



PSERB Resolution 2024-76

Re: Zozos P., Docket No. 2021-22

December 20, 2024

RESOLVED, that in the matter of Pauline Katina Zozos, Docket No. 2021-22, the Public School Employees' Retirement Board hereby accepts the recommendation of the Benefits and Appeals Committee and adopts the proposed Opinion and Order of the Board and dismisses Claimant's appeal with prejudice.

Mail Date: _____

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

IN RE: ACCOUNT OF PAULINE KATINA ZOZOS
DOCKET NO. 2021-22
CLAIM OF PAULINE KATINA ZOZOS

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation, and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to change her effective date of retirement is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: _____

By: _____
Richard Vague, Chairman

RECEIVED

MAY 30 2024

PSERB
EXECUTIVE OFFICE

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

**IN RE: Account of Pauline Katina Zozos,
Claim of Pauline Katina Zozos**

Docket No. 2021-22

PROPOSED OPINION AND RECOMMENDATION

**Peter D. Kovach
Hearing Officer**

**Date of Hearing: January 24, 2024
Hearing Officer: Peter Kovach
For Claimant: *Pro se*
For PSERS: Christine Trout, Esquire**

BACKGROUND AND PROCEDURAL HISTORY

This matter comes before the Public School Employees' Retirement Board ("Board") based upon the December 6, 2021 appeal and request for hearing filed by Pauline Katina Zozos ("Claimant" or "Zozos"). Claimant appealed the November 4, 2021 letter from Deputy Executive Director Jennifer A. Mills advising Claimant of a September 27, 2021 decision made by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") which denied Claimant's request to change the effective date of her retirement. Claimant appealed the November 4, 2021 notification letter on December 6, 2021, and on December 15, 2021, PSERS filed its Answer to the appeal.

By letter dated November 16, 2023, Board Secretary Terrill J. Sanchez appointed the undersigned Hearing Examiner to act as the Hearing Officer for Claimant's administrative appeal. By letter of the same date, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing regarding her appeal had been scheduled for Wednesday, January 24, 2024, at the offices of PSERS in Harrisburg.

The hearing was held as scheduled. Claimant attended the hearing and elected to proceed *pro se*. Claimant testified on her own behalf. Claimant offered two (2) exhibits into evidence; one (1) was admitted, one (1) was excluded upon the hearsay objection of PSERS. Christine Trout, Esquire, appeared on behalf of PSERS. PSERS presented its case through the testimony of Morgan Nimmons, a retirement representative for PSERS. PSERS entered into evidence eight (8) exhibits.

At the end of the hearing, PSERS indicated it wished to file a brief. Under the circumstances, the parties were advised that a scheduling order would be issued after the docketing of the transcript which would set forth a specific due date for PSERS brief, as well as the date by which Claimant could file a reply brief, if she desired.

The hearing transcript was docketed on February 15, 2024 and transmitted to the hearing officer by way of cover letter dated February 16, 2024. On February 23, 2024, the hearing officer issued an *Order Setting Briefing Schedule* (the "Briefing Order") which set forth the briefing requirements, established the filing deadline for PSERS primary brief, and also established April 15, 2024 as the filing deadline for Claimant to file a brief in reply to the anticipated brief of PSERS. PSERS timely filed its post-hearing brief on March 15, 2024. Claimant did not file a reply brief by April 15 as authorized by the Briefing Order. As the deadline for Claimant to file a reply brief expired over one (1) month ago, the record in this matter is now closed and ripe for disposition.

FINDINGS OF FACT

1. At all relevant times, Claimant was a member of PSERS. (Notes of Testimony ("N.T."), *passim*).
2. Claimant suffers from multiple sclerosis. (N.T. 12).
3. On July 6, 2020, Claimant requested a retirement estimate. (N.T. 39; PSERS-1).
4. The Request for Retirement Estimate form completed by Claimant informed Claimant that "[a]n Application for Retirement must be received by PSERS within 90 days of your termination date in order to receive retroactive retirement benefits." (N.T. 40; PSERS-1).
5. On July 13, 2020, PSERS provided Claimant with a Normal Retirement Estimate. (N.T. 19; PSERS-2).
6. The cover letter enclosing Claimant's retirement estimate states:

For a regular retirement, an Application for Retirement must be filed with PSERS within 90 days of your date of termination for retroactive benefits; otherwise, your benefit will be effective the date your Application for Retirement is received by PSERS.

