

Mail Date: MAR 11 2008

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

IN RE: ACCOUNT OF ALBERT ANDREWS
DOCKET NO. 2007-11
CLAIM OF ALBERT ANDREWS

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 neither party 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 the Claimant's request to purchase non-qualifying part-time service credit for the 1975-1976, 1988-1989, 1989-1990, 1990-1991, and 1991-1992 school years, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: MAR 11 2008

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE: ACCOUNT OF ALBERT ANDREWS
DOCKET NO. 2007-11
CLAIM OF ALBERT ANDREWS

BEFORE: Edward S. Finkelstein, Esquire

HEARING DATE: September 19, 2007

APPEARANCES: Jennifer A. Mills, Esquire
For - Public School Employees' Retirement
System

Albert Andrews, Claimant, pro se

OPINION OF THE HEARING EXAMINER

FINDINGS OF FACT

1. Albert Andrews ("Claimant") was an employee of the Pennsylvania Department of Transportation and therefore a member of the State Employees Retirement System ("SERS") when he applied to the Public School Employees' Retirement System ("PSERS") for multiple service credit in 1996. (PSERS Exhibit 2)

2. By letter dated October 31, 1996 PSERS forwarded to the Claimant an "Application to Purchase Credit for Full-Time Service" and an "Application to Purchase Credit for Part-Time Service". (PSERS Exhibit 1)

3. On or about December 30, 1996 PSERS received six (6) Applications to Purchase Credit for Part-Time Service which were submitted by the Claimant. (PSERS Exhibit 2)

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4. All of the 1996 Applications listed the Claimant's address as Barger Lane, General Delivery, Webster, PA 15087.

(PSERS Exhibit 2; N.T. 65-66)

5. A Statement of Amount Due was mailed to the Claimant on March 7, 1997 to Barger Lane, General Delivery, Webster, PA 15087 for the purchase of 0.54 years of PSERS service credit for his service at Belle Vernon Area School District. (PSERS

Exhibit 3; N.T. 42)

6. Claimant paid \$171.91 for the purchase of 0.54 years of PSERS service credit at that time. (N.T. 42-43)

7. Claimant received 0.54 service credit for the 1976-1977 school year at Belle Vernon Area School District for qualifying part-time school service listed on one of the 1996 Applications.

(PSERS Exhibit 3, 7; N.T. 43)

8. In 1996 PSERS would only permit purchase of part-time service credit for individuals who worked at least 80 days or 500 hours during a school year. The other five (5) 1996 Applications submitted by the Claimant did not qualify under this standard for purchase of part-time service credit. (PSERS

Exhibit 4; N.T. 43-45)

9. Claimant became a multiple service member with SERS effective May 1997 (PSERS Exhibit 7) by virtue of his purchase of service with PSERS of 0.54 years of qualifying part-time school service. (PSERS Exhibits 1, 2 and 3; N.T. 39, 41-44)

10. Prior to February 1999, PSERS members were not permitted to purchase non-qualifying part-time service that did not meet the standard of 500 hours or 80 days. (PSERS Exhibit 4; N.T. 43-44)

11. Effective February 1, 1999, PSERS' Board approved a new policy permitting active members of PSERS, of which Claimant was one as a result of his multiple service membership, to purchase retirement credit for non-qualifying part-time public school service. (PSERS Exhibit 4; N.T. 44-45)

12. In February of 1999, PSERS informed all active members, which included the Claimant, of the Board's Policy Statement for the purchase of previous non-qualifying part-time school service. (N.T. 51-52, 57, 58)

13. On May 7, 1999, PSERS notified all active members that, as a result of a pending lawsuit challenging the validity of the new Policy, implementation of the Policy was delayed and that all active members seeking to purchase non-qualifying part-time service had to file either a SP-239 "Intent to Purchase Non-Qualifying Part-Time Pennsylvania School Service" ("Intent") or a PSRS-100 "Application to Purchase Credit for Part-Time Service" to purchase non-qualifying part-time service. (PSERS Exhibits 5, 8 and 11; N.T. 52-53, 81, 86)

14. On May 7, 1999 a letter was sent to the Claimant from PSERS by first class mail at the General Delivery, Webster, PA

15087 address regarding a Court injunction regarding the possibility of obtaining previously non-qualified service.

