Public School Employees' Retirement System*, 737 A.2d 325 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 563 Pa. 624, 757 A.2d 937 (request for multiple service properly denied because PSERS did provide employee with sufficient notice within 30 days). However, in *Trakes v. Public School Employees' Retirement System*, 768 A.2d 357 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 568 Pa. 623, 792 A.2d 1256 (2001), we

distinguished Higgins. In *Trakes*, the employee argued that the Board erroneously denied her benefits application because she was not given proper notice of the requirement to apply for disability benefits while she was classified as an inactive member during the statutory two-year period. The employee cited Higgins for the proposition that PSERS was required to provide her with notice by first class mail. In rejecting the employee's argument, we held that:

we agree with the Board that *Higgins* is distinguishable from the situation in Strawn's case. *Higgins* involved a specific provision of the Retirement Code, 24 Pa.C.S. § 8506(g), which expressly requires that PSERS notify former SERS members of their right to elect multiple service membership upon gaining PSERS membership through public school employment. This Court concluded in *Higgins* that bulk mailings were not sufficient to comply with this specific statutory requirement to notify members of their right to elect multiple service. The Retirement Code does not contain an equivalent provision requiring that PSERS specifically notify its members of the two-year restriction on their inactive member status as set forth in 24 Pa.C.S. § 8102. If Strawn's approach were followed to its logical conclusion PSERS would be required to provide separate written notice regarding each provision in the Retirement Code that could have an impact on a member's benefits. If the General Assembly had intended to require specific notice of all Retirement Code provisions impacting a member's benefits it easily could have done so. See Section 1921 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921. It is not for the courts to add, by interpretation, to a statute, a requirement which the General Assembly did not see fit to include. *Hanna v. Public School Employes' Retirement System/Board*, 701 A.2d 800 (Pa.Cmwlth.1997). Accordingly, we conclude that the Board did not err in denying Strawn's application for disability retirement benefits. *Trakes*, 768 A.2d at 367.

*Cardella*, 827 A.2d at 1281.

The *Cardella* case, as well as the present case, deals with Section 8305.1 of the Retirement Code, which clearly does not contain a provision requiring that PSERS specifically notify its members of their opportunity to elect Class T-D membership. Therefore, based on the *Cardella* court's reasoning in *Trakes*, PSERS is not required to advise its members that there is legislation pending that, if enacted into law, could affect them under the Act. If so, every time an amendment to the Retirement Act is introduced into the legislature, PSERS would have to send out notices as to how this might affect a member's benefit.

The *Cardella* court, however, found that one salient fact distinguished *Cardella* from *Trakes*: In *Cardella*, PSERS elected to provide notice by first class mail to all its members of their option to become Class T-D members. *Cardella*, 827 A.2d at 1281-1282. The *Cardella* court held that taking PSERS' argument to its logical conclusion, PSERS could *willingly* provide notice of important retirement benefits to certain members and not others and the members who did not receive notice would have absolutely no recourse. For this reason, the *Cardella* court held that "basic principles of fairness dictate that if PSERS chooses to provide notice of retirement benefits

despite not being statutorily mandated to do so, it must provide the same notice to all its members." *Cardella, id.*

There is an important factual distinction between *Cardella* and the present case. Here, there is no actual benefit to which any member is entitled at the time Claimant's intent to change period expired on May 8, 2001, nor on the days between then and May 17, 2001 when Act 2001-9 was signed into law. Claimant would extend the limited holding in *Cardella* - that notice of an existing (i.e. enacted) retirement benefit that PSERS voluntarily provides must be provided to all similarly situated members to avoid the unfairness that would result from selective notice - to potential benefits that have not even been enacted into law.

In *Cardella*, the member claimed that he was not given notice of his opportunity to make the Class T-D election because he did not receive the notice PSERS provided to other active members - even though PSERS was not statutorily mandated to do so - because of problems he proved at hearing with his address and in receiving his mail.<sup>2</sup> The notices referred to in *Cardella* were notices provided by PSERS after Act 2001-9 was enacted into law on

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<sup>2</sup> The *Cardella* Claimant successfully rebutted the presumption of receipt of the initial benefit letter set forth in 22 Pa. Code § 213.45(a).

May 17, 2001. Here, Claimant argues that PSERS has a duty to provide notice even before possible legislation is enacted into law. There is no law to support Claimant's contention that PSERS owes any duty to notify its members about benefits under possible legislation. In fact, PSERS has no duty to provide notice of *existing* benefits unless mandated by the Retirement Code to do so. *Trakes, supra*, 768 A.2d at 367. *Cardella* only extended this general rule to require notice to all similarly situated members if PSERS provides voluntary notice of an *existing* benefit to some members and the option to become a Class T-D member was not clear until the House and Senate concurred on House Bill 26 on May 8, 2001.

