

Mail Date: JAN 28 2010

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

IN RE: ACCOUNT OF JOHN C. BALKO (D)
DOCKET NO. 2008-23
CLAIM OF JANICE M. BALKO

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Proposed Adjudication and Order of the Hearing Examiner; Claimant's Exceptions to the Proposed Adjudication and Order of the Hearing Examiner; and PSERS' Brief Opposing Claimant's Exceptions. We note that Claimant's Exceptions provide no additional argument or authority to support her Exceptions to the Hearing Examiner's Proposed Adjudication and Order and have been adequately addressed by the Hearing Examiner. The Board, therefore, denies the Claimant's Exceptions.

The Board notes that Conclusion of Law No. 10 is ambiguous, and, therefore, amends it to read:

The participation in PSERS of employees of PSBA, who are "school employees" under the Retirement Code that work for an agency or entity created by school districts, which are governmental entities in their own right, does not abrogate PSERS' maintenance of its pension fund as a governmental plan for purposes of ERISA. (Findings of Fact Nos. 73-76).

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law (as amended), Discussion, and Recommendation. We hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to change the elected retirement option of her deceased spouse, John C. Balko, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: JAN. 28 2010

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

**COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System**

In re :
Account of John C. Balko, Deceased :
Claim of Janice Balko :
: **Docket No. 2008-23**
:

PROPOSED ADJUDICATION AND ORDER

Dates of Hearing: March 25, 2009
May 21, 2009

Hearing Officer: Linda C. Barrett

For the Claimant: Randall G. Klimchock, Esquire
For PSERS: David W. Speck, Esquire

I. HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Janice M. Balko (Claimant) from a June 12, 2008 decision of the Executive Staff Review Committee (Executive Committee) of the Public School Employees' Retirement System ("PSERS" or "System") denying Claimant's request to receive the monthly annuity previously paid to her deceased husband, John C. Balko, a retired teacher who, at the time of retirement, elected a maximum single life annuity. Claimant maintains that she did not execute a spousal waiver of her survivor spousal annuity benefit, and the absence of a waiver obligates PSERS to pay her husband's full monthly benefit to her because PSERS is not a governmental plan as defined by the Employee Retirement Income Security Act of 1974 (ERISA).¹ Alternatively, Claimant argues that the denial of her benefits, despite her economic contributions to the marriage, violates public policy and the principles of fairness, equal protection, and due process.

A hearing in this matter was held on March 21 and May 25, 2009 in Harrisburg, Pennsylvania.

Claimant was present at the hearing and was represented by Randall G. Klimchock, Esquire. David W. Speck, Esquire, represented PSERS. Upon receipt of the hearing transcript, the hearing officer issued a briefing schedule. Pursuant to the briefing schedule, on July 20, 2009, Claimant filed her opening brief along with proposed findings of fact and conclusions of law with the hearing officer. PSERS' proposed findings of fact, conclusions of law, and supporting brief were received on August 17, 2009. Claimant's reply brief was received on August 31, 2009. The post-hearing briefs are considered timely and the matter is now ripe for disposition.

¹ 29 U.S.C. §§ 1001-1461.

II. FINDINGS OF FACT

A. John C. Balko's Retirement Election and Claimant's Subsequent Appeal

1. Claimant is Janice M. Balko ("Claimant"), the widow of John C. Balko ("Balko"). (Claimant Exhibit 1, N.T. *passim*).²

2. Claimant and Balko were married for over thirty-three years before Balko's death on January 10, 2008. (PSERS Exhibit 3; N.T. 6, 8, 26, and 39).

3. Claimant is a licensed registered nurse and has worked as a registered nurse for the last thirty-five years. She is currently employed full time at Excelsa Westmoreland Hospital. (N.T. 8).

4. Balko was employed as a full-time teacher for thirty-four (34) years for the Hempfield School District ("Hempfield"). (N.T. 9).

5. Before he became a full-time teacher for Hempfield, Balko worked as a substitute teacher for three (3) school districts. *Id.*

6. Balko became a member of the Public School Employees' Retirement System (PSERS) by virtue of his employment as a teacher with a school district.

7. Balko filed an Application for Retirement ("Application") on May 30, 2007. (Claimant Exhibit 1; N.T. 31).

8. Claimant was married to Balko at the time he submitted his Application. (N.T. 8, 10).

9. Balko named Claimant as his beneficiary on his Application for Retirement. (Claimant Exhibit 1; N.T. 36).

² N.T. refers to the Notes of Testimony from the March 25, 2009 hearing.