(N.T. 41; PSERS-2).
7. Claimant's last day of work as a school employee was September 1, 2020. (N.T. 18, 38; PSERS-6).
8. Claimant called PSERS to schedule a Retirement Exit Counseling Session, and the session was held on October 27, 2020. (N.T. 22, 37, 42, 43).
9. During the October 27, 2020 exit counseling session held by Skype, Claimant had a copy of the Retirement Exit Counseling Checklist, and she was able to take notes on the checklist. (N.T. 22-24; PSERS-3, PSERS-4).
10. Section B of the Exit Counseling Checklist states, in pertinent part:

In order to have your retirement start the day after your termination date, you must submit your application within 90 days of your termination date. If your

application is received more than 90 days after your termination or normal retirement date, your retirement date will be the date PSERS receives your application.

(PSERS-3 - PSERS-5).

11. During the October 27, 2020 exit counseling session, PSERS' retirement representative Morgan Nimmons reviewed all of the topics on the Retirement Exit Counseling Checklist, including the 90-day deadline. (N.T. 36, 41-43; PSERS-2 through PSERS-5).

12. At the exit counseling session, Ms. Nimmons informed Claimant that she could submit her Application for Retirement to PSERS by mail or fax. (N.T. 44).

13. Despite the coronavirus pandemic, beginning in mid-July 2020 PSERS' physical offices were open to the public, and PSERS' staff were working, answering phone calls, and processing mail and faxes. (N.T. 44-45, 48, 50).

14. Even when the PSERS physical offices were closed earlier that year – from approximately mid-March to mid-July 2020 – PSERS' staff were working, answering phone calls, and processing mail and faxes. (N.T. 44-45).

15. The Application for Retirement states,

To have your retirement start the day after your termination date, the Public School Employees' Retirement System (PSERS) must receive this application within 90 days of your termination date (provided by your employer).

* * * * *

After 90 days beyond your termination date, your retirement date will be the date the application is received by PSERS

(PSERS-3, PSERS-4).

16. PSERS received Claimant's first Application for Retirement via facsimile on December 1, 2020; the document was faxed from a Staples store. (N.T. 20-21; PSERS-3).

17. Claimant called PSERS on December 2, 2020, to confirm PSERS received her application.

18. During the December 2, 2020 telephone call, Complainant was informed that the application contained errors that needed to be fixed in order for PSERS to process it. (N.T. 24, 45-46).

19. PSERS received Claimant's revised Application for Retirement via facsimile on December 2, 2020; the document was also faxed from a Staples store. (N.T. 11-12, 25, 46; PSERS-4).

20. By letter dated December 24, 2020, PSERS notified Claimant of her finalized retirement benefit with an effective date of December 2, 2020. (N.T. 27-28, 38-39, 46; PSERS-6).

21. Claimant appealed her effective date of retirement to the ESRC. (PSERS-7; N.T. 46-47).

22. By letter dated November 4, 2021, Claimant was advised that the ESRC had denied Claimant's request to change her effective date of retirement. (N.T. 28-29; N.T. 46-47; PSERS-7).

23. On December 6, 2021, Claimant filed an Appeal from the decision of the ESRC and requested an administrative hearing. (Docket at 2021-22).

24. Claimant was afforded notice that an administrative hearing regarding Claimant's appeal would be held on January 24, 2024 before Hearing Examiner Peter Kovach. (Docket at 2021-22).

