

Mail Date: MAY - 7 2008

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

IN RE: ACCOUNT OF THOMAS A. KLINE
DOCKET NO. 2007-08
CLAIM OF THOMAS A. KLINE

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Opinion of the Hearing Examiner; Claimant's Exceptions to the Opinion of the Hearing Examiner; and PSERS' Letter Brief Opposing Exceptions. We note that Claimant's Exceptions provide no additional argument or authority to support his Exceptions to the Hearing Examiner's Opinion. The Board, therefore, denies the Claimant's Exceptions.

The Board finds appropriate the Hearing Examiner's Findings of Fact, Discussion, Conclusions of Law, and Recommendation, with the correction of the following typographical error: Page 11, the sentence "There obviously would have been no reason to set forth the December 31, 2002 deadline requirement if the Claimant's reasoning is to be followed." is corrected to "There obviously would have been no reason to set forth the December 31, 2001 deadline requirement if the Claimant's reasoning is to be followed."

With the above modification, we hereby adopt the Hearing Examiner's Opinion as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to be classified as a T-D member as a result of his employment with the Lower Merion School District, effective August 19, 2002, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: MAY - 7 2008

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

LEGAL OFFICE FEB 28 2008

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

February 26, 2008

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**Re: Account of Thomas A. Kline
Docket No. 2007-8
Claim of Thomas A. Kline**

Dear Messrs. Speck and Herring:

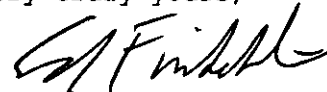
Enclosed is a copy of my Recommendation in the above-referenced administrative appeal. This Opinion will be submitted to the Public School Employees= Retirement Board for its consideration.

Prior to submission of the Opinion to the Board and pursuant to the Rules of Procedure, 1 Pa. Code '35.211, either party or both parties, may file with the Board a brief noting any exceptions to the Opinion of the Hearing Examiner. The brief noting exceptions must be filed within thirty (30) days from the date of this letter. A brief opposing exceptions may be filed in response to the brief on exceptions within twenty (20) days of receipt of the brief on exceptions.

Exceptions and briefs on exceptions should be submitted to Jeffrey B. Clay, Secretary, Public School Employees= Retirement Board, 5 N. 5th Street, P.O. Box 125, Harrisburg, PA 17108-0125 with copies to opposing counsel.

If the Complainant does not file exceptions, there is a possibility that if they later file an appeal of the Board=s Order to Commonwealth Court, they may be subject to a successful Motion to Quash the appeal.

Very truly yours,



Edward S. Finkelstein

ESF/ksh
Enclosure

cc: Mary Myers, PSERS, Legal Division
Dana Wellner, Office of General Counsel via email

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE: ACCOUNT OF THOMAS KLINE
DOCKET NO. 2007-
CLAIM OF THOMAS KLINE

BEFORE: Edward S. Finkelstein, Esquire

HEARING DATE: October 17, 2007

APPEARANCES: David W. Speck, Esquire
For - Public School Employees' Retirement
System

Charles L. Herring, Esq.
For - Claimant

OPINION OF THE HEARING EXAMINER

FINDINGS OF FACT

1. Thomas A. Kline ("Claimant") was employed by the Delaware County Intermediate Unit ("DELCO IU") in September 1998. (Stipulation of Fact, N.T. 5)
2. Claimant's last day of active service with the DELCO IU was on June 14, 2002. (Stipulation of Fact, N.T. 5-6)
3. Claimant received the same salary of \$2,743.00 per month from January 2002 through August 2002. (PSERS Exhibit 4; N.T. 32)
4. All of the salary Claimant received from January 2002 through August 2002 was from the DELCO IU. (PSERS Exhibit 4; N.T. 32)

5. During the summer of 2002, the Claimant interviewed for a position at the Lower Merion School District ("Lower Merion"). (N.T. 6) The interview was held on or about July 23, 2002 and Lower Merion orally offered Claimant a position on or about July 25, 2002. (N.T. 6)

6. The Claimant tendered his resignation to the DELCO IU on July 25, 2002.

7. The Lower Merion School District Board of School Directors did not approve the Claimant's employment until their August 19, 2002 Board meeting. (Claimant Exhibit 1) Claimant began working at Lower Merion on August 19, 2002. (N.T. 10)

8. Claimant was a ten over twelve teacher, meaning that he earned and was employed by the DELCO IU for a 12 month year, even though he only had to perform teaching service during the regular school year of September through June. (N.T. 30)

