

OCT 12 2010

Mail Date: _____

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

IN RE: ACCOUNT OF Sheila A. Eberhardt (D)
DOCKET NO. 2008-33
CLAIM OF Shelley Marie Eberhardt

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Hearing Officer's Proposed Decision and Order; Claimant's Exceptions to the Hearing Officer's Proposed Decision and Order; and PSERS' Brief Opposing Exceptions in which PSERS objected to the consideration of Claimant's Brief on Exceptions because the Claimant failed to timely file exceptions to the Hearing Officer's Proposed Decision and Order with the Board.

The Board finds that Claimant failed to timely file exceptions to the Hearing Officer's Proposed Decision and Order and thereby waived any exceptions to the Hearing Officer's Proposed Decision and Order. We note that even if the Board considered Claimant's Exceptions as timely filed, Claimant provides no additional argument or authority to support her Exceptions to the Hearing Officer's Proposed Decision and Order that would affect the Board's decision in this matter.

The Board, therefore, finds appropriate the Hearing Officer's Findings of Fact, Discussion, Conclusions of Law, and Recommendation with the following modifications:

- (1) On page 24, three lines from the bottom, the Hearing Officer's statement that Claimant's argument is "compelling" is changed to read: "While this argument

appears superficially to have merit, it nevertheless is unavailing for several reasons.”

- (2) On page 25, the last sentence of the second full paragraph is amended to read, “To require the Application to be voided on that basis would be untenable and, in most cases, would be detrimental to the member and his/her beneficiaries.”
- (3) On page 26, the first sentence of the third full paragraph is amended to read, “In fact, the Member completed her Application with her father and a private financial analyst advising her.”
- (4) On page 28, the word “compelling” in the first line of the last paragraph is replaced with “interesting.”

With the above modifications, we hereby adopt the Hearing Officer’s Proposed Decision as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant’s request to have her mother’s retirement application deemed incomplete, to void the retirement option elected therein and to have the death benefits payable under Option 1 is DENIED.

PUBLIC SCHOOL EMPLOYEES’
RETIREMENT BOARD

Dated: OCT 12 2010

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

LEGAL OFFICE JUN 25 2010

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

IN RE: ACCOUNT OF SHEILA A. EBERHARDT (D)
DOCKET NO. 2008-33
CLAIM OF SHELLEY MARIE EBERHARDT

BEFORE: Lynne M. Mountz, Esquire
Hearing Examiner

HEARING DATE: October 14, 2009

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

For Shelley Marie Eberhardt:
Stanley O. King, Esquire
Stephanie P. Saint-Cyr, Esquire

PROPOSED DECISION AND ORDER

Background

Shelley Marie Eberhardt (Claimant) appealed the decision of the Public School Employees' Retirement System (PSERS) denying her request to render the retirement application filed by her mother Sheila A. Eberhardt, now deceased, as incomplete and to void the retirement plan elected therein.

An administrative hearing was convened regarding Claimant's appeal on October 14, 2009. Both parties appeared at the hearing and were represented by counsel. Claimant was represented by Attorneys Stanley O. King and Stephanie P. Saint-Cyr. PSERS was represented by Attorney Jennifer A. Mills. The parties were provided full opportunity to examine and cross-examine witnesses, introduce documentary evidence and file post-hearing briefs.

Claimant and PSERS timely filed post-hearing briefs in this matter; Claimant filed a reply brief.

Based upon the testimony and evidence presented at the hearing and all other matters of record, the Hearing Examiner enters the following:

PROPOSED FINDINGS OF FACT

1. At all times relevant, Sheila A. Eberhardt (Member) was a member of PSERS by virtue of her employment with the Philadelphia School District. (N.T. 10).
2. On February 6, 2008, PSERS' Southeast Regional Office received an *Application for Retirement* (Application) signed and dated by the Member on February 4, 2008. (N.T. 46-47; PSERS Exhibit 1).
3. At the time that the Member was filling out her Application, she was bedridden and suffering from cancer. (N.T. 10-11, 36-37).
4. Ryan Moore, a financial analyst for American International Group, Inc. (AIG), gave the Member financial advice during this period of time and assisted her in filling out the Application. (N.T. 20-21, 36-37; PSERS Exhibit 2).
5. Claimant's grandfather also assisted the Member in filling out the Application and mailed the Application to PSERS. (N.T. 36-38).
6. Claimant recalled that a PSERS representative consulted with the Member regarding disability. (N.T. 37).
7. Claimant was present when the Member was filling out her Application. (N.T. 36-37).

