

Mail Date: JUN 24 2008

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

IN RE: ACCOUNT OF SANDRA N. LAPCEVIC (D)
DOCKET NO. 2006-21
CLAIM OF WILLETTE GALLMAN

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs; the Opinion and Recommendation of the Hearing Examiner; Intervenors' Exceptions to the Opinion of the Hearing Examiner; Claimant's Brief in Opposition to Intervenors' Exceptions; and PSERS' Letter Brief in Opposition to Intervenors' Exceptions.

This is a contested death benefit case between Claimant and Intervenors. When the Member-Decedent retired in May 2002, she named her mother as primary beneficiary and Intervenors as contingent beneficiaries. Decedent's mother died in July 2002. One month later – in August 2002 – Decedent submitted a new Nomination of Beneficiary form naming Claimant as the principal beneficiary with a 50% interest and Intervenors as contingent beneficiaries with a 25% interest each. Because the percentages did not equal 100% in each section of the form (i.e. the principal beneficiary section and the contingent beneficiary section), PSERS returned the form to Decedent. The form was changed by whiting out and correcting the percentages and was returned to PSERS in October 2002 without the changes being initialed. In the changed form, Claimant was still named as the principal beneficiary, but with a 100%

interest, and Intervenors were still named as contingent beneficiaries, but with a 50% interest each. PSERS received and accepted the corrected form in December 2002 and so notified the Decedent. The Decedent died in 2006.

The Hearing Examiner recommended that the corrected form be accepted since, even though the form may not have met PSERS' policies because: (1) it was the last form filed with PSERS; (2) PSERS had, after receipt of the corrected form, notified Decedent in December 2002 that the form had been accepted; and (3) Decedent never took any further action regarding her beneficiary. The Hearing Examiner emphasized, in ascertaining Decedent's intent, that after PSERS accepted and notified Decedent of the acceptance of the corrected form in December 2002, Decedent filed no subsequent form, thus evidencing her intent that the change was correct and should persist.

The Hearing Examiner opined that PSERS' written policies regarding staff's review of Nomination of Beneficiary forms do not constitute legislative regulations or interpretive rules and, thus, are not mandatory provisions that can act to invalidate a member's Nomination of Beneficiary form without any due notice to the member. The Hearing Examiner, therefore, concluded that, because Decedent filed no other Nomination of Beneficiary form with PSERS subsequent to being notified by PSERS that her October 2002 beneficiary form had been received and processed, PSERS is required to honor its contract with Decedent and to pay Decedent's death benefit to Claimant.

Intervenors excepted to the Hearing Examiner's determination that the October beneficiary form is valid. Intervenors argue that the "written designation" requirement of 24 Pa. C.S. §8507(e) was violated because Decedent did not initial the changes. This Board agrees with the Hearing Examiner that the October 2002 beneficiary form is valid and that PSERS is required to honor its contract with Decedent. Because PSERS notified Decedent that the October beneficiary form was processed and accepted by PSERS, it is reasonable to conclude that Decedent was led to believe that there was nothing further required by Decedent to nominate Claimant as primary beneficiary.

Intervenors also excepted on the ground that the Hearing Examiner erred in her reliance on *Girard Giant Eagle vs. Unemployment Compensation Board of Review*, 659 A.2d 60 (Pa. Cmwlth. 1995) in determining that certain testimony of Claimant did not constitute hearsay. The Board determines that it is not necessary to address whether such testimony constitutes hearsay because the decision is adequately supported absent reliance on the testimony of Claimant in question. As a result, of the 57 Findings of Fact proposed by the Hearing Examiner, this Board did not rely upon Findings of Fact Nos. 42 and 51 in their entirety and did not rely upon those portions of Findings of Fact Nos. 43, 54, 55, and 57 that are arguably, or potentially relate to, hearsay.

Intervenors also excepted to the Hearing Examiner's conclusion that Claimant's testimony did not violate the Dead Man's Statute, 42 Pa. C.S. §5930. For Claimant to be disqualified from testifying under the Dead Man's Statute, three conditions must be satisfied: (1) the Decedent must have had an actual right or interest

in the matter at issue; (2) the interest of Claimant must be adverse; and, (3) the right of the Decedent must have passed to a party of record who represents the Decedent's interests. *Punxsutawney Municipal Airport Authority v. Lellock*, 745 A.2d 666 (Pa. Super. 2000). The Board agrees with the Hearing Examiner that at least the third condition has not been met; the Board also notes and agrees with PSERS' response to the Intervenors' Exceptions that neither PSERS nor the Office of Chief Counsel represents the interests of Decedent.

Intervenors further argue that the Hearing Examiner improperly placed the burden to prove fraud on Intervenors. It is well settled under Pennsylvania law that Decedent was presumed competent to have made her beneficiary designation, and her signed nomination of beneficiary form is presumed to accurately express her state of mind. *See Estate of McGovern v. State Employees' Retirement Board*, 512 Pa. 377, 517 A.2d 523 (1986). This presumption may only be overcome by evidence that is "clear, precise and convincing." *Id.* The burden of proving the existence of fraud or concealment is upon the asserting party by evidence that is clear, precise and convincing. If Intervenors believed there was fraud, it was their burden to prove it. *Estate of Bosico*, 488 Pa. 274, 412 A.2d 505 (1980). The Board agrees with the Hearing Examiner that no evidence was presented that proved the existence of fraud.

All other exceptions repeat issues that have been adequately addressed in the Opinion and Recommendation, which we adopt in this Opinion and Order, so they need not be addressed specifically herein.

