

Mail Date: AUG 17 2010

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

IN RE: ACCOUNT OF RUTH A. LANDRY
DOCKET NO. 2009-07
CLAIM OF RUTH A. LANDRY

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 and Recommendation of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's Findings of Fact, Discussion, Conclusions of Law, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request for a determination that her retirement application was filed within 90 days of her resignation, in order to have her pension begin the day after termination of service, or, in the alternative, to "deem" her retirement application as of that date, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 8/17/10

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

LEGAL OFFICE JUN 16 2010

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE:

ACCOUNT OF RUTH A. LANDRY
CLAIM OF RUTH A. LANDRY

DOCKET NO. 2009-07

Michael L. Bangs
Hearing Examiner
429 South 18th Street
Camp Hill, PA 17011

January 27, 2010

Jennifer A. Mills, Esquire
Counsel for PSERS

William A. Hebe, Esquire
Counsel for Claimant

OPINION OF THE HEARING EXAMINER

Findings of Fact

1. Claimant was enrolled as a member of PSERS effective September 1973¹. (SF 1)
2. On or about March 30, 2008, Claimant notified the Northern Tioga School District of her intent to retire at the end of the 2007-2008 school year. (SF 2)
3. On April 15, 2008, Claimant attended a Retirement Exit Counseling session at the PSERS Northcentral Regional Office. (SF 3; Exhibit 1)
4. At the time Claimant attended the exit counseling session, Claimant intended to withdraw her contributions and interest and rollover her taxable portion. (SF 4)

¹ The parties entered into a stipulation on certain findings of fact, numbered 1-15, which are also identified with the designation "SF."

5. If a member does not have a completed *Authorization for Direct Rollover* form at the time of the exit counseling session, the standard counseling practice is to not accept the retirement application because it is incomplete. The retirement counselor provides a member with a pre-paid postage envelope for the member to mail PSERS a completed retirement application and a completed *Authorization for Direct Rollover* form. (SF 5)

6. Documents not submitted at the exit counseling session are to be sent directly to the retirement counselor within ninety days before or after a member's termination date. (SF 6, Exhibit 1)

7. At the time Claimant attended the exit counseling session on April 15, 2008, Claimant did not have an *Authorization for Direct Rollover* form that was completed and signed by a representative from the financial institution that was to receive Claimant's taxable withdrawal. (SF 7)

8. Claimant did not submit any documents during the exit counseling session on April 15, 2008. (SF 8, Exhibit 1)

9. Claimant was provided a pre-paid postage envelope at the exit counseling session to mail in her completed retirement application and an *Authorization for Direct Rollover* form to PSERS.² (SF 9)

10. On or about September 23, 2008, Claimant contacted PSERS and was informed that PSERS had not received a retirement application for Claimant. (SF 10)

11. On September 26, 2008, PSERS received Claimant's retirement application at its Northcentral Regional Office. Enclosed with the retirement application was a cover letter from

Claimant dated September 24, 2008, a copy of Claimant's Retirement Exit Counseling Checklist, and a completed *Authorization for Direct Rollover* form. (SF 11, Exhibit 2)

12. By letter dated September 26, 2008, PSERS informed Claimant of her initial retirement benefit based on her option election. The letter further stated that Claimant's effective date of termination was June 13, 2008 and that her effective date of retirement was September 26, 2008. (SF 12)

13. On September 29, 2008, PSERS received a letter from Claimant dated September 26, 2008 appealing her effective date of retirement. (SF 13)

14. Claimant's appeal was presented to PSERS Executive Staff Review Committee (ESRC). The ESRC denied Claimant's request to change her effective date of retirement to the day following her termination date because PSERS did not receive Claimant's retirement application within ninety days of her date of termination of school service. (SF 14, Exhibit 3)

15. Claimant timely filed an appeal and request for an administrative hearing. (SF 15)

16. While the parties stipulated in SF 9 that Claimant had received a pre-paid addressed envelope in which to return her retirement application and rollover form, the testimony indicated that while the form was pre-addressed to PSERS, it was not postage paid. (NT 22, 38-39)³

² Although part of the joint Stipulation of Facts, this factual averment was later contradicted by PSERS witness, and also in part by Claimant. It is addressed by this Hearing Examiner in Finding of Fact #16.

³ Citations to "NT" refer to the transcribed Notes of Testimony from the hearing before the Hearing Examiner on January 27, 2010.