(PSERS Exhibit 5; N.T. 86)

15. PSERS used the same method of mailing the May 7, 1999 letter to Claimant as PSERS used for all active members. (N.T. 53, 81)

16. PSERS' requirement to purchase non-qualifying part-time service under the new policy is that a member must file the application with the Board while an active member pursuant to Section 8303(c) of the Public School Employees' Retirement Code ("Retirement Code") between 1999 and the member's last day of paid service. (PSERS Exhibit 4; N.T. 45-46, 77-78)

17. Claimant was sent a 1999 Spring Retirement Chalkboard in June 1999 to Claimant's address of General Delivery, Webster, PA 15087, which presented the requirements to purchase credit for part-time service on page 5. The first paragraph states "Prior to February 1, 1999, part-time school service could only be purchased when the service was for at least 500 hours or 80 days in a given school year." The third paragraph states "If you are currently a contributing member of PSERS and have periods of part-time school service you now wish to purchase, you may obtain an *Application to Purchase Credit for Part-Time Service* (PSRS-100) from your employer or from PSERS. (PSERS Exhibit 13; N.T. 67)

18. Claimant was sent a 2000 Winter Update newsletter in October of 1999 to Claimant's address of General Delivery, Webster, PA 15087, again summarizing the February 1999 policy and giving the requirements to purchase credit for part-time service. (PSERS Exhibit 14; N.T. 70)

19. A similar PSERS Retirement Chalkboard newsletter was sent to Claimant's address of Redacted Redacted ery, Redacted Redacted in May 2004 again summarizing the February 1999 policy and giving the requirements to purchase credit for part-time service. (PSERS Exhibit 15; N.T. 71-72)

20. Claimant was sent a 2005 Winter Update newsletter to Claimant's address of Redacted Redacted Redacted Redacted that stated:

School employees who were PSERS qualified and contributing members on or after February 1, 1999, or who filed the form *Intent to Purchase Non-Qualifying Part-Time Pennsylvania School Service (SP-239)* prior to their termination of school employment are eligible to apply for the purchase of previously non-qualified part-time school service.

* * *

If you are retired prior to February 1, 1999, OR did not file form SP-239 prior to a retirement on or after February 1, 1999, you are not eligible to purchase this prior part-time school service. (Emphasis in original)

(Claimant's Exhibit 1)

21. A similar PSERS Retirement Chalkboard newsletter was sent to Claimant's address of Redacted Redacted Redacted

Redacted in March 2005 that states:

Earlier this month all active members and Multiple Service members who either filed the *Intent to Purchase Non-Qualifying Part-Time Pennsylvania School Service (SP-239)* or the *Application to Purchase Part-Time Service (PSRS-100)* received a personalized letter detailing the steps to proceed with the purchase along with an application to complete.

For those active members or Multiple Service members who may have non-qualifying part-time service but did not file the SP-239 or PSRS-100, You may file the PSRS-100 with the employer(s) where the service was rendered. Please note: You must be either an active contributing member or an active Multiple Service member to purchase this service credit.

(Claimant's Exhibit 3; PSERS Exhibit 16; N.T. 72-76)

22. Apparently during the entire time between 1996 and the Claimant's retirement from PENNDOT on March 5, 2005, the Claimant had his mail sent to Redacted General Delivery,

Redacted 7. (N.T. 21, 23) He never advised PSERS directly of a change of address. The 2005 Chalkboards were sent to the new address because when the Claimant filed for retirement with the State Employees Retirement System, they reported to PSERS the new mailing address of the Claimant.

23. The Claimant was, during the times relevant hereto, a partner in an auto parts store in Webster, PA and as a result either he or his partner in the auto parts store would go to the

post office in Webster and pick up the mail for the auto parts store as well as the Claimant's mail. (N.T. 11)

24. Claimant asserted he never received a personalized letter from PSERS detailing the steps to proceed with the purchase of non-qualifying service. (N.T. 33-35)

25. Claimant does not recall receiving the February 1999 letter from PSERS.

26. Claimant does not recall receiving the May 1999 letter from PSERS.

27. Claimant does not recall receiving a letter from PSERS stating that he was eligible to elect Class T-D membership. (N.T. 26-27)

28. Even though the Claimant was receiving publications from PSERS, he just automatically assumed he was in the system for qualifying for part-time service credit and that his request for part-time service credit would be processed by virtue of his 1996 Applications once the litigation was resolved. (N.T. 84)

29. As a result of the enactment of Act 2001-9, a PSERS Membership Class Election form was mailed to the Claimant at Barger Lane, General Delivery, Webster, PA on June 6, 2001 and the Claimant executed this form electing to change his current membership class in PSERS from T-C to T-D which he executed on July 7, 2001. (PSERS Exhibit 12; N.T. 66-67)

