

Mail Date: JAN 28 2010

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

IN RE: ACCOUNT OF ANGELA CERVO LABUDA  
DOCKET NO. 2008-31  
CLAIM OF ANGELA CERVO LABUDA

**OPINION AND ORDER OF THE BOARD**

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Proposed Adjudication and Order of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Proposed Adjudication and Order of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's requests to (1) receive annuity payments retroactive to her superannuation date of October 27, 2006, and (2) receive a higher monthly annuity are DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: JAN 28 2010

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

**COMMONWEALTH OF PENNSYLVANIA  
Public School Employees' Retirement System**

**In re  
Account of Angela Cervo Labuda**

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**Docket No. 2008-31**

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**PROPOSED ADJUDICATION AND ORDER**

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**Date of Hearing: March 25, 2009**

**Linda C. Barrett  
Hearing Officer**

## HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Angela Cervo Labuda (Claimant) from a decision of the Executive Staff Review Committee (Executive Committee) of the Public School Employees' Retirement System (PSERS) denying Claimant's request to change the effective date of her retirement because she did not file her Retirement Application within 90 days of her 62<sup>nd</sup> birthday and, therefore, her annuity became effective as of the date that her application was filed with PSERS: December 6, 2007. The Executive Committee also denied Claimant's request that her monthly benefit be increased to the amount she would have received with an effective date of retirement on her 62<sup>nd</sup> birthday - October 27, 2006.

Claimant was notified of the Executive Committee's decision by letter dated September 18, 2008.

Claimant timely filed an appeal and requested an administrative hearing.

On November 4, 2008, PSERS filed an Answer to Claimant's appeal.

On December 9, 2008, Executive Director Jeffrey Clay appointed a hearing officer to conduct Claimant's administrative hearing.

A hearing notice was subsequently issued on December 19, 2008, scheduling a hearing on Claimant's appeal for March 25, 2009 in Harrisburg, Pennsylvania.

On January 29, 2009, a pre-hearing conference call was held to consider Angela Cervo Labuda's request to change the location for the hearing. As an accommodation to Claimant, she was permitted to participate by phone on the date originally established for

the hearing. Claimant along with her brother, Michael Cervo, participated in the hearing by telephone. Jennifer A. Mills, Esquire, represented PSERS.

On April 17, 2009, upon receipt of the hearing transcript, the hearing officer established a briefing schedule. Claimant's brief was originally due on May 18, 2009. Claimant sought an extension of time in which to file her brief. PSERS did not oppose this request. By Order dated May 14, 2009, Claimant's request was granted and she was ordered to file her brief by no later than May 29, 2009. PSERS' was directed to file its opposing brief within thirty (30) days of service of Claimant's brief. Claimant was permitted to file a reply brief within fifteen (15) days of service of PSERS' brief.

Claimant filed her brief on May 29, 2009. PSERS' brief and Claimant's reply were timely filed. On July 22, 2009 PSERS filed objections to assertions made in Claimant's reply brief. The time has passed for Claimant to respond to PSERS' objections. The matter is now before the Board for final disposition.

**I. FINDINGS OF FACT:**

1. Claimant was born on October 27, 1944. (N.T. *passim*; Joint Exhibit A, ¶ 1).<sup>1</sup>
2. For all times material to this matter, Claimant's address of record with PSERS was Redacted Redacted Redacted (N.T. 81-82)
3. Claimant became a member of PSERS effective October 1986 upon her employment with the East Allegheny School District. (Joint Exhibit A, ¶ 2).
4. Claimant terminated her employment with the East Allegheny School district in September of 2000. (Joint Exhibit A, ¶ 3).

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<sup>1</sup> N.T. refers to Notes of Testimony contained in the Transcript prepared for the March 25, 2009 hearing. Joint Exhibit A contains Stipulations of Facts agreed and executed by both parties and introduced at the hearing. (N.T. 19).

5. At the time of her termination Claimant was 55 years old. (Joint Exhibit A, ¶ 4).

6. At the time of Claimant's termination, PSERS had recorded 15.27 years of service credit. (Joint Exhibit A, ¶ 4).

7. At the time of Claimant's termination, she did not apply for retirement benefits because she did not intend to retire; rather Claimant's intention was to wait to retire at age 66 and collect Social Security and her PSERS pension. (N.T. 73; Joint Exhibit A, ¶ 5).

8. Prior to 2000, Claimant did not request a retirement estimate. (N.T. 77-78).

9. At the time of Claimant's termination, she was considered a "vestee" for purposes of eligibility for retirement benefits from PSERS. (N.T. 24).

10. A vestee is a member of PSERS who terminates school service but leaves accumulated deductions in the fund and defers filing an Application for Retirement. (N.T. 23-24; 24 Pa.C.S. § 8102).

11. Beginning sometime after March 26, 2003 and through sometime after November 22, 2007, claimant received six (6) "Revised Statements of Account" or "Statements of Account" mailed to her at Redacted Redacted

Redacted her address of record with PSERS. (N.T. 83; Joint Exhibit A, ¶ 6; PSERS Exhibits 1-6).