8. In her Application, the Member listed March 4, 2008 as the effective date of her resignation. (PSERS Exhibit 1 at 1).
9. The Member terminated service with the Philadelphia School District on March 4, 2008. (N.T. 38, 40).
10. In Section 4 of the Application, the Member indicated that she wanted to withdraw all of her contributions and interest. (PSERS Exhibit 1 at 2).
11. The following language appears below Section 4,B of the Application: **"If you are withdrawing any part of your contributions or interest, you MUST complete the information on the next page."** (PSERS Exhibit 1 at 2). (Emphasis in original).
12. In response to the question "HOW do you want your contributions and interest distributed?" in Section 4,C,1 of the Application, the Member indicated that she wanted to withdraw all of her contributions and interest. (PSERS Exhibit 1 at 3).
13. In response to the question "WHERE would you like your installment(s) sent?" in Section 4,C,2 of the Application, the Member checked boxes indicating that she wanted 100% of the tax-free withdrawal paid to her and 100% of the tax-free withdrawal directly rolled over. The Member did not check any boxes to indicate where she wanted the taxable withdrawal sent. (PSERS Exhibit 1 at 3).
14. Section 5 of the Application, **Monthly Payment Plan**, contains the following language at the top of the section: "If you elect Option 1, this option will become effective upon receipt of this application by PSERS. If you elect an option other than Option 1, then your option election will not become effective until your effective date of retirement. If your death occurs prior to your effective date of retirement, then PSERS will presume

that you elected Option 1, with the person(s) designated in Section 7 or 8, as applicable, to be the beneficiary(ies) of your death benefit." (PSERS Exhibit 1 at 4).

15. The Member checked the "Maximum Single Life Annuity" option in Section 5 which states: "You will receive the maximum monthly payment for life. If you die before you receive an amount equal to the sum of your contributions and interest, the balance is paid to your beneficiary(ies)." (PSERS Exhibit 1 at 4).

16. The Member listed Claimant as the primary beneficiary in Section 7 of the Application. (PSERS Exhibit 1 at 5).

17. Section 9 of the Application, **Retirement Exit Counseling**, states in relevant part: "It is important that you understand your retirement benefits. PSERS strongly recommends that all members attend a small group PSERS *Retirement Exit Counseling* session. You may waive your counseling rights, although it is not recommended." (PSERS Exhibit 1 at 7).

18. The Member checked the box in Section 9 that states: "I am waiving my right to a PSERS *Retirement Exit Counseling* session. (PSERS Exhibit 1 at 7).

19. Section 12 instructs an applicant to check a box to certify whether there is or is not an existing court order or pending divorce proceeding. The member checked no boxes and left this section blank. (PSERS Exhibit 1 at 8).

20. The Member signed and dated her Application in Section 13 which contained the following relevant certifications: "**I certify that all statements made on this application are true and correct**" and "**I understand that the terms of my retirement are binding**

unless I file an *Intent to Change the Terms of the Retirement Plan* within 30 days of the date of my initial benefit letter". (PSERS Exhibit 1 at 8). (Emphasis in original).

21. The Member submitted an *Authorization for Direct Rollover (Retirement)* (ADR) with her Application. The Member signed Section A of the ADR and Ryan Moore signed Section B. (PSERS Exhibit 2).
22. The Member signed and dated a Premium Assistance Program Election Form on March 7, 2008 which PSERS received on March 10, 2008. (N.T. 61-62; PSERS Exhibit 6).
23. Through the Premium Assistance Program, PSERS reimburses eligible members up to \$100 per month for the cost of their health care coverage. (N.T. 61-61).
24. The Member died on May 21, 2008. (N.T. 10, 32; PSERS Exhibit 3).
25. Pamela Reitz has been a regional representative in the PSERS Southcentral Office since sometime in 2007. Her duties include conducting informational programs for members about retirement benefits and options; conducting retirement exit counseling for members; assisting members with retirement applications; reviewing benefit estimates with members; and, answering members' questions by telephone. (N.T. 42-43).
26. Ms. Reitz previously worked for approximately five years as a supervisor in the retirement processing section. In that capacity, she supervised the processing and calculating of initial retirement benefits. (N.T. 43).
27. In view of the heavy volume of retirement applications being received by PSERS at the time and by virtue of her experience in the retirement processing section, Ms. Reitz was assigned the Member's Application for processing. (N.T. 49-50).

28. The initial step in processing a retirement application is to scan the application into PSERS' computer system, whereupon it generates a workflow and is assigned to staff.

(N.T. 44).

29. Once the application is assigned to staff, all of the data entry is put into the computer system according to what was completed on the application. If all of the required information has been provided, the application would be moved forward for processing.

(N.T. 44-45).

30. If any of the information on the application is missing, a message will appear on the computer to alert the staff. Depending upon the type of information that is missing, the staff would either follow-up with the member by telephone or require the member to submit the missing information in written, document form. (N.T. 45).

31. When Ms. Reitz began to process the Member's Application, she became aware that there was some conflicting and/or missing information. Specifically, in Section 4, Subsection C, it was unclear where the installments were to be paid and in Section 12 there was no certification regarding the existence of a court order or pending divorce.

(N.T. 53-54).

32. Ms. Reitz was able to ascertain that the Member: had elected the Maximum Single Life Annuity option; had elected to withdraw her total contributions and interest; had provided authorization for a direct rollover and had named Claimant as her beneficiary.

(N.T. 51-53).

33. On or about June 16, 2008, Ms. Reitz attempted to telephone the Member regarding the conflicting and the missing information in order to complete the processing of her

Application. Ms. Reitz left messages on both of the telephone numbers in file for the Member. (N.T. 17-18, 54, 96-97; Claimant Exhibit 1).