9. Claimant received the balance of his contract salary with the DELCO IU during the summer of 2002 so that he was paid from September 2001 through August 2002 under his contract with the DELCO IU. (N.T. 32)

10. When Claimant began teaching at Lower Merion and received his first pay in September 2002, there was an increase in his salary over what he was paid by the DELCO IU. (PSERS Exhibit 4; N.T. 32)

11. Because Claimant earned and was paid the same salary from the DELCO IU from January to August 2002, PSERS treats the salary he received during that period as part of the 2001-2002 school year for which he received a full year of service credit, as though he worked during July and August 2002 for the DELCO IU. (PSERS Exhibit 4; N.T. 33-34)

12. When Claimant began working at Lower Merion, he was treated as a T-D Class employee with Class T-D withholdings deducted from his pay checks until on or about January 4, 2006 when PSERS notified him that there had been an error. (N.T. 10)

13. PSERS subsequently returned monies to Claimant and informed him of their position that he should have been a Class CT-C. (N.T. 11)

14. Up until August 2002, where Claimant's salary is shown as \$2,743.00, his salary was still being paid by the DELCO IU; then in September 2002, Claimant's salary was reported to PSERS as \$4,118 by his new employer, Lower Merion. (PSERS Exhibit 4; N.T. 31-32)

15. Claimant was still being paid by the DELCO IU in August 2002. (N.T. 32)

16. PSERS placed Claimant into Class T-C and he requested to have his membership reclassified as Class T-D. (PSERS Exhibit 1) PSERS denied this request in a letter dated April 10, 2007. (PSERS Exhibit 1) In that letter, PSERS Executive

Director, Jeffrey B. Clay, explained that PSERS denied Claimant's request because there was no break in his service sufficient for him to renew his membership in PSERS as a Class T-D member. This letter made reference to PSERS' 90-day break in service policy, stating that "[b]ecause there was an arrangement of employment to begin within 90-calendar days, you do not meet the 90-day break in service policy." PSERS therefore determined that the Claimant would retain his membership in Class T-C. The Claimant appealed this decision and the matter is now before the PSERS independent Hearing Examiner, Edward S. Finkelstein, Esq.

17. During the third quarter of 2002, PSERS received contributions to the Claimant's retirement account from both the DELCO IU and Lower Merion. (PSERS Exhibits 3, 4; N.T. 28)

18. Michelle Sellers, the retirement administrator with PSERS, testified that there was no break in contributions received by PSERS for the Claimant's account or in the Claimant's membership in PSERS during the summer of 2002. (N.T. 32, 34, 35)

19. The Claimant's resignation letter confirmed that he resigned "to take a similar position with the Lower Merion School District." (PSERS Exhibit 2)

20. The reason given the Executive Staff Review Committee for denying Claimant his request to elect Class T-D membership

upon his termination from the DELCO IU and employment by Lower Merion was that Claimant "accepted employment with the Lower Merion SD before resigning his position with the DELCO IU. . . It was only after [C]laimant had been offered a position that [he] submitted [his] resignation to the DELCO IU dated July 25, 2002." (PSERS Exhibit 1)

ISSUE: Should the Claimant be treated as a Class T-D member of PSERS as a result of his employment with the Lower Merion School District pursuant to 24 Pa. C.S. Section 8505(c) (1)?

DISCUSSION

The Claimant began his employment with the DELCO IU in September 1998 and as a result was an active member in PSERS. The Claimant's last day of active service with the DELCO IU was on June 14, 2002. However, the Claimant did not notify the DELCO IU that he was resigning until he submitted a written statement of resignation to the DELCO IU on July 25, 2002. This statement of resignation specifically noted that the Claimant was leaving "to take a similar position with the Lower Merion School District." The Claimant interviewed for the position at the Lower Merion School District on July 23, 2002 and prior to his submitting his letter of resignation and had received a verbal commitment to hire him for the fall 2002 school year.

The Claimant received the same salary of \$2,743.00 per month from January 2002 through August 2002 from the DELCO IU. While employed by the DELCO IU, the Claimant was a 10 over 12

teacher, meaning that he earned and was employed by the DELCO IU for a 12 month year, even though he only had to perform teaching service during the regular school year from September through June.

The Lower Merion School District Board of School Directors did not formally approve the Claimant's employment until its August 19, 2002 Board meeting. When the Claimant began teaching at Lower Merion he received his first pay in September 2002 which was an increase in salary over what he was paid by the DELCO IU. When Claimant began teaching at Lower Merion, he was treated as a Class T-D member with Class T-D withholdings deducted from his pay checks until on or about January 4, 2006 when PSERS notified him that there had been an error. PSERS subsequently returned monies to Claimant and informed him of their position that he should have been in Class T-C.

