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

IN RE: ACCOUNT OF J. W.
DOCKET NO. 2021-02
CLAIM OF J. W.

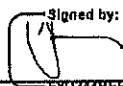
OPINION AND ORDER OF THE BOARD

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 waive the statutory deadline for filing an application for disability retirement is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 08/16/2024

Signed by:
By:  _____
Richard Vague, Chairman

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PSERB
EXECUTIVE OFFICE

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

In Re: Account of J [Redacted] W [Redacted] :
Claim of J [Redacted] W [Redacted] : Docket No. 2021-02
:

OPINION AND RECOMMENDATION

Date of Hearing: July 26, 2023

Hearing Examiner: Travis S. Anderson, Esquire

For the Claimant: E.J. Julian, Esquire

For PSERS: Dwight A. Decker, Jr., Esquire

I. HISTORY

This matter is before the Public School Employees' Retirement Board (the "Board") on an appeal filed by J [Redacted] W [Redacted] ("Claimant"). By letter dated December 28, 2020, PSERS Executive Staff Review Committee ("ESRC") denied Claimant's appeal from the June 23, 2020, determination that Claimant was not eligible for a disability benefit because he did not apply within two school years from his last active day worked. Claimant filed an appeal of that decision and requested an administrative hearing on January 25, 2021. Counsel for the Public School Employees Retirement System ("PSERS") filed an Answer to Claimant's appeal on February 9, 2021. On May 11, 2023, Board Secretary Terrill Sanchez appointed the undersigned hearing examiner for the administrative hearing in connection with Claimant's appeal. The Board's Docket Clerk served a Notice of Hearing upon the parties and ultimately scheduled the hearing on Claimant's appeal for July 26, 2023.

The hearing on Claimant's appeal convened, as scheduled, before the undersigned hearing examiner at 5 N. 5th Street, Harrisburg, PA 17101 at 10:00 a.m. Dwight A. Decker, Jr., Esquire, represented PSERS at the hearing. Claimant appeared and was represented by E.J. Julian, Esquire. At Claimant's request, Claimant and his counsel appeared at the hearing via videoconference.

Following receipt of the Notes of Testimony ("N.T"), a briefing schedule was established. Both parties submitted timely briefs and the record is now closed.

II. FINDINGS OF FACT

Procedural Background

1. Claimant first enrolled as a T-D class member of PSERS in August of 2005 when he began working for the Bentworth School District. (N.T., pp. 16, 26-27, 30, 59).
2. During the 2007-2008 school year, Claimant left the Bentworth School District and began working at California University of Pennsylvania. (N.T., pp. 16, 31).
3. Claimant vested and became eligible to receive a retirement benefit in 2010. (N.T., pp. 60, 68-69; Ex. PSERS-5).
4. On August 28, 2015, Claimant resigned from the California University of Pennsylvania via an emailed notice of resignation. (N.T., pp. 34-36; Ex. PSERS-28).
5. Claimant's resignation was prompted by a series of health problems that began to afflict him in 2014 and made it difficult for him to work. (N.T., pp. 17-18, 25).
6. Based on his last day of employment, Claimant's deadline to file for a disability retirement was June 30, 2018. (N.T., pp. 60, 74).
7. At the time of his resignation, Claimant was not specifically informed and did not know about the deadline for filing for disability retirement. (N.T., pp. 18-19, 21-22, 43, 102; Claimant's Exhibit 2).
8. PSERS records do not indicate that Claimant was given an application for disability benefits at the time of his resignation. (N.T., p. 102).
9. PSERS operates a website that contains information about disability retirement and a call center with employees available to answer members' questions via phone or email. (N.T., pp. 53-54, 72-73, 89-91; Ex. PSERS-27).

10. PSERS offers retirement counseling to members considering retirement and also regularly conducts online and in-person seminars regarding retirement benefits. (N.T., pp. 53-57, 81, 97-98).

