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

IN RE: ACCOUNT OF KALEM CALIEN
DOCKET NO.: 2014-03
CLAIM OF KALEM CALIEN

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Kalem Calien's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact, and that PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on March 20, 2014, and served a copy on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa.Code §§ 33.32, 33.35-33.36. On April 21, 2014, Claimant filed a timely response.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. See *Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa.Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984).

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

Because Claimant has not identified any facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant may elect multiple service membership with PSERS.

FINDINGS OF FACT

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

1. Claimant was first enrolled in PSERS in November 1991; he did not elect multiple service membership at the time.
2. Claimant has been an active member of PSERS since November 1991.
3. On June 6, 2001, PSERS sent active members, including Claimant, a letter regarding the provisions of the Act of May 17, 2001, P.L. 26 (“Act 2001-9”). (PSERS-1)
4. The June 6, 2001, letter provided, in pertinent part, as follows with respect to multiple service membership:

Dear Member:

This letter explains the urgent need for you to complete the enclosed election form to take advantage of the recent changes to your retirement plan. Your failure to do so by the deadlines indicated in this letter can result in your **permanent forfeiture** of these changes. Please read this letter carefully.

Governor Ridge signed Act 9 (formerly House Bill 26) into law on May 17, 2001. **Effective July 1, 2001**, Act 9:

- provides an opportunity to change your current **membership class** and enhance your benefit levels;
- opens a new window from July 1, 2001 – December 31, 2003, to elect **Multiple Service** membership if you have qualifying State Employees' Retirement System (SERS) service[.]

* * *

Window for Multiple Service Membership

Multiple Service membership combines nonconcurrent service credited with SERS and PSERS. Examples of SERS service include employment with a Commonwealth agency (such as employment with the PA Departments of Welfare, Transportation, Health, Labor and Industry), a state owned educational institution, Pennsylvania State University, or a community college.

If you are an **active** member of PSERS on July 1, 2001, and are not a Multiple Service member, although you had or have SERS covered service, Act 9 provides a window to elect Multiple Service membership. PSERS must receive your request for Multiple Service membership between July 1, 2001, and December 31, 2003.

* * *

If you have or had employment covered under SERS and you want to combine state and school service credit, you should use the enclosed *PSERS Membership Class Election Form* to request further information on Multiple Service membership. PSERS will mail additional information about becoming a Multiple Service member to you.

(PSERS-1)

5. Enclosed with the June 6, 2001, letter was an *Act 2001-9 PSERS Membership Class Election Form* that provided a box for a member to check if they wanted information on multiple service membership. (PSERS-1)

6. Claimant executed and returned the *Act 2001-9 PSERS Membership Class Election Form* that was enclosed with the June 6, 2001, letter to PSERS; he checked the box on the form requesting additional information regarding multiple service membership. (PSERS-2)

7. By letter dated November 29, 2001, PSERS provided Claimant with an *Application for Multiple Service Membership*. (PSERS-3)

8. The November 29, 2001, letter noted that “If the completed application is not received **by December 31, 2003, or prior to your termination from school employment, whichever is earlier**, your request for Multiple Service membership will be voided and you will not be eligible to request Multiple Service Membership unless you have a break in service.” (*Id.*)

9. The November 29, 2001, letter was mailed via first class mail to Claimant at his home address of [REDACTED]

10. PSERS keeps a record of all mail that is returned as undeliverable, and the November 29, 2001, letter was not returned to PSERS as undeliverable.

11. Claimant received the November 29, 2001, letter.

12. Claimant did not elect multiple service membership on or before December 31, 2003.

13. On September 19, 2012, Claimant submitted an *Application for Multiple Service Membership* to PSERS identifying employment with the Department of Public Welfare from January 1987 to November 1991. (PSERS-4)

14. By letter dated September 20, 2012, PSERS informed Claimant that his request for multiple service membership was denied. (PSERS-5)

15. On October 22, 2012, Claimant appealed PSERS' September 20, 2012, determination to the Executive Staff Review Committee ("ESRC"), admitting the following:

5. Admittedly in June 2001, I received from PSERS a letter which included a request for multiple service.
6. Admittedly, upon receipt of the 2001 PSERS letter, being unaware of the gravity and impact of the multiple service declaration, I failed to return the request document in a timely fashion.

I do realize I've breeched [sic] protocols of timeliness, thus creating a tenuous position at best. At no point during my employment with the state or school district did I intentional [sic] deceive so as to enhance my status or grant favor. My failure to submit my application was innocent neglect. When I received your letter in 2001, given that I had collected my retirement monies, I failed to understand its impact. I believed at the time that my state retirement was a "closed deal", because I had extracted all funds.