The DELCO IU reported to PSERS paying salary to the Claimant for July and August 2002 and Lower Merion reported paying Claimant in September 2002 at the rate of \$4,118.00 per month.

After PSERS noted its error and placed the Claimant into Class T-C service, he filed a formal request with PSERS to have his membership reclassified as Class T-D. PSERS denied this request in a letter dated April 10, 2007. In that letter, PSERS' Executive Director, Jeffrey B. Clay, explained that PSERS

denied Claimant's request because there was no break in his service sufficient for him to renew his membership in PSERS as a Class T-D member. This letter made reference to PSERS 90-day break in service policy, stating that "[b]ecause there was an arrangement of employment to begin within 90-calendar days, you do not meet the 90-day break in service policy." PSERS therefore determined that the Claimant would retain his membership in Class T-C. The April 10, 2007 denial of his request for Class T-D service was reviewed by the PSERS Executive Staff Review Committee and its decision noted that the Claimant's request to elect Class T-D membership was being denied because Claimant "accepted employment with the Lower Merion SD before resigning his position with the DELCO IU. . . It was only after [C]laimant had been offered a position that [he] submitted [his] resignation to the DELCO IU dated July 25, 2002."

In support of his position, the Claimant cites the Hearing Examiner to the Barbadoro case which this Hearing Examiner also participated in. In Barbadoro, the member had actually resigned his position with his current school district and then began looking for a new position which he subsequently found during the summer. As a result, the Hearing Examiner recommended to the Board that Mr. Barbadoro had a break in service due to his bona fide resignation prior to having a new position and

therefore he should be entitled, pursuant to 24 Pa.C.S. Section 8305(c)(1), to elect Class T-D membership. Claimant asserts that he also had a break in service because he resigned on July 25, 2002, and his appointment as a teacher for the Lower Merion School District was not formally approved until the Lower Merion School District Board of Directors formally approved his hiring at its meeting on August 19, 2002.

At the time of the Barbadoro decision, PSERS had a 90-day rule that if a member left one school district and was hired by another school district within 90 days, PSERS would consider that they had no break in service. The reason for that policy was to assist both members and school districts where it was not uncommon for a teacher to switch positions from one school district to another and the member would then therefore not lose any retirement credit as a result and it would lighten the burden on PSERS of disenrolling and then re-enrolling teachers into PSERS. It was determined by the PSERS Board that the 90-day rule should not apply in Barbadoro and PSERS is not applying the 90-day rule in this case either, contrary to the Claimant's assertion that it is.

The test that PSERS is applying in this case is "whether there is a bona fide break in service—even if less than 90 days—with no *pre-arranged* employment with a new school employer before a member's termination with the current employer. PSERS

asserts that only if there is no pre-arranged employment, can the Retirement Code be construed to allow a school employee like Claimant to "become a school employee and an active member under 24 Pa. C.S. Section 8305(c) (1)".

PSERS asserts that Claimant's transition from the DELCO IU under a pre-arranged agreement of employment with the Lower Merion School District is a totally seamless transition for PSERS purposes, and (unlike Mr. Barbadoro), Claimant retained his status as a school employee and an active member throughout the transition and did not "become a school employee and an active member" during the transition as required by 24 Pa.C.S. Section 8305(c) (1), but was a school employee and an active member throughout the transition.

PSERS cites Webster's Ninth New Collegiate Dictionary (1988 ed.) for the definition of "become" which is "to come into existence", "to come to be". Based on this definition, PSERS asserts that the Claimant did not "become a school employee and an active member" by virtue of his employment with the Lower Merion School District because he had been offered and accepted that position prior to his resignation from the DELCO IU. The Hearing Examiner agrees that this case presents a substantial difference from the fact situation in Barbadoro.

The Claimant argues that he did not actually become an employee of the Lower Merion School District until his

appointment was approved by the Lower Merion School District Board of Directors on August 19, 2002. In support of that argument, the Claimant cites Waltman v. Albany Twp. School Dist., 64 Pa. Super. 458 (1915) (Holding that the appointment of a teacher is not valid until there has been a vote of the majority of members of the board of school directors.); Potts v. School Dist. Of Penn Twp., 193 A. 290 (Pa. Super. 1937) (Holding that a basic requirement of the employment of a public school teacher is appointment by the board of school directors.). See also Preston v. Saucon Valley School Dist., 666 A.2d 1120 (Pa. Cmwlth. 1995) (A school board's failure to vote publicly on salary increase rendered it unenforceable.). There is no evidence in the record that the Claimant would not have resigned had he not been accepted for hiring by the Lower Merion School District prior to July 25, 2002 although the Claimant obviously understood that his contract would actually have to be formally approved by the Lower Merion School District Board of Directors before he could become an employee of that school district.