10. Balko's effective date of retirement was June 20, 2007, the day after he terminated service with Hempfield. (Claimant Exhibit 1, 9; PSERS Exhibit 2; N.T. 10, 36-37).

11. At the time Balko submitted his Application, he elected the Maximum Single Life Annuity (MSLA). (Claimant Exhibit 1; N.T. 33).

12. Balko did not discuss with the Claimant the specific retirement option he selected. (N.T. 11).

13. A maximum single life annuity permits a member to choose a maximum monthly payment for his lifetime. If the member dies before he receives an amount equal to his contributions and interest, the remaining balance of the contributions is paid to the named beneficiary. (N.T. 33).

14. In addition to selecting a maximum single life annuity, Balko also withdrew his total contributions and accrued interest in the amount of \$113, 927.00. (Claimant Exhibit 1; N.T. 32-33, 38).

15. Balko's total rollover contributions and interest were sent to Midland National Life Insurance. (PSERS Exhibit 2; N.T. 38).

16. Claimant is the beneficiary of the Midland National Life Insurance account. (N.T. 25).

17. On or about August 27, 2007, PSERS mailed an initial benefit package to Balko which included Balko's personalized explanation of his initial retirement benefit ("initial benefit letter") and an "Intent to Change the Terms of the Retirement Plan" ("Intent to Change") form. (PSERS Exhibit 2, p. 3; N.T. 37-38).

18. This August 27, 2007 letter confirmed that Balko had elected the maximum single life annuity option. (PSERS Exhibit 2; N.T. 36).

19. The Intent to Change form explained how Balko could make changes to his retirement benefit election. Specifically, the form advised Balko that if he wanted to make any change to his retirement selection, including a "change in the retirement option, including a change in the survivor annuitant under the existing option selection," PSERS had to receive the form with the change by September 24, 2007. (PSERS Exhibit 2, p. 3; N.T. 37)

20. Balko did not return the Intent to Change form to PSERS. (N.T. 38).

21. After his retirement became effective on June 20, 2007, Balko began receiving a monthly PSERS annuity payment. (Claimant Exhibit 2; N.T. *passim*).

22. PSERS did not pay a death benefit to Claimant because Balko had already withdrawn his contributions and interest. (N.T. 16, 34).

23. PSERS did make a payment of \$3,725.71 to Balko on January 31, 2008, but, on February 21, 2008, upon learning of Balko's death, sought a pro-rata refund from Claimant in the amount of \$2,269.97. (Claimant Exhibit 2; N.T. 41).

24. A pro-rata payment in the amount of \$1,500.00 was made to Claimant, as beneficiary, for the number of days that Balko lived during the month that he died. An installment payment of \$4,000.00 was also due to Claimant as Balko's beneficiary. (Claimant Exhibit 2; N.T. 34, 41-42).

25. The February 21, 2008 letter also advised Claimant that there would be no further payments from Balko's account. (Claimant Exhibit 2).

26. On or about March 14, 2008, Claimant filed an Appeal of the February 21, 2008 decision with PSERS Executive Committee seeking a joint survivor annuity from Balko's retirement benefit. Specifically, Claimant maintained that she was entitled to receive the same monthly benefit that Balko himself received before his death. (Agency Record).

27. The type of benefit Claimant seeks is commonly referred to as "Option 2." Selection of Option 2 provides the survivor with the same gross monthly benefit at the time of death of the member. (N.T. 35).

28. Balko did not elect Option 2. (N.T. 35-36; Claimant Exhibit 1).

29. Claimant maintains that she did not waive her spousal interest in the monthly annuity payments made to Balko. (N.T. 5, 18, and 25).

30. Claimant did not sign the retirement application submitted by Balko. (Claimant Exhibit 1; N.T. 15).

31. Claimant did not attend any retirement counseling sessions with Balko at the time he submitted his application. (N.T. 11).

32. Balko attended a pre-retirement counseling session at Hempfield Area School District prior to completing his Application and selecting his retirement options. *Id.*

33. Balko did not review his retirement options with Claimant at the time he made his elections. (N.T. 11-12).

34. Claimant did not see the Application until after Balko's death when she requested a copy from PSERS. (N.T. 15).

35. On June 12, 2008, after reviewing Claimant's appeal, the Executive Committee denied Claimant's request. (PSERS Exhibit 5).

36. Claimant was notified by letter dated June 12, 2008, that the Executive Staff Review Committee of PSERS reviewed her request to continue to receive Balko's full monthly annuity. Claimant was informed that the Executive Committee denied her request because PSERS did not receive a completed Intent to Change form from Balko. (PSERS 5).