Finally, the Board believes it is appropriate to include as an additional finding of fact a state of events that was relied upon by the Hearing Examiner in her recommendation but not specifically made as a recommended Finding of Fact:

58. Decedent made no further changes to her beneficiary nomination after being notified by PSERS that her October 2002 Nomination of Beneficiary form had been accepted. (Official Notice, PSERS' Records)

Based on the foregoing, we hereby find appropriate the Hearing Examiner's Findings of Fact (as qualified above), Conclusions of Law and Recommendation and adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that Decedent's death benefit is payable to Claimant, Willette Gallman, as designated by Decedent in Decedent's most recently filed, processed and acknowledged Nomination of Beneficiary form received by PSERS on October 29, 2002.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: JUN 24 2008

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

LEGAL OFFICE MAR 11 2008

In Re: :
Account of Sandra N. Lapcevic (D) :
Claim of Willette Gallman : Docket No. 2006-21
:

OPINION AND RECOMMENDATION

Date of Hearing: September 12, 2007
Hearing Officer: Jackie Wiest Lutz, Esquire
For Claimant: Edward T. Harvey, Esquire
For PSERS: Jennifer A. Mills, Esquire
For Intervenors: James R. Antoniono, Esquire

HISTORY

This matter first came before the Public School Employees' Retirement Board (Board) on October 6, 2006, when Willette Gallman (Claimant) filed a Request for Administrative Hearing to appeal a decision of the Public School Employees Retirement System (PSERS) which determined that the beneficiaries of the account of Sandra N. Lapcevic (Decedent) were those individuals named on Decedent's December 9, 2004 Nomination of Beneficiary form ("December 2004 Nomination form").

The December 2004 Nomination form was signed by a Court-appointed Guardian of the Estate of Decedent. Claimant challenged the validity of the December 2004 Nomination form on the ground that the Guardian lacked authority under 20 Pa. C.S. §5536 to change a beneficiary without petitioning the court.

On October 17, 2006, PSERS notified Christine M. Vilsack, Karen E. Snizaski, Laura Lapcevic and Joseph Lapcevic of their right to intervene in Claimant's Request for Administrative Hearing. Thereafter, on October 20, 2006, Jennifer A. Mills, Esquire, filed an Answer to Claimant's Request for Administrative Hearing, claiming that the Board lacks jurisdiction to interpret the provisions of 20 Pa. C.S. §5536 to determine whether the court appointed guardian lacked the authority to change a beneficiary without petitioning the court.

Claimant's Request for Administrative Hearing was subsequently stayed by PSERS to allow the parties to proceed in a court of competent jurisdiction to determine whether the Guardian lacked the authority to change the beneficiaries of the Decedent's account.

On June 28, 2007, the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division, Ordered, Adjudged and Decreed that the Guardian lacked the authority under 20 Pa. C.S.A. §5536(b) to submit the December 2004 Nomination form to PSERS; accordingly, by Order dated August 2, 2007, the Board granted Claimant's request to set aside the December 2004 Nomination form and dismissed Claimant's appeal as moot. However, the Board further ordered that the case shall proceed to an administrative hearing on the remaining issue of how the decedent's death benefit should be distributed.

On August 7, 2007, Jackie Wiest Lutz, Esquire was appointed to act as hearing officer for the administrative hearing in this matter. A hearing notice was subsequently issued on August 14, 2007, scheduling a hearing to determine how the decedent's death benefit should be distributed for September 12, 2007.

The hearing proceeded as scheduled on September 12, 2007 at 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing, and was represented by Edward T. Harvey, Esquire. Intervenors Karen E. Snizaski and Christine M. Vilsak were also present at the hearing and were represented by James R. Antoniono, Esquire. Jennifer A. Mills, Esquire, represented PSERS.

Following the close of evidence and upon receipt of the hearing transcript, a briefing schedule was established by the Hearing Officer. Pursuant to the briefing schedule, simultaneous briefs were due by all parties on or before October 29, 2007; responsive briefs were then due no later than November 28, 2007.

Timely briefs were filed by all parties. The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Sandra N. Lapcevic (“Decedent”) was first enrolled in the Public School Employees’ Retirement System (“PSERS”) in January of 1967. (Joint Exhibit A, ¶1)
2. Decedent filed an Application for Retirement with PSERS dated May 6, 2002 retiring from employment effective June 11, 2002 with 35.56 years of service. (Joint Exhibit A, ¶2; Joint Exhibit 1)
3. On the Application for Retirement, Decedent nominated Helen Lapcevic, Decedent’s mother, as principal beneficiary with distribution of 100% and Karen E. Snizaski and Christine M. Vilsack (collectively “Intervenors”) as contingent beneficiaries with distribution of 50% respectively. (Joint Exhibit A, ¶3; Joint Exhibit 1)
4. Helen Lapcevic died on July 15, 2002. (Joint Exhibit A, ¶4)
5. On August 2, 2002, PSERS received a Nomination of Beneficiaries form from Decedent (“the August beneficiary form”). (Joint Exhibit A, ¶6; Joint Exhibit 3)
6. The reverse side of the Nomination of Beneficiaries form contains a series of instructions. Pertinent to this case, the instructions state as follows:

NOMINATION OF BENEFICIARIES
Public School Employees’ Retirement System

This form is a legal document used to nominate the person(s) entitled to receive applicable benefits payable from the Public School Employees Retirement System (PSERS) upon your death. . .

IMPORTANT: **Read all instructions carefully.** Forms not properly and completely filled in and/or forms containing erasures or other alterations will not be accepted by PSERS. If you make a mistake, request a new form.

INSTRUCTIONS:

- A. **PRINCIPAL BENEFICIARY(IES).**
 - **This section must be completed.**
 - **Percent** – Use percentages, not fractions or decimals. . . Percentages must equal 100 percent within *each* section (Principal and contingent).

B. CONTINGENT BENEFICIAR(IES). Completion of this section is optional.

- If you designate a contingent beneficiary in Section B, that person(s) receives the full amount in the event all principal beneficiaries (Section A) are deceased.

D. CERTIFICATION.

- **Sign and date the form in the space provided.**

Send original form to:
Public School Employees' Retirement System
PO Box 125
Harrisburg, PA 17108-0125

This form will not be valid until filed in proper form at the Public School Employees' Retirement System. A copy of your processed beneficiary form will be returned for your records.