34. On or about June 23, 2008, Claimant returned Ms. Reitz's telephone calls and informed Ms. Reitz that her mother had died. (N.T. 13-14, 19, 54).

35. On June 25, 2008, PSERS received written notification of the Member's death. (N.T. 10, 54-55, 71-72; PSERS Exhibit 3).

36. Ms. Reitz contacted the PSERS Office of Chief Counsel for guidance on how to proceed with the Member's Application. (N.T. 54-55).

37. Following her conversation with Ms. Reitz, Claimant attempted to locate the information that was missing from the Member's Application. Claimant found what she believed to be the missing information and called Ms. Reitz to inform her of the same. (N.T. 15-16).

38. Ms. Reitz informed Claimant that her mother's case was now in the death benefits department and she should forward the information to an individual Ms. Reitz identified in that department. Claimant testified that she followed those instructions. (N.T. 15-16; Claimant Exhibit 3).

39. Subsequent to her mother's death and prior to her conversations with Ms. Reitz, Claimant called PSERS to inquire about the status of her mother's retirement. Claimant recalls that the representative who answered the telephone stated that if the application was incomplete, the Option 1 benefit would automatically apply. (N.T. 24-25).

40. PSERS sent the Member two *Early Retirement Estimates*, one dated June 30, 2008 and one dated July 23, 2008. (Claimant Exhibits 4-5).
41. PSERS sent Claimant a letter dated July 23, 2008 and informed her that a retroactive payment of approximately \$15,105.66 was payable to the estate of the Member for monthly annuity payments during the period of March 4, 2008 through May 21, 2008 and that the amount of the Member's total contributions and interest, \$165,111.83 would be rolled over to AIG. (N.T. 7-28; Claimant Exhibit 2).
42. PSERS determined a monthly annuity for the Member and death benefit payable based upon the option election and the total withdrawal of contributions and interest as contained in her Application as well as the certification by the employer of termination of services. (N.T. 53, 55-57, 110-112).
43. With respect to the conflicting information contained in Section 4 of the Member's Application, PSERS assumed, as it does in all cases when it is not clear where to send the taxable withdrawal, that the member intends to receive the tax-free portion and rollover the taxable portion. (N.T. 58, 78).
44. The assumption of where to send the taxable withdrawal did not affect the calculation of the Member's monthly annuity, option election or death benefit. (N.T. 58-59).
45. Normally, after PSERS receives and processes an application for retirement, a letter is sent to the member confirming his/her retirement choices and benefit options. (N.T. 82, 84; Claimant Exhibit 6 at 4).
46. Enclosed with the confirmation letter is An *Intent to Change the Terms of the Retirement Plan* form, which allows new retirees to change their retirement option and/or

- contributions and interest after reviewing the information in the benefits letter provided the form is timely returned to PSERS. (N.T. 82, 84-85; Claimant Exhibit 6 at 4).
47. If a member dies before filing an Intent to Change form, the intent to change process is no longer viable. (N.T. 88-89; Claimant 6 at 5).
48. The Member was never provided with an Intent to Change form. (N.T. 88).
49. By facsimile dated October 26, 2008, Claimant provided PSERS with a signed affidavit from the Member's ex-spouse certifying that he had no legal interest in the Member's annuity as a result of their divorce. (PSERS Exhibit 9).
50. By letter dated December 1, 2008, PSERS informed Claimant that it was changing the manner of disbursement set forth in its July 23, 2008 letter and would be paying the tax-free portion of the Member's contributions and interest to her estate. (N.T. 22-23, 56; PSERS Exhibit 4).
51. By letter dated November 20, 2008, PSERS advised Claimant that its Executive Staff Review Committee had denied her request to change the terms of her deceased mother's retirement plan. (PSERS Exhibit 5).
52. An administrative hearing regarding Claimant's appeal was scheduled for and held on October 17, 2009. (N.T. *passim*; PSERS Exhibits 7-8).

PROPOSED CONCLUSIONS OF LAW

1. Claimant bears the burden of establishing the facts necessary to sustain her claim. *See, Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
2. While a member is entitled to a liberal construction of the Retirement Code, the member has only those rights created by the retirement benefit statute. *See, Burris v. State Employees' Retirement Board*, 745 A.2d 704 (Pa. Cmwlth. 2000); *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *allocatur denied*, 668 A.2d 1139 (Pa. 1996); *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624 (Pa. Cmwlth. 1996); *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).
3. Neither the Public School Employees' Retirement Board nor PSERS has the authority to grant rights beyond those specifically set forth in the Retirement Code. *See, Forman v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 2001).
4. The Member's Application contains all of the information required under the Retirement Code and creates a contract with PSERS.
5. A retirement option election is irrevocable unless it falls within one of the exceptions set forth in the Retirement Code or regulation, which are not applicable in this case. *See*, 24 Pa. C.S. § 8507 (j) and 22 Pa. Code § 213.45.
6. By executing and submitting her Application, the Member entered into a binding retirement contract with PSERS.

