

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEE'S RETIREMENT BOARD

IN RE: ACCOUNT OF SAMUEL A. DeFAZIO  
DOCKET NO. 2005-21  
CLAIM OF SAMUEL A. DeFAZIO

ORDER

AND NOW, upon consideration of Claimant's Request for an Administrative Hearing, PSERS' Motion for Summary Judgment, and Claimant's Response to PSERS' Motion for Summary Judgment and Cross-Motion for Summary Judgment, it is hereby:

ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, Claimant's Cross-Motion for Summary Judgment is DENIED and Claimant's Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code §201.3(b), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: MAR 16 2007

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

MAR 16 2007

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

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

IN RE: ACCOUNT OF SAMUEL A. DeFAZIO  
DOCKET NO. 2005-21  
CLAIM OF SAMUEL A. DeFAZIO

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal, requesting that Samuel A. DeFazio's ("Claimant") Request for Administrative Hearing be dismissed. Claimant has filed a response to the PSERS Motion for Summary Judgment as well as a Cross-motion for Summary Judgment.

Claimant has requested to purchase credit for thirty (30) days of part-time service rendered during the 1971-1972 school year. Prior to this Motion for Summary Judgment, the parties agreed on a set of factual stipulations, which describe the history of Claimant's requests regarding purchasing part-time service credit or per diem substitute service. The stipulations refer to four occasions when Claimant requested to purchase part-time service credit. The most recent attempt by the Claimant to purchase part-time service occurred when Claimant filed an Intent to Purchase Credit on June 22, 1999 and a final application to purchase per diem substitute service credit on July 21, 1999. After all of the applications to purchase per diem substitute service were received and the corresponding adjustments were made to Claimant's account, the only

amount still being requested by Claimant is for thirty days of per diem substitute service rendered during the 1971-1972 school year.

At the time that the thirty days of service were rendered in 1971-1972, and for the duration of Claimant's active membership in PSERS, the policy of the Board was to allow members to purchase per diem substitute service only if they had school service of at least eighty days or five-hundred hours during the school year for which the per diem substitute service occurred. The Board changed its policy regarding the five-hundred hour requirement in 1999. This change, however, was not fully implemented until it was upheld by the Pennsylvania Supreme Court in *Pennsylvania School Boards Association v. Public School Employees' Retirement Board*, 580 Pa. 610, 863 A.2d 432 (2004). During the time between the initial policy change in 1999 and the Supreme Court's decision in 2004, PSERS gave its *active* members the opportunity to file either an *Intent to Purchase Non-Qualifying Part-Time Pennsylvania School Service* ("Intent") or an *Application to Purchase Credit for Part-Time Service* ("Application").

On June 22, 1999, PSERS received an *Intent* form from Claimant, seeking to purchase non-qualifying part-time service. Approximately one month later, on July 21, 1999, PSERS received an Application to purchase part time service. PSERS denied the request to purchase the thirty days of service rendered in 1971-72 because Claimant had ceased to be an active member after February 25, 1998, as this was the last day that the school district submitted payments to him. The option to file an *Intent* form was given only to those who were active members at the time they submitted the *Intent* form.

Claimant appealed that decision and was denied an initial request for an administrative hearing when this Board granted PSERS Motion for Summary Judgment on December 15, 2005. Claimant appealed the Board's grant of summary judgment to the Commonwealth Court. See *Defazio v. PSERS*, 56 C.D. 2006 (Filed 2/17/2006). Thereafter, PSERS and Claimant filed a joint motion to remand the case back to the Board. The Commonwealth Court granted the motion and remanded the case back to the Board. A copy of the order that remanded the case is attached to this opinion. PSERS, after remand, credited Claimant's account with an additional 8.26 days, which were earned during years in which the Claimant had at least eighty days or five-hundred hours of school service. Claimant has now received credit for all part-time service rendered in years for which he worked at least eighty days or five-hundred hours.

The only issue now remaining is whether Claimant can purchase the thirty days rendered during the 1971-1972 school year. After Stipulations were rendered and agreed upon by both parties on November 7, 2006, PSERS filed a Motion for Summary Judgment on December 20, 2006 and served a copy on Claimant, as required by the General Rules of Administrative Practice and Procedure and this Board's regulations. 1 Pa. Code §§ 33.32, 33.35-33.36; 22 Pa. Code § 201.3(b). Claimant submitted a Cross-Motion for Summary Judgment and accompanying brief on January 18, 2007 in response to the PSERS Motion for Summary Judgment.

Summary judgment should be granted only if the record shows that no genuine issue of material fact exists and that the moving party is entitled to

judgment as a matter of law. *Overly v. Kass*, 554 A.2d 970 (Pa. Super. Ct. 1989); *Bishop v. Washington*, 480 A.2d 1088 (Pa. Super. Ct. 1984). There are no disputed material facts at issue in this appeal. In the absence of disputed material facts, this Board has the authority to decide the legal issues in dispute without an evidentiary hearing. *Allen v. Public School Employee's Retirement Board*, 848 A.2d 1031 (Pa. Commw. Ct. 2004).