30. Although PSERS file for Claimant would contain a notice if any mail sent to Claimant was returned from the post office as "undeliverable mail", there is no evidence that any correspondence sent by PSERS to Claimant, was ever returned by the post office. (N.T. 56-57)

31. The United States Post Office verified the address for Claimant on file with PSERS as Redacted Redacted ry, Redacted Redacted 7 and that by using only the General Delivery, Webster, Pennsylvania 15087 address mail would be delivered to Claimant at the Post Office with the auto parts store mail. (PSERS Exhibit 10; N.T. 20-22)

32. Claimant remained employed by the Pennsylvania Department of Transportation until his retirement on March 5, 2005. (PSERS Exhibit 6; N.T. 16, 19, 36, 60)

33. Claimant asserted he never experienced a problem receiving his mail between October 1996 and March 2005. (N.T. 12)

34. PSERS accepts updates for a multiple service member's address changes either from the member or from SERS. (N.T. 75)

35. The Claimant could not seem to recall when he moved from the Webster, PA address to Redacted Redacted PA. Although he thought it was some time between three and five years previous to the hearing in this matter on September 19,

2007¹. He noted that at the time he moved he notified the post office to forward his mail to his new address in Monongahela, PA. (N.T. 12)

36. The Claimant asserts that he called PSERS around 1998-99 and spoke to a "Karen" who informed him that there was litigation over the issue of purchasing service credit by part-time school employees.

37. On February 5, 2007 PSERS denied Claimant's request to purchase non-qualifying part-time service because he terminated his employment before filing an Application or Intent form. (PSERS Exhibit 8)

38. On April 11, 2007, PSERS' Executive Staff Review Committee denied Claimant's request to purchase non-qualifying part-time service because he did not preserve his right by filing an Intent form or an Application between February 1, 1999 and his retirement date with SERS on March 5, 2005 and his 1996 applications did not preserve his right to receive credit for non-qualifying part-time service because such right did not exist in 1996. (PSERS Exhibit 11)

39. Claimant timely filed a Request for Administrative Hearing on the above issue, and the hearing was held on

¹ The Notes of Testimony erroneously state that the hearing was held on September 20, 2007; however, in fact, it was held on September 19, 2007.

September 19, 2007 before Hearing Examiner Edward S. Finkelstein, Esquire. (PSERS Exhibits 17 and 18)

40. At the hearing in this matter on September 19, 2007 the Claimant was advised that he had the right to be represented at the hearing by counsel and he waived that right and agreed to represent himself. (N.T. 4)

ISSUE: SHOULD THE CLAIMANT BE PERMITTED TO PURCHASE PART-TIME SERVICE CREDIT FOR SCHOOL YEARS OF LESS THAN 80 DAYS OR 500 HOURS AFTER HE HAS RETIRED AND IS NO LONGER AN ACTIVE MEMBER OF PSERS?

DISCUSSION

It is well settled that Claimant bears the burden of establishing the facts necessary to sustain his claim. See Gierschick v. State Employees' Retirement Board, 733 A.2d 29 at 32 (Pa. Cmwlth. 1999); See also, Wingert v. State Employees' Retirement Board, 589 A.2d 269 (Pa. Cmwlth. 1991). While a member is entitled to a liberal construction of the Retirement Code, he has only those rights created by the retirement statutes and none beyond. Burris v. State Employees' Retirement Board, 745 A.2d 704 (Pa. Cmwlth. 2000); Bittenbender v. State Employees' Retirement Board, 622 A.2d 403 (Pa. Cmwlth. 1992). The agency must construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa.C.S. §1921(a)(b).

Prior to February 1, 1999, PSERS would not permit an individual to purchase part-time service credit for a school year in which they worked less than 500 hours or 80 days. However, on February 1, 1999, PSERS issued a Policy concerning the purchase of previously non-qualifying service credits under Section 8303(c) of the Retirement Code ("Code"). The new Policy stated that "[a]n active member may purchase credit for part-time school service where the service was less than 500 hours or 80 days (non-qualifying)." The new Policy allowed active members to purchase credit for part-time school service that had previously been deemed non-qualifying thus preventing purchase, if they fell within certain hourly and daily parameters. The only change from the old Policy to the new Policy was the addition of the ability to purchase "non-qualifying" part-time school service ("NQPT").

