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

IN RE: ACCOUNT OF KATHY J. KELLY (D)
DOCKET NO. 2014-19
CLAIM OF ANDREW T. KELLY

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it Preliminary Objections filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Andrew T. Kelly's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because he lacks standing and the capacity to bring the appeal on behalf of his adult children.

On December 1, 2014, Claimant filed an Appeal and Request for Administrative Hearing. By letter dated December 17, 2014, PSERS requested an extension until January 12, 2015, to file a response, indicating that PSERS believed an issue existed as to whether Claimant had standing. PSERS stated that it had contacted Claimant's counsel regarding whether his adult children would be added as claimants, and that counsel were working to resolve the issue. By Order dated December 18, 2014, the Board granted PSERS the extension.

Claimant's adult children were not added to the appeal or substituted as claimants, and, on January 12, 2015, PSERS filed Preliminary Objections, a brief in support thereof, and a Notice to Plead. PSERS served a copy by First Class Mail on Claimant's counsel, as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. Claimant's response was due on or before February 2, 2015. Claimant did not respond. Nor did Claimant file an amended Appeal and Request for Administrative Hearing. Pa.R.C.P. 1028(c)(1) ("A party may file

an amended pleading as of course within twenty days after service of a copy of preliminary objections.”).

Pursuant to 22 Pa. Code § 201.6(a), before filing an answer, PSERS may file preliminary objections to an appeal and request for an administrative hearing that conforms to Pennsylvania Rule of Civil Procedure 1028. Rule 1028(a)(5) permits a party to raise preliminary objections on the basis that a claimant lacks standing and/or lacks the capacity to sue. See Pa.R.C.P. 1028(a)(5); *Howard v. Commonwealth of Pennsylvania*, 957 A.2d 332, 335-336 (Pa. Cmwlth. 2008). A preliminary objection made pursuant to Rule 1028(a) (5) raises questions of fact outside of the record, and it must be endorsed with a notice to plead. See Pa.R.C.P. 1028(a), cmt.; Pa.R.C.P. 1017(c)(2), cmt. A claimant has twenty (20) days to respond to preliminary objections. See Pa.R.C.P. 1026; Pa.R.C.P. 1028(c)(2), cmt.; Pa.R.C.P. 1017, cmt. If a claimant fails to respond, the averments set forth in the preliminary objections are deemed admitted. See Pa.R.C.P. 1029(b).

In reviewing preliminary objections, the Board accepts as true all well-pled allegations of material fact and all inferences reasonably deducible therefrom. See *Howard*, 957 A.2d at 334 (citation omitted). For preliminary objections to be sustained, it must appear with certainty that the law will not permit recovery. *Id.* Any doubt is resolved in favor of the non-moving party (i.e., Claimant). *Id.*

FINDINGS OF FACT

Claimant did not respond to PSERS’ Preliminary Objections and, accordingly, the Board deems the averments set forth therein as admitted. Based on the record, therefore, the Board finds the following relevant facts not in dispute:

1. Kathy J. Kelly (“Decedent”) filed an *Application for Disability Retirement* with PSERS on June 24, 2009, electing the Option 2 monthly payment plan and naming her spouse, Claimant, as her survivor annuitant.

2. By letter dated July 13, 2009, PSERS informed Decedent that her disability retirement benefit had been approved. Her benefit was approved each year through 2013.

3. On September 13, 2013, PSERS received a *Nomination of Beneficiaries* ("NOB") form from Decedent, identifying her daughter, Erin Marie Kelly, born in 1984, and her son, Sean Andrew Kelly, born in 1986, as primary beneficiaries, each to receive 50%.

4. Erin Marie Kelly and Sean Andrew Kelly are adults.

5. By letter dated September 23, 2013, PSERS acknowledged receipt of the NOB form, but reminded Decedent that she had named Claimant as her survivor annuitant. The letter informed Decedent that "[y]ou may only name a new survivor annuitant and/or elect a new monthly option if your survivor annuitant has predeceased you or if your marital status has changed since the effective date of your retirement." The letter noted that "[i]f either of these conditions applies and you would like to see the impact of electing a new survivor annuitant or changing your monthly option, you may request an estimate by completing the enclosed *Request for Recalculation Estimate* (PSRS-1309) form."

6. Decedent did not respond to PSERS' September 23, 2013, letter.

7. On October 18, 2013, PSERS received a copy of Decedent's death certificate that identified October 10, 2013, as her date of death. The death certificate noted Decedent's marital status as "divorced."