37. The Executive Committee also advised Claimant that the application for retirement defined each option available to Claimant's husband who elected to enter into a binding contract when he filed the properly completed retirement application which became effective on June 20, 2007. (PSERS Exhibit 5).

38. Claimant filed a timely appeal from the Executive Committee's determination and requested an administrative hearing. (Agency Record).

39. An administrative hearing on Claimant's appeal was held on March 25, 2009 and May 21, 2009. (Transcripts, March 25, 2009 and May 21, 2009, *passim*).

40. Claimant was present at the hearing on March 25, 2009 and was represented by counsel. (March 25, 2009 Transcript, *passim*).

41. Claimant waived her right to be present on May 21, 2009, but authorized her counsel to represent her interests. (May 21, 2009 Transcript, *passim*).

42. All parties filed timely post-hearing briefs. (Docket, Agency Record).

B. PSERS Status as Governmental Retirement Plan

43. The Public School Retirement System was established by the General Assembly's enactment of the Public School Retirement Code (Retirement Code), Act of

July 18, 1917 (P.L. 1043, No. 343), and codified by the Act of June 1, 1959 (P.L. 350, No. 77), *as amended*, 24 Pa. C. S. § 8101, *et. seq., as amended*.

44. PSERS is directed by the Public School Employees' Retirement Board of Trustees (Board). 24 Pa .C .S. § 8501.

45. The Board and PSERS itself are defined by statute. 24 Pa. C .S. §§ 8102 and 8501(a).

46. Section 8501 explicitly describes the Board as an “independent administrative board” consisting of 15 members: the Secretary of Education, *ex officio*; the State Treasurer, *ex officio*; two Senators; two members of the House of Representatives; the Executive Secretary of the Pennsylvania School Boards Association, *ex officio*; two members to be appointed by the Governor, at least one of whom shall not be a school employee or an officer or employee of the State; three to be elected by the active professional members of the system from among their number; one to be elected by annuitants from among their number; one to be elected by the active nonprofessional members of the system from among their number; and one to be elected by members of Pennsylvania public school boards from among their number. 24 Pa. C .S. § 8501(a); (N.T. II, 19, 43, and 50).³

47. Title II of the Pennsylvania Consolidated Statutes defines Commonwealth government as “[t] he government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly, and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, . . .” 2 Pa. C.S. §101.

³ N.T. II refers to the second day of testimony-May 21, 2009.

48. Each member of the Board must take an oath of office which is then filed in the Office of the Secretary of the Commonwealth. 24 Pa. C.S. § 8501(a).

49. The Board transacts business in the name of PSERS and has a fiduciary obligation to operate the System. (N.T. II, 35-36).

50. The Board's debt obligations are obligations of the Commonwealth. 24 Pa. C.S. §8531.

51. The Board has exclusive jurisdiction over the investments made by PSERS. 24 Pa. C.S.8521(a).

52. Retirement benefits are established by statute and PSERS has exclusive jurisdiction over benefit issues. 24 Pa. C.S. § 8502(h).

53. The General Assembly provides a standing appropriation to PSERS to manage investment expenses and benefit expenses. (N.T. II, p. 27).

54. PSERS and the Board follow the Governor's policy directives on subjects such as personnel procurement, legal counsel, budget, and complement. *Id.*

55. The Board establishes PSERS' budget and submits it to Governor's Office. The Governor has the authority to modify the PSERS' budget. 24 Pa. C .S. § 8502(c); (N .T. II, 27-28).

56. The Board's actions are subject to statutory conditions, limitations, and restrictions. 24 Pa. C .S. § 8521(a); (N .T. II, 36).

57. The General Assembly has changed the conditions, limitations, and restrictions placed on PSERS. For example, in the 1990's, the General Assembly placed restrictions on PSERS to require it to make investments from a legal list, which was a list of permitted investments. This legal list did not allow PSERS to take advantage of the

favorable NASDAQ stock market. As a result, the General Assembly modified this condition and eliminated the approved categorical investments in favor of the concept of “prudent investor authority,” and imposed upon PSERS the requirement that all investments were to be made as a prudent investor would invest. (N.T. II, 36- 37).

58. PSERS and its sister retirement system for state employees - SERS - are considered integral parts of the Commonwealth of Pennsylvania affording them immunity from suit under provisions of the Eleventh Amendment to the United States Constitution. U.S. Const., Art. IX; *Blake v. Kline*, 462 F. Supp. 824 (E.D. Pa. 1978).

59. PSERS is a defined benefit pension system with three sources of contributions: investment returns, contributions from active members, and contributions from employers. (24 Pa. C.S. §§ 8502(k) and (m); N.T. II, 35).