12. The Statement of Account for School Year 2004-2005 dated November 10, 2005 described estimated retirement benefits for "Early Retirement as of June 30,

2005 and estimated retirement benefits for “Normal Retirement as of October 27, 2006.” (PSERS Exhibit 4, p. 3).

13. The Statement of Account for School Year 2005-2006 dated January 14, 2007 described estimated retirement benefits for “Early Retirement as of June 30, 2006 and estimated retirement benefits for “Normal Retirement as of October 27, 2006.” (PSERS Exhibit 5, p. 3).

14. The Statement of Account for School Year 2006-2007 dated November 22, 2007 described estimated retirement benefits for Normal Retirement as of July 1, 2007.” (PSERS Exhibit 6, p. 3).

15. Beginning with the Statement of Account for School year 2004-2005, each Statement of Account reported a “Final Average Salary” in the amount of \$25,509.68 as reported by the East Allegheny School District. (PSERS Exhibits 4-6, p. 3)

16. Under Section 8102 of the Retirement Code, the term “Final average salary” is defined, in pertinent part, to mean:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . . .

(Official Notice; 24 Pa. C.S. § 8102).

17. Between June 2002 and October 2006, PSERS prepared informative literature and made it available to its members. (PSERS Exhibits 7a, 7b, 8a, 8b, 8c, 8d; Joint Exhibit A, ¶¶ 9-13).

18. On June 3, 2002, PSERS’ records reflect that an Active Member Handbook (2002 Handbook) was mailed to Claimant on June 3, 2002. (Joint Exhibit A, ¶ 10; PSERS Exhibits 7a and 7b).

19. Claimant recalls receiving all correspondence from PSERS related to her current appeal. (N.T. 82-83; Joint Exhibit A; PSERS Exhibits 13, 15, 16, 17a).

20. Claimant does not recall receiving the 2002 Handbook mailed to Claimant on June 3, 2002. (N.T. 73-74, 83).

21. Page 17 of 2002 Handbook contains a section entitled "Vesting Your Retirement Benefit," and explains when a member's account is vested, the member is eligible for "[a]n unreduced benefit at normal retirement age." The 2002 Handbook directs that further information can be found in PSERS pamphlet "Let's Talk About Leaving Employment and Your PSERS Benefit," publication #9580. (*Id.* at 2, ¶ PSERS Exhibit 7a).

22. After Claimant's termination in September 2000 and through October 2006, PSERS prepared a pamphlet "Let's Talk About Leaving Employment and Your PSERS Benefit," publication #9580 which was issued four times: (1) November 2000, (2) January 2003, (3) April 2003, and (4) July 2006. (Joint Exhibit A, ¶¶ 3, 12; PSERS Exhibits 8a-8d).

23. A copy of the pamphlet "Let's Talk About Leaving Employment and Your PSERS Benefit," as revised, was available on PSERS official website and a hard copy was available upon request by PSER members. (Joint Exhibit A, ¶ 13).

24. On September 19, 2006, PSERS notified Claimant that she would soon reach her normal retirement age and would be "eligible to apply for an unreduced retirement benefit."<sup>2</sup> (N.T. 72; Joint Exhibit, ¶ 14; PSERS Exhibit 9).

25. The September 19, 2006 letter advised Claimant that the "effective date of your retirement will be October 27, 2006, if you file your retirement application within

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<sup>2</sup> Hereinafter referred to as "the September 19, 2006 letter."

90 days before or after your 62<sup>nd</sup> birthday” and that “[i]f you do not apply for retirement benefits within 90 days after you reach normal retirement age, your retirement will begin the date the retirement application is received by PSERS.” (Joint Exhibit, ¶ 15; PSERS Exhibit 9).

26. The September 19, 2006 letter also recommended that Claimant contact the Regional Representative in her area for counseling and an explanation of her retirement options. The letter contained a telephone and fax number for a PSERS Member Service Center along with a regional office map. (PSERS Exhibit 9).

27. Claimant received the September 19, 2006 letter. (N.T. 84; Joint Exhibit A, ¶¶ 16, 20; PSERS Exhibit 11).

28. Upon receiving the September 19, 2006 letter, Claimant did not contact PSERS or request counseling within 90 days of reaching normal retirement age because she did not intend to retire at the time she received the September 19, 2006 letter. (N.T. 73-75, 78-79, 84-85; Joint Exhibit A, ¶ 17).

29. When she began to contemplate retirement on or about November 29, 2007, Claimant contacted PSERS’ Southwest Regional Office (Regional Office) at that time.<sup>3</sup> (N.T. 74, 78).

30. Around this same time, Claimant met with a financial advisor. (N.T. 75, 78).

31. After speaking with Bob Carnegie at the Regional Office, Claimant filed an *Application for Retirement* dated December 4, 2007 (Application) with PSERS on December 6, 2007. (N.T. 75; Joint Exhibit ¶ 19, PSERS Exhibit 10).

