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

IN RE: ACCOUNT OF BERNADETTE M. KISSELL
DOCKET NO. 2015-11
CLAIM OF BERNADETTE M. KISSELL

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 Bernadette M. Kissell's ("Claimant") Appeal and 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 December 16, 2015, 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 December 16, 2015, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. On January 5, 2016, Claimant filed a response.

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). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine 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 and give him 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. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984). "Summary judgment may be entered against a party who does not respond." Pa.R.C.P. 1035.3(d).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying "(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.C.P. No. 1035.3(a). "An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence." Pa.R.C.P. No. 1035.3(b).

Because Claimant has not identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, the Board finds that there are no disputed material facts. The Board further 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's premium assistance overpayment debt of \$900.00 should be waived.

FINDINGS OF FACT

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

1. In August 1977, Claimant enrolled in PSERS through her employment with the Peters Township School District (the "District").
2. In 1991, the Pennsylvania General Assembly established a premium assistance program for "participating eligible annuitants" of PSERS. The program provides "eligible annuitants" with a supplemental monthly payment to be used toward the

purchase of basic health insurance. See Act of August 5, 1991, P.L. 183, No. 23; 24 Pa.C.S. § 8509.

3. On June 25, 1993, the Public School Employees' Retirement Board ("Board") voted, by resolution, to: (A) establish a multiple option health insurance plan (i.e., PSERS' Health Options Program ("HOP")); and (B) effective January 1, 1994, reduce the number of approved insurance plans for eligible annuitants who qualify for premium assistance to: (1) HOP; and (2) school district plans. See PSERS-1A and 1B.

4. On June 8, 2010, Claimant filed an *Application for Retirement* with PSERS. PSERS-2.

5. PSERS processed Claimant's retirement application and, by letter dated August 14, 2010, informed Claimant that her gross monthly annuity would be \$4,267.88. PSERS-3.

6. On September 23, 2010, Claimant filed a *Premium Assistance Election Form* with PSERS, on which she certified as follows:

I acknowledge that it is my responsibility to notify PSERS if there is a change in the amount of premium I pay for health insurance coverage or if I terminate my coverage with an approved plan. I authorize my school employer or health insurance representative to release any information regarding my health insurance and verify my out-of-pocket premium expense. I agree to return all Premium Assistance payments made to me in error and authorize PSERS to withhold payments from my monthly retirement benefit in absence of my lump sum payment.

PSERS-4.

7. Along with her *Premium Assistance Election Form*, Claimant returned to PSERS the *Premium Assistance Election Details* page that explained, in part:

To be eligible for Premium Assistance you must satisfy both the Service or Retirement Type Requirements **and** the Approved Plan Requirements. These requirements are as follows

* * *

2. **Approved Plan Requirements**

You must have an out-of-pocket premium expense for your basic health insurance coverage from

- A PSERS Health Options Program, **or**
- B A Commonwealth school employers' (PSERS reporting unit) group health insurance plan providing hospital, medical and major medical coverage

PSERS-4.

8. Claimant's *Premium Assistance Election Form* identified an out-of-pocket premium expense of \$100.00 for herself only, effective September 1, 2010, for health coverage from the District's approved group health insurance plan. See PSERS-4.

9. In October 2010, Claimant began receiving \$100.00 a month in premium assistance from PSERS, retroactive to September 1, 2010.

10. On November 30, 2013, Claimant's coverage with the District's approved group health insurance plan terminated.

11. Sometime prior to December 31, 2013, the District notified Claimant that her coverage with the District's plan had terminated. PSERS-5 at Section D, ¶ 2.

12. Neither Claimant nor the District notified PSERS that Claimant's coverage with this District's plan had terminated.

13. PSERS performs an annual audit to verify premium assistance benefits by contacting school employers that have members receiving premium assistance benefits and requesting confirmation that each member continues to meet the criteria to continue to receive premium assistance.

14. In March 2015, in connection with PSERS' annual audit, PSERS first became aware that Claimant's coverage with the District's approved group health insurance plan had terminated as of December 1, 2013.