(Joint Exhibit A, ¶14; Joint Exhibit 7)

7. Similar to the Application for Retirement, the Nomination of Beneficiaries form contains separate sections to be completed by the member to designate the member's Principal Beneficiary(ies) and Contingent Beneficiary (ies), if any. (Joint Exhibit 3)

8. The August beneficiary form listed Willette Gallman ("Claimant") as Decedent's Principal Beneficiary, with 50% distribution adjacent to Claimant's name; the August beneficiary form listed Intervenors as Decedent's Contingent Beneficiaries, with 25% distribution adjacent to their respective names. (Joint Exhibit A, ¶6; Joint Exhibit 3)

9. The Decedent's August beneficiary form was signed and dated by Decedent on July 29, 2002. (Joint Exhibit A, ¶7)

10. By letter dated October 19, 2002, PSERS returned the August beneficiary form to Decedent. In pertinent part, the letter notified Decedent as follows:

Dear Ms. Lapcevic:

The Public School Employees' Retirement System (PSERS) is returning your *Nomination of Beneficiaries* (PSRS-187).

Please provide the following information on your form:

- Percentages - - totaling 100 percent within each section.

See instructions on the reverse side of form under Section A and/or Section B.

Without this information the form may not be processed.

If the information requested above can be included on your form without altering existing information, feel free to do so. If not, a blank form is enclosed to assist you in submitting an acceptable form. Please submit only one form.

After receipt and acceptance of your *Nomination of Beneficiaries*, we will send you a confirmation of the change. . . .

(Joint Exhibit A, ¶8; Joint Exhibit 4)

11. On October 29, 2002, PSERS received a corrected *Nomination of Beneficiaries* form (the “October beneficiary form”); the October beneficiary form was, in fact, the same August beneficiary form that was signed by Decedent on July 29, 2002, except that the October beneficiary form reflected altered percentages next to the beneficiaries through the use of whiteout. (Joint Exhibit A, ¶’s 9 and 10; Joint Exhibit 5)

12. The October beneficiary form changed the percentage distribution adjacent to Claimant’s name as Principal Beneficiary to 100%, and changed the percentage distribution adjacent to Intervenors as Contingent Beneficiaries to 50%, respectively, so that the percentages totaled 100% within each section. (Joint Exhibit A, ¶11; Joint Exhibit 5)

13. The October beneficiary form was not re-executed by Decedent; nor was the whited-out portion of the form initialed by Decedent. (Joint Exhibit A, ¶12; Joint Exhibit 5)

14. By letter dated December 27, 2002, PSERS notified Decedent that PSERS “received and processed [Decedent’s] Nomination of Beneficiary Form (PSRS-187).” In pertinent part, the letter states:

Dear Ms. Lapcevic:

The Public School Employees Retirement System (PSERS) has received and processed your Nomination of Beneficiary Form (PSRS-187).

If you wish to change your beneficiary nomination with PSERS in the future, you must obtain a new Nomination of Beneficiary Form, complete it and forward it to PSERS for processing.

If you have any questions or wish to receive a new form, please contact the Member Service Center by calling toll – free. . . .

(Joint Exhibit A, ¶13; Joint Exhibit 6)

15. On October 18, 2004, the Court of Common Pleas of Allegheny County, PA, Orphan's Court Division, Ordered, Adjudged and Decreed Dianne Spivak ("Guardian") as Permanent Plenary Guardian of the Estate of Decedent. (Official Notice, Board records)
16. On December 13, 2004, PSERS received a Nomination of Beneficiary form dated December 9, 2004, signed by the Guardian, naming Intervenors Christine Vilsack and Karen Snizaski, along with Laura Lapcevic and Joseph Lapcevic, as primary beneficiaries of Decedent's death benefit. (Official Notice, Board records)
17. Decedent died on February 11, 2006 leaving a balance of \$688,514.01 to be paid to her last named beneficiaries. (Joint Exhibit A, ¶5; Joint Exhibit 2)
18. On February 23, 2006, PSERS determined that the last named beneficiaries of Decedent's death benefit were Intervenors Christine Vilsack and Karen Snizaski, Laura Lapcevic and Joseph Lapcevic. (Official Notice, Board records)
19. On October 6, 2006, Claimant filed a Request for Administrative Hearing with the Public School Employees' Retirement Board ("Board") to appeal the decision of PSERS

on the basis that the Guardian lacked the authority under 20 Pa. C.S. §5536 to change a beneficiary without petitioning the court to do so. (Official Notice, Board records)

20. On October 17, 2006, PSERS notified Intervenors and Laura Lapcevic and Joseph Lapcevic of their right to intervene in Claimant's Request for Administrative Hearing. (Official Notice, Board records)

21. On October 20, 2006, PSERS filed an Answer to Claimant's Request for Administrative Hearing asserting that the Board lacked jurisdiction to interpret 20 Pa. C.S. §5536 to determine whether a court appointed guardian lacks authority to change a beneficiary without petitioning the court. (Official Notice, Board records)

22. Through counsel, Intervenors and Laura Lapcevic and Joseph Lapcevic verbally notified PSERS of their intent to intervene in this matter and of the parties intent to proceed in a court of competent jurisdiction to determine whether the Guardian lacked the authority to change the beneficiaries of the Decedent's account. (Official Notice, Board records)

23. On November 30, 2006, PSERS notified the parties in writing that the administrative hearing was stayed pending the decision of the Court of Common Pleas of Allegheny County, Commonwealth of PA, Orphan's Court Division. (Official Notice, Board records)

24. On June 28, 2007, the Court of Common Pleas of Allegheny County, Commonwealth of PA, Orphan's Court Division Ordered, Adjudged and Decreed that the Guardian lacked the authority under 29 Pa. C.S. §5536(b) to submit the Nomination of Beneficiary form dated December 9, 2004. (Official Notice, Board records)

25. On June 28, 2007, Christine M. Vilsack and Karen E. Snizaski ("Intervenors") verbally notified PSERS, following up in writing by letter dated July 6, 2007 through counsel, of their intent to challenge the Nomination of Beneficiary form received by PSERS on October 29, 2002, that would pay 100% of the death benefit to the Claimant as the primary beneficiary. (Official notice, Board records)

26. The June 28, 2007 Orphans' Court Order was not appealed and is now final. (Judicial Notice)

27. Marla Cattermole (Cattermole) is the manager of the disability and death benefits center of PSERS; Cattermole is responsible, in part, for making sure that death and disability benefits are timely paid and for assisting staff resolve issues or problems that arise in the processing of those benefits. (N.T. 6)