This case is factually and legally distinguished from *Cardella* for two reasons. First, the benefit at issue here, Class T-D membership, had not even been enacted into law at the time Claimant asserts he should have received notice of the possible benefit at least by May 8, 2001. Claimant would thus extend notice of potential benefits even further than the notice of benefits generally that was rejected by the *Trakes* court: "If Strawn's approach were followed to its logical conclusion PSERS would be required to provide separate written notice regarding each provision in the Retirement Code that could have an impact on a

member's benefits." *Trakes*, 768 A.2d at 367. Here, if Claimant's approach were followed, PSERS would be required to provide separate written notice to all members who would be potentially affected by proposed legislation. Such a requirement would be even more burdensome than notice of all benefits that the *Trakes* court specifically rejected as being required due to the burden on PSERS.

Second, under the then proposed legislation, Claimant would not have been eligible to elect Class T-D membership because his intent to change (rescind) period expired on May 8, 2001 and he thus was no longer able under 22 Pa. Code § 213.45(a) to change his status to an active or inactive member as of July 1, 2001 as required by 24 Pa.C.S. § 8305.1. Claimant concedes that "equal protection does not absolutely prohibit the Commonwealth from characterizing people differently for the purpose of providing them with different treatment; [rather] it requires that any [differential treatment] be reasonable and not arbitrary." Claimant's brief at 9. Here, it is not reasonable to expect PSERS to implement a notice campaign to members whose intent to change period expired on the very day that both the House and Senate had approved the legislation that became Act 2001-9 on May 17, 2001. In fact, it is commendable that PSERS undertook an effort to

notify members whose intent to change period had not expired as of the next day after the approval by the House and Senate - May 9, 2001 - of the need to file the intent to change form in order to preserve the ability to elect Class T-D membership.

Claimant is not factually similar to the members whose intent to change period had not expired as of May 9, 2001 because Claimant's period had expired on May 8, 2001. Moreover, Claimant has not cited one case of someone with a May 9, 2001 intent to change due date, who actually filed the form then and elected Class T-D membership. The cases cited by Claimant all had intent to change due dates a week or more after Claimant's May 8, 2001 due date: Ferrier's initial benefit letter from PSERS is dated April 9, 2001, which gave him until *May 14, 2001* to submit an intent to change form. (Claimant Exhibit 3); Small's initial benefit letter from PSERS is dated May 24, 2001, which gave him until *June 27, 2001* to submit an intent to change the form. (Claimant Exhibit 1); and Discher's initial benefit letter from PSERS is dated May 3, 2001, which gave him until *June 6, 2001* to submit an intent to change form. (Claimant Exhibit 2). Claimant was therefore not similarly situated to the only other PSERS members for

which he provided any proof that they had elected Class T-D membership after filing an intent to change form.

B. Is Claimant entitled to elect Class T-D membership nunc pro tunc?

Even though Claimant was not eligible to elect Class T-D membership because he was no longer an active or inactive PSERS member on June 30 and July 1, 2001, he is still requesting that PSERS make an exception. The Commonwealth Court of Pennsylvania, however, has held that absent a statute granting authority to PSERS to make an exception, no exception can be made. *Forman v. Public School Employes' Retirement Board*, 778 A.2d 778 (Pa. Commw. Ct. 2001). In *Forman*, the Claimant filed an application for retirement on September 2, 1998, and was then notified by PSERS that she was ineligible to retire under Act 41 because she had missed the statutory deadline of July 11, 1998. *Id.* at 779. Forman appealed the decision and argued that she met the mental incapacity criteria as set forth in *Estate of McGovern v. State Employees' Retirement Board*, 512 Pa. 377, 517 A.2d 523 (Pa. 1986). *Forman*, 778 A.2d at 779. She claimed the mental incapacity was brought on by a combination of contract negotiation and her struggle with breast cancer. *Id.*



The *Forman* court held that "*Nunc pro tunc* relief is unavailable since she has not established the untimely filing was the result of fraud, a breakdown in the courts, or negligence on the part of a third party. *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979)." *Forman*, 778 A.2d at 780. However, it appears that the Court in *Forman* left open the possibility that under some circumstances *nunc pro tunc* relief might be available in an appropriate case as the Court analyzed two possible additional scenarios that might have warranted relief in two paragraphs stating "assuming arguendo". In the present case, Claimant is arguing that "his failure to modify his retirement date to take advantage of the new Act 9 pension benefits was actually due to a breakdown in PSERS and/or negligence on the part of a third party [presumably PSERS]."  
" Claimant's brief at 11.