On March 23, 1999, the Pennsylvania School Boards' Association ("PSBA") filed a lawsuit against PSERS, challenging the validity of the PSERS Board's non-qualifying service policy. PSERS notified all active members that, as a result of a pending lawsuit challenging the validity of the new Policy, implementation of the NQPT policy was delayed. Active members, seeking to purchase NQPT were given the opportunity to file either a SP-239 *Intent to Purchase Non-Qualifying Part-Time*

Pennsylvania School Service ("Intent") or a PSRS-100 Application to Purchase Credit for Part-Time Service ("Application").

On December 30, 1996 the Claimant submitted six (6) Applications to Purchase Credit for Part-time Service rendered during various school years from 1975 to 1992. Only one (1) Application, that being for service in the Belle Vernon Area School District, was for more than 80 days or 500 hours in a school year. PSERS did not act on the other five (5) Applications because they were for less than 80 days or 500 hours in a school year. The Claimant was permitted and did purchase the part-time school service at the Belle Vernon Area School District for the 1976-77 school year by paying \$171.91. As a result of his purchase of the 1976-77 service with the Belle Vernon Area School District, the Claimant became a multiple service member of PSERS as he was also, at that time in 1999 an employee of PENNDOT and therefore a member of the State Employees' Retirement System.

PSERS denied Claimant's request to purchase additional credit for service rendered during the 1975-1976, 1988-1989, 1989-1990, 1990-1991, 1991-1992 school years (the other five applications) because such service was NQPT service and at the time Claimant filed the 1996 applications, PSERS did not allow the purchase of such service. Apparently the Claimant took no further action on the five (5) Applications that were rejected

at that time but merely felt that they would sit in his file at PSERS. Claimant is now barred from applying for the purchase of NQPT because Claimant is no longer an active member of PSERS or SERS as he retired March 5, 2005 from PENNDOT. Section 8303(c) of the Retirement Code provides in pertinent part:

§8303. Eligibility points for retention and reinstatement of service credits

(c) **PURCHASE OF PREVIOUS CREDITABLE SERVICE.** - Every active member of the system or a multiple service member who is an active member of the State Employees' Retirement System on or after the effective date of this part may purchase credit and receive eligibility points:

- (1) as a member of Class T-C for previous school service or creditable nonschool service or
- (2) as a member of Class T-D for previous school service, provided the member elects to become a Class T-D member pursuant to section 8305.1 (relating to election to become a Class T-D member);

upon written agreement by the member and the board as to the manner of payment of the amount due for credit for such service; except, that any purchase for reinstatement of service credit shall be for all service previously credited.

24 Pa. C.S. §8303(c)

A member is defined as an "[a]ctive member, inactive member, annuitant, or vestee." 24 Pa.C.S. §8102. Further, an active member is defined as "[a] school employee for whom pickup contributions are being made to the fund or for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part. .

." 24 Pa.C.S. §8102. The State Employees' Retirement Code defines an "active member" as a "State employee, or a member on leave without pay, for whom pickup contributions are being made to the fund". 71 Pa.C.S. §5102. Pickup contributions cease once a member terminates his employment. Under the Retirement Code, an annuitant is "[a]ny member on or after the effective date of retirement until his annuity is terminated." 24 Pa.C.S. §8102. Under the State Employees' Retirement Code an annuitant is "[a]ny member on or after the effective date of retirement until his annuity is terminated." 71 Pa.C.S. §5102. Since the member categories are mutually exclusive such that a member cannot be in two categories at the same time, Claimant could not have been an active member and an annuitant at the same time.

The Claimant acknowledges that he never filed an Intent or Application after the effective date of the PSERS policy on February 1, 1999 for the purchase of NQPT service but before his effective date of retirement which forecloses any ability to take advantage of the new PSERS policy. It is undisputed that Claimant retired from Active member status with SERS with an effective retirement date of March 5, 2005. Also undisputed is the fact that Claimant submitted his applications for purchase of part-time service in December of 1996. Claimant argues that his 1996 applications should have preserved his right to purchase NQPT service. The Supreme Court's affirmation of the

1999 policy did not change the requirement in the policy that the member be an "active" PSERS member at the time of the NQPT purchase request. Moreover, the request had to be made after the February 1, 1999 effective date of the policy since, prior to that date, PSERS' interpretation of the Retirement Code disallowed the purchase of non-qualifying part-time service (of less than 80 days or 500 hours in a fiscal year) by an active member. Even if viewed in a light most favorable to Claimant, by viewing these documents at the time they were executed, the attempt to purchase NQPT service credits was made three full years prior to the Board's allowance of the purchase of NQPT.