(PSERS-6)

16. During his time with the Department of Public Welfare, Claimant was a member of the State Employees' Retirement System ("SERS"). (See PSERS-6)

17. After Claimant resigned from his employment with the Department of Public Welfare, he received a refund from SERS of the contributions that he had made to SERS while employed. (See PSERS-6)

18. On December 6, 2013, the ESRC denied Claimant's request to elect multiple service membership. (PSERS-7)

19. On January 6, 2014, Claimant appealed the ESRC's determination by filing a timely Appeal and Request for Administrative Hearing. (PSERS-8)

20. On January 16, 2014, PSERS filed its Answer to Claimant's Appeal and Request for Administrative Hearing. (PSERS-9)

21. On March 20, 2014, PSERS filed its Motion for Summary Judgment.

22. On April 21, 2014, Claimant filed a response to PSERS' Motion for Summary Judgment.

23. This matter is ripe for Board adjudication.

DISCUSSION

The Public School Employees' Retirement Code ("Retirement Code") permits active PSERS members to combine their public school retirement credit with credit previously earned as state employees toward the receipt of a combined benefit, but it places a time restriction on making that decision after becoming an active member of PSERS. See 24 Pa.C.S. § 8507(c). Act 2001-9 opened a window for any active member of PSERS who was formerly an active member in SERS and whose service credit in SERS had not been converted to service credit in another public pension plan or retirement system in the Commonwealth to elect to become a multiple service member. Act of May 17, 2001, P.L. 26, No. 9, Section 29. Under Act 2001-9, qualified members of PSERS could elect multiple service membership between July 1, 2001, and December 31, 2003.

In June 2001, PSERS sent active members, including Claimant, information regarding Act 2001-9. (PSERS-1) The correspondence informed active members of the window for electing multiple service membership. The correspondence warned that "PSERS must receive your request for Multiple Service Membership between July 1, 2001, and December 31, 2003." (*Id.*) Claimant received the June 6, 2001, correspondence, as evidenced by: (1) his execution and return of the *Act 2001-9 PSERS Membership Class Election Form* that was included with the June 6, 2001, correspondence; and (2) his admission as to having received the June 6, 2001, correspondence. (PSERS-2; PSERS-6) In 2001, Claimant requested from PSERS and received additional information regarding multiple service membership, including an *Application for Multiple Service Membership*. (PSERS-2; PSERS-3) Claimant, however, did not elect multiple service membership on or before December 31, 2003.

Almost nine years after the Act 2001-9 election deadline, on September 19, 2012, Claimant submitted an *Application for Multiple Service Membership* to PSERS. (PSERS-4.) Claimant admits to the untimeliness of his application, but nevertheless requests that the Board permit him to make the election. (PSERS-6; PSERS-8)

Preliminarily, a PSERS member need only be notified of the requirements to elect multiple service membership once. *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745, 752 (Pa. Cmwlth. 1999). To give a member "more than one such chance would be to go beyond the Retirement Code." *Id.* Here, the evidence indisputably shows that Claimant was notified of and had a genuine opportunity to elect multiple service membership during the Act 2001-9 window, but failed to do so.

Claimant admits that he received notice of the deadline to elect multiple service membership in 2001, that he failed to make a timely election, and that he is at fault for having "made many mistakes" during the process. (See PSERS-6; PSERS-8) Nevertheless, Claimant asserts that he should be permitted to elect multiple service membership now because he, at no point, "practiced deception," his failure to make his election on time was due to "innocent neglect," and because he "always believed that 'purchase of service' was doable anytime." (PSERS-8) Claimant also argues that no harm would come to him or the Board if he were granted relief. The spirit of the law allowing for flexibility, he claims, should govern. (See *id.*) There are no exceptions, however, to the statutory deadlines for electing multiple service. See 24 Pa.C.S. § 8101, et seq. Further, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

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, 706 (Pa. Cmwlth. 2000); *Dowler v. Public School Employees' Retirement Board*, 620 A.2d 639, 644 (Pa. Cmwlth. 1993); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992). Allowing an untimely election would be tantamount to circumventing the express language of the Retirement Code, which the Board cannot do. *Dowler*, 620 A.2d at 644; *Marinucci v. State Employees' Retirement System*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004). Thus, the Board is precluded from deeming Claimant's untimely multiple service application as timely filed. See *Forman v. Public School Employees' Retirement Board*,

778 A.2d 778, 780 (Pa. Cmwlth. 2001); *see also Allen v. Public School Employees' Retirement Board*, 848 A.2d 1031, 1033 (Pa. Cmwlth. 2004).

Accordingly, PSERS' Motion for Summary Judgment is GRANTED and Claimant's Request for Administrative Hearing is DENIED.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Request for Administrative Hearing is DISMISSED in compliance with 22 Pa.Code § 201.6, as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. Accordingly, this Board denies Claimant's request to elect multiple service membership with PSERS.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: June 13, 2014

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