60. The Board sets the appropriate contribution rate for all employers, including the Commonwealth of Pennsylvania, and annually certifies its calculation of contribution rate pursuant to the statutory funding methodology. (N.T. II, p. 35).

61. The active member contribution rate is also set by statute. 24 Pa. C. S. § 8102 (definition of basic contribution rate).

62. The employer and Commonwealth contribution rates are set by the Board according to the funding methodologies specified in the Retirement Code. 24 Pa. C.S. § 8328.

63. PSERS serves as the mandatory pension provider for all public schools in the Commonwealth. 24 Pa. C.S. §§ 8102 and 8301(a).

64. The Retirement Code defines government entity as a “Board of school directors, board of public education, intermediate unit board of directors, area vocational-

technical board, any governing board of any agency or authority created by them, and the Commonwealth.” 24 Pa. C.S. §8102.

65. A public school includes those schools or classes conducted under the order and superintendence of the Department of Education including, but not limited to: all educational classes of any employer charged with the responsibility of public education within this Commonwealth, as well as those classes financed wholly or in part by the Federal Government, State-owned colleges and universities, the Pennsylvania State University, community colleges, area vocational-technical schools, intermediate units, the State Board of Education, Scotland School for Veterans' Children, Thaddeus Stevens State School of Technology, and the Pennsylvania State Oral School for the Deaf. 24 Pa. C.S. §8102.

66. Charter schools are considered public schools in Pennsylvania. 24 P.S. 17-1703-A. (N.T. II, p. 23-24).

67. PSERS, as a financial reporting entity, utilizes government accounting standards. (N.T. II, 33-34).

68. PSERS participates in the Commonwealth's GAAP audit under the standards established by the Government Accounting Standards Board (GASB). (N.T. II, 33, 37).

69. The Retirement Code provides that the retirement benefits fund (“Fund”) managed by the Board is guaranteed by the full faith and credit of the Commonwealth. 24 Pa. C.S. § 8531.

70. By virtue of the Retirement Code, the State Treasurer is the physical custodian of the Fund. 24 Pa.C.S. §8903(b). Payments from the pensions benefit fund

must be made by the State Treasurer's designee in accordance with requisitions signed by the Secretary of the Board and ratified by resolution of the Board. 24 Pa. C.S. §8903(b). (N.T. II, 28-29).

71. The Fund consists of several separate accounts held by the State Treasury Department to be used for the benefit of the System, including a health insurance savings account, a member's accumulated contribution account, a state accumulated contribution account containing investments, and an annuity reserve account which is funded with a 100% obligation to pay benefits. 24 Pa. C.S. §8522. (N.T. II, 29-30).

72. The Retirement Code does not contain a provision for a spouse to consent or sign off on a member's benefit selection. (N.T. II, p. 31-32).

73. The Public School Code authorizes any school board or board of education to become a member of the Pennsylvania School Boards' Association (PSBA). 24 P.S. §5-516.

74. The Public School Code authorizes the payment of dues to PSBA from the school district. *Id.*

75. The Retirement Code defines a school employee as any person "engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee" 24 Pa. C. S. §8102.

76. A board of school directors is defined by the Retirement Code as a governmental entity. 24 Pa. C. S. §8102.

III. CONCLUSIONS OF LAW

1. Claimant was afforded an opportunity to be heard in connection with her appeal. (Findings of Fact Nos. 35-42).
2. Section 8507(j) of the Retirement Code allows an annuitant to change a benefit plan in only two circumstances: (1) A member who has elected Option 1 may change his/her designated beneficiary at any time; and (2) A member who has designated a survivor annuitant at the time of retirement shall have the right to re-elect an option and to nominate a beneficiary or a new survivor annuitant if the survivor annuitant predeceases the member or the member is awarded a divorce or becomes married subsequent to the election of the option. In no other case may a benefit plan be changed by an annuitant. 24 Pa. C.S. §8507(j).
3. The Board has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701(Pa. Cmwlth.), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995).
4. Claimant is not entitled an alteration of her deceased husband's benefit payment plan under Section 8507(j) of the Retirement Code. (Findings of Fact Nos. 1-34).
5. Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan, regulations of PSERS allow an annuitant to declare an intent to change the final terms of the benefit payment plan by filing a written intent with the System within 30 days of the annuitant's receipt of the initial benefit letter sent to the member by the System. 22 Pa. Code §213.45(a).

