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

IN RE: ACCOUNT OF BETTYJEAN KLING
DOCKET NO. 2011-27
CLAIM OF BETTYJEAN KLING

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 Bettyjean Kling's (Claimant) Request for Administrative Hearing be dismissed because there is no issue of material fact, and PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on June 1, 2012, and served a copy by First Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa.Code §§ 33.32, 33.35–33.36. By letter dated June 1, 2012, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under P.A.R.C.P. No. 1035.3. Claimant's response, therefore, had to be filed on or before July 2, 2012. See 1 Pa.Code §§ 31.11, 31.12, and 33.34. Claimant did not file a response to the motion.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. See *Liles v. Balmer*, 567 A.2d 691 (Pa.Super. 1989). While the General Rules of Administrative Practice and Procedure prevent the entry of summary judgment by the hearing officer, it does not preclude such action by the Board. 1 Pa.Code § 35.180; see also *United Healthcare Benefits Trust v. Ins. Comm'r of Pa.*, 620 A.2d 81 (Pa.Cmwlth. 1993).

To defeat a motion for summary judgment, the non-moving party has to show only that a dispute of material fact exists. In determining whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party, giving such non-moving party the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa.Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. See *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa.Cmwith. 1984).

FINDINGS OF FACT

Based on the record the Board finds the following facts not in dispute:

1. Claimant became a member of PSERS in 1998.
2. On May 11, 2009, PSERS received Claimant's *Application for Retirement*.
3. In the application, Claimant identified her address as **REDACTED** **REDACTED**. Claimant elected to withdraw her total contributions and interest, and elected Option 2 as her monthly payment plan naming a survivor annuitant.
4. Seven days later, on May 18, 2009, PSERS mailed to Claimant at **REDACTED** **REDACTED** an *Initial Retirement Benefit* letter.
5. In that letter, PSERS noted a termination date of November 5, 2008, a retirement date of May 11, 2009, and Claimant's election of the Option 2 monthly payment plan. PSERS also notified Claimant as follows: "The terms of your retirement plan will be binding unless you file the enclosed *Intent to Change the Terms of the Retirement Plan* (PSRS-1242) by June 22, 2009."

6. In her Appeal and Request for Administrative Hearing, Claimant admits that PSERS mailed the *Initial Retirement Benefit* letter to her "last known address," and that it was not returned undeliverable.

7. Enclosed with PSERS' May 18, 2009, *Initial Retirement Benefit* letter to Claimant was an *Intent to Change the Terms of the Retirement Plan* form, which provided, in pertinent part:

This is an official document containing time sensitive material. Please read carefully.

PSERS must receive this form by **June 22, 2009** in order to change any of the following terms of your retirement:

* * *

3. A change in the retirement option, including a change in the survivor annuitant under the existing option selection.

* * *

5. A change in the effective date of retirement. (Emphasis in original.)

8. On July 6, 2009, 14 days after the due date of June 22, 2009, PSERS received an *Intent to Change the Terms of the Retirement Plan* form from Claimant. Claimant circled the text that read "5. A change in the effective date of retirement." Claimant wrote the following text on the bottom of that form:

I retired Nov. 5 2008. WASD did not send info to PSERS until Jan 2, 2009. PSERS did not log it until Feb. Records show I was in constant contact w PSERS since Fall 08 to no Avail. Please adjust Retirement date to Nov. 08. Any Delay was no fault of mine[.] I did all I could!

9. Claimant did not indicate that she wanted to change the terms of her retirement option on the July 6th *Intent to Change the Terms of the Retirement Plan* form.

10. Claimant identified the **REDACTED** address as her return address on the envelope in which her *Intent to Change the Terms of the Retirement Plan* form was submitted.

11. By letter dated July 14, 2009, PSERS informed Claimant that because she missed the deadline of June 22, 2009, to file her *Intent to Change the Terms of the Retirement Plan* form, her request to change the terms of her retirement was deemed withdrawn and her original retirement terms remained in effect. Claimant was informed of her appeal rights.

12. On August 3, 2009, PSERS received a letter from Claimant appealing PSERS determination to withdraw her *Intent to Change the Terms of the Retirement Plan* form.

13. In her appeal, Claimant requested for the first time that PSERS change her retirement option to the highest payment option.

14. By letter dated November 2, 2011, PSERS' Executive Staff Review Committee (ESRC) granted Claimant's request to change the effective date of her retirement from May 11, 2009, to November 5, 2008, but denied her request to change her monthly payment plan from Option 2 to Maximum Single Life Annuity because Claimant failed to timely file an *Intent to Change the Terms of Retirement Plan* form as required by 22 Pa.Code § 213.45 and the irrevocable nature of the election of a retirement option, 24 Pa.C.S. § 8507(j).¹

15. Claimant has not notified PSERS that her survivor annuitant predeceased her.

16. Claimant has not notified PSERS that her marital status has changed since the date of her retirement.

17. PSERS records do not show that Claimant notified PSERS in writing or orally prior to this appeal that correspondence from PSERS should be sent to an address other than the **REDACTED** address.

¹ Claimant's request to change the effective date of her retirement was granted due to the results of litigation between Claimant and her employer that changed her date of termination.

18. The first record that PSERS has of Claimant identifying an alternate address is in her appeal to the ESRC dated August 3, 2009.