According to 24 P.S. Section 5-508,

"The affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects: --

appointing or dismissing district superintendents,
assistant district superintendents, associate

superintendents, principals and teachers." (emphasis added)

PSERS' position is that because the Claimant had a pre-arranged employment relationship with the Lower Merion School District, even though his contract had not been formally approved by the Lower Merion School District Board of Directors, his membership in PSERS continued without a break in service. Without a break in service, the Claimant could not "become" a school employee and an active member under 24 Pa.C.S. Section 8305(c)(1). To follow the Claimant's logic, any teacher that had not previously elected Class T-D status could make a pre-arrangement with their existing school district to resign and be re-employed by their school district. Obviously that would totally defeat the purpose of 24 Pa.C.S. Section 8305(c)(1) and even more importantly, the provisions set forth by the Legislature when it created Class T-D membership and the procedures for Class T-C members to elect T-D status.

Due to the passage of Act 2001-9, and litigation that followed, all Class T-C members who wanted to become Class T-D members had to elect to do so by December 31, 2001. There obviously would have been no reason to set forth the December 31, 2002 deadline requirement if the Claimant's reasoning is to be followed. The members would not have had to make the election in 2001. Rather, whenever they wanted to make the election all they would have to do, according to Claimant's

argument, is to set up a pre-arrangement with their current employer to resign and be re-hired. This then would eviscerate the requirements set forth in 2001 to change from Class T-C to Class T-D membership.

If Claimant would have proven that his hiring by the Lower Merion School District was not at all a foregone conclusion by July 25, 2002, then the pre-arranged issue might be different. However, clearly the Claimant believed as did the appropriate officials at the Lower Merion School District that the Claimant had a teaching position with that school district for the fall 2002 school year as of July 25, 2002. That distinction clearly distinguishes this case from the Barbadoro case. Therefore, the request of the Claimant for Class T-D membership for his employment by the Lower Merion School District should be denied.

In making this recommendation, the Hearing Examiner is not relying on the "90-day rule", nor is PSERS, but rather the pre-arranged employment situation that the Claimant had on July 25, 2002. There is no indication in the record that the Claimant would have retired on July 25, 2002 if he did not have the agreement of the staff at the Lower Merion School District that he had a position effective September 2002. He therefore did not "become" a school employee as he had continuously been one.

CONCLUSIONS OF LAW

1. A person that becomes a school employee and an active member . . . on or after the effective date of this subsection, [July 1, 2001] shall be classified as a Class T-D member upon payment of regular member contributions." 24 Pa.C.S. Section 8305(c)(1).

2. Claimant is not "a person who becomes a school employee. . . on or after [July 1, 2001]" because he was an employee of the DELCO IU receiving compensation and benefits until his seamless, pre-arranged and overlapping employment began with the Lower Merion School District upon its approval of his contract on August 19, 2002. 24 Pa.C.S. Section 8305(c)(1).

3. Claimant had a pre-arranged position lined up with the Lower Merion School District at the time he filed his resignation letter with the DELCO IU, did not miss a paycheck or any employment benefits from his last day of active service with the DELCO IU on June 14, 2002 until he began employment with the Lower Merion School District on August 27, 2002 after his contract was approved by that School District's Board of Directors on August 19, 2002.

4. The reason Claimant did not become an active school employee after July 1, 2001 is because he was already a school employee and an active member of the DELCO IU continuously

receiving salary and benefits until his employment with the Lower Merion School District.

5. Claimant had the opportunity to present testimony concerning his resignation from the DELCO IU and the fact that he had not already taken a position with the Lower Merion School District and failed to do so.


6. The Claimant had a pre-arranged employment with the Lower Merion School District at the time the Claimant submitted his resignation to the DELCO IU on July 25, 2002.

7. PSERS is entitled to an adverse inference that there was a pre-arranged employment situation with the Lower Merion School District at the time the Claimant submitted his resignation with the DELCO IU on July 25, 2002. Maquette v. Goodman, 771 A.2d 775 (Pa. Super. 2001).

RECOMMENDATION

The Claimant's request to elect Class T-D status should be denied.

Dated: February 26, 2008


Edward S. Finkelstein
Hearing Examiner