25. Claimant appeared for the January 24, 2024 hearing and elected to proceed *pro se*; Claimant was afforded the opportunity to testify, examine witnesses, to offer her own exhibits, to object to the testimony and exhibits offered by PSERS, and to file a post-hearing brief. (Docket at 2021-22; N.T. *passim*).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. (Findings of Fact (“F.F.”) 1, 7, 19).
2. Claimant was afforded notice of the determination regarding the effective date of her retirement benefit, was provided an opportunity to appeal the staff determination to the ESRC, did appeal that decision to the ESRC, and was given notice and the opportunity to be heard in connection with her appeal from the ESRC’s determination confirming the effective date of her retirement benefit as December 2, 2020. (F.F. 20-25).
3. Claimant has the burden of proof in this proceeding. (*Wingert v. State Employees’ Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991)).
4. The burden of proof to be applied in an administrative action is the preponderance of the evidence standard. (*Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 602 A.2d 863 (Pa. 1998); *Suber v. Pennsylvania Commission on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005)).
5. Claimant has only those rights recognized by statute and none beyond. (*Bittenbender v. State Employees’ Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992)).
6. In that Claimant did not transmit a proper application for an annuity/retirement benefit to PSERS until December 2, 2020, Respondent’s effective date of retirement is December 2, 2020. (F.F. 7, 16-19; 24 Pa.C.S. § 8102).
7. The ESRC properly denied Claimant's request to change her effective date of retirement. (F.F. 22; Conclusions of Law 3 - 6).

DISCUSSION

Claimant comes before the Board requesting that her effective retirement date be revised from December 2, 2020 (the date a proper application was received by PSERS) to September 2, 2020 (the day after her last date as a school employee). The phrase “effective date of retirement” is defined in the Public School Employees' Retirement Code (the “Code”) as:

§ 8102. Definitions.

* * * * *

“Effective date of retirement.” *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 or:*

(1) In the case of a member who applies for an annuity subsequent to 90 days after termination of service, the date of filing such application or the date specified on the application, whichever is later.

(2) In the case of a vestee who files an application for an annuity within 90 days of his superannuation age, the attainment of such age.

(3) In the case of a vestee who defers the filing of an application for an annuity to a date later than 90 days following attainment of superannuation age, the date of filing or the date specified on the application, whichever is later.

(4) In the case of a finding of disability, the date certified by the board as the effective date of disability.

* * * * *

24 Pa.C.S. § 8102 at “Effective date of retirement.”

In Claimant’s appeal and during the hearing, no claims or evidence were presented that the effective date of retirement for Claimant might be controlled by paragraphs (2) or (3) of the definition of “effective date of retirement” (relating to vestees filing upon reaching superannuation). Further, while Claimant did reference in her testimony and documentation that she suffers from multiple sclerosis (F.F. 2. See also December 6, 2021 *Appeal and Request for Administrative Hearing*), no evidence was submitted during the hearing that there had been a

finding of “disability” as that term is utilized within the Code,¹ or that the Board had certified an effective date of disability for Claimant. (N.T. *passim*). Consequently, paragraph (4) also does not appear to control this matter.

Instead, Claimant’s multiple sclerosis diagnosis was presented as one of the potential factors the Claimant believes could support a Board finding that Claimant be excused from failing to submit a properly completed application on or before November 30, 2020 (90 days from the date she terminated her employment). It is uncontroverted that Claimant first attempted to submit her application on the 91st day after her employment terminated – December 1, 2020. (F.F. 16. *See also* Claimant Exhibit 2 at pg. 3). However, the application she submitted on that date had errors and required correction. Claimant learned of those errors by telephone when she spoke to a PSERS representative on December 2, 2020. (F.F. 17-18). Corrections were made to the application, and it was retransmitted to PSERS the same day – December 2, 2020 – the 92nd day after her employment terminated. (F.F. 19). That is the date PSERS asserts it received a proper application and the date from which Claimant appeals. (F.F. 20; *See also* PSERS-7 at Attachment A).

It is well established that Claimant bears the burden of establishing the facts necessary to sustain her claim. *See, Wingert v. State Employees’ Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991); *Gierschick v. State Employees’ Ret. Bd.* 733 A.2d 29, 32 (Pa. Cmwlth. 1999). Further, it is well established that the PSERS is a creature of the legislature, and its members only have those rights created by the Retirement Code and none beyond. *See, e.g., Bittenbender v. State Employees’ Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992); *Burris v. State Employees’ Ret. Bd.*, 745 A.2d 704,

¹ A disability annuity may be granted “if the [member] becomes mentally or physically incapable of continuing to perform the duties for which [the member was] employed.” (Emphasis added). *See* 24 Pa.C.S. § 8307(c). *See also*, 24 Pa.C.S. § 8505(c) (providing procedures for the medical examiner to evaluate the members application and medical records for disability and to make a finding of disability or nondisability).