17. Sometime after May 1, 2008, but while school was still in session for the year, Claimant took the pre-addressed envelope with her retirement application and rollover form to the Post Office, and mailed it to PSERS. (NT 12-14, 22)

18. Claimant is certain that the envelope with her retirement application and rollover form had the correct postage, because she waited at the window and a postal employee handled it. (NT 25)

19. Claimant's husband remembers her mailing her retirement application because doing so made her happy. (NT 28)

20. During Claimant's retirement counseling session on April 15, 2008, she had been told by Katie Hanna, her retirement counselor, that the State was in the process of switching computer systems, and that there would likely be a delay in processing her retirement application. (NT 12)

21. The computer system was switched over in approximately March of 2008. (NT 38)

22. After waiting for over the expected ten to twelve weeks, Claimant pulled out her copy of her retirement application to double-check the date, and noticed an error regarding her banking information. (NT 15)

23. Because of the error regarding her banking account information, Claimant called PSERS, and was informed that her retirement application had never been received; she then called Katie Hanna to discuss this problem. (NT 15-16)

24. When Katie Hanna received Claimant's call, she and other members of her office looked for Claimant's application on Katie's desk, then in the pile of applications to be scanned

into the computer, then in the filing drawer, but they did not find her retirement application. (NT 36-37).

25. After Katie verified to Claimant that she did not have her retirement application, she did tell Claimant that she had received verification from Claimant's school district of her June 13, 2008 retirement date, and asked Claimant to send her a copy of her retirement application, with a letter explaining what had happened. (NT 16-17).

26. Katie Hanna did not testify at the administrative hearing, but Michelle Earnest, the regional office supervisor at the PSERS Lock Haven office, verified that Claimant had called Katie regarding her missing application, and that they did search the office for it, to no avail. (NT 36-37)

27. Ms. Earnest indicated that when received at PSERS, retirement applications are not logged or noted as such, but are stamped in, put in a scanning machine and scanned to someone in the mail room. (NT 40, 42-43)

28. Every six months, all of the original retirement applications are shredded. (NT 41, 44)

29. On January 27, 2010, a hearing on the above matter was held before Independent Hearing Examiner Michael L. Bangs, Esquire.

Discussion

PSERS was created by the legislature and can grant no rights beyond those specifically set forth in the Retirement Code. Hughes vs. Public School Employees' Retirement System, 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, he 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' interpretation of the Retirement Code is entitled to great deference. Panko v. Public School Employees' Retirement System, 492 A.2d 805 (Pa. Cmwlth. 1985).

The Retirement Code defines "Effective Date of Retirement" as:

The first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date or:
(1) In the case of a member who applies for an annuity subsequent to 90 days after termination of service, the date of filing such application or the date specified on the application, whichever is later.

24 Pa. C.S. § 8102. The "date of termination of service" applicable to this case is the "effective date of [Claimant's] resignation," which was June 13, 2008. See *Id.*

Based on the June 13, 2008 date of termination of service, Claimant's 90-day deadline to file her retirement application would have been September 11, 2008. While it is uncontested that PSERS received a copy of Claimant's retirement application on September 26, 2008, this was seventeen (17) days past the due date. The question then becomes whether Claimant's uncontested testimony that she mailed her retirement application well within the required time period is sufficient to satisfy the Retirement Code's requirement of "properly fil[ing] an application for annuity." Relevant caselaw indicates that it is not.

In Harastay v. Public School Employees' Retirement Board, 945 A.2d 783 (Pa. Commw. 2008), the Court dealt with Harastay's failure to timely file his class T-D election form. The Retirement Code had been amended in 2001 to create a new class of service, which provided enhanced benefits, but required higher member contributions. *Id.* at 784. The election for this class of service had to be made by December 31, 2001. *Id.* at 785. PSERS reminded Harastay

numerous times of his deadline to make the election via: (1) A letter sent to all members on May 18, 2001; (2) Publications in the spring and fall of 2001; (3) A class election form sent to Harastay on June 6, 2001; (4) A follow-up reminder letter on June 14, 2001; (5) A second reminder letter on November 30, 2001; and (6) A third reminder letter and another election form on December 5, 2001. Id. Harastay's testimony was that he finally mailed his election form requesting Class T-D service on December 21, 2001; he said he had received the other notices, but had "procrastinated" in sending them. Harastay at 786. PSERS never received Harastay's election form, which Harastay testified meant it had been lost either by them or by the postal service. Id.