28. PSERS' procedures with respect to the review and processing of nomination of beneficiary forms includes making sure that both the principal and contingent beneficiary areas of the Nomination of Beneficiary form add up to 100% and that no alterations or whiteouts are made to the forms. (N.T. 8)

29. When the Decedent's August and October Nomination of Beneficiary Forms were received by PSERS, PSERS had a written policy in effect regarding staff's review of Nomination of Beneficiary forms. (N.T. 9-13; PSERS' Exhibit 10)

30. The written policy states that the Member's Signature must be completed in ink and that Whiteout/Alterations are not acceptable. (PSERS' Exhibit 10)

31. Under PSERS' review policies, the only exception to the rule that forms containing alterations and/or whiteouts are not acceptable is if the member initialed the alteration or whiteout. (N.T. 10; PSERS' Exhibit 11)

32. The purpose behind the requirement that a member must initial a change or alteration is that it indicates to PSERS that it is the clear intent of the member; in addition, PSERS must guard against fraud occurring in cases of death benefits. (N.T. 13-14)
33. There has been no evidence proffered by any party to this proceeding that fraud was perpetrated by the Claimant. (Transcript, *passim*)
34. In processing a death benefit, PSERS will look for the most current Nomination of Beneficiary form on file, make sure that the form is accurate and complete, and payout the death benefit according to the beneficiary form. (N.T. 14)
35. The Decedent's most current Nomination of Beneficiary form on file with PSERS is the October beneficiary form, which lists Claimant as Decedent's Principal Beneficiary, with 100% distribution adjacent to Claimant's name. (Official Notice, PSERS' Records)
36. PSERS notified the Decedent on December 27, 2002 that the October beneficiary form had been "received and processed." (N.T.19-20; Joint Exhibit 6)
37. The significance of the words "received and processed" as used in the December 27, 2002 letter to the Decedent means that the form had been accepted by PSERS. (N.T. 20)
38. Once a form has been processed by PSERS, a copy of the form is then returned to the member. (N.T. 27)
39. Cattermole does not know why there was a departure from PSERS' written policy with regard to the Decedent's October beneficiary form. (N.T. 18)

40. Claimant first met the Decedent over 30 years ago, when Claimant began preparing Decedent's income tax returns. (N.T. 37-38)

41. In 2001, Decedent came to Claimant's office and was walking with a cane; the Decedent was still employed with the Penn Hill School District as a teacher in 2001 but had been diagnosed with Parkinson's disease. (N.T. 40-41)

42. As the two conversed, the Decedent asked Claimant if Claimant could help her to find someone to take her to see her mother, who was in Hospice. (N.T. 40)

43. Claimant told the Decedent that she would take her to see her mother and, in fact, began taking the Decedent to see her mother every day for over a year. (N.T. 42)

44. Claimant would generally go to the Decedent's home in the evenings; anytime that the Decedent had paperwork that needed to be completed, the Decedent would place the paper work on her table for the Claimant to complete. (N.T. 56)

45. Claimant took care of the Decedent's laundry and saw to it that Decedent's house was cleaned; Claimant also arranged for improvements to be done at the Decedent's home so that it would be more accessible to someone with the Decedent's disabilities. (N.T. 45)

46. At all relevant and material times, Carolyn L. Howard (Howard) was a Licensed Practical Nurse. (N.T. 74-75)

47. In or around August of 2002, Howard was hired by Claimant to help the Decedent with her daily routines; Howard would generally arrive at the Decedent's home around 10:00 a.m. and stay with her until 4:30 p.m., making sure that the Decedent had her lunch and took her medicine. If the Decedent had a doctor's appointment, Howard would

accompany the Decedent, along with the Claimant to the Decedent's doctor's appointments. (N.T. 75)

48. The Decedent had an established routine with her mail; when Howard arrived in the mornings, she would bring in the Decedent's mail and leave it on the desk for her. By around 11:00 a.m., she would then help the Decedent to her desk, where the Decedent would sit, open her mail and go through her papers. (N.T. 76)

49. Whenever there was anything that the Decedent wanted the Claimant to see, she would put it on a pile for the Claimant to look at when she arrived. (N.T. 56, 77)

50. All of the handwriting on the Decedent's August beneficiary form, with the exception of the Decedent's signature, date and social security number, is the Claimant's handwriting. (N.T. 49-50; Joint Exhibit 3)

51. Everything on the Decedent's August beneficiary form that appears in Claimant's handwriting was written by Claimant at the request of the Decedent. (N.T. 54)

52. Claimant did not know the Intervenors when Claimant completed the August beneficiary form for the Decedent; the first time that Claimant met the Intervenors was when they went before the Orphans' Court Judge in Allegheny County in or around late 2006/early 2007. (N.T. 54)

53. The Decedent's returned beneficiary form (the August beneficiary form) was among paperwork on Decedent's table that was waiting for Claimant when she arrived at Decedent's home one evening. (N.T. 56)

54. Claimant sat at the table with Decedent that evening and the Decedent told Claimant that Section A has to be 100 % and Section B has to be 100%. (N.T. 56)

55. The Decedent had whiteout among her papers and told Claimant to put 100% on A and 50/50 on B. (N.T. 56)

56. Claimant applied the whiteout to the form and wrote the numbers that currently appear on the October beneficiary form. (N.T. 57; Joint Exhibit 5)