7. Under Pennsylvania law, the Member was presumed competent to execute her Application; the Application is presumed to accurately express her state of mind. *See, Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa. 1986).
8. Claimant produced no evidence to establish that the Member was incompetent to execute her Application.
9. Claimant produced no evidence to establish that PSERS misled the Member or provided her with inaccurate information prior to or during the execution of her Application.
10. PSERS does not owe a member a duty to question the appropriateness of the member's retirement elections. *See, Marron v. State Employees' Retirement Board*, 544 A.2d 1095 (Pa. Cmwlth. 1988), *alloc. den.* 562 A.2d 829 (Pa. 1989); *Welsh v. State Employees' Retirement System*, 808 A.2d 261 (Pa. Cmwlth. 2002).
11. There is no evidence in the record that PSERS violated Section 8505 (g) of the Retirement Code. 24 Pa. C.S. § 8505 (g).
12. The remedy for a violation of Section 8505 (g) of the Retirement Code does not include the revocation of an otherwise valid retirement application.
13. The Member's election of a Maximum Single Life Annuity is irrevocable.

DISCUSSION

The essential facts giving rise to this claim are undisputed. The Member, gravely ill, filled out an Application which she signed and dated February 4, 2008. In the Application, the Member: listed March 4, 2008 as her retirement date; elected the Maximum Single Life Annuity; elected to withdraw all of her total contributions and interest, payable in one installment; and named Claimant as her sole beneficiary. The Member provided inconsistent information regarding how much of the tax-free withdrawal was to be paid directly to her and how much was to be directly rolled over. She provided no directions with respect to how to disburse the taxable withdrawal and did not complete the portion of the Application regarding the existence of a pending divorce and/or a related court order.

The Member's Application was received by PSERS on February 6, 2008. When Pamela Reitz attempted to process the Application, the computer program alerted her to the fact that the document contained confusing/missing information regarding the disbursement of the Member's withdrawal as well as a missing certification regarding the existence or non-existence of divorce proceedings/court order. On or about June 16, 2008, Ms. Reitz made two telephone calls to the Member's residence in an attempt to obtain the missing information. On or about June 23, 2008, Claimant returned Ms. Reitz's calls and informed her that her mother, the Member, had passed away. Two days later, PSERS received a copy of the Member's death certificate confirming that she had died on May 21, 2008.

PSERS subsequently processed the Application and sent a letter to Claimant dated July 23, 2008 in which it explained the benefits payable on the Member's account. Pursuant to the letter, a retroactive payment representing monthly annuities due the Member from March 4,

2008 through May 21, 2008 was payable to the Member's estate. The single installment amount representing the Member's contributions and interest was to be rolled over to AIG.

Claimant filed the instant appeal asserting that: (1) the Member's Application did not constitute a binding contract with PSERS; (2) the Member's Application was not final because a final audit of her retirement account was not performed and she was not presented an opportunity to change the terms of her benefit plan; (3) because the Member did not properly file a retirement application prior to her death she did not have an effective date of retirement; and (4) PSERS violated the Retirement Code when it failed to certify the Member's retirement information within 60 days of her filing the Application.

Claimant asserts that the retirement plan elected by her mother in the Application plan clearly did not reflect her intent. Claimant testified that her mother intended her retirement benefits to serve as an insurance policy for Claimant. The death benefit payable to Claimant pursuant to the Application processed by PSERS is approximately \$180,000. By contrast, Claimant states that the value of the Member's account would approximate 1.3 million dollars had she selected Option 1 as her retirement plan. Claimant asserts that she is entitled to death benefits as if her mother had elected Option 1 because the Application was not binding for any or all of the reasons she cites.¹

PSERS, in turn, argues that the Member filed a valid Application which formed a binding contract with PSERS upon filing. PSERS contends that it was therefore required to honor the option elected by the Member in her Application.

¹ Section 8347 (a) of the Retirement Code provides: **(a) Members eligible for annuities.** --Any member, other than an annuitant, who dies and was eligible for an annuity in accordance with section 8307 (a) or (b) (relating to eligibility for annuities) shall be considered as having applied for an annuity to become effective the day before his death; and in the event he has not elected an option, it shall be assumed that he elected Option 1 and assigned as beneficiary that person last designated in writing to the board. 24 Pa. C.S. § 8347.

Essentially this case involves a determination of two issues: (1) whether the information contained in the Member's Application is legally sufficient to constitute a binding contract with PSERS and (2) when does a properly filed retirement application become final and binding. Notwithstanding PSERS' assertion to the contrary, these are matters of first impression given the unique facts presented.

Whether the Application as completed by the Member was properly filed

Claimant first asserts that the Application is not a binding contract with PSERS because the Application was not properly completed by the Member prior to her death. The record does reflect that the Application was incomplete when it was filed with PSERS and remained so up to and including the time when the death benefits were processed. PSERS, however, asserts that the missing information related to and affected only the payment of the benefits; the Member had completed all of the statutorily required sections of the Application relating to the selection of a retirement plan which enabled it to effectuate the retirement.