PSERS argues that the implementation of the 1999 policy change cannot be considered retroactive. The Hearing Examiner does not agree with this argument and as reflected in the numerous newsletters and correspondence that were sent to all active members of PSERS beginning with the February 1999 letter announcing the new policy, PSERS made it clear to all its active members that they would be able to purchase prior NQPT service credits that up until February 1, 1999 they were not able to purchase. This correspondence and the newsletters made it very clear to the members that they would be able to purchase prior NQPT service credits and therefore PSERS did deem the policy change retroactive-at least to the extent that it would cover service rendered prior to the effective date of the policy.

Claimant cannot rely on his applications filed pre-policy because PSERS' policy during that time did not allow for the purchase of NQPT credit. As stated previously, the requirement to purchase service, whether qualifying part-time or NQPT, is statutorily mandated under Section 8303(c). The statute not only mandates that the member be in active status at the time of application but also requires that there must actually be a request. Claimant's contention that his 1996 applications should have preserved his right to purchase NQPT service nearly three years later is illogical as it is based on an assumption that a request to purchase NQPT service in 1996 would sustain its effectiveness indefinitely until PSERS might allow such purchase. There is no indication that PSERS was even considering a change in its application of the NQPT service requirements in 1996. Thus, as a matter of law, Claimant's request to purchase NQPT service filed in December of 1996 cannot be considered as timely filed.

Claimant also makes equitable arguments as to why he should be allowed to purchase NQPT even though he is not an active member and did not file an Intent or an Application between 1999 and 2005. Claimant argues that he failed to file either an Intent or an Application with the Board between February 1, 1999 and March 5, 2005 because he was not properly notified that he needed to re-file his applications. The main thrust of his

argument is that he did not receive any correspondence or information from PSERS regarding the requirement that he must file an Intent or Application; therefore, PSERS should disregard the active requirement of Section 8303 and allow him to apply now. 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 v. PSERB, 778 A.2d 778, 780 (Pa. Cmwlth. 2001), citing Bass v. Commonwealth, 401 A.2d 1133 (Pa. 1979). Even if the Board is permitted to give such relief, Claimant has not established any presence of fraud, a court breakdown, or third-party negligence. Rather, Claimant is citing a failure of PSERS to notify him of the existence of the Board's policy and/or the necessity of re-filing an Application as the basis of his failure to file within the time limit as an active member. Such a claim does not satisfy the basis for *nunc pro tunc* relief.

The evidence shows that Claimant was mailed the February 1999 letter informing members of the Board's new policy allowing for the purchase of NQPT and the May 1999 letter notifying all active members that the approved policy had been challenged. The evidence further demonstrates that PSERS continually sent correspondence and newsletters to all active members. Throughout his active status, Claimant was provided with updates

on the court case and was advised of the need to file an Intent or an Application. Claimant's argument that somehow this information did not reach him is deficient since every publication and letter sent to Claimant was sent to him at a valid address on file with PSERS and Claimant offered no evidence that he was unaware of his ability to purchase NQPT service. On the contrary, Claimant acknowledged his receipt of PSERS Updates and Retirement Chalkboards outlining the requirements of purchasing NQPT and the need for Claimant to file an Intent or an Application while he was an active member. Furthermore, the evidence presented by PSERS shows that no correspondence or mailing was ever returned as undeliverable. It appears that the Claimant just "assumed" he would qualify and did not take any action to make sure of this.

In addition, the Claimant knew that he would have to pay to purchase NQPT service credit as this is the procedure that he followed in 1996 when he bought the 0.54 years of service for the 1976-77 school year at the Belle Vernon Area School District. Therefore, at the very least, when the Claimant began his retirement process with PENNDOT in 2005 he clearly knew that he had not yet obtained NQPT service credits for the other five (5) Applications that he had filed in 1996. Surely any reasonable person would have inquired at that stage, prior to his retirement, as to the status of those other five (5)

Applications. For whatever reason, the Claimant did nothing as to those outstanding five (5) Applications.

Claimant's argument that the period of his eligibility to purchase NQPT service should be extended because of a lack of adequate notification could be construed as a request that PSERS be equitably estopped from enforcing any requirement that Claimant had to actually apply for the purchase of NQPT while an active member under 24 Pa.C.S. §8303(c) and when the purchase of NQPT was permitted. In effect, Claimant argues that the failure to notify Claimant of the requirement that an Application must be filed with the Board after 1999 should excuse the statutory requirement that (1) an application to purchase school service must be filed with the Board and (2) that such application must be received while being an active member. Such equitable considerations cannot be used to estop PSERS from imposing the statutory eligibility requirements for a purchase of service in the same way that PSERS could not be estopped in Finnegan.