57. Claimant did not mail the October beneficiary form to PSERS; however, she saw the December 27, 2002 letter from PSERS around a month later when she was at the Decedent's home and learned from the Decedent that it had been approved. (N.T. 58-59)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1-57)
2. The statutory provisions of the Retirement Code create a contract between the Commonwealth and the public school employees. *Kline v. Morrison*, 44 A.2d 267 (1945).
3. The contract that a public school employee has with the Commonwealth must be liberally construed in favor of the member. *Bowers v. State Employees' Retirement System*, 371 A.2d 1040 (1977).
4. A "beneficiary" is the person or persons last designated in writing to the board by a member to receive his accumulated deductions or a lump sum benefit upon the death of such member. 24 Pa. C.S. §8102.
5. The instructions on the reverse side of PSERS Nomination of Beneficiary form do not constitute legislative regulations or interpretive rules and are not mandatory provisions. *Lowing v. Public School Employees' Retirement Board*, 776 A.2d 306 (Pa. Cmwlth. 2001)
6. PSERS' written policy regarding staff's review of Nomination of Beneficiary forms, which states that the Member's Signature must be completed in ink and that Whiteout/Alterations are not acceptable, do not constitute legislative regulations or interpretive rules and, likewise, are not mandatory provisions that can act to invalidate a Member's Nomination of Beneficiary form without any due notice to the Member. *Id.*
7. Claimant is the person last designated in writing to the board by the Decedent to receive Decedent's accumulated deductions or a lump sum benefit upon the death of Decedent. (Findings of Fact Nos. 1-57)

8. Because the Decedent filed no other Nomination of Beneficiary form with PSERS' subsequent to being notified by PSERS on December 12, 2002 that Decedent's October Nomination of Beneficiary form had been received and processed, PSERS is required to honor its contract with the Decedent and to pay the Decedent's death benefit to Claimant. (Findings of Fact Nos. 1-57)

DISCUSSION

The Board is charged in this matter with determining how the Decedent's death benefits should be distributed. Both PSERS and the Intervenors urge the Board to direct that the Decedent's death benefits be payable to the contingent beneficiaries designated by Decedent in her Application for Retirement; Claimant urges the Board to direct that the Decedent's death benefits be payable as designated by Decedent in the Decedent's most recently filed Nomination of Beneficiary form.

The facts of this case are principally undisputed. Only testimony by the Claimant regarding the Decedent's statements and directions to the Claimant with respect to the Claimant's completion of the Decedent's Nomination of Beneficiary Forms are contested.¹ Intervenors argue that such statements are hearsay; PSERS argues that the Dead Man's Statute, 42 Pa. C.S. §5930, bars testimony by Claimant regarding those facts.

Upon careful consideration of applicable rules of evidence and case law, the Hearing Officer finds and recommends to the Board that the Decedent's statements and directions to the Claimant with respect to the completion of the Decedent's Nomination of Beneficiary Forms may and should be considered by the Board in conjunction with the

¹ The testimony at issue is Claimant's testimony, as reflected in Findings of Fact Nos. 51-56, that:

- All of the handwriting on the Decedent's August beneficiary form, with the exception of the Decedent's signature, date and social security number, is Claimant's handwriting;
- Everything on the Decedent's August beneficiary form that appears in Claimant's handwriting was written by Claimant at the request of the Decedent;
- The Decedent's October beneficiary form was among paperwork on Decedent's table that was waiting for Claimant when she arrived at Decedent's home one evening;
- Claimant sat at the table with Decedent that evening and the Decedent told Claimant that Section A has to be 100% and Section B has to be 100%;
- The Decedent had whiteout among her paper and told Claimant to put 100% on A and 50/50 on B.
- Claimant applied the whiteout to the form and wrote the numbers that currently appear on the October beneficiary form.

evidentiary record as a whole, for purposes of understanding the circumstances, and ascertaining the Decedent's intention, surrounding the completion of Decedent's August and October beneficiary forms.²

² Claimant's testimony is not hearsay. As the Commonwealth Court explained in *Girard Giant Eagle vs. Unemployment Compensation Board of Review*, 659 A.2d 60 (Pa. Cmwlth. 1995),

Hearsay is an out of court statement, oral or written, or even non-verbal, which is offered for the purpose of proving the truth of the matter asserted in the statement. *Clearly, when we speak of proving the truth of the matter asserted we can only be speaking of a factual assertion, not an order or a command, not a question or a request.* Black's Law Dictionary defines statement as "a declaration of matters of fact." The words of the manager in the case before us [Claimant testified that he was told by a manager to use his judgment and to not take advantage of the situation] certainly are not a declaration of matters of fact, they are an order or command. They were offered to explain why Claimant did what he did at the time of the incident. We can only conclude that these words do not constitute hearsay. The Supreme Court put it this way, "it is well established that an out-of-court statement offered to explain a course of conduct is not hearsay." State of mind is a phrase often used for this situation, as an explanation that it is not hearsay because it is not offered for the truth of its content, but to show that this is what the witness understood, what was in his mind where he acted as he did. *He, being the witness, can be cross-examined at length to test the credibility of whether this was his state of mind.* *Id.* at 62 (emphasis added).

As in *Girard Giant Eagle*, here, the words of the Decedent were not declarations of matters of fact; they were a request or command made to Claimant. They were offered to explain why the Claimant changed the percentage allocations that appear on the Decedent's October beneficiary form as they currently appear. In addition, as in *Girard Giant Eagle*, Claimant was available for cross-examination by all parties to test her credibility.

Similarly, the Dead Man's Statute is inapplicable to this proceeding. The Dead Man's Statute provides, in pertinent part, as follows:

§5930. Surviving party as witness, in case of death, mental incapacity, etc.

. . . in any civil action or proceeding, where any party to a thing or contract in action is dead. . . and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased. . . party, shall be a competent witness to any matter occurring before the death of said party

42 Pa. C.S. §5930.

In order for Claimant to be disqualified from testifying under the Dead Man's Statute, three criteria must be satisfied: (1) the Decedent must have had an actual right or interest in the matter at issue; (2) the interest of Claimant must be adverse (this criterion is not satisfied); and, (3) the right of the Decedent must have passed to a party of record who represents the decedent's interests (this criterion is not satisfied). *Punxsutawney Municipal Airport Authority*, 745 A.2d 666 (Pa. Super. 2000).

Factual Background:

Decedent was a member of the Public Employees Retirement System for many years, retiring in June of 2002, with 35.56 years of service. On her Application for Retirement, Decedent nominated her mother, Helen Lapcevic, as her 100% principal beneficiary; Intervenors, Karen E. Snizaski and Christine M. Vilsack, were named as contingent beneficiaries, each to receive a 50% distribution of applicable benefits, in the event that the designated principal beneficiary pre-deceased the Decedent.