15. Previously, by letter dated August 6, 2014, PSERS requested that Claimant either confirm her continued coverage under the District's plan or enroll in HOP to continue receiving premium assistance:

[PSERS] has implemented a new procedure for verifying eligibility for Premium Assistance. Premium Assistance recipients who are nearing age 65 and have not enrolled in HOP are required to verify continuation of coverage under their school employer's plan approved for Premium Assistance. The retiree who does not enroll in HOP will be asked to complete a new Premium Assistance Election Form. If the retiree fails to enroll in HOP or submit a new Premium Assistance Election Form by the retiree's 65th birthday, Premium Assistance payments will be discontinued.

You are approaching or have recently reached your 65th birthday and are currently receiving Premium Assistance. Our records indicate at this time, you do not have active coverage with one of the HOP offered plans. We are mailing a Premium Assistance Election form to be completed and returned[.]

PSERS-6.

16. Instead of notifying PSERS that her coverage with the District's plan had terminated, Claimant submitted an application for coverage in HOP on August 25, 2014, and she was enrolled effective September 1, 2014. PSERS-7.

17. On August 25, 2014, Claimant also filed a *Premium Assistance Election Form* with PSERS identifying her plan as HOP, and she began receiving \$100.00 a month in premium assistance from PSERS. PSERS-8; PSERS-9.

18. Premium assistance payments are made one month before the coverage begins.

19. Claimant was not enrolled in HOP or the District's approved group health insurance plan during the period December 1, 2013, through July 31, 2014.

20. Although the District offered Claimant a COBRA plan for the period beginning December 1, 2013, Claimant decided instead to purchase a "private policy" with Highmark to cover the period December 2013 through July 2014. See PSERS-5 at Section D, ¶¶1, 2; PSERS-10, ¶ 3; PSERS-11 at p. 2, ¶ 2.

21. PSERS, unaware at the time that Claimant's coverage with the District had terminated, paid premium assistance to Claimant in the amount of \$900.00 during the period December 2013 through July 2014.

22. On March 10, 2015, Claimant informed PSERS that, among other things, that she had received a letter from the District stating that she “did not have an approved plan for the period Dec 2013 thru July 2014 & thus the premium assistance payments [she] received would need to be returned,” and she requested that PSERS “waive the repayment.” PSERS-10.

23. By letter dated August 14, 2015, PSERS informed Claimant that she owed PSERS \$900.00 for premium assistance overpayment and explained that, beginning in October 2015, PSERS would deduct \$100.00 from her monthly retirement benefit until her premium assistance debt was repaid without charging interest. PSERS-12.

24. In October 2015, PSERS began applying Claimant’s \$100.00 monthly premium assistance payment toward her premium assistance debt of \$900.00. PSERS-15.

25. On August 24, 2015, the Executive Staff Review Committee (“ESRC”) denied Claimant’s request that her premium assistance debt be waived, stating:

By signing your *Premium Assistance Election Form*, dated September 15, 2010, you acknowledge that it was your responsibility to notify PSERS if there were a change in the health insurance premium paid to your former school employer. You also agreed that you would return all Premium Assistance payments made to you in error, and you authorized PSERS to withhold payments from your monthly retirement benefit in absence of a lump sum repayment. It is PSERS’ policy to suspend Premium Assistance payments until all Premium Assistance debts are paid. By doing so, PSERS continues to pay you the full amount of your monthly annuity. Thus, there is no “undue hardship,” as defined by the law, that would support a discretionary waiver.

PSERS-13.