6. Agency regulations, when properly adopted, have the force and effect of law. PSERS cannot ignore or refuse to follow its own rules. *Commonwealth of Pennsylvania vs. State Conference of State Police Lodges of the Fraternal Order of Police*, 513 Pa. 285, 520 A.2d 25 (Pa. 1987).
7. PSERS has no authority under its regulations to allow altering of the final terms of Balko's benefit payment plan because Balko failed to file an Intent to Change form within 30 days of his receipt of the initial benefit letter. 24 Pa. C.S. §38507(j). (Findings of Fact Nos. 17-20).
8. PSERS is a governmental administrative agency and an integral part of the Commonwealth of Pennsylvania. 2 Pa. C.S. §101; 24 Pa. C.S. §§ 8101, 8328, 8501, 8502, 8521, 8522, 8531, and 8903(b). (Findings of Fact Nos. 43-71).
9. PSERS maintains a governmental plan within the definition established by ERISA. 29 U.S.C. §§ 1002 and 1003(b). (Findings of Fact Nos. 43-71).
10. The participation in PSERS of employees of PSBA which is comprised of school employees that work for school districts which are governmental entities in their own right does not abrogate PSERS' maintenance of its pension fund as a governmental plan for purposes of ERISA. (Findings of Fact Nos. 72-76).
11. PSERS is not required to obtain spousal consent under ERISA. (Findings of Fact Nos. 43-72).
12. Claimant is not entitled to payment of her deceased husband, John C. Balko's monthly annuity. (Findings of Fact Nos. 1-34, 43-76).

IV. DISCUSSION

Claimant's appeal is based on two theories. Claimant's primary claim is that the interpretation of the spousal consent provisions found in ERISA compels payment to her of the same annuity benefit her husband, John Balko, was receiving prior to his death. Alternatively, Claimant maintains that the denial of her benefits, despite her contributions to her marriage, violates public policy, the principles of fairness, and her rights to equal protection and due process. In either case, Claimant asserts that her husband's election is either void under federal law or voidable under state law. I will address Claimant's alternative argument first.

A. *Selection of Retirement Options under the Retirement Code*

1. General Principles

Generally speaking, an annuitant's surviving spouse may not change the election made by the member absent a showing of duress, incompetence, incapacity, fraud, or some other contractual impairment, and, even in those instances, Pennsylvania Courts have routinely denied a survivor's or claimant's effort to seek benefits beyond those to which they were entitled, especially if those claims are based on an attempt to change the member's benefit election. *Stevenson v. State Employees' Retirement Board*, 711 A.2d 533, (Pa. Cmwlth. 1998); *Marron v. State Employees' Retirement Board*, 544 A.2d 1095 (Pa. Cmwlth. 1988), *alloc. den.* 522 Pa. 607, 562 A.2d 829 (1989); *Estate of McGovern v. State Employees' Retirement Board*, 481 A.2d 981 (Pa. Cmwlth. 1984), *rev.*, 517 A.2d 523 (1986); *Gold v. Public School Employees' Retirement Board*, 47 Pa. Commonwealth Ct. 197, 407 A.2d 482 (1979); *Ogden v. Public School Employees' Retirement Board*, 27

D&C2d 151, 77 Dauphin 259 (1961), *aff'd per curiam* 198 Pa. Superior Ct. 174, 182 A.2d 228 (1962).⁴

In *Marron*, a decedent member's wife sought review of a decision by the State Employees' Retirement Board denying her request to void her deceased husband's election to receive disability retirement benefits as a monthly annuity rather than a lump-sum payment. The wife alleged that where an annuitant elected a retirement benefit option on the basis of inadequate counseling, the election was voidable. The Commonwealth Court found that there was no provision in the SERS Code that permitted a survivor annuitant to change a plan elected by the employee-member. The court held that decedent was advised of his options and provided with an estimate of the payments he would receive under each option and of the death benefits provided under each option and that, absent a mistake in calculation of benefits or any fraudulent or misleading conduct, SERS could not lawfully comply with the wife's request to change the option selected. Here, the record establishes that Balko did attend retirement counseling. (Findings of Fact No. 32). The record establishes that Balko made his election after being counseled. (Findings of Fact Nos. 7, 32). After he retired, Balko received a letter from PSERS explaining his initial benefit package, which included Balko's personalized explanation of his initial retirement benefit. (Findings of Fact Nos. 17-20). This August 20, 2007 letter confirmed that Balko had elected the maximum single life annuity option. (Findings of Fact No. 18).

⁴ In many instances, the State Employees' Retirement (SERS) Code, 71 Pa. C.S. § 5101-5956, has provisions that are analogous to those in the Public School Employees' Retirement Code. Consequently, court opinions containing interpretations of either the PSERS Code or the SERS Code on provisions which are identical in each Code are applicable to the interpretation of the other system. *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624 (Pa. Cmwlth. 1996).