The Decedent's mother died on July 15, 2002. Subsequently, on August 2, 2002, PSERS received a Nomination of Beneficiaries form from the Decedent (the "August beneficiary form") which listed Claimant as Decedent's principal beneficiary, with 50% distribution adjacent to Claimant's name. Intervenors were listed as Decedent's contingent beneficiaries, with 25% distribution adjacent to their names.

The Decedent's August beneficiary form was rejected by PSERS and returned to the Decedent with instructions to the Decedent to provide percentages within each section, i.e., principal beneficiary and contingent beneficiary, that total 100 percent. The Decedent was advised that if the information can be included on her form without altering existing information, she was to "feel free to do so." (Joint Exhibit A, ¶8; Joint Exhibit 4)

In matters involving insurance proceeds, which is akin to the annuity at issue here, both our Superior and Supreme Courts have recognized that a beneficiary under an insurance policy claims only in his/her own right. Thus, within the context of the Dead Man's Statute, "persons claiming insurance proceeds against designated beneficiaries are not witnesses adverse to any rights of the deceased so as to render them incompetent to testify." *Grasso v. John Hancock Mutual Life Insurance Company*, 214 A.2d 261, 262 (Pa. Super. 1965)(citing, *Fulforth v. Prudential Insurance Company*, 24 A.2d 749 (Pa. Super. 1942); *Gritz v. Gritz*, 336 Pa. 161, 7 A. 2d 1 (1939). Here, there has been no evidence offered or representations made that Claimant has an interest adverse to the Decedent; moreover, since Claimant, PSERS and Intervenors are acting in their own right and not as a representative of the Decedent's estate, the Dead Man's Statute does not apply.

On October 29, 2002, PSERS received a *corrected* Nomination of Beneficiaries form ("October beneficiary form") from Decedent. This form was the same August beneficiary form that had previously been submitted to PSERS by the Decedent except that the percentages adjacent to the principal and contingent beneficiary names were changed, as instructed by PSERS, to total 100% within each section. The changes were made through the use of whiteout. As corrected, the percentage distribution adjacent to Claimant's name in the principal beneficiary section totaled 100 percent and the percentage distributions adjacent to the two contingent beneficiaries in the contingent beneficiary section were 50% and 50%, respectively, totaling 100%.

Upon receipt of the Decedent's October beneficiary form, PSERS notified the Decedent in writing by letter dated December 27, 2002, that her October beneficiary form had been "*received and processed.*"³ Marla Cattermole, the manager of PSERS' disability and death benefits center ("Cattermole") testified that the significance of the words, "received and processed" means that the Decedent's October beneficiary form had been accepted by PSERS.

In addition to being informed by PSERS that her October beneficiary form was received and processed, the Decedent was notified that if she wished to change her beneficiary nomination with PSERS in the future, she would be required to obtain a new form, complete it and forward it to PSERS for processing. The Decedent made no further changes to her beneficiary nomination, and died on February 11, 2006, leaving a balance of \$688,514.01 to be paid to her last named beneficiary.

³ See, Findings of Fact No. 14.

Arguments:

PSERS and the Intervenors argue that notwithstanding PSERS' representation to the Decedent that her nomination of beneficiary form had been accepted, the Decedent's death benefits should be payable to the contingent beneficiaries designated by Decedent in her Application for Retirement because the percentages appearing on the August beneficiary form were altered by "whiting out" the percentages and resubmitting the form (the October beneficiary form), without initialing the alterations.

PSERS and Intervenors base their respective positions on the instructions that were contained on the reverse side of the Nomination of Beneficiary form and PSERS' policies and practices that were in effect at the time it received the Decedent's August and October 2002 beneficiary forms.⁴

According to PSERS, the instructions on the Nomination of Beneficiary form states that the Member is not permitted to make changes or alterations to the form. The instructions provide, in pertinent part:

IMPORTANT: Read all instructions carefully. Forms not properly and completely filled in and/or forms containing erasures or other alterations will not be accepted by PSERS. If you make a mistake, request a new form. (Joint Exhibit 7)

PSERS then adds that in larger bold font at the bottom of the form, the following statement appears:

"This form will not be valid until filed in proper form at the Public School Employees' Retirement System."

⁴ PSERS' policies required staff to routinely check whether the percentages allocated to more than one beneficiary totaled 100 percent and whether the form contained any alterations or whiteouts. If either of these two discrepancies were apparent from the form, staff was instructed not to accept the form. According to PSERS, the purpose behind PSERS' policy is to *ensure the clear intent of the member* and to prevent fraud.

Based on these instructions, which echo PSERS' policies, PSERS argues that it should not have accepted the Decedent's October beneficiary form because "it was void based on an alteration that was not executed or initialed by the Member." (PSERS' post-hearing brief, p. 7)⁵

Conversely, citing *Lowing v. Public School Employes' Retirement Board*, 776 A.2d 306 (Pa. Cmwlth. 2001), Claimant argues that "[t]he instructions on the form are a framework, or a mere guide, for the Board to utilize in ensuring that the member's intent is carried out, rather than a mandatory regulation that must be strictly followed." *Id.* at 309.⁶ In *Lowing*, the Court acknowledged that the instructions do not qualify as an interpretation of the underlying statute that must be upheld. *Id.*

Claimant further argues that PSERS' decision to dispute the validity of the Decedent's October beneficiary form *only after the Decedent's death* has deprived the Decedent of the opportunity to obviate PSERS' objections, particularly when the

⁵ PSERS explains that when it received Claimant's August beneficiary form, that form was rejected because even though Claimant was listed as the primary beneficiary and Intervenors were listed as contingent beneficiaries, the distribution was 50%, 25% and 25%, respectively; thus, the intent of the Decedent was not ascertainable because each section did not total 100%. (PSERS' brief, p. 5) PSERS contends that the Decedent's October beneficiary form must now be rejected for similar reasons because it "is not sufficiently explicit to inform PSERS of the Member's intention because the Member did not re-execute or initial the alterations." (PSERS' post-hearing brief, pgs. 6-7) According to PSERS, it is feasible that the Decedent could have intended for distribution of 50%, 25%, and 25% all as primary beneficiaries. (PSERS' brief, p. 5) However, this is unlikely because Intervenors were clearly listed in the section pertaining to contingent beneficiaries, which is consistent with the Decedent's wishes even as expressed in her Application for Retirement.