11. PSERS has generated a comprehensive brochure regarding disability retirement that is available online and at PSERS regional offices, and PSERS will also send a copy to members upon request. (N.T., pp. 87-89; Exs. PSERS-25 and 26¹).

12. PSERS regularly sends newsletters and statements of account to members, including Claimant. (N.T., pp. 61-70, 72-75, 85-88; Exs. PSERS-1 through 13, 18 through 24).

13. Claimant testified that he has suffered from cataracts, glaucoma, and macular degeneration, which make reading difficult. (N.T., p. 21).

14. After resigning, Claimant pursued Social Security Disability benefits, operating under the belief that a formal declaration of disability was necessary before he could apply to PSERS for disability retirement. (N.T., p. 19).

15. Claimant first contacted PSERS about filing for retirement on September 24, 2019, when he requested a retirement estimate from PSERS over the phone. (N.T., pp. 40, 77-80; Ex. PSERS-14).

16. PSERS provided Claimant with a retirement estimate on October 30, 2019. (N.T., pp. 40, 80; Ex. PSERS-15).

17. Claimant attended a PSERS exit counseling session on November 13, 2019, where he first inquired with PSERS about disability retirement. (N.T., p. 105, 107).

¹ Exhibit PSERS-25 is a version of the brochure created in 2012, while PSERS-26 is the newer version created in 2016. (N.T. pp. 88-89).

18. Claimant has never filed an application for retirement with PSERS. (N.T., pp. 82-83, 103).

19. By letter dated June 23, 2020, PSERS informed Claimant that he was not eligible for a disability benefit because he did not apply within two school years from his last active day worked. (N.T., p. 84; Ex. PSERS-16).

20. By letter dated December 28, 2020, the ESRC denied Claimant's appeal of PSERS' June 23, 2020, determination. (N.T., pp. 84-85; Ex. PSERS-17).

21. Claimant participated in the hearing, was represented by counsel, testified, cross-examined PSERS' witness, moved an exhibit into evidence, and filed a post-hearing brief. (Case file, *passim*).

III. CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal. (Findings of Fact Nos. 1-21).
2. Claimant was afforded an opportunity to be heard in connection with his appeal.

(Findings of Fact No. 21).

3. Based on his last day of employment, Claimant's deadline to file for a disability retirement was June 30, 2018. (Findings of Fact Nos. 4, 6; 24 Pa.C.S. §§ 8102, 8307(c); 22 Pa. Code § 213.44).

4. The Board does not have the ability to grant Claimant *nunc pro tunc* relief from the statutory filing deadline. (Discussion section, *infra*).

IV. DISCUSSION

Claimant has the burden of proof in this matter. *Hamilton v. State Emps. Ret. Bd.*, 194 A.3d 1147, 114-55 (Pa. Cmwlth. 2018)². The degree of proof required to establish a case before an administrative tribunal in an action of this nature is preponderance of the evidence. *Kirkpatrick v. Bur. of Professional and Occupations Affairs, State Bd. of Barber Examiners*, 117 A.3d 1286, 1288 n.7 (Pa. Cmwlth. 2015). Preponderance of the evidence is the least rigorous evidentiary standard. *Helwig v. Com., Dep't. of Trans., Bur. of Driver Licensing*, 99 A.3d 153, 158 (Pa. Cmwlth. 2014). "A preponderance of the evidence is 'such proof as leads the fact-finder...to find that the existence of a contested fact is more probable than its nonexistence.'" *Dep't. of Trans. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Cmwlth. 2010) (quoting *Slgafoos v. Pa. Bd. of Probation and Parole*, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986)). In other words, it is a "'more likely than not' standard." *Commonwealth v. \$6,425.00 Seized From Esquilin*, 880 A.2d 523, 552 (Pa. 2005).

