

Mail Date: JAN 30 2008

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

IN RE: ACCOUNT OF SANDRA E. TURNER  
DOCKET NO. 2006-23  
CLAIM OF SANDRA E. TURNER

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Opinion of the Hearing Examiner in the above-referenced matter. We note that neither party filed Exceptions to the Opinion and Recommendation of the Hearing Examiner.

The Board finds appropriate the Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Hearing Examiner's Opinion and Recommendation attached hereto, with the correction of the following typographical error: Page 9, Conclusion of Law No. 1, the sentence "PSERS is a creature of statute and derives its authority from the provisions of the State Employees' Retirement Code. 71 Pa. C.S. §§ 5101-5956" is corrected to "PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code. 24 Pa. C.S. §§ 8101-9102."

With the above modification, we hereby adopt the Hearing Examiner's  
Opinion as our own, and accordingly:

IT IS HEREBY ORDERED that the Claimant's request to seek eligibility  
for Class T-D membership after the December 31, 2001 deadline, is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: JAN 30 2008

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

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF SANDRA E. TURNER :  
CLAIM OF SANDRA E. TURNER :

: DOCKET NO. 2006-23

: Michael L. Bangs  
: Hearing Examiner  
: 429 South 18<sup>th</sup> Street  
: Camp Hill, PA 17011

: June 13, 2007

: Jennifer A. Mills, Esquire  
: Counsel for PSERS

: Sandra E. Turner  
: Pro Se Claimant

OPINION OF THE HEARING EXAMINER

Findings of Fact

1. Sandra E. Turner ("Claimant") became a member of the Public School Employees' Retirement System ("PSERS") in September 1971, by virtue of her employment as a teacher at Taylor Allderdice High School in Squirrel Hill, Pittsburgh, Pennsylvania.

("Leighton"). (N.T. 10, 25)

2. Claimant remained so employed for 34.85 years, until her retirement on June 20, 2006. (N.T. 10, 19)

3. Between at least 2001 and up to and including the present date, Claimant's resided at Redacted Redacted Pennsylvania. (N.T. 9, 18)

4. Prior to 2001, members of PSERS were classified only as class T-C service for retirement purposes, under which retirement benefits were calculated with a 2.0% multiplier. (N.T. 26)

5. The enactment of Act 9 legislation in 2001 enabled PSERS members to elect an optional T-D service class, under which retirement benefits would be calculated with a 2.5% multiplier. (N.T. 26)

6. Act 9 required eligible members to file "a written notice with the board on or before December 31, 2001, or before the termination of school service, or State service as applicable, whichever first occurs." 24 Pa.C.S. § 8305.1(b)

7. Act 9 limited this election by providing "[i]f the member fails to timely file an election to become a class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member." 24 Pa.C.S. § 8305.1(d)

8. In May of 2001, PSERS sent a mass mailing to all of its active and inactive members to notify them of the Act 9 legislation and the opportunity to elect a new class of service; this mailing explained the benefit of electing Class T-D service, and explained the election requirement of filing a written election form with PSERS by December 31, 2001. (N.T. 27, 29, Exhibit PSERS-3)

9. In June of 2001, PSERS sent another mass mailing to all of its active and inactive members concerning the Act-9 legislation and including an election form to elect Class T-D membership. (N.T. 28-29, Exhibit PSERS-4)

10. A second notice and election form was sent by mass mail to members over the summer of 2001, again alerting them to the opportunity to choose Class T-D membership. (N.T. 29, Exhibit PSERS-5)

11. In the summer of 2001 the "Retirement Chalkboard" a newsletter providing updates to members, was mass mailed to active PSERS members, highlighting Act 9 and providing the T-D election deadline date of December 31, 2001. (N.T. 31, Exhibit PSERS-8)

12. Another "Retirement Chalkboard" was sent in to all active members in the fall of 2001, containing a lead article about the election forms for Class T-D service with mention of the approaching deadline. (N.T. 31-32, Exhibit PSERS-9)

13. On November 30, 2001, a letter was sent via first-class mail to Claimant, notifying her of her right to elect Class T-D membership, and providing a specific comparison based on Claimant's account information of the benefit of Class T-D service over Class T-C service. (N.T. 29-30, Exhibit PSERS-6)

14. Also in November 2001, a final notice was sent to those members of PSERS who had not yet filed for Class T-D service, including Claimant, notifying them of the approaching deadline and including a form if they wished to make the election. (N.T. 30, Exhibit PSERS-7)