The courts have held in Finnegan, 560 A.2d 848 (Pa. Cmwlth. 1989) and again in Cosgrove v. State Employees' Retirement Board, 665 A.2d 870 (Pa. Cmwlth. 1995), that the board cannot be estopped from applying the statutory provisions of the Code, even where a member received inadequate, incorrect or even no information from an employer or the board. Thus, PSERS cannot be estopped from enforcing the mandate of 24 Pa.C.S. §8303(c),

requiring an application to be filed and that the member be active in order to purchase school service. The elements of equitable estoppel have been set forth as: [1] an inducement of a party to believe that certain facts exist, [2] an act of justifiable reliance upon that belief and [3] a detriment to the actor. Finnegan, supra, 560 A.2d at 850. The elements of estoppel must be proven by clear and convincing evidence. Police Pension Fund Association Board v. Hess, 562 A.2d 391 (Pa. Cmwlth. 1989), alloc. denied, 569 A.2d 1371.

In Finnegan v. PSERB, 560 A.2d 848 (Pa. Cmwlth. 1989), aff'd, 591 A.2d 1053 (Pa. 1991), the Court held that PSERS could not be estopped from enforcing a positive statutory provision, even if the elements of estoppel could be established. The claimant was told that she could buy 15 years of nonschool service, and retired based upon that representation. The Retirement Code, however, specifically limited such purchases to 12 years. The court ruled that PSERS could not be estopped from applying this provision, because to do so would be tantamount to giving PSERS' employee errors the effect of amending the substance of a statute.

In Lawrie v. PSERB, 595 A.2d 753 (Pa. Cmwlth. 1991), the court denied a claimant's request for interest on her accumulated deductions, despite the fact that neither her school employer nor PSERS had her complete a refund application. The

Court nonetheless refused to apply the estoppel doctrine, stating "it is a situation where the law has provided no remedy." Id. at 758. See also, Rosenstein v. PSERS, 685 A.2d 624 (Pa. Cmwlth. 1996); Tyson v. PSERS, 737 A.2d 325 (Pa. Cmwlth. 1999). Like the Court noted in Lawrie, the facts in the present case are less egregious because in the present case (as in Lawrie), the allegation is that there was no information, rather than erroneous or misleading information. As analyzed by the Lawrie court, however, there is no basis to grant relief where no information is alleged to have been given, while denying relief in Finnegan where erroneous information on which the claimant relief to her detriment was given. Lawrie, 595 A.2d at 758.

Moreover, the Commonwealth Court has held that there must be an expressed statutory duty on the part of PSERS to provide notice about a benefit, in order to toll the period in which the benefit must otherwise be elected, until sufficient notice is given. Higgins v. Public School Employees' Retirement Board, 736 A.2d 745 (Pa. Cmwlth. 1999). In Higgins the Court allowed the claimant to elect multiple service membership more than 30 days after employment, as required by 24 Pa.C.S. §8507(c) (prior to amendment by Act 2001-9), because the employer failed to provide notice of the opportunity to elect multiple service upon the member's employment as required by Section 8506(g), until

notice had been given by the employer or PSERS. Unlike the notice provision at issue in Higgins, in the present case, no notice is required to be given to Claimant of any "right" he has to purchase school service, whether qualifying part-time or NQPT service, while an active member, nor is there any statutory obligation under the Code or elsewhere that would require the Board to provide notice of a policy change. It is undisputed that Claimant read the information provided by PSERS in the Retirement Chalkboards and Updates. Claimant contends that he was "waiting" for PSERS to give him NQPT service based on his 1996 applications.² At the very least, Claimant should have contacted PSERS again before his retirement on March 5, 2005 to check on the status of his request for the additional five applications that he had filed for part-time service credit.

The issue in this matter then turns to whether the Board can allow Claimant to purchase NQPT service based on Claimant's assumption that his 1996 applications were sufficient to preserve his "right" to purchase NQPT service in 1999. Clearly, Claimant was not justified making such an assumption because the 1999 Policy change was not known in 1996 and there was no expectation that the Policy would change in the foreseeable

² Although he offered testimony that at some point he contacted PSERS and inquired about his 1996 applications, Claimant failed to provide credible evidence as to when the phone call took place, whether it was a general response or a specific inquiry, what was specifically told to Claimant and what Claimant was inquiring about. The first time Claimant specifically inquired about his NQPT was not until after he was already an annuitant and no longer an active member eligible to purchase NQPT service.

future. Thus, Claimant has failed to establish the elements for estoppel at the administrative hearing.