Soon after retirement, PSERS also sent Balko an Intent to Change form. The Intent to Change form explained how Balko could make changes to his retirement benefit election. (Findings of Fact No. 19). Specifically, the form advised Balko that if he wanted to make any change to his retirement selection, including a “change in the retirement option, including a change in the survivor annuitant under the existing option selection,” PSERS had to receive the form with the change by September 24, 2007.⁵ *Id.*; PSERS Exhibit 2). Balko did not return the Intent to Change Form to PSERS. (Findings of Fact No. 20).

Under Pennsylvania law, the fact that Claimant did not participate in the initial counseling session or have involvement in the election is immaterial to the legitimacy of the election made by Balko. A surviving spouse's non-attendance at a retirement counseling session is no reason to set aside a retirement election of the member. *Shoemaker v. State Employees' Retirement Board*, 688 A.2d 751 (Pa. Cmwlth. 1997),

⁵ The Intent to Change form states at the top of the page:

This is an official document containing time sensitive material. Please read carefully.

PSERS must receive this form by September 24, 2007 in order to change any of the following terms of your retirement:

1. A change in the amount of money withdrawn. . . .
2. A change in the retirement annuity type
3. A change in the retirement option
4. A voiding (rescission) of the retirement application.
5. A change in the effective date of retirement.

The initial benefit letter explains, in pertinent part:

You selected the Maximum Single Life Annuity Option and decided to withdraw your total contributions and interest. The terms of your retirement plan will be binding unless you file the enclosed form “Intent to Change the Terms of the Retirement Plan” PSRS – 1242).

PSERS Exhibit 2. .

alloc. den. 548 Pa. 676, 698 A.2d 597 (1997). Moreover, Claimant cannot claim that she knew nothing about her husband's election, having conceded during her testimony that she was told by him that there were different options to select from and that he was going to take "the option that would give **him** the most amount of money." (N.T. 11) (Emphasis added). According to Claimant, her husband explained that he would then have a benefit equivalent to the pay he would have received while working. (N.T. 11-12). In response to being given that information by her husband, Claimant testified that, "I just didn't pay attention. I mean, it just wasn't important to me at the time." (N.T. 12).

Claimant's evidence clearly establishes that Balko intended to maximize his annuity and specifically elected, on two (2) separate occasions, *not* to consider his wife's financial situation in the event he should predecease her, otherwise he would have made another election.⁶ In fact, Claimant offered no direct evidence that Balko told her that he believed his election was designed to provide separately for her at all. *See, Hess v. Public School Employees' Retirement Board*, 460 A.2d 1231 (Pa. Cmwlth. 1983). (Oral representations are insufficient to designate a beneficiary under the Retirement Code).⁷

⁶ While Claimant's arguments also raise the issue of PSERS' obligation to inform Balko that he had an obligation under federal law to make an election that would include future payments to her, that argument cannot be construed as a failure on the part of the retirement counselor to fully inform Balko of his rights and duties since this counseling is premised on the obligations under the PSERS Code absent any preemption under federal law. The issue of preemption will be addressed separately in Section IV.B.

⁷ The record contains no record of fraud or incompetence of any kind, although Balko's election may have been inconsiderate to his wife's future financial situation plight. Her testimony that the two had a solid marriage partnership of mutual love and respect with contributions by both spouses, while compelling, does not negate the precise declaration of intent by Balko's election to take the maximum life annuity.

2. Applicability of the Principles of Equal Protection, Due Process, and Public Policy

Claimant advances the position that the denial of her benefits, despite her contributions to her marriage, violates public policy, the principles of fairness, and her rights to equal protection and due process. Claimant does not provide any state or federal authority for this position in her brief.⁸ However, in other pleadings, Claimant advanced the reasoning of Judge Friedman's concurring opinion in *Hoffman v. Pennsylvania State Employees' Retirement Board*, 743 A.2d. 1014 (Pa. Cmwlth. 2000) as support for her policy arguments. (Agency Record, Claimant's Pre-Hearing Statement).

In *Hoffman*, the member was a retired State Police Officer who elected Option 1 and named his wife as principal beneficiary. After the member and his wife separated, he changed his beneficiary to name his son from a previous marriage and then died before entry of a divorce decree. The wife sought to void the new beneficiary nomination and the SERS Board denied her request. On appeal, the Commonwealth Court explicitly rejected the equal protection and due process claims holding that allowing a non-spouse to be a beneficiary is not a denial of the equal protection or due process clauses under the United States Constitution. 743 A.2d. 1014; *see also, Titler v. State Employees' Retirement Board*, 768 A.2d 899 (Pa. Cmwlth. 2001). The Commonwealth Court recognized that the General Assembly had created no right in the spouse of a member to the death benefits afforded by the SERS Code. This analysis is equally applicable here to the annuity payments made pursuant to Balko's election of the maximum single life.