Pursuant to the Retirement Code, an active member with five or more years of credited service can apply for and receive an early annuity, provided the member terminates service and files a proper application. 24 Pa. C.S. § 8307 (b). When submitting the application, the member must elect one of the annuity options found in Section 8345 (a) which provides in relevant part:

(a) General rule.--Any . . . eligible member upon termination of school service . . . may apply for and elect to receive either a maximum single life annuity, . . . or a reduced annuity certified by the actuary to be actuarially equivalent to the maximum single life annuity and in accordance with one of the following options, . . .

(1) Option 1. --A life annuity to the member with a guaranteed total payment equal to the present value of the maximum single life annuity on the effective date of retirement with the provision that, if, at his death, he has received less than such present value, the unpaid balance shall be payable to his beneficiary.

(2) Option 2.—A joint and survivor annuity payable during the lifetime of the member with the full amount of such annuity payable thereafter to his survivor annuitant, if living at his death.

(3) Option 3.—A joint and fifty percent (50%) survivor annuity payable during the lifetime of the member with one-half of such annuity payable thereafter to his survivor annuitant, if living at his death.

(4) Option 4.—Some other benefit which shall be certified by the actuary to be actuarially equivalent to the maximum single life annuity . . .

24 Pa. C.S. § 8345 (a).

The Retirement Code also requires a member to "nominate a beneficiary or a survivor annuitant, as the case may be, by written designation filed with the board at the time of his retirement." 24 Pa. C.S. § 8507 (j). Section 8505.1 (a) requires a member who elected to withdraw any portion of his accumulated deductions to "elect the amount in not more than four installments." 24 Pa. C.S. § 8505.1 (a).

In her Application, the Member fulfilled all of these statutory requirements. The Member executed her Application on February 4, 2008. She terminated service on March 4, 2008, which was certified by her employer. Under the Monthly Payment Plan section, the Member checked the box beside the Maximum Single Life Annuity. That option was described on the Application as:

You will receive the maximum monthly payment for life. If you die before you receive an amount equal to the sum of your contributions and interest, the balance is paid to your beneficiary(ies). (*Name at least one beneficiary in Section 7*).

(PSERS Exhibit 1 at 4). (Emphasis in original). In Section 7 of the Application, the Member designated Claimant as her primary beneficiary. Under Section 4,A, the Member indicated

that she wanted to withdraw money and under Sections 4,B and 4,C, she indicated that she wanted to withdraw all of her total contributions and interest in one installment.

Also, in Section 4,C, the Member indicated that she wanted 100% of her tax-free funds to be paid to her and 100% of them to be directly rolled over. She did not specify where she wanted her taxable funds to be disbursed. The Member also submitted an ADR with her Application. In it, she indicated that she was authorizing PSERS to directly roll over one installment of the withdrawn funds to AIG. The ADR was signed by both the Member and by Ryan Moore. Claimant identified Mr. Moore as her mother's financial consultant who had assisted her in completing the Application.

Claimant asserts that the missing and conflicting information contained in Section 4,C of the Application as well as the missing certification in Section 12 regarding the existence or non-existence of a court order or pending divorce, constituted mandatory information which precluded PSERS from processing the Application. Claimant argues that Ms. Reitz did not process the Application because of the missing information and sought to obtain it from the Member in order to do so. Claimant also contends that the Member had a statutory right to elect a direct rollover and correctly notes that "[a] retiree's rights granted by the Code are so personal that no other person can exercise those rights on behalf of the members." *Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624,626 (Pa. Cmwlth. 1996).

That this was an unusual and complex fact pattern is evident by the testimony of Ms. Reitz. Ms. Reitz candidly admitted that she had never been presented with a situation in which a member had filed an incomplete application and then died before the information

could be obtained. Accordingly, Ms. Reitz felt compelled to seek guidance from PSERS' Office of Chief Counsel.

PSERS ultimately decided and argues now that because the Member had provided all of the information in the Application that was required under the Retirement Code, the Application, as filed, was contractually binding and could be processed. The Member's election of a retirement plan, her designation of a beneficiary and her election to withdraw her total contributions are clearly set forth in the Application. Accordingly, an effective date of retirement², a monthly annuity for the Member and any death benefit potentially payable could be established from the completed portions of the Application.

In this case the missing certification regarding the possible existence of a court order and the conflicting information regarding the amount of the contributions to be rolled over, while important to the subsequent distribution of the benefits, were not essential to the Member's election of a retirement plan.

As Ms. Reitz testified, PSERS customarily (and in this case specifically) delays the processing of retirement applications that contain missing information of this nature in order to insure the proper disbursement of funds. Generally, the applications are processed when the missing information is received. Although there has been a delay in processing those applications, they are paid on the basis of the retirement plan and with the effective retirement date contractually established between the member and PSERS when the application was filed. The preservation of the effective date of retirement clearly inures to the benefit of the member.

² The term "effective date of retirement" is defined as "the first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date." 24 P.a. C.S. § 8102.

With respect to Section 4,C of the Application, Section 8533 (d) of the Retirement Code provides that a member "may elect, at the time and in the manner prescribed by the board, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan by way of a direct rollover." 24 Pa. C.S. § 8533 (d). The Member exercised this right, but provided confusing information on the Application regarding the rollover. The Member indicated that she wanted 100% of her tax-free funds paid to her and 100% of them to be rolled over to AIG. She did not specify how she wanted the taxable funds disbursed. The Member executed an ADR which was signed by Mr. Moore authorizing a rollover of funds in one installment.