In the first instance, there was no breakdown in PSERS administrative processes because there is no process or duty to notify members about pending legislation. Secondly, in order for PSERS to have been negligent in not informing Claimant about pending legislation on or before the date he could have done something on May 8, 2001, Claimant must demonstrate that PSERS or a third party had a duty to so notify Claimant about the pending legislation.

Claimant has failed to demonstrate that either PSERS or a third party had such a duty, so his negligence argument must fail for that reason as well as his failure to prove any negligent act on the part of PSERS or a third party.

In the case of *Allen v. Public School Employees' Retirement Board*, 848 A.2d 1031 (Pa. Commw. Ct. 2004), Allen failed to submit the proper materials to change her Class T-C status before the statutory deadline of December 31, 2001. *Id.* at 1032. Despite PSERS sending all applicable forms and several follow-up letters reminding Allen of the pending deadline, Allen still did not submit her paperwork until January 8, 2002. *Id.* She claimed that the reason for her delay was due to her divorce proceedings as she forwarded all pension related material to the divorce lawyer and could not interfere with the pension as it was considered marital property. *Id.* In affirming the PSERS Board's grant of a motion for summary judgment, the court found that there were no exceptions to the statutory deadline, and that the "Board was without authority to grant rights beyond those specifically set forth in the Code." *Id.* at 1033 (citing *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Commw. Ct. 2001)). Here, the PSERS Board is similarly without authority to allow Claimant to receive benefits under the

Class T-D membership provisions when he was not qualified to elect Class T-D membership at the time it was initially offered. To do so would grant rights to Claimant beyond those set forth in the Retirement Code.

The Hearing Examiner has virtually copied the PSERS brief as it accurately and fairly presents the facts in this case, analyzes the applicable law and the arguments of the Claimant and reaches the conclusion that the Hearing Examiner believes is correct under the facts of this case and the applicable law. It is also noteworthy that although the Claimant was provided the opportunity to reply to the PSERS' brief, he chose not to respond or differentiate his position from that presented by PSERS in its brief.

At some point in our lives we face cut off dates and unfortunately here, Claimant may have retired just one day too early. Sometimes those things happen and under the Retirement Code PSERS has no authority to make an exception to bend the law for the Claimant.

#### CONCLUSIONS OF LAW

1. The Act of May 17, 2001, P.L. 26, No. 9 ("Act 2001-9"), 24 Pa.C.S. §8305.1, requires that a person who was an active or inactive member on June 30 and July 1 of

2001 must elect T-D membership in writing by the earlier of December 31, 2001 or the date of termination of service.

2. Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan, an annuitant may declare an intent to change the final terms of the benefit payment plan by filing a written intent with the System within 30 days of the annuitant's receipt of the initial benefit letter sent to the annuitant by the System. The letter will be deemed to be received by the annuitant 3 business days after the date of mailing. 22 Pa. Code § 213.45(a).

3. The burden of proof and persuasion is on the Claimant. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Commw. Ct. 1991).

4. Claimant was not eligible to elect Class T-D membership because his intent to change (rescind) period expired on May 8, 2001 and he thus was no longer eligible to change his status to an active or inactive member as of July 1, 2001 as required by 24 Pa.C.S. § 8305.1. 22 Pa.Code § 213.45(a).

5. *Nunc pro tunc* relief may not be granted, as Claimant has not offered any evidence of fraud, a breakdown in the courts, or negligence on the part of a third party.

Vita

6. Claimant is ineligible to elect Class T-D membership because he was not an active or inactive member on June 30 and July 1, 2001 but was then an annuitant of PSERS ineligible to elect Class T-D membership under 24 Pa. C.S § 8305.1.

7. PSERS is not authorized to enlarge the time required to file an election set forth in the Retirement Code. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Commw. Ct. 2001).

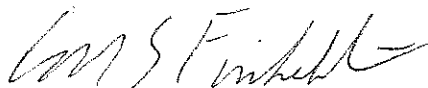
8. The Claimant has not been denied due process in the processing of his retirement benefits by PSERS.

**Recommendation**

The Claimant's request to elect T-D membership after the statutory deadline for making such an election should be denied.

Respectfully submitted,

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