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<sup>3</sup> The Transcript states the year to be 2008. Whether an error exists in the transcript or Claimant misstated the year, other un-refuted evidence establishes 2007 as the year Claimant contacted PSERS. (cf. N.T. 74, 78; Joint Exhibit A at 3, ¶ 18).



32. In her Application, Claimant elected the Option 1 monthly payment plan and elected to withdraw all of her contributions and interest to be rolled over to a financial institution. (N.T. 31-32, 79-80; PSERS Exhibit 10, pp. 2-4 and PSERS Exhibit 14).

33. Claimant attached a letter dated December 1, 2007 to her Application requesting that the effective date of her retirement be October 27, 2006 and requesting retroactive payment to that date. Claimant also attached a copy of the September 19, 2006 letter. (Joint Exhibit A, ¶ 20; PSERS Exhibit 11).

34. The Regional Office received the Application on December 6, 2007. (Joint Exhibit A, ¶ 21, PSERS Exhibit 10).

35. The Regional Office contacted Claimant on December 7, 2007 because her Application contained incomplete information. (N.T. 75; Joint Exhibit A, ¶ 22).

36. Claimant was unable to take time off from work to personally attend an exit counseling session at the Regional Office. Consequently, on December 10, 2007 Claimant participated in a telephone exit counseling session. (N.T. 75-76; Joint Exhibit A, ¶ 23; PSERS Exhibit 10, p. 7).

37. Claimant did not attend an exit counseling session prior to December 10, 2007. (N.T. 76; Joint Exhibit A, ¶ 24).

38. On December 19, 2007, the Regional Office received Claimant's corrected Application. (Joint Exhibit A, ¶ 25).

39. On January 8, 2008, PSERS provided Claimant with her initial retirement benefit listing her effective date of retirement as December 6, 2007 and the type of retirement as "Normal". (Joint Exhibit A, ¶ 26; PSERS Exhibit 12a-12b).

40. When PSERS' Retirement Processing Center receives an application for retirement, the application is reviewed for completeness and accuracy. Once the application is deemed accurate, the information is entered into the computer system to calculate an annuity based on the member's elections in accordance with a statutory formula. (N.T. 21-24).

41. The statutory formula used to calculate Maximum Single Life Annuity (MSLA) is the member's Final Average Salary multiplied by two percent by the member's years of credited service and, in the case of a member who is under superannuation age, multiplied by a reduction factor. (N.T. 22, 48-49, 54-56, 64).

42. The Final Average Salary is used to calculate the estimated benefits reported on the member's Statement of Account. (N.T. 22).

43. The Final Average Salary reported by the East Allegheny School District was incorrectly reported in the wrong fiscal year. (N.T. 42).

44. The incorrect reporting by the school district inflated the calculation of Claimant's Final Average Salary. (N.T. 42).

45. PSERS is required by law to correct any change or mistake in its records which would result in a member receiving from PSERS more or less than the member would have been entitled to receive had the records been correct. (N.T. 42; *See also* 24 Pa.C.S. § 8534).

46. Claimant's MSLA of \$7,208.39 annually was calculated using Claimant's corrected Final Average Salary of \$23,603.12 multiplied by 15.27 years of service multiplied by 2%. (N.T. 64-69; PSERS Exhibit 18, p. 3 and PSERS Exhibit 19, p. 3).

47. Because a vestee does not earn additional credited service and salary following the date of termination, the present value of vestee's account, i.e. MSLA, reaches its highest upon the member's attainment of superannuation age when no early reduction factor is applicable. (N.T. 24-25).

48. Superannuation retirement age is the age of sixty-two (62) with at least one year of service credit or accrual of thirty-five (35) years of service credit. (N.T. 54).

49. Regardless of whether a member reaches superannuation age, a reducing factor is applied to the calculation of an annuity when a member chooses an optional payment plan other than a MSLA. (N.T. 48-49).

50. In explaining an Option 1 monthly payment plan, Section 5 of the Application states in pertinent part, "[y]ou will received a reduced monthly payment for life. Each month, the amount of your payment is deducted from the present value of your retirement. Upon your death, the balance remaining will be paid to your beneficiary(ies). Your present value is shown under this option on your retirement estimate." (Joint Exhibit A; PSERS Exhibit 10).

51. In addition to the reducing factor from the selection of an option other than MSLA, a withdrawal of contributions and interest decreases the monthly annuity amount. (N.T. 34, 43-44, 61-62; PSERS Exhibit 18, p. 5 and PSERS Exhibit 19, p. 5).

52. Section 4 of the Application states that, **[t]he amount of money you withdraw in Section 4 will reduce your monthly benefit; the more you withdraw, the greater the reduction.**" (PSERS Exhibit 10, emphasis in original).

53. PSERS is statutorily required to apply the reductions for option selection and withdrawal of contribution and interest to the calculation of an annuity. (N.T. 49). 24 Pa.C.S. § 8345.

54. The present value of Claimant's account reached its highest at \$105,314.62 on October 27, 2006, when Claimant attained age 62 and no early reduction factor was applicable. (N.T. 30, 33-34, 55-56; PSERS Exhibit 18, p. 6).