As noted above, even if there is a duty to notify about the change in the Board's policy or Claimant's "right" to purchase NQPT service, PSERS was under no statutory obligation to notify its members via first class mail, certified mail or otherwise. PSERS' only obligation was that if it chose to notify its members of retirement benefits, it must provide the same notice to every member. Cardella v. Public School Employees' Retirement Board, 827 A.2d 1277 (Pa. Cmwlth. 2003). PSERS presented an abundance of evidence that it furnished information to all active members on numerous occasions about the requirements to purchase NQPT service under the 1999 policy, specifically the February 1999 letter that informed all active members that they now had a right to apply to purchase NQPT service. The May 1999 letter not only informed active members of the pending lawsuit and injunction, but again reiterated that active members can now purchase NQPT service.

Claimant argues that he never received such letters and although a copy of the letters cannot be produced, Claimant's own evidence supports PSERS' contention that Claimant received actual and constructive notice of the requirements to purchase NQPT service. The Higgins Court stated that "[i]n the absence of specific statutory notice provisions, what is required of a

governmental unit is that which is sufficient to provide the person to be notified with actual or constructive notice" and that bulk mailing is discouraged unless "there is proof of actual reading". 736 A.2d at 752. Claimant testified that the information provided by the PSERS Updates and Retirement Chalkboards were not only available to him prior to his retirement on March 5, 2005 but that he read the articles and was aware of the content.

Claimant was sent a 1999 Spring Retirement Chalkboard in June 1999, which stated "Prior to February 1, 1999, part-time school service could only be purchased when the service was for at least 500 hours or 80 days in a given school year." The third paragraph states "[i]f you are currently a contributing member of PSERS and have periods of part-time school service you now wish to purchase, you may obtain an *Application to Purchase Credit for Part-Time Service* (PSRS-100) from your employer or from PSERS". (PSERS Exhibit 13; N.T. 67) Claimant was sent a 2000 Winter Update in October of 1999 again summarizing the February 1999 policy and setting forth the requirements to purchase credit for part-time service. (PSERS Exhibit 14; N.T. 68-69). A similar PSERS Retirement Chalkboard was sent to Claimant in May 2004 again summarizing the February 1999 policy and set forth the requirements to purchase NQPT service. (PSERS

Exhibit 15). Claimant was sent a 2005 Winter Update that states:

School employees who were PSERS qualified and contributing members on or after February 1, 1999, or who filed the form *Intent to Purchase Non-Qualifying Part-time Pennsylvania School Service (SP-239)* prior to their termination of school employment are eligible to apply for the purchase of previously non-qualified part-time school service.

If you retired prior to February 1, 1999, OR did not file form SP-239 prior to a retirement on or after February 1, 1999, you are not eligible to purchase this prior part-time school service. (Emphasis as in newsletter)

(Claimant Exhibit 1). A similar PSERS Retirement Chalkboard was sent to Claimant in March 2005 that states:

Earlier this month all active members and Multiple Service members who either filed the *Intent to Purchase Non-Qualifying Part-Time Pennsylvania School Service (SP-239)* or the *Application to Purchase Part-Time Service (PSRS-100)* received a personalized letter detailing the steps to proceed with the purchase along with an application to complete.

For those active members or Multiple Service members who may have non-qualifying part-time service but did not file the SP-239 or PSRS-100, you may file the PSRS-100 with the employer(s) where the service was rendered. Please note: You must be either an active contributing member or an active Multiple Service member to purchase this service credit.

(Claimant Exhibit 3; PSERS Exhibit 16; N.T. 72-76)

It is well-established that the party who maintains the existence of certain facts must prove those facts. South Hills Health System v. Department of Public Welfare, 510 A.2d 934 (Pa. Cmwlth. 1986) (citations omitted), cited in Wingert v. State Employees' Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth.