Ms. Reitz testified that when a member completes an application in this manner, i.e. directing 100% of the tax-free funds to both be paid to the member and be rolled over and failing to specify where to direct the taxable funds, PSERS customarily assumes that the member intends to receive 100% of the tax-free withdrawal and roll over 100% of the taxable funds. PSERS ultimately decided to distribute the Member's contributions and interest in this manner and notified Claimant of the same by letter dated December 1, 2008.³

Claimant contends that PSERS is prohibited from making this decision for the Member thereby rendering the Application materially defective and incapable of being filed.⁴ PSERS' decision regarding how to give effect to the Member's intended distribution of her withdrawn

³ PSERS initially advised Claimant by letter dated July 23, 2008 that all of the contributions and interest would be rolled over to AIG. There is no evidence on the record which explains the difference. It is also important to note that Claimant testified that she provided PSERS with the missing information requested by Ms. Reitz to the Death Benefit Center in July 2008. Neither Claimant nor PSERS provided evidence to support what supplemental information was actually provided to PSERS. It is thus not apparent whether this information was utilized in any fashion by PSERS.

⁴ The issue of whether the distribution accurately reflects the Member's intent is not presented in this appeal.

funds, however, was made after she had unequivocally elected her retirement option, her beneficiary and her decision to withdraw all of her contributions and interest. Importantly, PSERS' distribution of the total contributions and interest in this matter did not affect the calculation of the Member's monthly annuity, her option election nor the amount of the death benefit. On this basis and on the narrow issue presented, it cannot be concluded that PSERS' subsequent distribution of the Member's withdrawn funds negates the contractually binding election of her retirement plan.

The Member's failure to certify the existence or non-existence of a pending divorce or court order in her Application similarly does not affect the binding nature of the Application which otherwise contained the information required by the Retirement Code. Certification of a pending divorce or court order is not required by the Retirement Code to effectuate the option selection. 24 Pa. C.S. §§ 8533.1-8533.4. PSERS requests this information prior to payment in order to protect itself from the possibility of a double payment in the event that a benefit for which it had paid was subject to a pending divorce settlement or a claim for equitable distribution. *See, Kirsop v. Public School Employees' Retirement Board*, 747 A.2d 966 (Pa. Cmwlth. 2000).⁵

In sum, neither the absence of a certification regarding the existence of a divorce proceeding/court order or the manner in which the Member completed Section 4 of the Application regarding the withdrawal of her contributions and interest, rendered the Member's Application legally ineffective for purposes of establishing a retirement plan.

⁵ Claimant provided documentation to PSERS on October 26, 2008, verifying that the Member's ex-spouse was not entitled to any of her retirement benefits.

Whether the Application and the Member's election of a retirement plan became final and binding upon filing

Turning to the issue of when a retirement application becomes binding under the Retirement Code, it is clear that at least prior to 1998 the matter had been judicially decided. Pennsylvania Courts consistently held that when a member of PSERS retires and elects a retirement option, he enters into a contract with PSERS. *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa.1986); *Estate of Burlingame v. Public School Employees' Retirement System*, 557 A. 2d 1128 (Pa. Cmwlth. 1989), *appeal denied*, 568 A.2d 1250 (Pa. 1989).

Additionally, the contract between a member and PSERS which exists at the time of the retirement plan election is not voided because the member died before receiving his first payment or because there was no Board approval. The processing of the application is ministerial in nature. *See, Ogden v. Public School Employees' Retirement Board*, 27 Pa. D. & C.2d 151; *Gold v. Public School Employees' Retirement Board*, 407 A.2d 482 (Pa. Cmwlth. 1979).

Claimant contends that this case law is no longer applicable because it preceded the promulgation of Section 213.45 of the Board's regulations. That regulation states in relevant part as follows:

§ 213.45. Change in benefit payment plan

(a) Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan, an annuitant may 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 annuitant by the System. The letter will be deemed to be received by the annuitant 3 business days after the date of mailing.

(b) Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan, an annuitant may 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 statement provided for in section 8505 (g) of the Retirement Code (relating to duties of the board regarding applications and elections of members), which statement will be deemed to be received by the annuitant 3 business days after the date of mailing, if one of the following conditions are met:

(1) The annuitant's retirement records contain an error regarding service credit, salary or accumulated deductions that was not corrected by the System until after the application for the annuity was filed, and either of the following exists:

(i) The difference between the monthly annuity as corrected and the monthly annuity calculated with the error is more than 5%.

(ii) The error results in the member losing eligibility for a benefit other than an annuity.

(2) The annuitant demonstrates that the annuitant, or the annuitant's agent, made a written error on the application. The System will not consider a change in the life circumstances of the annuitant, beneficiaries or survivor annuitants (for example, death, divorce, illness, accident) as evidence of a written error.

...