⁸ Implicit in the fairness and equal protection argument is Claimant's preemption argument relying on ERISA. That will be addressed in detail in Section IV.B.

annuity.⁹ Indeed, Judge Friedman's opinion concurs in this result, while recognizing that the General Assembly's statutory framework for SERS members (and, by operation of *Estate of Rosenstein, supra*, PSERS) does not afford the same protection they would receive under ERISA. 743 A.2d. 1018.

B. *The Applicability of ERISA's Spousal Consent and Waiver Provisions*

PSERS' arguments in response to Claimant's primary argument are based on the interpretation of the spousal consent provisions found in two related federal statutes- ERISA and the Internal Revenue Code (IRC). A summary of the pertinent provisions of these two federal statutes is necessary prior to a commencement of a review of the relevant facts to the law.

Pursuant to ERISA, a plan participant's surviving spouse is automatically designated as the beneficiary of the participant's death benefits. 29 U.S.C. § 1055(b)(1)(C)(i). Further, in order to designate or change a beneficiary, a married participant must provide the written, notarized approval of his or her spouse. 29 U.S.C. § 1055(c)(2). These protections were added pursuant to the Retirement Equity Act of 1984 (REA), Pub.L. No. 98-397, 98 Stat. 1426 (1984), which made significant changes in ERISA's provisions for survivor benefits, providing an employee's spouse with added protection and involving him or her in making choices with respect to retirement income on which the spouse, as well as the employee, may rely. *See* S. Rep. No. 98-575 at 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2558.

Section 205 states in pertinent part:

⁹ Moreover, in those MLSA cases supplied by PSERS in support of its position that Claimant is not entitled to change this election because it is a personal right held by the member, Pennsylvania Courts have recognized this principle in its opinions. *Krill v. Public School Employes' Retirement Board*, 713 A.2d 135 (Pa. Cmwlth. 1998; *Ogden, supra*.

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans. Each pension plan to which this section applies shall provide that—

(1) In the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity.

Whether Section 205 applies is also contingent on whether PSERS is a governmental plan as defined by ERISA. 29 U.S.C. §1002(32). ERISA does not apply to governmental plans. 29 U.S.C. §1003(b). PSERS maintains that it is a governmental plan within the meaning of these provisions and, as such, the ERISA requirements for spousal joint and survivor annuities and spousal consent do not apply.

The term "governmental plan" means:

§ 1002. Definitions

(32) A plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

29 U.S.C. § 1002.

The language of ERISA does not contain any additional provisions that would elucidate the characteristics of a governmental plan beyond the plain meaning of the statute itself.

To support its position that ERISA is a governmental plan, PSERS suggests that an examination of the standards utilized by the IRS helps to inform whether it qualifies as a governmental plan for purposes of ERISA and also the IRC. According to PSERS, under the combined analysis, Claimant's appeal must fail. However, Claimant does not

rely on an analysis of the Internal Revenue Code at all. Indeed, PSERS' reliance on the IRC provisions is not at all necessary to reach a result in this case.¹⁰

1. Purpose of ERISA

Congress enacted ERISA to address abuses which were rampant in the *private* pension system. See generally H.R.Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639 ("*House Report*"). See also 29 U.S.C. § 1001. At that time, Congress also considered whether ERISA should apply to public sector employee benefit plans. See *House Report* at 4647. However, Congress elected to remove public plans from ERISA's scope. The governmental plan exemption embodied in Section 1003(b) reflects "Congress' intent to refrain from interfering with the manner in which state and local governments operate employee benefit systems." *Feinstein v. Lewis*, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 573 (2d Cir. 1980). Likewise, the definition of "governmental plan" contained in Section 1002(32) was drafted in accordance with Congress' aim to preserve federalism.