55. The present value of Claimant's account on December 6, 2007 remained at \$105,314.62 because Claimant had not accrued additional years of service or salary. (N.T. 33-35, 56, 59; PSERS Exhibit 19, p. 6).

56. Claimant did continue to accrue statutory interest on her contributions from the date of her termination until the date of retirement. As of October 27, 2006, the statutory interest credited totaled approximately \$9,402.68. As of December 6, 2007, the statutory interest credited totaled approximately \$11,713.08. (N.T. 36-37; PSERS Exhibit 18, p. 1 and PSERS Exhibit 19, p. 1).

57. The total contributions and interest Claimant was eligible to withdraw as of October 27, 2006 was \$26,169.52; and as of December 6, 2007 the amount increased to \$28,479.92. (N.T. 68-69; PSERS Exhibit 18, p. 5, PSERS Exhibit 19, p. 5 and PSERS Exhibit 12a).

58. With a retirement date of December 6, 2007, an Option 1 election and a total withdrawal of contributions and interest, Claimant's monthly benefit was calculated by applying the following calculations:

- a. The reduction for the lump sum withdrawal was calculated by dividing the lump sum withdrawal (\$28,479.92) by the \$ annuity value (14.610) to total

an annual reduction to the MSLA of \$1,949.34 for the withdrawal. (N.T. 68-69; PSERS Exhibit 19, p. 4).

- b. Because Claimant chose Option 1, Claimant's MSLA (\$7,208.39) was multiplied by the option-reducing factor of .9378 to equal an annual annuity of \$6,760.03. (N.T. 68-69; PSERS Exhibit 19, p. 5).
- c. The reduction to the MSLA for the withdrawal (-\$1,949.34), which is expressed as a negative, is multiplied by the Option 1 reducing factor (.9378) to total an annual annuity Option 1 withdrawal reduction of -\$1,828.10. (N.T. 68-69; PSERS Exhibit 19, p. 5).
- d. The annual annuity Option 1 withdrawal reduction (-\$1,828.10) is subtracted from the value of the Option 1 annuity (\$6,760.03) to total an annual annuity of \$4,931.94 when divided by 12 monthly payments equals \$410.99 per month. (N.T. 68-69; PSERS Exhibit 19, p. 6).

59. The Option 1 reducing factor of .9378 is supplied to PSERS by the actuaries and applied to the calculation of an annuity to ensure that the benefit is actuarially sound. (N.T. 60-62). The monetary (\$) annuity value of 14.610 is derived from mortality tables designed to determine life expectancy. (N.T. 60-63).

60. With a retirement date of October 27, 2006, an Option 1 election and a total withdrawal of contributions and interest, Claimant's monthly benefit was calculated by utilizing the following calculations:

- a. The reduction for the lump sum withdrawal was calculated by dividing the lump sum withdrawal (\$26,169.52) by the \$ annuity value (14.610) to total

an annual reduction to MSLA of \$1,791.21 for the withdrawal. (PSERS Exhibit 18, p. 4).

b. Because Claimant chose Option 1, Claimant's MSLA (\$7,208.39) was multiplied by the option-reducing factor of .9378 to equal an annual annuity of \$6,760.03. (PSERS Exhibit 18, p. 5).

c. The reduction to the MSLA for the withdrawal (-\$1,791.21), which is expressed as a negative, is multiplied by the Option 1 reducing factor (.9378) to total an annual annuity Option 1 withdrawal reduction of -\$1,679.79. (PSERS Exhibit 18, p. 5).

d. The annual annuity Option 1 withdrawal reduction (-\$1,679.79) is subtracted from the value of the Option 1 annuity (\$6,760.03) to total an annual annuity of \$5,080.24 when divided by 12 monthly payments equals \$423.32 per month. (PSERS Exhibit 18, p. 6).

61. The amount of accumulated statutory interest credited to Claimant's account as of October 27, 2006 was less than the accumulated statutory interest credit to Claimant's account as of December 6, 2007. (N.T. 34, 36-37; PSERS Exhibit 18, p. 1 and PSERS Exhibit 19, p. 1).

62. With the election of an Option 1 monthly payment plan and withdrawal of contributions and interest, the reduction in Claimant's monthly annuity calculated with a retirement date of December 6, 2007 was greater than what the reduction would have been with a retirement date of October 27, 2006 because there was a higher withdrawal of statutory interest in December of 2007 which resulted in a greater reduction in the calculation of Claimant's MSLA. (N.T. 34, 43-49, 58; PSERS Exhibits 18 and 19).

63. Had Claimant elected not to withdraw her contributions and interest, her monthly annuity based on an Option 1 monthly payment plan would equal \$563.34 with either an effective retirement date of October 27, 2006 or an effective retirement date of December 6, 2007. (N.T. 37-39, 58; PSERS Exhibit 18, p. 12 and PSERS Exhibit 19, p. 12).