(f) The right to void or change a benefit payment plan is personal to the annuitant and may only be exercised by the annuitant or the annuitant's attorney in fact. The estate, spouse, alternate payee, survivor annuitants or beneficiaries of an annuitant may neither file nor complete an intent to void or change the benefit payment plan. If an annuitant dies before filing or completing an intent to void or change the benefit payment plan, the intent will be deemed withdrawn.

...

(h) Changes will be retroactive to the member's original effective date of retirement unless the date is changed as part of the changed application for an annuity.

(1) For a changed application to become effective, the annuitant shall either return any excess monthly annuity payments or moneys withdrawn under Option 4 within 30 days after the date of certification of the amount due or elect an actuarial reduction to be applied to the annuitant's account.

Claimant asserts that pursuant to this regulation, the Member's retirement contract was not final until her retirement account was audited and she was thereafter provided an opportunity to change the terms of her retirement benefit plan. In support of this assertion, Claimant quotes the following language regarding the Board's purpose in promulgating the regulation: "The Public School Employees' Retirement Board (Board) is adopting an amendment to § 213.45 (relating to change in benefit payment plan) . . . by removing the requirement that once an application for an annuity (benefit payment plan) has been filed, the option selection is irrevocable." 28 Pa. Bulletin 2688 (1998).

There is no question that the Board recognized the difficulties presented when members are required to make an irrevocable election of a retirement option at the time of filing a retirement application. This is especially true when members do not have all of the information available, for example, a final accounting of the actual number of credited years of service. Under those circumstances it is possible that an individual can retire on the basis of his estimated years of service, only to discover later, to his financial detriment, that the estimate was incorrect. As is evident in the purpose of the Section 213.45, it is precisely this type of concern that prompted the adoption of the regulation. *Id.* at 2688-2689.

Claimant interprets the regulation to mean that a member's contract with PSERS is never final until 30 days after a final audit is completed and the member has had an opportunity to change the retirement plan. This interpretation, however, is not supported by the express language of the regulation itself.

The regulation provides annuitants⁶ with two distinct windows of opportunity in which to change their retirement plan. The first window, available to all annuitants, is "within 30 days of the annuitant's receipt of the initial benefit letter sent to the annuitant by the System." 22 Pa. Code § 213.45 (a). The second window is "within 30 days of the annuitant's receipt of the statement provided for in section 8505 (g) of the Retirement Code (relating to duties of board regarding applications and elections of members)." 22 Pa. Code § 213.45 (b). Importantly, this latter window is applicable only when one of the enumerated errors or conditions set forth in that section are met.

Notably, both of these sections are preceded by the phrase "**Notwithstanding the otherwise irrevocable nature of the election of a benefit payment plan.**" Giving effect to all of the words in the regulation, and consistent with the Board's express purpose to remedy the problems that arose when annuitants had **no opportunity to change a retirement plan**, it is clear that the Board intended by the regulation that the election of a retirement plan is irrevocable unless or until an annuitant timely files an Intent to Change form during one of the permissible windows of opportunity.

In this case, unfortunately, the Member died before she came within one of the two express windows of opportunity in which she could change her retirement plans. The ability to exercise that option ceased upon her death. The "otherwise irrevocable nature" of the Member's retirement plan, made effective, as of the date she filed her Application, remained so at the time of her death.

⁶ Only "annuitants" are eligible to declare an intent to change the final terms of their benefit payment plans. 22 Pa. Code § 213.45 (a) and (b). An "annuitant" is defined as "[a]ny member on or after the effective date of retirement until his annuity is terminated." 24 Pa. C.S. § 8102.

Claimant alternatively argues that even if the Member is deemed to have properly filed an application for retirement on February 6, 2008, PSERS violated its statutory obligation under Section 8505 (g) of the Retirement Code when it failed to notify her of final and accurate benefits information by April 6, 2008. Section 8505 (g) states in relevant part:

(g) Initial annuity payment and certification. – The board shall make the first monthly payment to a member who is eligible for an annuity within 60 days of the filing of his application for an annuity . . . and receipt of the required data from the employer of the member. Concurrently the board shall certify to such member:

- (1) The accumulated deductions standing to his credit showing separately the amount contributed by the member, the pickup contribution and the interest credited to the date of termination of service.
- (2) The number of years and fractional part of a year credited in each class of service.
- (3) The final average salary on which his annuity is based as well as any applicable reduction factors due to age or election of an option or both.
- (4) The total annuity payable under the option elected and the amount and effective date of any future reduction on account of social security old-age insurance benefits.

24 Pa. C.S. § 8505 (g).

Claimant contends that because PSERS violated this section, it deprived the Member of her right to exercise a change in her benefit plan under Section 213.45 (b). Claimant argues that if given the opportunity, the Member, given her circumstance, certainly would have elected to change her benefit plan to Option 1 to fulfill her expressed desire to provide a life insurance policy for Claimant.

While this argument is compelling, it nevertheless is unavailing for several reasons. First, as PSERS correctly observes, there is no evidence in the record to establish when PSERS had received the required data from the Member's employer which is an element in

establishing the 60 day time period set forth in Section 8505 (g). Thus, a violation of this section has not definitively been established. Second, even if PSERS had violated Section 8505 (g), there is no evidence in the record to support a finding that the Member could have met the limited criteria in Section 213.45 (b) of the regulations required in order to change her retirement plan.