2. Standard for Governmental Plan

When applying the principles of federal statutory construction it is elementary to examine the definition contained in ERISA for a governmental plan. Courts historically begin an analysis of statutory interpretation by considering "the language [of the statute] itself." *United States v. James*, 478 U.S. 597, 604, (1986). A court must "assume that the

¹⁰The Internal Revenue Code also contains a requirement that tax qualified plans provide for joint and survivor annuities and for pre-retirement survivor annuities. 26 U.S. C. § 401(a)(11)¹⁰. The IRC contains spousal consent and waiver rules for a Section 401(a) (11)(A) plan in IRC Section 417, 26 U.S. C. § 417. Additionally, the Internal Revenue Code contains spousal consent and waiver rules in IRC § 401(a) (13) (C) (ii).¹⁰ However, IRC § 417 applies only to plans to which Section 401(a) (11) applies. If PSERS is a governmental plan, then the spousal consent and waiver rules contained within the IRC would not apply. However, a full examination of these provisions and the evidence PSERS offered in support of its position is not necessary as Claimant has not raised this standard as one that should be considered as a basis for her claim.

legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9, (1962)). Thus, "absent a clearly expressed legislative intention to the contrary, [the language used] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

A governmental plan is one that is "established . . . for its employees by . . . the government of any State . . . or by any agency or instrumentality of any of the foregoing." A governmental entity is one that is either: (1) Created directly by a state so as to constitute a department or administrative arm of government; or (2) Is administered by individuals who are responsible to public officials or to general electorate. *Shannon v. Shannon*, 965 F2d 542 (7th Cir. 1992), *reh, en banc, den* (7th Cir. 1992) 1992 US App LEXIS 17391 and *cert den sub nom Shannon v. United Services Auto Ass'n.*, 506 US 1028 (1992). In the present case, the language within the Retirement Code, along with the evidence contained in the record, definitively establishes that PSERS is a governmental plan and is therefore exempt from the application of the spousal consent and waiver provisions of ERISA. (Findings of Fact Nos. 43-76).

At the hearing, PSERS offered the testimony of Executive Director Jeffrey Clay who serves as the Chief Operating Officer for the agency with supervisory authority over the various functions required for administration of the pension plan. (N.T. II, 12). Executive Director Clay's testimony clearly established that the Retirement Code establishes a comprehensive public school employees' pension system. PSERS, the PSERS Board, and the pension plan administered by them are created by state statute which can only be amended by the Commonwealth's General Assembly. 24 Pa. C.S.

§ 8101, *et seq.* PSERS, is an entity of the Commonwealth. The Board exercises control over management of the System. 24 Pa. C.S. § 8501(a). The General Assembly established the composition of the Board consisting of Legislative and Executive branch appointees and employee plan participants. These Board members have discrete fiduciary obligations to operate and transact business on behalf of the System.

24 Pa. C.S. §§ 8521(a), (e), and (f).

During his testimony, Executive Director Clay acknowledged that only the General Assembly may make changes in benefit and contribution provisions for PSERS' retirement plan. In fact, according to Executive Director Clay, the Retirement Code itself is the actual plan document for the pension system. (N.T. II, 30-31). It is abundantly clear that PSERS fulfills the essential characteristics of a governmental plan within the definition of ERISA. (Findings of Fact Nos. 43-76).

Claimant argues that the participation of the PSBA must negate the status of PSERS as a governmental plan under the provisions of ERISA. This argument is not persuasive. The mere fact of participation in this plan by some private entities will not place its plan outside of ERISA's definition of governmental plan where the extent of private participation *is de minimis*. *Nowell v. Central Serv. Ass'n.*, 106 F. Supp. 2d 888. (S.D. Miss. 2000). In response to this assertion, Executive Director Clay testified that the number of PSBA's members, *vis a vis* the public school and other government participants, is very small in comparison to the rest of the membership. (N.T. II, 41-43). In addition, the School Code and the Retirement Code recognize the unique relationship school boards, its members, and employees have with schools and consider the work of school boards to be engaged in the work of a public school. School boards are permitted

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to become members of PSBA and those dues are paid from school district funds. 24 P.S. §5-516; 24 Pa. C.S. §8102. Consequently, for purposes of the Retirement Code and ERISA, PSBA is not a private entity and its participation in PSERS does not abrogate its status as a governmental plan under ERISA. (Findings of Fact No. 73-76).

RECOMMENDATION

Accordingly, I recommend that the attached Order **affirming** the decision of the Executive Staff Review Committee be issued and Claimant's appeal be **denied**.

November 2, 2009



LINDA C. BARRETT

Hearing Officer

**COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System**

In re :
Account of John C. Balko, Deceased :
Claim of Janice Balko :
 : **Docket No. 2008-23**
 :

ORDER

AND NOW, this ____ day of _____, 2009 based upon the foregoing Findings of Fact, Conclusions of Law, and Discussion and the recommendation of the Impartial Hearing Officer dated November 2, 2009, the Board adopts the Proposed Report of the Hearing Officer and hereby **AFFIRMS** the June 12, 2008 decision of the Executive Staff Review Committee.

BY ORDER:

For the Public School Employees'
Retirement Board