PSERS issued a policy statement on February 1, 1999 that altered its interpretation of 24 Pa.C.S. § 8303(c), under which an individual could purchase non-qualifying part-time service ("NQPTS"). (Stipulations, Exhibit C). The previous policy allowed the purchase of service of only qualifying service, where the amount worked in a school year was five-hundred hours or more. The new policy states "[a]n active member may purchase credit for part-time school service where the service was less than 500 hours or 80 days (non-qualifying)." It is important to note, however, that while the ability to purchase non-qualifying time has changed, the requirement of being an active member to purchase service credit has not. Therefore, in either situation, under the old or the new policy, the individual must have been an active member when the request to purchase was made.

Section 8303(c) of the Retirement Code states that "[e]very *active member* of the system or a multiple service member who is an active member of the State Employees' Retirement System on or after the effective date of this part may purchase credit and receive eligibility points . . . for previous school service." 24 Pa.C.S. § 8303(c) (emphasis added). An active member is defined as "a school

employee for whom pick-up contributions are being made to the fund . . . .” 24 Pa.C.S. §8102. The term “school employee” is defined as “Any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis.” 24 Pa.C.S. § 8102. It is quite clear, based on the above statutory language, that Claimant could not assert a right to purchase previous school service after February 26, 1998. February 26, 1998 was the last date that Claimant’s employer made payments to him and, consequently, he was no longer an active member after that date. In fact, Claimant was not an active member for eleven months prior to the issuance of the new policy effective February 1, 1999. As a result, Claimant was not an active member when the new policy took effect, and his request to purchase service arising from the June 22, 1999 *Intent* form and the July 21, 1999 *Application* must therefore be denied.

Claimant argues that even if the *Intent* form and *Application* submitted in 1999 are not accepted, Claimant should still be entitled to purchase the thirty days of service because he attempted at least two other times to purchase this credit. Specifically, Claimant references a letter sent to him by PSERS on May 9, 1979 and tries to use the statement “[i]f you should retire, or should your death occur while the decision is pending, your right or your beneficiaries’ right to purchase the service will be protected” to argue that PSERS should be estopped from denying Claimant’s request to purchase previous school service.

(Stipulations, Exhibit A).

Reliance on this letter, however, is inappropriate. The letter cannot be read to place in abeyance the requirement at the time it was written that to purchase service, the service must have occurred in a year where at least eighty days or five-hundred hours were worked. That requirement was not the subject of the court case suggested by the letter. See *Tredyffrin School District v. PSERB*, 430 A.2d 1018 (Pa. Cmwlth 1981). The eighty day or five-hundred hour requirement was still in place at the time of the letter. Therefore, Claimant's thirty days of service during the 1971-1972 school year could not have been purchased at that time nor at anytime while Claimant was an active member. As stated in the letter, Claimant's right to purchase part-time service of at least eighty days or five-hundred hours was protected. The letter, however, never gave Claimant the right to purchase the thirty days of previous school service because service of less than eighty days or five-hundred hours was not being disputed at the time of the May 9, 1979 letter.

By invoking applications to purchase credit that were submitted by the Claimant before the 1999 policy change, the Claimant is essentially requesting that the 1999 policy change be made retroactive to dates as distant as 1979. In adopting the 1999 Policy, however, the Board expressly made the change effective February 1, 1999. Under the rules of statutory construction, there is a presumption that, absent an express statement to the contrary, a statute shall not be interpreted to be retroactive. 1 Pa.C.S. § 1926 (2005). The presumption against retroactivity also holds true for amendatory statutes. *Budnick v. Budnick*, 419 Pa. Super. 172, 177, 615 A.2d 80, 83 (1992) quoting *DeMatteis v.*

*DeMatteis*, 399 Pa. Super. 421, 434, 582 A.2d 666, 672 (1990). This presumption has been applied to agency regulations as well. See *Jenkins v. Unemployment Compensation Bd. of Review*, 162 Pa. Super. 49, 51, 56 A.2d 686, 687 (1948). Although this is a change in policy, not a statute or regulation, it is substantially similar to an amendatory statute and, accordingly, the same standard applies. For that reason, the pre-1999 standard remains in effect for applications filed before the effective date of the Policy.

Therefore, PSERS' Motion for Summary Judgment is granted and Claimant's Cross-motion for Summary Judgment is denied.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SAMUEL A. DEFAZIO  
Petitioner,

v.

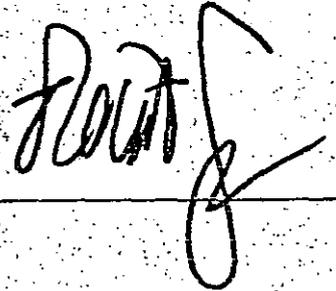
No. 56 C.D. 2006

COMMONWEALTH OF PENNSYLVANIA,  
PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD,  
Respondent,

ORDER

AND NOW, this 17<sup>th</sup> day of February, 2006, the Joint Motion to Remand for an Administrative Hearing is hereby GRANTED. The case is remanded back to the Public School Employees' Retirement Board for final disposition, without prejudice for Petitioner to take another appeal to this Court, if necessary.

Jurisdiction is relinquished.

J. 

Certified from the Record

FEB 17 2006

and Order Ent