More importantly, if PSERS had violated Section 8505 (g) and was found to have wrongfully delayed the payment of benefits, the available remedy is to pay the additional interest that accrued during the delay. *Cianfrani v. State Employees' Retirement Board*, 468 A.2d 1151 (Pa. Cmwlth. 1983), *aff'd* 479 A.2d 468 (Pa. 1984). The remedy is not to revoke an otherwise valid retirement application.

The "discretionary" right to change a retirement plan in 213.45 (a) of the regulations exists in the window of time within 30 days of receipt of the initial benefit letter. PSERS delayed the processing of the Application in this case in order to obtain additional information from the Member. It is clear that the initial benefit letter was not sent to the Member prior to her death. Without condoning the length of the delay in this case, to require the Application to be voided on that basis would be untenable.

Claimant presumes that the Member would have elected Option 1 had she been afforded the opportunity to change her retirement plan. This is the exact result that would be achieved by revoking her Application and voiding the retirement plan that the Member actually elected. While this might produce the result that Claimant seeks, Claimant's presumption regarding the Member's intent is not legally sufficient grounds to require the revocation of the Application when the Member died prior to having the opportunity to

change her retirement plan. To find otherwise requires invalidation of the retirement plan of any member who dies prior to receiving the initial benefit letter, **regardless of the member's intent**. Such a result is clearly inconsistent with the plain terms of the Retirement Code, its purpose and the regulations adopted by the Board.

Finally, Claimant has offered no probative evidence to establish that the Member made a mistake when she elected the Maximum Single Life Annuity. Claimant bears the burden of establishing facts to support her claim. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).

In her Application, the Member expressly waived her right to retirement counseling despite this statement which immediately preceded her waiver: "It is important that you understand your retirement benefits. PSERS strongly recommends that all members attend a small group PSERS *Retirement Exit Counseling* session. **You may waive your counseling rights, although it is not recommended.**" (Emphasis added). It was the Member's decision to waive her right to retirement counseling. No one at PSERS provided the Member with false or inaccurate information. No one at PSERS misled the Member into selecting the Maximum Single Life Annuity.

The Member completed her Application with her father and her financial advisor. Neither individual testified at the hearing regarding the Member's option election. Claimant, who was present while the Member was completing her Application, was not personally involved in the completion of the Application and could not testify with respect to the Member's option election. Claimant testified that the Member had completed two retirement

applications and that her grandfather had sent the wrong one to PSERS. No such evidence was produced at the hearing, nor did her grandfather testify about the same.

Claimant has not alleged nor has any evidence been produced to establish that the Member was incompetent to execute her Application and elect her retirement plan. Under Pennsylvania law, the Member was presumed competent to have executed the Application. The Application is presumed to accurately express her state of mind when doing so. *Estate of McGovern*, 517 A.2d 523 (Pa. 1986).

PSERS does not owe a duty to a member to question her retirement elections. *Marron v. State Employees' Retirement Board*, 544 A.2d 1095 (Pa. Cmwlth. 1988), *alloc. den.* 562 A.2d 829 (Pa. 1989); *Welsh v. State Employees' Retirement System*, 808 A.2d 261 (Pa. Cmwlth. 2002).

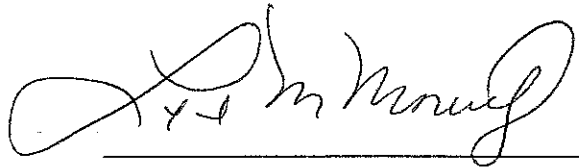
It is well settled that while a member is entitled to a liberal construction of the Retirement Code, the member has only those rights created by the retirement benefit statute. *Burris v. State Employees' Retirement Board*, 745 A.2d 704 (Pa. Cmwlth. 2000); *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *allocatur denied*, 668 A.2d 1139 (Pa. 1996); *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624 (Pa. Cmwlth. 1996); *Cosgrove v. State Employees' Retirement Board*, 665 A. 2d 870 (Pa. Cmwlth. 1995); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992). Neither the Public School Employees' Retirement Board nor PSERS has the authority to grant rights beyond those specifically set forth in the Retirement Code. *Forman v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 2001).

In sum, the Member's Application and her election of the Maximum Single Life Annuity, were contractually binding at the time of filing. Her election of a retirement plan was irrevocable and, not falling within one of the legal exceptions provided, remained so upon her death.

Claimant has provided thoughtful and compelling arguments in support of her position in this difficult case. The Member unfortunately elected an irrevocable retirement option that was not the most advantageous to Claimant. While a decision to the contrary might produce a seemingly more equitable result, it would be inconsistent with the Retirement Code. Accordingly, it will be recommended that Claimant's appeal be denied.

RECOMMENDATION

It is recommended that the Public School Employees' Retirement Board issue an Order denying the appeal of Shelley Marie Eberhardt to have death benefits on the Account of Shelia A. Eberhardt, Deceased, payable under Option 1.



Lynne M. Mountz, Esquire
Hearing Examiner

Dated:

June 24, 2010