64. On February 29, 2008, PSERS responded to a telephone inquiry made by Claimant regarding the December 1, 2007 letter of appeal stating that the letter of appeal was never forwarded to PSERS' appeal section. Claimant was then provided with the right to appeal the effective date of her retirement to the Executive Committee. (Joint Exhibit A, ¶ 27; PSERS Exhibit 13).

65. On March 9, 2008, Claimant timely appealed the effective date of her retirement and the calculation of her annuity to the Executive Committee. (Joint Exhibit A, ¶ 28; PSERS Exhibit 14).

66. Claimant's appeal raised the following issues:

- a. The September 19, 2006 letter contained no definitive language warning her that she would be forfeiting her monthly pension and it would be reduced if she did not apply for retirement within 90 days of her 62<sup>nd</sup> birthday.
- b. The September 19, 2006 letter advising her that her retirement would begin the date the application was received did not address the consequences of her failure to file within the appropriate time frame.

- c. The 2006 Estimated Retirement Benefit amount (\$471.87) listed under Option 1 differed from the 2007 Estimated Retirement Benefit amount (\$461.88) for the same option.
- d. During conversations with PSERS' Bob Carnegie he was unable to explain why the language provided in the September 16 [sic], 2006 letter gave no warning about the consequences of a failure to file for retirement within 90 days of her birthday.

(PSERS Exhibit 14).

67. Claimant requested, *inter alia*, that the Executive Committee make adjustments to her account and remit the year of revised payments from "October 27, 2007 through December 2007" establish her date of retirement as October 27, 2006 retroactively, and readjust her monthly benefit to \$471.87 per month. (PSERS Exhibit 14).

68. On March 13, 2008, PSERS acknowledged receipt of Claimant's appeal. (Joint Exhibit A, ¶ 29; PSERS Exhibit 15).

69. On September 18, 2008, the Executive Committee denied Claimant's request to change the effective date of her retirement because she did not file her Application within 90 days of her 62<sup>nd</sup> birthday. (Joint Exhibit A, ¶ 30; PSERS Exhibit 16).

70. The Executive Committee denied Claimant's request to increase her monthly benefit to equal the amount she would have received if her effective date of retirement was her 62<sup>nd</sup> birthday because (1) her monthly annuity was decreased by her withdrawal of the additional interest that accrued after her 62<sup>nd</sup> birthday, which in effect



increased the amount Claimant withdrew; and (2) there was an error in the salary figures used to calculate her final average salary that, when corrected, caused a decrease in her final average salary. (Joint Exhibit A, ¶ 31; PSERS Exhibit 16).

71. Claimant timely filed an Appeal and Request for Administrative Hearing claiming that she did not receive adequate notice of the effect of not filing for retirement with PSERS upon attaining superannuation retirement age and her “monthly amount associated with Option 1 would have been higher” had she made application at superannuation retirement age. (Department Records; Claimant’s Appeal and Request for Administrative Hearing).

72. A hearing was held on March 25, 2009. (N.T. *passim*).

## II. CONCLUSIONS OF LAW:

1. Claimant was afforded an opportunity to be heard in connection with her appeal. (Findings of Fact 1- 72).

2. Claimant received notice of her rights and had an opportunity to make an informed decision regarding her retirement date. (Findings of Fact 11-15, 22-28).

3. Claimant bears the burden of establishing those facts upon which she relies in order to prevail. *Wingert v. State Employees’ Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).

4. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees’ Retirement Code. 24 Pa.C.S. § 8101, *et. seq.*

5. While Claimant has only those rights recognized by statute and none beyond, she is entitled to a liberal construction of the Retirement Code. *Bittenbender v.*

*State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992); *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995).

6. The Retirement Code requires that the Board provide notice within 90 days of a member reaching superannuation age that the member shall apply for an annuity within 90 days of attainment of superannuation age and that, if the member does so apply, the effective date of retirement will be the date of attainment of superannuation age; but, that, if the member does not so apply but defers an application to a later date, the effective date of retirement will be the date of filing the application. 24 Pa.C.S. § 8505(f).

7. Since Claimant filed her Application for Retirement on December 6, 2007, more than 90 days after her termination of service, Claimant's effective date of retirement is the filing date of her Application: December 6, 2007. (Findings of Fact Nos. 25, 34; 24 Pa.C.S. §§ 8102 and 8505(f)).

8. PSERS satisfied the requirements of 24 Pa.C.S. § 8505(f) by providing notice to Claimant that she was attaining superannuation age and had 90 days to file for retirement to preserve an effective date of retirement of her 62<sup>nd</sup> birthday. (Findings of Fact Nos. 24-25; 24 Pa.C.S. § 8505(f)).

9. Claimant failed to meet the requirement of 24 Pa.C.S. § 8507(h) by not filing for retirement within 90 days of being notified by PSERS that she was reaching superannuation age. (Findings of Fact Nos. 28, 31-34; 24 Pa.C.S. § 8507(h)).

10. The Board is precluded from taking an untimely application and deeming it as timely filed or extending a legislatively created deadline. *Forman v. PSERB*, 778 A.2d 778 (Pa. Cmwlth. 2001).