DISCUSSION

The filing of an application for retirement, election of a benefit option, or nomination of a beneficiary or survivor annuitant creates an irrevocable contract between the member and the Board. *Krill v. Public School Employees' Retirement Board*, 713 A.2d 135 (Pa.Cmwth. 1998). Section 8507(j) of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. (Retirement Code), provides that a PSERS member who, at the time of retirement, elects to receive a reduced annuity under option 1, 2, 3, or 4 must name a beneficiary or survivor annuitant. 24 Pa.C.S. § 8507(j). If the member elects Option 2, she can reelect an option and change the survivor annuitant only if the survivor annuitant predeceases her or if her marital status changes. See also 22 Pa.Code § 215.7(h). Section 8507 dictates that "[i]n no other case shall a benefit plan be changed by an annuitant." 24 Pa.C.S. § 8507(j).

In 1998, the Board promulgated 22 Pa.Code § 213.45 that provides that a member also may change their payment plan if they do so within 30 days of the receipt of an initial benefit letter:

§ 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 member by the System. The letter will be deemed to be received by the annuitant 3 business days after the date of mailing.

The Retirement Code and its attendant regulations, therefore, permit the change of an option election made by the member or permit the naming of a new survivor annuitant if (1) the member files an *Intent to Change the Terms of the Retirement Plan* form within 33 days of the date of the initial benefit letter, (2) the originally named survivor annuitant

predeceases the member, or (3) the member's marital status changes.² Otherwise, the law directly precludes a member from changing her option election.

Claimant does not meet any of the conditions that would permit her requested relief to change her benefit option. Claimant did not file an *Intent to Change the Terms of the Retirement Plan* form within 33 days of receiving the initial benefit letter. By letter dated May 18, 2009, PSERS advised Claimant of her initial retirement benefit and notified her that if she intended to change the terms of her retirement, she must file an *Intent to Change the Terms of the Retirement Plan* form no later than June 22, 2009. The letter was sent to Claimant's last known address on file with PSERS and was not returned as undeliverable. Claimant did not file her *Intent to Change the Terms of the Retirement Plan* form until July 6, 2009 – approximately 14 days late. Further, Claimant's request on that form was to adjust her retirement date from November 05, 2008, to November 08, 2008. Claimant did not actually request the change to her retirement option until August 3, 2009 – more than 40 days late. The Retirement Code and its attendant regulations do not provide for an exception to the 30-day rule set forth in 22 Pa.Code § 213.45.

Nor has Claimant alleged a triggering event that would permit a change to her retirement option. Claimant has not notified PSERS of the death of her survivor annuitant or any change in her marital status. Accordingly, these exceptions do not apply. See 24 Pa.C.S. § 8507(j).

Moreover, the Board cannot grant equitable relief in this matter. Claimant admits that the *Intent to Change the Terms of the Retirement Plan* form was sent to her "last known address" and that she returned it to PSERS after the deadline. Nevertheless, Claimant requests that PSERS allow her to change the terms of her retirement because she was only "2 weeks late." Such a request is basically a request for *nunc pro tunc*

² PSERS' regulations also allow for a change to a retirement plan when there is an error regarding service credit, salary, or accumulated deductions and certain conditions are met. 22 Pa.Code § 213.45(b). This provision does not apply, as Claimant is not seeking to remedy an error. She is merely seeking to change her monthly benefit plan.

relief, and is only available if the untimely filing was the result of fraud, a breakdown in the courts, or negligence on the part of a third party. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa.Cmwth. 2001), citing, *Bass v. Commonwealth*, 401 A.2d 1133 (1979); *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848 (Pa.Cmwth. 1989).

PSERS cannot provide a benefit that would produce a result that is contrary to positive law. See *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848 (Pa.Cmwth. 1989). In *Finnegan*, the claimant was told that she could buy 15 years of nonschool service, and retired based upon that representation. The Retirement Code, however, specifically limits such purchase to 12 years. The court ruled that PSERS could not be estopped from applying this statutory provision because to do so would be tantamount to giving PSERS' employee errors the effect of amending the substance of a statute. The court held that the Board cannot be estopped from applying the statutory provisions of the Retirement Code, even where a member received inadequate, incorrect or even no information from an employer or the Board.

Even if the Board were permitted to give such relief, Claimant has not established any presence of fraud, a court breakdown, or third-party negligence. Rather, Claimant cites a failure of PSERS to send the documents to an alternate address. Claimant asserts that she told PSERS over the telephone that she would be in New Jersey dealing with family emergencies and illnesses. PSERS, however, has no record of Claimant changing her address from the [REDACTED] address to a [REDACTED] address prior to her appeal to the ESRC dated August 3, 2009. Throughout Claimant's correspondence with PSERS, from her *Application for Retirement* to her current appeal, Claimant has identified the [REDACTED] address as her return address. Claimant's failure to change her address with PSERS is not an excuse under the Retirement Code or its regulations to change a retirement option. Furthermore, these excuses do not satisfy the basis for *nunc pro tunc* relief.

The family emergencies that Claimant cites in her appeal are also insufficient to establish a basis for Claimant to change the terms of her binding contract with PSERS. Claimant's preoccupation with personal matters does not satisfy the basis for *nunc pro tunc* relief that would justify her failure to meet the filing deadline. Consequently, Claimant is precluded from changing her retirement plan from an Option 2 to Maximum Single Life Annuity.

For the above stated reasons, the Board finds that the applicable law is clear and that the record does not contain any facts which, if proven, would establish a legal basis for the Board to change Claimant's retirement plan. Accordingly, PSERS' Motion for Summary Judgment is GRANTED and Claimant's Request for Administrative Hearing is DENIED.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Request for Administrative Hearing is DISMISSED in compliance with 22 Pa.Code § 201.6(b), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. Accordingly, this Board denies Claimant's request to change her retirement option.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 9, 2012

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