706 (Pa. Cmwlth. 2000); *Hughes v. Public Sch. Employees' Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlth. 1995), *allocator denied*, 668 A.2d 1139 (Pa. 1996). While a member is entitled to a liberal construction of the Retirement Code, PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Bittenbender*, 622 A.2d at 405. Equitable relief is not an available remedy under the Retirement Code. *Finnegan v. Public School Employes' Ret. Bd.*, 560 A.2d 848, 851 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991).

Respondent is not the first member of PSERS to suffer from a medical condition and to have submitted retirement paperwork outside a deadline created by statute. In *Forman v. Pub. Sch. Employes' Ret. Bd.*, 778 A.2d 778 (Pa. Cmwlth. 2001), the Commonwealth Court reviewed a decision of the Board after the Board refused to deem an application submitted by Forman as having been timely filed. A legislative enactment created a limited-time window where Forman and other members with 30 qualifying eligibility points, but who had not met the normal minimum age requirement to retire without penalty, were nevertheless eligible for retirement without a reduction in their annuity (the "30-and-out retirement"). However, the legislation specified that the date to submit an application to qualify for 30-and-out retirement was July 1, 2019.

Forman suffered from breast cancer and the availability of health care insurance coverage after retirement was a significant factor in her decision whether to retire or continue teaching. Unfortunately, her local school employer and union were negotiating a new contract at and around the time when the '30-and-out retirement' application deadline was expiring. Forman ultimately filed her application for 30-and-out retirement several weeks after the deadline, but was denied because the application was filed late. Forman appealed the denial to the Board, claiming in part, that her medical condition had created a circumstance which clouded her ability to make a decision. Therefore, she argued, her late filing should be excused because she should have been considered

mentally incapacitated. The Board sustained the initial determination that she did not qualify for 30-and-out retirement and noted that the Board lacked authority to accept a retirement application and deem it to be timely filed. *Id.* at 779. On appeal to the Commonwealth Court, the Court agreed with the Board and observed that:

[the Act] contains no exceptions to its requirements. PSERB has no authority to grant rights beyond those specifically set forth in the retirement code.... Forman did not timely file her retirement application, and there is no mechanism available permitting her to amend the filing date and bring the filing of the application within the [Act's] retirement window. Nunc pro tunc relief is unavailable since she has not established the untimely filing was the result of fraud, a breakdown in the courts, or negligence on the part of a third party.

Forman, 778 A.2d at 780 (internal citations omitted).

Claimant similarly seeks what amounts to *nunc pro tunc*² relief in this matter. “It is well-settled that the burden of demonstrating the necessity of *nunc pro tunc* relief is on the party seeking to file the appeal, and the burden is a heavy one.” *Harris v. Unemployment Comp. Bd. of Review*, 247 A.3d 1223, 1229–30 (Pa.Cmwlt. 2021) citing *Blast Intermediate Unit No. 17 v. Unemployment Comp. Bd. of Rev.*, 165 Pa.Cmwlt. 513, 645 A.2d 447, 449 (1994). In this case, Claimant has made no allegations of fraud, or that there was negligence by a third party, as referenced as possible reasons for granting relief in *Forman*.

Instead, Claimant alleged in her documentation and during the hearing that the PSERS offices were closed, that she did not have access to many of the typical resources, and that trainings were occurring online. (N.T. 8, 12). These claims, therefore, would appear to fall under the *nunc pro tunc* category of an alleged breakdown in the agency’s operations.

Contrary to Claimant’s claims however, PSERS Retirement Representative Nimmons credibly testified that the PSERS offices had, in fact, reopened to the public by mid-July 2020.

² “Lat. Now for then. A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done. ...” Blacks Law Dictionary, 6th Ed (1990).

(F.F. 13). Ms. Nimmons further testified that even when the PSERS offices had been closed, the PSERS staff continued to work, answer phone calls, and receive and process mail and faxes. (F.F. 14).