26. On September 22, 2015, Claimant filed an *Appeal and Request for Administrative Hearing*. PSERS-5.

27. On October 8, 2015, PSERS filed an Answer. PSERS-14.

28. On December 16, 2015, PSERS filed a Motion for Summary Judgment.

29. On January 5, 2016, Claimant filed a response to PSERS’ motion.

30. The matter is ripe for Board adjudication.

DISCUSSION

Pursuant to the Act 23 of 1991,¹ the Pennsylvania General Assembly established a premium assistance program for “participating eligible annuitants” of PSERS. See 24 Pa.C.S. § 8509. The program was enacted to assist qualified PSERS annuitants in paying for the high cost of health care insurance by providing a supplemental monthly payment to the annuitant. The Public School Employees’ Retirement Code (“Retirement Code”) defines “participating eligible annuitants” as “[a]ll eligible annuitants who are enrolled or elect to enroll in a health insurance program approved by the [Board].”² 24 Pa.C.S. § 8102. The Board, pursuant to its discretion, has limited the approved health insurance plans to: (1) HOP; and (2) Pennsylvania public school district group plans. PSERS-1A; PSERS-1B; PSERS-4; *Hanna v. PSERB*, 701 A.2d 800, 802 (Pa. Cmwlth. 1997). Thus, to receive premium assistance, an “eligible annuitant” must file an election form with PSERS and must be enrolled in the Health Options Program or their school employer’s group plan. 24 Pa.C.S. § 8509(c); see *Hanna, supra*; PSERS-1B; PSERS-4. If an eligible annuitant is not in one of the approved plans, they are not eligible for premium assistance.

In September 2010, Claimant enrolled in PSERS’ premium assistance program. In her enrollment documents, Claimant was put on notice that she had to satisfy the “Approved Plan Requirements” to be eligible for premium assistance. PSERS-4. Specifically, Claimant was notified that an out-of-pocket premium expense for her basic health coverage was required from either: (1) the “PSERS Health Options Program”; or (2) “A Commonwealth school employers’ (PSERS reporting unit) group health insurance

¹ Act of August 5, 1991, P.L. 183, No. 23.

² “Eligible annuitants” are defined as:

All current and prospective annuitants with 24 1/2 or more eligibility points and all current and prospective disability annuitants. Beginning January 1, 1995, “eligible annuitants” shall include members with 15 or more eligibility points who terminated or who terminate school service on or after attaining superannuation retirement age and who are annuitants with an effective date of retirement after superannuation age.

24 Pa.C.S. § 8102.

plan providing hospital, medical and major medical coverage.” *Id.* Claimant submitted the *Premium Assistance Election Form* to PSERS, indicating that she had a “School Sponsored” plan with the District. PSERS-4. She certified to PSERS as follows:

I acknowledge that it is my responsibility to notify PSERS . . . if I terminate my coverage with an approved plan. * * * I agree to return all Premium Assistance payments made to me in error and authorize PSERS to withhold payments from my monthly retirement benefit in absence of my lump sum payment.

Id. In October 2010, Claimant began receiving \$100.00 a month in premium assistance from PSERS, retroactive to September 1, 2010.

As of December 1, 2013, Claimant’s coverage with the District’s approved group health insurance plan terminated, but she did not inform PSERS. See PSERS-5 at Section D, ¶ 1. Instead, Claimant obtained a “private policy” with Highmark for the period December 2013 through July 2014 and continued to accept premium assistance payments from PSERS. See PSERS-5 at Section D, ¶¶ 1, 2; PSERS-10, ¶ 3; PSERS-11 at p. 2, ¶ 2. In August 2014, after receiving PSERS’ request to either confirm her continued coverage in an eligible plan or enroll in HOP, Claimant elected to enroll in HOP and submitted another *Premium Assistance Election Form* to PSERS identifying her new plan. See PSERS-6; PSERS-7; PSERS-8. In August 2014, Claimant began receiving \$100.00 a month in premium assistance to offset the premiums due for her HOP coverage. Claimant did not advise PSERS that her coverage under the District’s group plan had previously terminated or provide PSERS with updated information about her new “private policy” with Highmark.

It was not until March of 2015 that PSERS learned, through its annual audit to verify premium assistance benefits, that Claimant’s coverage with the District’s approved group health insurance plan had terminated as of December 1, 2013. By letters received in March and April 2015, Claimant confirmed the termination and immediately requested that any debt be waived. See PSERS-10; PSERS-11.