11. PSERS cannot be estopped from enforcing the mandate of 24 Pa.C.S. § 8507(h). *Finnegan v. PSERB*, 560 A.2d 848 (Pa. Cmwlth. 1989), *aff'd* 591 A.2d 1053 (Pa. 1991).

12. Claimant is not entitled to receive an annuity payment retroactive to her superannuation date of October 27, 2006. (Findings of Fact Nos. 1, 25, 35, 69-70; 24 Pa.C.S. §§ 8505(f)).

13. If a beneficiary of the PSERS is receiving mistaken benefits, the Board is duty bound, under the Retirement Code, to correct the mistake. *Bittenbender, supra*, 24 Pa.C.S. § 8534(b).

14. Section 8102 of the Public School Employees' Retirement Code defines the term "Final average salary" to mean "[t]he highest average compensation received as an active member during any three non-overlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . . ." 24 Pa. C. S. §8102.

15. PSERS correctly calculated Claimant's annuity in accordance with the statutory formula expressed in the Retirement Code. (Findings of Fact Nos. 46-62).

16. Claimant is not entitled to receive a greater monthly annuity than what she is currently receiving. (Findings of Fact Nos. 46-62).

17. Claimant did not present sufficient evidence to support her appeal. (Findings of Fact 1-66).

18. The evidence supports the Executive Committee's decision to deny Claimant's appeal pursuant to 24 Pa.C.S. §§ 8308 and 8507. (Findings of Fact 1-66).

19. The evidence presented by Claimant is insufficient to overturn the decision of the Executive Committee. (Findings of Fact 1-66).

### **III. DISCUSSION:**

Claimant, a retired member, is seeking review of a decision of the PSERS Executive Committee denying her request to preserve the date of attainment of superannuation age (age 62) as her effective date of retirement – October 27, 2006. Claimant maintains that a September 19, 2006 notice letter provided by PSERS did not adequately explain the consequences of failing to apply for retirement within 90 days of attaining age 62, specifically that the letter failed to notify her that she would forfeit benefits if she did not make the election within the correct time period. (PSERS Exhibits 11, 14). Additionally, Claimant argues the calculation of her annuity is also incorrect. (PSERS Exhibit 14).

In addition to the substantive arguments raised in her appeal, Claimant raises procedural matters in connection with her request to be represented at the hearing by her brother. Finally, PSERS has moved to strike portions of Claimant's reply brief as containing facts not of record or as hearsay. This report will address the procedural matters first.

#### *A. Representation at Administrative Hearings.*

Claimant questions the initial ruling by the hearing officer at the hearing denying her request to be represented by her brother. She also questions the propriety of PSERS' counsel objecting to her request. At the hearing, PSERS' counsel placed an objection on the record and took the position that the request violated the General Rules of Administrative Practice and Procedure (GRAPP). 1 Pa. Code §§ 31.1-35.251. (N.T. 8).

According to the Administrative Agency Law, any party *may* be represented by counsel at an administrative hearing. 2 Pa.C.S.A. § 502 (emphasis added). However, an individual may proceed in an administrative hearing without counsel; and the individual bears the responsibility to secure counsel if she desires to be represented. *Shenk v. State Real Estate Commission*, 527 A.2d 629, 631 (Pa. Cmwlth., 1987). When an individual appears at a hearing *pro se*, the appearance may be considered a voluntary waiver of the right to counsel in an administrative proceeding. *Novak v. Commonwealth, Insurance Dept.*, 525 A.2d 1258, (Pa. Cmwlth., 1987).

In this case, Claimant was notified of her right to be represented by counsel. (PSERS Exhibit 17a). Rather than exercise her right to retain counsel, Claimant asked to be represented by her brother at the hearing. (N.T. 7-8; Joint Exhibit A, PSERS Exhibit 17a). Claimant's brother is not an attorney. (N.T. 89-90). In support of her request, Claimant and her brother referred to Section 31.23(2) of GRAPP. (N.T. 7-8). The pertinent provision of this regulation states:

§ 31.23. Other representation prohibited at hearings. A person shall not be represented at a hearing before an agency head or a presiding officer except:

- (1) As stated in § 31.21 or § 31.22 (relating to appearance in person; and appearance by attorney).
- (2) As otherwise permitted by the agency in a specific case.

PSERS objected to this request and the hearing officer sustained the objection based on her interpretation that this provision of GRAPP applied to the hearing unless PSERS had expressly promulgated a specific regulation superseding or amending it in accordance with the Commonwealth Documents Law, 45 P.S. §§ 1201-1208. (N.T. 9-10). See also, *Celane v. Insurance Commissioner*, 415 A.2d 130 (Pa. Cmwlth. 1980).

The objection of counsel was not improper and the hearing officer's decision on this procedural issue was not an error and should be upheld by the Board.