Ms. Nimmons' testimony that PSERS was working, receiving mail and faxes, and responding to its members appears supported by Claimant's own experience with PSERS. Approximately two (2) months prior to her last date of employment – in early July 2020 – Claimant requested a retirement estimate from PSERS. (F.F. 3). Within one (1) week of having logged that request, PSERS generated and transmitted to Claimant both a Retirement Estimate form, as well as a cover letter for that estimate. It is noted that both the cover letter for the estimate and the estimate itself advised Claimant that an application for retirement must be received within 90 days of the date employment terminated in order to qualify for retroactive benefits. (F.F. 4, 6).

Claimant terminated her employment as a teacher on September 1, 2020. (F.F. 7). Claimant then scheduled and participated in an on-line exit counseling session with PSERS on October 27, 2020. (F.F. 8-9). This was approximately one (1) month before the end of Claimant's ninety (90) day filing deadline to receive benefits retroactive to the day after her employment terminated. Claimant was able to obtain a PSERS Retirement Exit Counseling Checklist (the "Checklist") before or during the counselling session, since she was able to take notes on the Checklist about items discussed during the exit counseling session. (F.F. 9).

PSERS witness, Ms. Nimmons, provided that counselling session to Claimant and others via Skype.[®] (F.F. 9). Ms. Nimmons testified that she went over each bullet point on the Checklist with the participants, including a bullet point regarding the 90-day deadline. (F.F. 10-11). PSERS' staff was also available to answer questions after the retirement exit counseling session (N.T. 44). Claimant later submitted a signed copy of that Checklist with the submission of both her December

1, 2020, and her corrected December 2, 2020 applications. (F.F. 9). Among other things, the Checklist advised Claimant that “

.... In order to have your retirement start the day after your termination date, you must submit your application within 90 days of your termination date. If your application is received more than 90 days after your termination or normal retirement date, your retirement date will be the date PSERS receives your application.

(F.F. 10).

Claimant faxed, or caused to be faxed, a copy of her retirement benefit application to PSERS on December 1, 2020; the application was faxed from a Staples store. (F.F. 16). Claimant called PSERS on December 2, 2020 to confirm that her December 1, 2020 faxed application had been received. (F.F. 17). Claimant was able to speak with a PSERS representative on December 2, 2020, who reviewed the application and advised Claimant of noted errors. (F.F. 18). Claimant then faxed, or caused to be faxed, a revised application, again from a Staples store, to PSERS the same day – December 2, 2020. (F.F. 19).

Consequently, there does not appear to have been any evidence of a breakdown in PSERS operations which substantially impeded Claimant’s ability to file the application within 90 days. Procedures and working conditions for PSERS employees may have changed; however, PSERS was clearly receiving and processing its mail and faxes, answering the phone, and conducting retirement exit counselling sessions in the second half of 2020.

In her written statement, Claimant asserted that, due to COVID-19, she did not have her typical access to a copier, fax machine and other paper records that would make the preparation and submission less burdensome (Claimant-2, pg. 2). This would not be a breakdown in the operation of the agency, as generally contemplated for *nunc pro tunc* relief. Instead, it would be a breakdown in Claimant’s personal administrative resources. Nevertheless, *nunc pro tunc* relief has been granted in limited circumstances when a delay due to “unexpected [] causes” afflicts the

ability of a party to file on time. See e.g., *Bass v. Commonwealth*, 485 Pa. 256, 260; 401 A.2d 1133, 1135 (1979) (*nunc pro tunc* relief was appropriate when litigant's attorney prepared necessary appeal papers and placed them on the desk of his secretary six days prior to the filing deadline; however, the secretary who was also the secretary who would routinely check the desks of other secretaries who were ill, became ill, left work, and did not return to work until after the filing deadline had passed); *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996) (litigant had appointment with attorney to prepare appeal, but collapsed several days prior to the appointment and remained hospitalized until after the appeal period had run); *Perry v. Unemployment Compensation Board of Review*, 74 Pa.Cmwlth. 388, 459 A.2d 1342 (1983) (delay due to mechanical failure of law clerk's car *en route* to Post Office to mail appeal). In matters where a *nunc pro tunc* filing was authorized in the face of a delay which could only be assigned to the party making the filing, the reason for the delay has to be attributable to what has been called a “non-negligent happenstance” *In re In the Interest of C.K.*, 369 Pa.Super. 445, 535 A.2d 634, 637 (1987).