15. All of the above-mentioned mailings sent by PSERS were sent to Claimant at  
Redacted Redacted (Exhibits PSERS 3-9)

16. Although PSERS maintains a file for "undeliverable mail" returned from the post office, there is no evidence than any of PSERS Exhibits 3 through 9, all of which were mailed to Claimant were ever returned by the post office. (N.T. 32)

17. As of the June 13, 2007 Administrative Hearing, Claimant has never filed an election for Class T-D service. (N.T. 35)

18. While there was a typing error in Claimant's June 30, 2004 statement of account indicating that she had received 1.00 years of Class TD service and 32.85 years of Class TC service, all other statements of Claimant's account were correct in indicating that upon her retirement, *all* of her years of service were credited by PSERS as Class T-C service. (N.T. 33-34, Exhibits PSERS-11, 12, 13, 14)

19. In the beginning of 2001, Claimant's daughter went missing from college, resulting in Claimant filing a missing person's report in Baltimore, Maryland, on February 10, 2001. (N.T. 12, 15-16, Exhibit Claimant-2)

20. Claimant's daughter was not found until somewhere near the end of 2002. (N.T. 13)

21. During the search for her daughter, Claimant continued to pay her bills, and never missed a day of work. (N.T. 17-18, 21)

22. During the time that her daughter was missing, Claimant did return to PSERS a "Nomination of Beneficiaries" form; which PSERS received on July 9, 2001. (N.T. 34, Exhibit PSERS-15)

23. Claimant does not remember reading the particular information sent by PSERS regarding the option to elect Class T-D service, and therefore never filed the form to elect Class T-D service. (N.T. 24)

24. Following her retirement and PSERS crediting all her service as Class T-C, Claimant requested that the PSERS Executive Staff Review Committee review her case and consider awarding her Class T-D service. (Exhibit PSERS-16)

25. PSERS Executive Staff Review Committee denied Claimant's request for Class T-D service by letter dated September 18, 2006. (Exhibit PSERS-16)

26. Claimant filed a Request for Administrative Hearing on the above issue, and the hearing was held before Independent Hearing Examiner Michael L. Bangs, Esquire on June 13, 2007.

#### Discussion

PSERS was created by the legislature and can grant no rights beyond those specifically set forth in the Retirement Code. Hughes vs. PSERS, 622 A.2d 701 (Pa. Cmwlth. 1995); alloc. den. 668 A.2d 1139 (Pa. 1995). While a member is entitled to a liberal construction of the Retirement Code, she has only those rights that were created by the retirement benefit statutes, and none beyond. Cosgrove v. State Employees' Retirement Board, 665 A.2d 870 (Pa. Cmwlth. 1995).

PSERS denied Claimant's request for T-D class service because she did not file her request for service by December 31, 2001. Act 9, now codified in the Retirement Code, states the law regarding election of Class T-D service:

(a) GENERAL RULE. —A person who is:

- (1) a member of the system; or
- (2) a multiple service member who is a State employee and a member of the State Employee's Retirement System;

and who, on the effective date of this subsection, is eligible for Class T-D membership may elect to become a member of Class T-D.

- (b) **TIME FOR MAKING ELECTION.** – The member must elect to become a Class T-D member by filing a written notice with the board on or before December 31, 2001, or before the termination of school service or State service as applicable, whichever first occurs.
- (c) **EFFECT OF ELECTION.** – An election to become a Class T-D member shall remain in effect until the termination of employment. Those members who, on the effective date of this section, contribute at the rate of 5 ¼% shall be deemed to have accepted the basic contribution rate of 6 ½% for all Class T-D service performed on or after January 1, 2002. Those members who, on the effective date of this section, contribute at the rate of 6 ¼% shall be deemed to have accepted the basic contribution rate of 7 ½% for all Class T-D service performed on or after January 1, 2002.
- (d) **EFFECT OF FAILURE TO MAKE ELECTION.** – If the member fails to timely file an election to become a Class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member.

24 Pa.C.S. § 8305.1.

The statutory deadline of December 31, 2001 is set forth in the Code, and allows for no exceptions. In Allen v. Public School Employees' Retirement Board, 848 A.2d 1031, 1033 (Pa. Cmwlth. 2004), Claimant Allen requested that she be allowed to file for Class T-D service past the statutory deadline of December 31, 2001, based on the fact that her chaotic divorce had led her to forget the deadline. In denying her request, the Court held that the Retirement Code does not provide the Board with the authority to deem an untimely application as timely filed. Id., citing, Forman v. Public School Employees' Retirement Board, 778 A.2d 778 (Pa. Cmwlth. 2001). Furthermore, the Court held that the Board is actually precluded from taking such action, since it is not specifically entitled to do so by the Retirement Code. Id.