*B. Reply Brief.*

PSERS has also raised objections to the content of Claimant's reply brief claiming that it contains material that is not part of the record, is hearsay, or is not a properly cited rule of law. Specifically, PSERS refers to the following items;

- a) The definition of present value. (Reply Brief, p.7).
- b) The statement, "[w]hat the Claimant failed to state clearly that day was that she never visited PSERS website until some time subsequent to her November 29, 2007 phone conversation with a member of PSERS Pittsburgh regional office." (Reply Brief, No. 16 pp. 2-3).
- c) References to Claimant's inability to pay a court reporting service for the transcript. (Reply Brief, No. 18, p. 3 and Argument Section on pp. 3 and 5).
- d) The introduction of Claimant's Exhibits A and B as not being part of the original record or submitted without foundation for authenticity, relevance, and hearsay. (Reply Brief, Claimant's Exhibits A and B).
- e) A recitation of a conversation that Claimant had with PSERS counsel regarding the issue of whether Claimant's brother could represent her at the hearing. (Reply Brief, p. 3).

References by Claimant to documents or statements that were not introduced at the hearing will not be considered as part of this report. Claimant's factual statements contained in her brief are hearsay. Ordinarily, hearsay evidence is inadmissible unless some exception applies. (Pa.R.E. 802). However, that rule is relaxed in proceedings before administrative agencies. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002). In *Walker v. Unemployment Comp. Bd. of Review*, 27 Pa. Cmwlth. 522, 367 A.2d 366 (1976), the Commonwealth Court established the following standard to apply to the use of hearsay evidence during administrative

proceedings:

(1) Hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board; (2) hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

*Id.* at 370 (citations omitted).

The Pennsylvania Supreme Court adopted the *Walker* rule and affirmed its use in appropriate cases. *See, e.g., Rox Coal Co.* In this case, Claimant did not offer these statements as part of her testimony. Most notably, she did not clarify her testimony regarding the use or non-use of the PSERS website at the hearing although she had the opportunity at the hearing to do so. (N.T. 80, 109). As such her statements are extra-record hearsay and PSERS has raised a legitimate objection to their use. The same analysis applies to the documents Claimant attached to her reply brief contesting the hearing officer's exclusion of Claimant's brother to represent her. Moreover, the representations made by PSERS counsel to Claimant prior to the hearing, even if they were admitted, are irrelevant to a determination regarding representation as the regulation and the laws are clear in this regard. *Nolan v. Department of Public Welfare*, 673 A.2d 414 (Pa. Cmwlth. 1995)(as a general rule, a non-attorney may not represent parties before the Pennsylvania courts or administrative agencies).

Finally, Claimant's inability to refer to portions of the record because she could not pay for a transcript will not prejudice her as the hearing officer has an independent responsibility to review the entire transcript of the proceedings and refer to those portions of the transcript upon which specific findings of fact are made.

C. Substantive Issues.

1. Notice

Claimant argues that PSERS did not provide her with notice about the financial consequences of a failure to file an Application for Retirement within 90 days of her 62<sup>nd</sup> birthday. Specifically, Claimant maintains that the September 19, 2006 letter should have contained a warning in bold print advising that a failure to submit her application upon reaching her official retirement age or within 90 days thereafter would result in “a permanent loss of funds from that point in time.” (PSERS Exhibit 11).

There is no dispute that Claimant received notice from PSERS that she was about to reach retirement age. (Findings of Fact Nos. 11-14, 24-27). The real question here is whether the notice was adequate. A reasonable and, therefore, constitutionally valid method for notice is a direct notice that is reasonably certain to inform those affected, or, where conditions do not reasonably permit direct notice, the form of notice chosen should be a feasible and customary method which is more likely (or at least as equally likely) to provide notice than those methods which were not chosen. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 90 S. Ct. 652 (1950).

In this case, the Board’s notice obligation is set forth in the Retirement Code which outlines its duty vis a vis notice as:

**§ 8505. Duties of board regarding applications and elections of members**

(f) NOTIFICATION TO VESTEES APPROACHING SUPERANNUATION AGE.-- The board shall notify each vestee in writing 90 days prior to his attainment of superannuation age that he shall apply for his annuity within 90 days of attainment of superannuation age; that, if he does so apply, his effective date of retirement will be the date of attainment of superannuation age; that, if he does not so apply but defers his application to a later date, his effective date of retirement will be the date of filing the application or the date specified on the application, whichever is later, and that, if he does not file an application within



seven years after attaining superannuation age, he shall be deemed to have elected to receive his accumulated deductions upon attainment of superannuation age.

24 Pa. C.S. § 8505.

The record establishes that the September 19, 2006 letter in question conforms with the statutory requirement and informs Claimant that **“the effective date of your retirement will be October 27, 2006, if you file your retirement application within 90 days before or after your 62<sup>nd</sup> birthday.** The letter goes on to say that **“[i]f you do not apply for retirement benefits within 90 days after you reach normal retirement age, your retirement will begin the date the retirement application is received.”** (Emphasis supplied).<sup>4</sup> In fact, the language in the letter follows the statutory language with the exception that it does not use the complex term superannuation age but actually spells out the specific age (62) and date (October 27, 2006) for the Claimant. In addition, the letter recommends that Claimant contact a regional representative for retirement counseling and provides the phone number for the Member Service Center. Claimant chose not to contact anyone upon receiving this letter. (Findings of Fact No. 28). Her assumption that she would somehow be able to retroactively receive unreduced benefits if she failed to act is not reasonable nor is it borne out by the express language in the letter itself. (PSERS Exhibit 11).