The COVID-19 pandemic was undeniably an extraordinary circumstance and changed how virtually everyone in the world lived their lives and interacted with each other. However, despite its initial extraordinary nature, COVID-19, without more, has been previously held to not warrant the application of *nunc pro tunc* relief. In *Hatzis v. Unemployment Comp. Bd. of Review*,³ 2021 WL 1847192, 256 A.3d 502 (Pa.Cmwlth. 2021), the Commonwealth Court examined whether *nunc pro tunc* relief should be granted to an individual, Hatzis, who had a matter pending before the Unemployment Compensation Board of Review (“UCBR”). The UCBR referee issued a

³ As an unreported panel decision of the Commonwealth Court, the case is cited for its persuasive value, but not as binding precedent. See section 414 of the Commonwealth Court's internal operating procedures.

decision on March 10, 2020. Under the applicable UCBR rules, the deadline to file an appeal of that decision was 15 days later.

At the time the referee's decision was issued and placed in the mail, Hatzis claimed he was in California with family. However, due to COVID-19 lockdowns, he claimed he was physically unable to return to his home to receive his mail. Hatzis ultimately filed an appeal of the UCBR referee's decision, but did it on March 27, 2020, two (2) days after the deadline – like Claimant.

In his written appeal, Hatzis asserted that he received the referee's decision on March 19, 2020. However, at hearing Hatzis averred that he had misworded his appeal and instead claimed he only became aware that the UCBR decision had been scheduled to be delivered to his house on March 19, 2020 through a United States Postal Service ("USPS") electronic delivery notification. Hatzis claimed he did not actually know the content of the decision until his mother e-mailed photographs of the decision to him on March 27, 2020.

The UCBR noted that Hatzis had failed to corroborate his account regarding when he actually received the decision, and the UCBR made a credibility determination that he had notice of the decision on March 19, 2020. Ultimately the Hatzis decision turned on that credibility determination and his late appeal was denied. However, instructive to this matter is the observation that regardless of whether Hatzis learned of the decision on March 19, 2020 and filed two (2) days late, or Hatzis learned of the decision on March 27, 2020 and filed two (2) days late, Hatzis was clearly attempting to file his appeal during the very early days of COVID-19 when virtually every part of work and life was being conducted on an *ad hoc* basis. Had COVID-19 been sufficient, by itself, to constitute the necessary 'happenstance,' and thus worthy of automatically permitting a *nunc pro tunc* appeal, the Hatzis case would not have needed to turn on a credibility determination. COVID-19 would have been enough. Consequently, the Hatzis case implies that more than just

the occurrence of COVID-19 must be needed to obtain *nunc pro tunc* relief from a statutory deadline.

By way of contrast to Hatzis's late appeal filed during the first few uncertain weeks of COVID lockdowns, when Claimant retired in September 2020, COVID-19 had been affecting the nation and the world for approximately five and one-half (5 1/2) months. In the interim, the March 19, 2020 stay-at-home order had been lifted. Most businesses had reopened and most activities and services available prior to the start of COVID were again being provided, either remotely when feasible, or conducted in person with masking and social distancing. COVID-19, which had been extraordinary and arguably an unforeseeable happenstance in nature at its start, had essentially transformed into a 'new normal.' The successful *ad hoc* procedures became the routine.

Claimant failed to present evidence to show why she was unable to reasonably anticipate and plan for those 'new normal' impediments caused by COVID which might impact her ability to complete and return her retirement benefit application by the deadline. (N.T., *passim*). On the contrary, it is unclear what steps, if any, Claimant actually took in identifying and attempting to mitigate any impediments to her timely filing of the application. (N.T., *passim*).

Finally, it is observed that no testimony or documents were presented which would show that circumstances had changed between her application deadline date (November 30, 2020) and the dates she did eventually transmit her application to PSERS (December 1 and 2, 2020). Claimant's medical condition may have rightly caused Claimant heightened fears of contracting COVID. Yet Claimant was able to (or was able to have someone else) travel to a retail establishment and transmit her initial application by facsimile to PSERS. After learning of errors on the application, Claimant (or claimant's agent) again travelled back to the Staples store to fax

a revised application to PSERS. This is despite no evidence in the record that COVID infection rates had drastically changed or that Claimant's medical condition had changed.