1991). Here, Claimant has alleged that PSERS failed to provide him with notice of the requirement to file an Application or Intent to purchase NWPT service. PSERS rebutted Claimant's testimony on this issue by presenting evidence of the numerous PSERS publications and correspondence that were sent to Claimant that explained the purchase of NQPT requirements and effective date. Also, all publications and correspondence were mailed to Claimant using the same method of mailing as it did for all active members. Claimant's excuse that he was not aware that he needed to re-file his 1996 applications is not persuasive. First, Claimant did not offer any reliable evidence that he did not receive any of PSERS correspondence or Retirement Chalkboards and Updates. Claimant testified that he never experienced problems receiving his mail; however, it must be noted that Claimant did not always pick up his mail at the post office as sometimes his partner from the auto parts store would pick up the mail. Second, Claimant's own testimony reveals that he was aware of the articles in the Retirement Chalkboards and Updates. That fact rebuts Claimant's contention that he was justified in believing that his 1996 applications were sufficient to preserve his right to purchase NQPT service in 1999. Claimant could not have been clearer at the administrative hearing that he was aware of the 1999 policy and of the requirement that he had to file an Intent or an

Application prior to his retirement in 2005. He just "assumed" that his 1996 Applications would be sufficient. Any "misunderstanding" on the part of the Claimant was not a result of any failure of PSERS.

The requirements to purchase service are mandated under the Retirement Code and cannot be modified by the Board. Claimant has not presented evidence to rebut the presumption that he did not receive mail from PSERS. There is insufficient evidence to show that Claimant did not receive any of the publications or correspondence from PSERS. Claimant has received credit for all part-time service rendered in years in which he worked at least 80 days or 500 hours. The only additional part-time service that Claimant is now seeking is for service credit of 0.92 years of service which is the total amount of time covered by the five Applications (N.T. 77), which Claimant is not eligible to receive credit for as a matter of law.

Claimant has not met his burden of proof on this issue and he has further failed to prove the elements of estoppel or justify a granting of *nunc pro tunc* relief. Consequently, even if PSERS is subject to a claim of estoppel for allegedly failing to provide required information about purchasing NQPT service or of the Board's 1999 policy, Claimant's estoppel arguments must be dismissed because of the abundant evidence showing that such information was provided and received and read by Claimant and

that he should have inquired again before retiring in March 2005.

CONCLUSIONS OF LAW

1. 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, et al.

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

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

4. Section 8303(c) of the Retirement Code provides that an active member is entitled to purchase previous school service upon written agreement by the member and the board. 24 Pa.C.S. §8303(c).

5. An "active member" is defined as "a school employee for whom pickup contributions are being made to the fund." 24 Pa.C.S. §8102.

6. The State Employees' Retirement Code defines an "active member" as a "State employee, or a member on leave without pay,

for whom pickup contributions are being made to the fund". 71 Pa.C.S. §5102.

7. Claimant's status as an active member ended by operation of law at the time he retired as a member of SERS. Lawrie, supra.

8. Because Claimant retired from SERS effective March 5, 2005, Claimant was not an active member of PSERS or SERS when he requested to purchase NQPT service.

9. The "active member" eligibility is mandatory and cannot be waived by PSERS.

10. Because PSERS did not allow the purchase of NQPT service at the time Claimant first requested to purchase such service in 1996, the 1996 applications are ineffective to preserve Claimant's right to purchase NQPT service after 1999.

11. Because Claimant was not an active member at the time he requested to reactivate his 1996 applications, he is ineligible to purchase NQPT service from PSERS at this time.

12. Claimant's request to purchase NQPT service after 1999 when he is not an active member is untimely and PSERS is not authorized to enlarge the statutory time frame in which a member must file an application to purchase service. Forman v. PSERB, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

13. The Board is precluded from taking an untimely application and deeming it as timely filed. Forman v. PSERB, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

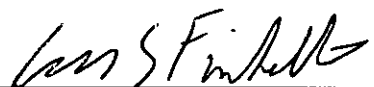
14. PSERS cannot be estopped from enforcing the mandate of 24 Pa.C.S. §8303(c) requiring a member to be active in order to purchase service. Finnegan v. PSERB, 560 A.2 848 (Pa. Cmwlth. 1989), aff'd 591 A.2d 1053 (Pa. 1991).

15. Claimant is not entitled to purchase NQPT service because PSERS did not authorize such purchase at the time Claimant filed his applications in 1996.

RECOMMENDATION

The appeal of the Claimant should be dismissed as he has not filed a timely request for purchase of part-time service credit for the years 1975-1976, 1988-1989, 1989-1990, 1990-1991 and 1991-1992.

Dated: January 10, 2008


Edward S. Finkelstein
Hearing Examiner