During the hearing, PSERS introduced evidence about other informational mailings that were sent by PSERS to Claimant that would have provided information

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<sup>4</sup> This language is consistent with the obligations imposed by the statute upon the member under 24 Pa. C.S. § 8505:

(i) FAILURE TO APPLY FOR ANNUITY. --If a member is eligible to receive an annuity and 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 with the board or the date designated on the application whichever is later.

about retirement. (Findings of Fact Nos. 11-15, 17-27). Claimant maintains that she only received the September 19, 2006 letter relating to her retirement benefit. However the record also establishes that a 2002 Active Member Handbook was mailed to the same address where Claimant admits to receiving other correspondence and retirement information from PSERS which she did read. (Findings of Fact Nos. 19, 27). During her testimony, Claimant also maintained that the September 19, 2006 letter did not define “normal retirement date” and so she believed her normal retirement date would coincide with the date or age when she became eligible to receive Social Security benefits which in her case was age 66. (N.T. 72-73). However, Claimant concedes she received several statements from PSERS that listed her “Normal Retirement as of October 27, 2006.” (Findings of Fact Nos. 11-14). Certainly, Claimant was in a position to know that October 26, 2006 was her 62<sup>nd</sup> birthday. These facts suggest that Claimant received notice of her rights regardless of whether she chose to carefully read and digest that information.

## 2. The Applicable Retirement Date

Section 8102 of the Public School Employees’ Retirement Code (Retirement Code) defines “[e]ffective date of retirement” to mean, in pertinent part:

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:

(3) In the case of a vestee who defers the filing of an application for an annuity to a date later than 90 days following attainment of superannuation age, the date of filing or the date specified on the application, whichever is later.

24 Pa. C.S. § 8102.

Since the record reveals that Claimant's Application for Retirement was filed more than 90 days *after* the date of termination of service, under Section 8102 of the Retirement Code, Claimant's annuity is effective as of the date that her application was filed with PSERS, i.e., December 6, 2007. Thus, the Board has no authority to grant Claimant's request to change the effective date of her retirement. *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995) (PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code).

### 3. Calculation of Annuity

As PSERS notes in its brief, PSERS is a creation of the Legislature. Thus, an employee has only those rights created by statute and none beyond it. *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

Under Section 8102 of the Retirement Code, Claimant's "Final Average Salary" is:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . .

(24 Pa. C.S. § 8102).

Therefore, when calculating a member's Final Average Salary, PSERS must do so consistent with this statutory definition.

The annual statements sent to Claimant provided her with the information necessary to review and question the accuracy of PSERS' records. The burden is upon the member to be certain that PSERS' records are accurate before the member retires.

*David W. Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Commw. Ct. 1995).

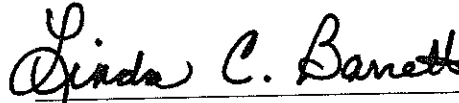
The record contains no evidence to suggest that the initial or revised Statements of Account information provided to Claimant was misleading. PSERS did not intentionally or negligently misrepresent facts. An administrative agency's interpretation of its own regulations is controlling unless the interpretation is plainly erroneous or inconsistent with either the regulation or the statute under which it is promulgated. *Clark v. Commonwealth, Department of Public Welfare*, 546 A.2d 1277 (Pa. Commw. Ct. 1988). Parties dealing with the government are charged with knowledge of, and are bound by, statutes and lawfully promulgated regulations, and reliance upon incorrect information received from a government agent or employee cannot alter the terms of a statute regardless of the economic hardship which may result. *Brown v. Richardson*, 395 F. Supp. 185, 190 (W.D. Pa. 1975). See also, *Commonwealth v. Seagram Distillers Corporation*, 109 A.2d 184 (Pa. 1954). Moreover, PSERS has a legal obligation to correct any change or mistake in its records which would result in a member receiving from PSERS more or less than the member would have been entitled to receive had the records been correct. 24 Pa.C.S. § 8534. The record established that PSERS carefully applied its rules governing the calculation of Claimant's monthly benefit upon learning of the school district's salary reporting error and in accordance with Claimant's election of Option 1. (Findings of Fact Nos. 40-63). The calculation of Claimant's annuity is correct.<sup>5</sup>

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<sup>5</sup> At the hearing, Claimant attempted to offer testimony from her brother, a certified public accountant, regarding the accuracy of PSERS calculations although he had no familiarity with PSERS' regulations and was not present for retirement counseling by PSERS or during the meeting with her financial planner. The testimony was ultimately disallowed. (N.T. 89-105).

**IV. RECOMMENDATION:**

The Committee's decision is supported by the record. Accordingly, I recommend that the attached Order **affirming** the decision of the Executive Staff Review Committee be issued and Claimant's appeal be **denied**.



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LINDA C. BARRETT  
Hearing Officer

DATE: September 24, 2009