One is left to guess why those activities and mitigation strategies, successfully implemented on Tuesday, December 1, and Wednesday, December 2, 2020, were not able to be implemented on November 30, 2020. Without information showing an additional happenstance had occurred on or shortly before November 30, 2020, and why Claimant could not reasonably overcome that/those additional impediments by November 30, 2020, Claimant would be unable to meet her "heavy burden" of showing entitlement to *nunc pro tunc* relief, as alluded to in Forman.

Assuming, for the sake of argument, that Claimant had been able to show that some unexpected cause – a happenstance – had occurred on or shortly before November 30, 2020, and that/those additional factor(s) prevented Claimant from timely filing her application. Even under those circumstances it is doubtful that Claimant would have been entitled to the relief she sought. Turning back to the decision in Forman, after finding that Forman (like Claimant) had not successfully demonstrated facts sufficient for *nunc pro tunc* relief, the Court then went on to reiterate its ruling in Cosgrove v. State Employees' Retirement Board, 665 A.2d 870 (Pa.Cmwlt.1995) that the retirement system is "a creature of the legislature." Forman 778 A.2d at 780. The Retirement Code does not explicitly grant the Board the authority to allow an untimely application to be "deemed" timely filed. Therefore, the Forman court observed that the Board would likely have been precluded from 'deeming' the application to have been timely filed, even if Forman had been able to demonstrate the necessary facts for consideration of *nunc pro tunc* relief. Id.

The Hearing Officer (and undoubtedly the Board) has sympathy for Claimant and her plea for leniency. The alleged difference in retirement benefits due to Complaint filing her application

one (1) or two (2) days after the deadline does not appear to be insignificant. Claimant estimated in her written statement submitted during the hearing that the difference was “over \$10,000.” (Claimant-2, pg. 2). However, for the foregoing reasons, Claimant has not met her burden of proving that the ESRC’s determination regarding her effective retirement date was improper. Therefore, the following recommendation will be made to the Board:

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

IN RE: Account of Pauline Katina Zozos,

Docket No. 2021-22

Claim of Pauline Katina Zozos

RECOMMENDATION

AND NOW, this **30th** day of **May 2024**, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Hearing Officer for the Public School Employees' Retirement Board ("Board") recommends that the Board **DENY CLAIMANT'S APPEAL** of the determination made by the Public School Employees' Retirement System Executive Staff Review Committee. Claimant's effective retirement date should remain as December 2, 2020.

NOTICE

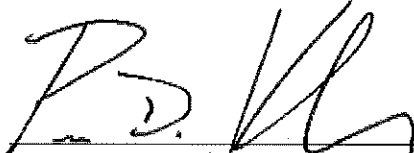
A party may file exceptions to this proposed opinion and recommendation in accordance with 1 Pa. Code §§ 35.211 and 35.212 (relating to procedure to except to proposed report; and content and form of briefs on exceptions). *See* 22 Pa. Code § 201.11(d). **Exceptions shall be filed with the below-noted Appeal Docket Administrator** and must be received by **Monday, July 1, 2024**, the first business day 30 days after the mailing date of this proposed opinion and memorandum. *See* 1 Pa. Code § 35.211 (participant desiring to appeal to the agency head shall, within 30 days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in brief on exceptions; brief opposing exceptions may be filed in response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the agency head).

If exceptions are filed, the Board will rule upon the exceptions. The Board may adopt or reject, in whole or in part, or supplement the proposed opinion and recommendation or issue its

own opinion and order, whether or not exceptions to the proposed opinion and recommendation are filed by any party. *See* 22 Pa. Code § 201.11(c).

A legal assistant for the Office of Hearing Examiners will distribute this proposed opinion and recommendation to the Appeal Docket Administrator and the parties.

BY ORDER:


Peter D. Kovach
Hearing Examiner

Claimant:

Pauline Katina Zozos


For PSERS:

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Date of Mailing:

May 30, 2024