

Mail Date: MAY 07 2007

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

IN RE: ACCOUNT OF LANORDE WHEELER (Decedent)
DOCKET NO. 2006-15
CLAIM OF BEVERLY J. PORTER-WHEELER (Claimant)

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment and supporting brief filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal, contending that Claimant is not eligible to void or change Lanorde Wheeler's ("Decedent") benefit payment plan, and that the matter be dismissed with prejudice. The Claimant did not file a brief opposing the motion

Claimant has requested that PSERS allow her to change or void the retirement application filed by her deceased spouse, Lanorde Wheeler. Decedent's retirement application was filed on July 14, 2003, and in that application, Decedent elected the maximum single life annuity option and withdrew all of his contributions and interest. PSERS then notified Decedent of his initial retirement benefit by letter dated July 24, 2003. Along with that letter, PSERS included an *Intent to Change the Terms of the Retirement Plan* form ("Intent"). This Intent form stated that if Decedent desired to make changes in his retirement plan, he needed to do so no later than August 27, 2003. Decedent submitted the Intent form on November 10, 2003.

On November 25, 2003, PSERS informed Decedent by letter that his attempt to change was denied, as the Intent form was not received on or before the August 27, 2003 deadline. Decedent appealed this denial to the Executive Staff Review Committee ("ESRC") by letter dated January 5, 2004. The ESRC considered Decedent's appeal and denied the request to change the terms of his retirement application. Decedent was informed of the ESRC's denial by letter dated May 27, 2004, and he filed a formal appeal on June 17, 2004. PSERS filed an Answer on July 1, 2004, to the Request For Administrative Hearing. On October 8, 2004, Decedent's counsel sent a letter to the hearing examiner, withdrawing Claimant's administrative appeal but requesting to reserve the right to re-file at a later date. On October 12, 2004, PSERS objected to the request to preserve the re-filing of the case and instead requested that the withdrawal be entered with prejudice. The Board issued an order to Decedent on November 29, 2004, that stated:

NOW THEREFORE, IT IS HEREBY ORDERED that pursuant to Claimant's letter of withdrawal, and his not requesting a continuance of his scheduled Administrative Hearing, the Request for Administrative Hearing is deemed MOOT and this matter is hereby DISMISSED WITH PREJUDICE.

Subsequent to this order, PSERS was notified on June 21, 2005, that Decedent had passed away. Eleven months later, on May 26, 2006, Claimant filed a Request for Administrative Hearing regarding the same issues that were raised in Decedent's June 17, 2004, Request for Administrative Hearing. It is this Request for Administrative Hearing that is the subject of PSERS' Motion for Summary Judgment.

Summary judgment serves to eliminate the needless use of time and resources of both 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). Any party may move for summary judgment after the pleadings are closed, but within such time as not to delay trial unduly, based on the pleadings together with any depositions, answers to interrogatories, admissions on file and supporting affidavits. Pa.R.C.P. 1035. 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, and all doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thompson v. Nason Hospital*, 535 A.2d 1177 (Pa. Super. 1988); *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817 (Pa. Commw. Ct. 1984).

The retirement benefit contract entered into between PSERS and a member is final and binding. *Krill v. Public School Employees' Retirement Board*, 713 A.2d 132 (Pa. Commw. Ct. 1998). Once submitted, the Retirement Code provides very limited means for changing the terms of the contract. The Board's Regulations provide the following method:

- (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 received by the annuitant 3 business days after the date of mailing

22 Pa. Code §213.45(a) (emphasis added).¹

Furthermore, the Regulation states that the ability to change the terms of the retirement application is personal to the member. Section 213.45(f) specifically provides that:

(f) The right to void or change a benefit payment plan is personal to the annuitant and may only be exercised by the annuitant or the annuitant's attorney in fact. The estate, spouse, alternate payee, survivor annuitants or beneficiaries of an annuitant may neither file nor complete an intent to void or change the benefit payment plan. If an annuitant dies before filing or completing an intent to void or change the benefit payment plan, the intent will be deemed withdrawn

22 Pa.Code §213.45(f).

In the present case, the Claimant is not disputing the fact that PSERS sent the initial benefit letter to Decedent on July 24, 2003. Along with the initial benefit letter, PSERS sent to Decedent the *Intent to Change the Terms of the Retirement Plan* form. This form, in accordance with 22 Pa. Code §213.45(a), gave Decedent 30 days for returning the form and specifically stated that the deadline to return the form to PSERS was August 27, 2003. It is undisputed that Decedent did not file an *Intent* form until November 10, 2003. The Commonwealth Court of Pennsylvania has held that, absent a statute granting authority to PSERS to make an exception, no exception can be made. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Commw. Ct. 2001). Additionally, "PSERB has no authority to grant rights beyond those

¹ 24 Pa.C.S. §8507(j) provides the only other method to alter the terms of a retirement plan. Under this method, a member is permitted to nominate a new survivor annuitant if the previous survivor annuitant predeceases the member or unless the member is awarded a divorce or becomes married subsequent to the election of the option.

specifically set forth in the Retirement Code." *Id.* at 780 (citing *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Commw. Ct. 1995), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995).

Under these standards and in the absence of a statute allowing for the expansion of a deadline for filing the Intent form, Decedent's Intent form cannot be accepted, as it was received several months past the statutory deadline.

Moreover, Claimant cannot step into the shoes of Decedent for purposes of attempting to effectuate a change in Decedent's retirement application. As stated in section 213.45(f) of the *Regulations*, "[t]he right to void or change a benefit payment plan is personal to the annuitant." 22 Pa. Code 213.45(f). The *Regulations* go on further to specifically disallow the estate, spouse, alternate payee, survivor annuitants or beneficiaries to file an intent to void or change the benefit payment plan. *Id.* A duly promulgated regulation, as here, is as binding as a statute with the force of law. *Rohrbaugh v. Pennsylvania Public Utility Commission*, 727 A.2d 1080 (Pa. 1999).

Therefore, the only way that Decedent could have changed the terms of his retirement application once submitted, would have been if he personally completed the intent to change form and submitted it within the regulatory deadline. The ability of a spouse or beneficiary to change the terms of the retirement application is expressly prohibited.

Furthermore, Claimant cannot now assert a challenge on behalf of Decedent because Decedent's appeal was dismissed with prejudice. The failure

to exhaust an administrative remedy at the time it is available does not preserve a right to invoke the untimely process at some indefinite time in the future. See, *O'Brien v. State Employees' Retirement Board*, 469 A.2d 1008 (Pa. 1983). Even though an administrative hearing was pending in this matter, Decedent withdrew his request for the administrative hearing on October 8, 2004. Counsel for Decedent attempted to reserve the right to re-file the administrative hearing request, but the Board issued an order denying the request, and the matter was dismissed with prejudice.

For the above stated reasons, PSERS' Motion for Summary Judgment is Granted and Claimant's Request for Administrative Hearing is Denied.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEE'S RETIREMENT BOARD

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CLAIM OF BEVERLY J. PORTER-WHEELER (Claimant)

ORDER

AND NOW, upon consideration of Claimant's Request for an
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 WITH
PREJUDICE in accordance with 22 Pa. Code §201.3(b), as no genuine issue of
material fact exists. Decedent's Request for an Administrative Hearing was
previously dismissed as Moot and Dismissed with Prejudice, Claimant has no
standing to seek such a hearing and PSERS is entitled to judgment as a matter
of law.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: MAY 07 2007

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