8. By letter dated February 12, 2014, PSERS informed Claimant that PSERS had no divorce information on file and requested information.

9. On February 24, 2014, PSERS received a copy of a *Decree in Divorce* from Claimant that indicated that Claimant and Decedent had divorced effective July 7, 2011.

10. By letter dated March 28, 2014, PSERS informed Claimant that the *Decree in Divorce* automatically removed him as survivor annuitant to Decedent's retirement benefit.

11. Claimant appealed PSERS' determination to the Executive Staff Review Committee ("ESRC").

12. By letter dated October 30, 2014, the ESRC concluded: (1) that Decedent's divorce from Claimant in July 2011 automatically removed Claimant as survivor annuitant; and (2) because there was no survivor annuitant at the time of Decedent's death, there is no death benefit payable. The ESRC noted that the NOB form naming Erin Marie Kelly and Sean Andrew Kelly as primary beneficiaries "was not the proper method to change [Decedent's] survivor annuitant under an Option 2 retirement[.]

13. On December 1, 2014, Claimant filed an Appeal and Request for Administrative Hearing with the Public School Employees' Retirement Board.

14. Claimant avers, in his appeal papers to the Board, that his "ex-wife's designation of [him] as her survivor annuitant was nullified by [their] divorce in July 2011." Appeal and Request for Administrative Hearing, Section D.

15. An administrative hearing is not scheduled in this matter.

DISCUSSION

Claimant requests that the Board accept a NOB form that PSERS received on September 13, 2013, identifying Decedent's daughter, Erin Marie Kelly, and her son, Sean Andrew Kelly, as primary beneficiaries, each to receive 50% of her retirement benefit. Erin Marie Kelly, born in 1984, and Sean Andrew Kelly, born in 1986, are Decedent and Claimant's adult children. See 23 Pa.C.S. § 5101("An individual 18 years of age and older shall be deemed an adult and may sue and be sued as such."). Claimant does not seek personal relief; he seeks relief only for his adult children. PSERS challenges Claimant's standing to bring this appeal and his capacity to bring this appeal on behalf of his adult children.

Standing is threshold issue, and a claimant must establish it prior to the resolution of a dispute. *Pittsburgh Palisades Park, LLC v. Commonwealth of Pennsylvania*, 888 A.2d 655, 659 (Pa. 2005). "The traditional concept of standing focuses on the idea that a person who is not adversely impacted by the matter he seeks

to challenge does not have standing to proceed with the court system's dispute resolution process." *Id.* To prove standing, a claimant must demonstrate that he is aggrieved. *Pittsburgh Palisades Park, LLC*, 888 A.2d at 659. He must have a substantial, direct, and immediate interest in the outcome of the litigation. *Id.* at 660. A claimant must "be negatively impacted in some real and direct fashion." *Id.* Otherwise, a tribunal cannot be assured that there is a legitimate controversy. *See id.* at 659-660.

Claimant does not dispute that he was removed as Decedent's Option 2 survivor annuitant with PSERS upon their divorce in July 2011 and, therefore, that he is not entitled to any benefits from PSERS. *See* Appeal and Request for Administrative Hearing, Section D; *see also* 20 Pa.C.S. § 6111.2. Claimant asserts only that his adult children are now Decedent's survivor annuitants or beneficiaries with PSERS pursuant to the September 13, 2013, NOB form, and he requests that relief be afforded to them. *See* Appeal and Request for Administrative Hearing, Sections C and D. Failing to establish that he is *personally* aggrieved, adversely affected, or negatively impacted by this appeal, Claimant does not have standing to bring this appeal.

Further, having failed to show that he has the legal authority to sue on behalf of his adult children, such as proof that he is their legal guardian or is their agent by virtue of a power of attorney, Claimant lacks the capacity to bring this appeal. *See generally* Pa.R.C.P. 2053 (guardian or guardian ad litem may represent an incapacitated person in a legal action); 20 Pa.C.S.A. § 5603 (agent authorized through a power of attorney to pursue claims and litigation).

CONCLUSION

For the above-stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant lacks standing and lacks the capacity to bring this appeal on behalf of his adult children. Accordingly, PSERS' Preliminary Objections are GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED.

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ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Preliminary Objections:

IT IS HEREBY ORDERED, that PSERS' Preliminary Objections are GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(a) and Pa.R.C.P. 1028(a) (5), as Claimant lacks standing and the lacks the capacity to bring this appeal on behalf of his adult children.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: March 12, 2015

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