⁶ When *Lowing* was decided, PSERS' instructions on the Nomination of Beneficiary form required that there be two witnesses to the member's signature and that a named beneficiary may not be a witness.

In *Lowing*, the decedent/member had previously designated his ex-wife as his beneficiary; however, subsequent to his divorce, the member filed a new nomination of beneficiary form naming another person as his beneficiary. Contrary to PSERS' instructions, the new form was witnessed by the school district secretary *and by the newly named beneficiary*. When the decedent/member died, the ex-wife filed a claim for benefits; however, despite the instructions on its forms, PSERS notified the second beneficiary that she was the sole beneficiary of the account. The ex-wife appealed, and the issue on appeal was whether the instructions on PSERS' Nomination of Beneficiary form must be strictly followed in order to effectuate a valid beneficiary designation.

Decedent was led by PSERS to believe that her nomination of beneficiary form had been accepted. According to Claimant, Cattermole acknowledged that once the Decedent was notified by PSERS that her beneficiary form had been received and processed, there was nothing else for the Decedent to do:

By Mr. Harvey: Once Ms. Lapcevic received the December 27, 2002 letter, which is Exhibit 6, and. . . a copy of the nomination of beneficiary form - - which is Exhibit 5, back from PSERS, there would have been nothing else for Ms. Lapcevic to do with this particular nomination form; isn't that true?

By Ms. Cattermole: According to the letter, no.

By the Hearing Examiner: So that is true?

By Ms. Cattermole: That is true.
(N.T. 29)

In determining the proper disposition of the Decedent's death benefits, it is the member's intent that must control. Under the Retirement Code, a "beneficiary" is the person or persons last designated in writing to the board by a member to receive his accumulated deductions or a lump sum benefit upon the death of such member. 24 Pa. C.S. §8102. Thus, the Board's statutory obligation is to pay the death benefits payable on a member's account to the person last designated in writing to the Board.⁷

⁷The pertinent provisions of the Retirement Code provide as follows:

§8507. Rights and duties of school employees and members.

(e) Beneficiary for death benefits. - - Every member shall nominate a beneficiary by written designation filed with the board to receive the death benefit or the benefit payable under the provisions of Option 1. Such nomination may be changed at any time by the member by written designation filed with the board. . .

§8505. Duties of board regarding applications and elections of members.

(h) Death benefits. - - Upon receipt of notification of the death of a member, the board shall notify the designated beneficiary . . . of the benefits to which he is entitled and shall make the first payment to the beneficiary under the plan elected by the beneficiary within 60 days of receipt of certification of death and other necessary data. . .

24 Pa. C.S. §§8507(e), 8102 and 8505(h).

PSERS cites to no authority, other than PSERS' internal policies and the instructions on the beneficiary form, for its position that the Decedent's October beneficiary form is void. PSERS concedes that neither the Retirement Code nor its implementing regulations "specifically require that a Nomination of Beneficiary form is void if it contains an alteration." (PSERS' post-hearing brief, p. 9)

Although PSERS' written policies direct staff to reject Nomination of Beneficiary forms that contain whiteout/alterations, the policies were not followed in this instance. In addition, the *Lowing* Court has recognized that such written policies/instructions are not binding legislative regulations. They do not track any provision of the Retirement Code; they are purely guidance to staff to protect against fraud or forgery. Moreover, there has been no evidence of fraud or forgery proffered by any interested party to this proceeding.⁸

When, as here, the Decedent's intent with respect to the disposition of her death benefits is at issue, it is important to consider factors other than the disputed form itself to reach a proper determination. Otherwise, form would prevail over substance. In such instances, the facts and circumstances surrounding the completion of the Decedent's October beneficiary form as well as the relationship that existed between the Decedent and the Claimant during the relevant time period are helpful considerations.

The evidence reveals that Claimant first met the Decedent approximately 30 years ago when Claimant began preparing the Decedent's income tax returns. When the Decedent came to Claimant's office in 2001, the Decedent was still working as a school teacher, but, had been diagnosed with Parkinson's disease. During this visit, the Decedent

⁸ No testimony was offered at all by the Intervenors; PSERS' sole witness simply provided testimony regarding PSERS policies.

asked Claimant if Claimant could help her to find someone to take her to see her mother, who was in Hospice. Claimant told the Decedent that she would take the Decedent to see her mother and, began doing so nearly every day for over a year.

The evidence reveals that the Claimant not only took the Decedent to see her mother every day but began caring for the Decedent in the sense that she would go to the Decedent's home every evening to assist Decedent with miscellaneous household tasks such as laundry and cleaning. Claimant arranged for improvements to be done to the Decedent's home so that it would be more accessible to someone with the Decedent's disabilities. Claimant also hired a nurse to help the Decedent with her daily routines while the Claimant could not be there. Anytime that the Decedent had paperwork that needed to be done the Decedent would place the paperwork on her table for the Claimant to complete.

It is undisputed that all of the handwriting on the Decedent's August beneficiary form, with the exception of the Decedent's signature, date and social security number, is the Claimant's handwriting. Claimant testified that she completed this information for the Decedent, at the request of the Decedent. The Decedent then signed and dated the form and filled in her social security number.

Claimant's testimony regarding her completion of the August beneficiary form is credible because the information appearing on the form about the intervenors, including their names, addresses, dates of birth and social security numbers, is information that Claimant would not have known independently. Claimant testified that *she did not know the Intervenor*s when she completed this form for the Decedent; the Intervenor

no testimony to refute Claimant's testimony.⁹ Thus, the Claimant would have had to obtain this information from the Decedent.