Pursuant to Section 8534 (b) of the Retirement Code, upon discovery that Claimant was ineligible for premium assistance during the period December 2013

through July 2014, PSERS was statutorily required to correct its records and, therefore, informed Claimant that she owed PSERS \$900.00. PSERS-12. In October 2015, PSERS began applying the \$100.00 Claimant received in monthly premium assistance for her HOP coverage to recoup the debt. See PSERS-15. PSERS did not reduce Claimant's monthly annuity. See *id.*

Claimant requests that the Board waive her \$900.00 premium assistance debt, asserting that she has fallen on hard economic times and that her husband has serious health issues. The Board, however, does not have the authority to grant her a waiver. The Board may consider a discretionary waiver only if all of the following conditions are met:

- (1) the adjustment or portion of the adjustment will cause undue hardship to the member;
- (2) the adjustment was not the result of erroneous information supplied by the member;
- (3) the member had no knowledge or notice of the error before adjustment was made, and the member took action with respect to their benefits based on erroneous information provided by the system; and
- (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made.

24 Pa.C.S. § 8303.1(a)(1); *White v. Pub. Sch. Employees' Ret. Bd.*, 11 A.3d 1, 13 (Pa. Cmwlth. 2010) (a claimant "must satisfy all four provisions of this waiver-of-adjustment provision in order to qualify"). As PSERS points out, Claimant does not meet the first condition.

To establish an "undue hardship" for purposes of Section 8303.1(a)(1), Claimant must show that the adjustment either: (1) causes a reduction in excess of 5% of her monthly annuity; or (2) results in her losing eligibility for a benefit other than annuity. 22 Pa. Code § 213.3a(a). Here, there has been no reduction in Claimant's monthly annuity and Claimant has not lost eligibility for a benefit other than an annuity. See PSERS-15.

Thus, the Board is precluded from considering Claimant's request to grant her a discretionary waiver.³

Claimant also argues that her debt should be waived because her private policy was with Highmark and through the same Highmark office listed on her insurance card with the District and she used the premium assistance monies to help pay for that coverage. She notes that her new insurance card was "almost the same" as her former one. As PSERS notes, however, the fact that her policy may have been through the same insurance *carrier* or insurance office does not change the result here, because the coverage was not through the District's approved group *program* with that carrier. Members are eligible for premium assistance only if they participate in a Board-approved *program*. This issue was decided in *Hanna*, in which the Commonwealth Court rejected a member's claim that he was eligible for premium assistance because he had a policy through the Pennsylvania Bar Association with Capital Blue Cross/Pennsylvania Blue Shield, because that same carrier was the underwriter for HOP. 701 A.2d at 804. There is no dispute in this matter that Claimant was not in a Board-approved *program* during the period at issue here.⁴

Accordingly, Claimant's appeal must be dismissed.

³ Claimant attempts to place the blame on the District and/or PSERS for her predicament, but she agreed to be responsible for informing PSERS that her coverage with the District's plan had terminated as of December 1, 2013, and she was responsible for ensuring that she did not receive payments from PSERS for which she was not eligible. See PSERS-4. The enrollment form that she signed and submitted to PSERS clearly stated her obligations and the financial impact that could occur if she failed to comply, yet she chose to do nothing. See *id.* She cannot now argue that financial responsibility should lie elsewhere for her blatant failure to comply with the terms of her agreement to receive premium assistance.

⁴ Claimant admits that she had COBRA coverage through the District for the period at issue and that she chose to transfer it to her husband and not maintain it for herself. Had Claimant chosen to pay for COBRA coverage through the District for herself, she would have remained eligible for premium assistance.

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 to waive Claimant's \$900.00 premium assistance overpayment debt. Accordingly, PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DENIED.

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

IN RE: ACCOUNT OF BERNADETTE M. KISSELL
DOCKET NO. 2015-11
CLAIM OF BERNADETTE M. KISSELL

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 Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request that her \$900.00 premium assistance overpayment debt be waived.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: March 11, 2016

By: Melva S. Vogler

Melva S. Vogler, Chairman