Claimant is requesting that the Board consider her request for Class T-D service as timely filed, based on the fact that she was preoccupied with her missing daughter during the time that the letters were sent regarding the T-D election. Such a request is basically a request for *nunc pro tunc* 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 at 780, citing, Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). Even if the Board was permitted to give such relief, Claimant has not established any presence of fraud, a court breakdown, or third-party negligence. Rather, Claimant is citing her own preoccupation with her personal matters as the basis for her failure to elect Class T-D service, and thus does not satisfy the basis for *nunc pro tunc* relief.

Furthermore, Claimant's preoccupation with her missing daughter did not rise to the level of a mental incapacity, such as to justify her failure to meet the election deadline. A similar argument was overruled in Forman, in which Claimant Forman attempted to prove that a mental incapacity resulting from her breast cancer illness caused her to fail to elect early retirement. Forman at 779. The Court denied her requesting, holding that:

Under Pennsylvania law, a signed document gives rise to the presumption that it accurately expresses the state of mind of the signing party. The presumption is rebutted where the challenger presents clear and convincing evidence of mental incompetence. Mental incompetence is established through evidence that the person is unable to understand the nature and consequences of the transaction. A presumption of mental incapacity does not arise merely because the disposition of the property seems unreasonable.

Forman, at 780, citing McGovern v. State Employees' Retirement Board, 512 Pa. 377, 517 A.2d 523, 526 (1986). Obviously, Claimant has not presented evidence to satisfy the standard for mental incapacity, as she continued to pay her bills, did not miss a day of work and returned her

Nomination of Beneficiaries form during her almost two-year search for her daughter. Rather, Claimant's evidence suggests that she was functioning quite well during a stressful period in her life.

Claimant also alleges that she either did not receive or did not read any notices from PSERS that may have been sent to her regarding her option to elect Class T-D service. Since the Retirement Code does specify the manner in which notice must be given, notice sent by first class mail is deemed to be sufficient notice under the law. Higgins v. Public School Employees' Retirement System, 736 A.2d 745 (Pa. Cmwlth. 1999); Tyson v. Public School Employees' Retirement System, 737 A.2d 325 (Pa. Cmwlth. 1999). PSERS satisfied the requirement of providing notice by the seven mailings it sent to Claimant regarding the election and deadline to elect Class T-D service, one of which was sent via first-class mail.

The burden of proof and persuasion is on the Claimant. Wingert v. State Employees' Retirement Board, 138 Pa. Cmwlth. 43, 589 A.2d 269 (1991). Claimant has not proven that she was suffering from a mental incapacity such as to render her failure to elect Class T-D service excusable. Additionally, she did not allege any factors to justify the granting of *nunc pro tunc* relief. Moreover, even if she had proven either of these things, PSERB has not been given authority under the Retirement Code to deem an untimely election for Class T-D service as timely filed.

### Conclusions of Law

1. PSERS is a creature of statute and derives its authority from the provisions of the State Employees' Retirement Code. 71 Pa. C.S. §§ 5101-5956.

2. Claimant has only those rights recognized by statute and none beyond. Bittenbender v. State Employees' Retirement Board, 154 Pa. Cmwlth. 11, 622 A.2d 403 (1992).

3. Claimant bears the burden of establishing those facts upon which she relies in order to prevail. Wingert v. State Employees' Retirement Board, 138 Pa. Cmwlth. 43, 589 A.2d 269 (1991).

4. Act 9 of 2001 provided a benefit to PSERS members by allowing them to elect Class T-D service, with a higher multiplier for retirement calculations, if they filed a written notice of election by December 31, 2001.

5. Claimant failed to meet the burden of establishing either that she should be granted an exemption from the statutory deadline to elect Class T-D service, or that PSERS failed to provide proper notice of the deadline.

6. PSERB is precluded from taking an untimely application and deeming it as timely filed. Forman v. Public School Employees' Retirement Board, 778 A.2d 778 (Pa. Cmwlth. 2001)

7. Notice by first-class mail is sufficient under the law. Higgins v. Public School Employees' Retirement System, 736 A.2d 745 (Pa. Cmwlth. 1999)


8. PSERS provided Claimant with legally sufficient notice of the option to elect Class T-D service.

9. Claimant is not entitled to Class T-D election credit under the Retirement Code because she did not file her request prior to December 31, 2001.

**Recommendation**

This Hearing Examiner recommends that Claimant's request to elect Class T-D service credit be DENIED.

Respectfully submitted,

BY:   
MICHAEL L. BANGS  
Hearing Examiner

Date: 10/26/07