The record further establishes that by the time that the Decedent's mother died on July 15, 2002, the Claimant had been caring for the Decedent and taking the Decedent to see her mother at Hospice for over a year. Under these circumstances, it is not unreasonable that the Decedent would nominate Claimant as her principal beneficiary since her mother was now deceased. Similarly, it is not unreasonable or illogical that the Decedent, who was suffering from Parkinson's disease, would request the Claimant to complete the Nomination of Beneficiary form for her, particularly if writing was difficult for her.¹⁰

Claimant testified that the Decedent's *returned* August beneficiary form was among the paperwork on Decedent's table that was waiting for Claimant one evening when she arrived at the Decedent's home.

PSERS' October 19, 2002 letter to the Decedent that accompanied the Decedent's *returned* August beneficiary form states, in pertinent part:

Please provide the following information on your form:

- Percentages - - totaling 100 percent within each section.
See instructions on the reverse side of form under Section A and/or Section B.

Without this information the form may not be processed.

If the information requested above can be included on your form without altering existing information, feel free to do so. If not, a blank form is enclosed to assist you in submitting an acceptable form. Please submit only one form.

⁹ In fact, the Intervenor's offered no testimony at all during the hearing.

¹⁰ The Decedent's signature, date and social security number as it appears on the August and October beneficiary forms is shaky. Furthermore, when questioned on cross-examination why the Decedent could not have written in her own numbers where the whiteout now appears, Claimant responded, "[s]he might have been shaking." (N.T. 64)

According to Claimant, she sat at the table with the Decedent that evening and the Decedent told her that Section A had to be 100% and Section B has to be 100%. The Decedent had whiteout among her papers and told Claimant to put 100% on A and 50/50 on B. Claimant testified that she applied the whiteout to the form and wrote the numbers that currently appear on the October beneficiary form at Claimant's direction. None of the information, i.e., names, addresses, social security numbers or dates of birth of any of the designated beneficiaries, was altered. The only change to the form is that the percentages adjacent to the principal and contingent beneficiary names were corrected using whiteout, to total 100% within each section. Thus, arguably, the Decedent was able to include the requested information on the form without altering existing information.

Carolyn Howard, the Licensed Practical Nurse who was hired by Claimant to help the Decedent with her daily routines, corroborated Claimant's testimony with respect to the Decedent's routine with her mail. Howard testified that she would generally arrive at the Decedent's home around 10:00 a.m. and stay with her until 4:30 p.m. When Howard arrived in the mornings, she would generally bring in the Decedent's mail and leave it on the desk for her. By around 11:00 a.m., Howard would then help the Decedent to her desk, where the Decedent would sit, open her mail and go through her papers. Howard testified that whenever there was anything that the Decedent wanted the Claimant to see, she would put it on a pile for the Claimant to look at when she arrived in the evenings.

(N.T. 75-77)

Although the Decedent's initials do not appear adjacent to the corrections that were made to the October beneficiary form, the instructions on the reverse side of the nomination form do not instruct a member to initial changes to the form. On the contrary,

the instructions state that forms containing erasures or other alterations will not be accepted by PSERS. However, as the evidence reveals, the Decedent's corrected form *was* accepted by PSERS. The evidence reveals that the Decedent was notified:

Dear Ms. Lapcevic:

The Public School Employees Retirement System (PSERS) has received and processed your Nomination of Beneficiary Form (PSRS-187).

If you wish to change your beneficiary nomination with PSERS in the future, you must obtain a new Nomination of Beneficiary Form, complete it and forward it to PSERS for processing. . . .

Although Intervenors assert that “[t]here is no way of knowing whether the decedent did in fact direct the Claimant, as she alone asserts, to make the alterations to the October beneficiary form,” (Intervenors’ brief, p. 9), the record does circumstantially preponderate in that direction.

The relationship that existed between the Claimant and the Decedent, both before and after the Decedent submitted the August and October beneficiary forms to PSERS, is significant. Claimant was clearly a person who looked after the Decedent during this relevant time period and who the Decedent trusted to handle paperwork for her. This fact is corroborated by the testimony of Carolyn Howard who testified that whenever there was anything that the Decedent wanted the Claimant to see, she would put it on a pile for the Claimant to look at when she arrived in the evenings. It is further corroborated circumstantially by the fact that the Claimant prepared the Decedent’s income taxes for her for many years. Unfortunately, there is no indication from the record what the relationship was between the Decedent and the Intervenors.

In addition, the Decedent made no further changes to her beneficiary nomination after being notified by PSERS that her form had been accepted. This is telling because it suggests that the Decedent was satisfied with the nominations that she made and with the fact that her October beneficiary form had been accepted as submitted.

The statutory provisions of the Retirement Code create a contract between the Commonwealth and the public school employees, *Kline v. Morrison*, 44 A.2d 267 (1945); this contract must be liberally construed in favor of the member. *Bowers v. State Employees' Retirement System*, 371 A.2d 1040 (1977). Here, the last communication between PSERS and the Decedent was PSERS' written confirmation to the Decedent that her Nomination of Beneficiary form had been received and processed. The Nomination of Beneficiary form to which PSERS was referring was the Decedent's October beneficiary form.

One legal principle that remains inflexible is the Board's statutory obligation to pay the death benefits payable on a member's account to the person last designated in writing to the Board. That person, as confirmed in writing to Decedent by PSERS, is Claimant.

Because the Decedent filed no other Nomination of Beneficiary form with PSERS' subsequent to being notified by PSERS that her October beneficiary form had been received and processed, PSERS is required to honor its contract with the Decedent and to pay the Decedent's death benefit to Claimant.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re:

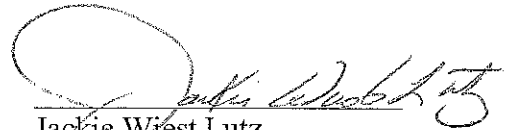
Account of Sandra N. Lapcevic (D)
Claim of Willette Gallman

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Docket No. 2006-21

RECOMMENDATION

AND NOW, this 10th day of March 2008, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Decedent's death benefits should be payable to Claimant as designated by Decedent in the Decedent's most recently filed, processed and acknowledged Nomination of Beneficiary form received by PSERS on October 29, 2002.



Jackie Wiest Lutz
Hearing Officer

Date of Mailing: March 10, 2008