The Court ruled that the "mailbox rule," a rule of evidence in which proof of mailing raises a presumption that it has reached the person to whom it was addressed did not apply in the Harastay case. Id. at 788. The Court reasoned that the Board is entitled to great deference in its interpretation of the Retirement Code, and cannot be overturned unless such interpretation is clearly erroneous. Harastay at 787, citing, Laurito v. Public School Employees' Retirement Board, 146 Pa. Commw. 514, 606 A.2d 609, 611 (Pa. Cmwlth. 1992). The Board had interpreted the Retirement Code to require that the class T-D election forms be actually received by PSERS by December 31, 2001. Id. at 787. In support of this interpretation, the Board referenced its adoption of the General Rules of Administrative Practice and Procedure, which state: "[D]ocuments required or permitted to be filed...shall be received for filing at the office of the agency within the time limits, if any, for filing. *The date of receipt at the office of the agency and not the date of deposit in the mails is determinative.*" Harastay at 787-788, citing, 1 Pa. Code § 31.11 (emphasis in original). The Court held that the adoption of this rule combined with the

interpretation by PSERS that the date of filing was the date the document was actually received by PSERS was not clearly erroneous, and made the mailbox rule inapplicable to such a situation. Id. at 788. Because “substantial evidence supports the finding that the election form was not received,” Harastay had not sustained his burden of proof of filing⁴. Id.

Clearly, Harastay is on point with the instant case. The wording of the statute in regard to the filing of the retirement application is very similar to the wording in Harastay, in that it references the “date of filing.” PSERS’ adoption of the General Rules of Administrative Practice and Procedure, as quoted above, requires that the date of receipt at PSERS be considered the “date of filing.” The Court held in Harastay that “[t]he Board contends that the timeliness of any document filed with PSERS is governed by the *actual receipt* of the document, rather than the date of mailing.... We agree.” Harastay at 788 (emphasis in original). Since the only evidence regarding receipt is that PSERS received Claimant’s retirement application on September 26, 2008, this date must be the filing date of her retirement application.

Claimant argues alternatively that PSERS should administratively “find” that her application was timely filed, despite the discussion above. This argument was dismissed in Forman v. Public School Employees’ Retirement Board, 778 A.2d 778, 780 (Pa. Commw. 2001), in which the Court held that “no legal argument has been presented establishing that PSERB has the authority to take an untimely filed retirement application and ‘deem it’ timely filed.” Furthermore, “[t]he retirement code does not grant PSERB such authority; therefore, PSERB is precluded from taking such action, since the retirement system is a creature of the legislature and

⁴ 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).

its members have only those rights created by the retirement benefit statute.” Id., citing, Cosgrove v. State Employees’ Retirement Board, 665 A.2d 870 (Pa. Cmwlth. 1995).
Consequently, PSERS cannot do here what it was prohibited from doing in Forman.

Conclusions of Law

1. PSERS was created by the legislature and can grant no rights beyond those contained in the Retirement Code. Hughes vs. Public School Employees’ Retirement System, 622 A.2d 701 (Pa. Cmwlth. 1995); *alloc. den.* 668 A.2d 1139 (Pa. 1995).
2. PSERS’ interpretation of the Retirement Code is entitled to great deference. Panko v. Public School Employees’ Retirement System, 492 A.2d 805 (Pa. Cmwlth. 1985).
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. The Retirement Code provides an “effective date of retirement” as “the first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date,” or, if after 90 days, the date of filing such application or the date on the application, whichever is later. 24 Pa. C.S. § 8102.
5. In order to satisfy the Retirement Code and be timely filed, the retirement application must be *actually received* by PSERS within 90 days of the date of termination of service. See, Harastay, 945 A.2d 783 (Pa. Commw. 2008)
6. Claimant did not satisfy her burden of proof that she filed her application by September 11, 2008, which was 90 days after her termination date, as PSERS did not receive her retirement application until September 26, 2008.


7. PSERS is prohibited from "deeming" an untimely retirement application as timely filed, since the Retirement Code does not grant it such authority. Forman, 778 A.2d at 780.

Recommendation

This Hearing Examiner recommends that Claimant's requests to either consider her retirement application as timely filed, or to "deem" her retirement application as timely filed be DENIED.

Respectfully submitted,

BY:


MICHAEL L. BANGS
Hearing Examiner

Date: 6/5/10