To determine if Claimant has met his burden of proof, the factfinder is empowered to weigh the evidence and make credibility determinations. *Long v. Bur. of Professional and Occupational Affairs, State Bd. of Podiatry*, 112 A.3d 671, 676 (Pa. Cmwlth. 2015). In weighing any evidence, a factfinder "may rely on his or her experience [and] common sense" to arrive at a proper conclusion. *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009). The ultimate "findings need not be supported by uncontradicted evidence, so long as they are supported by substantial evidence." *Balshy v. Pa. State Police*, 988 A.2d 813, 835 (Pa. Cmwlth. 2010) (*en banc*).

² Cases involving the State Employees Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions of" the Public School Employees' Retirement Code. *Krill v. Pub. Sch. Emps. Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

PSEERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101, *et seq.* *Forman v. Pub. Sch. Emps. Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001). "The Board is charged with the execution and application of the Retirement Code, and the Board's interpretation should not be overturned unless it is clear that such construction is erroneous." *Mento v. Pub. Sch. Emps. Ret. Sys.*, 72 A.3d 809, 813 (Pa. Cmwlth. 2013). "An employee has only those rights created by the Retirement Code, and none beyond it." *Id.* (quoting *Hughes v. Pub. Sch. Emps. Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlth. 1995)).

Under the Retirement Code, one is only eligible for disability retirement if he is an "active member" or "inactive member" of PSEERS. 24 Pa.C.S. § 8307(c); 22 Pa. Code § 213.44. Subject to exceptions not applicable here, an "active member" is "[a] school employee for whom pickup contributions are being made to the [Public School Employees' Retirement F]und [("fund")]," while an "inactive member" is "[a] member for whom no pickup contributions are being made to the fund... and for whom contributions have been made within the last two school years." 24 Pa.C.S. § 8102. Thus, disability retirement is only available to members who are presently contributing to the fund or members who have made contributions to the fund within two school years of applying for the benefit. *Trakes v. Pub. Sch. Emps. Ret. Bd.*, 768 A.2d 357, 362 (Pa. Cmwlth. 2001), *pet. for allowance of app. denied*, 792 A.2d 1256 (Pa. 2001). The Board does not have any authority to waive these requirements. *Forman*, 778 A.2d at 780.

Claimant's last day of employment occurred during the 2015-2016 school year. Based on his last day of employment, Claimant's deadline to file for a disability retirement was June 30, 2018. Claimant has yet to file for a disability retirement. Claimant is therefore not eligible for disability retirement.

Claimant does not contest that he ceased to be an "active member" or "inactive member" of PSERS after June 30, 2018. Claimant nonetheless seeks dispensation to apply for disability retirement *nunc pro tunc* based on an alleged breakdown in the system. He specifically contends that PSERS violated his due-process rights and breached a statutory obligation to provide Claimant with an application for an immediate annuity pursuant to Sections 8506(i) and 8502(g) of the Retirement Code. These statutory provisions read in relevant part as follows:

§ 8506 Duties of employers

* * *

(i) Termination of service by members.--The employer shall, in the case of any member terminating school service, advise such member in writing of any benefits from the system to which he may be entitled under the provisions of this part and shall have the member prepare, on or before the date of termination of school service, one of the following three forms, a copy of which shall be given to the member and the original of which shall be filed with the board:

(1) An application for the return of accumulated deductions.

(2) An election to vest his retirement rights, if eligible, and, if he is a joint coverage member and so desires, an election to become a full coverage member and an agreement to pay within 30 days of the date of termination of service the lump sum required.

(3) *An application for an immediate annuity, if eligible*, and, if he is a joint coverage member and so desires, an election to become a full coverage member and an agreement to pay within 30 days of date of termination of service the lump sum required.

* * *

24 Pa.C.S. § 8506(i) (emphasis added).

§ 8502. Administrative duties of board

* * *

(g) Performance of employer duties.--In the event the employer fails to comply with the procedures as mandated in section 8506 (relating to duties of employers),

the board shall perform such duties and bill the employer who shall pay for the cost of same...

* * *

24 Pa.C.S. § 8502(g). Claimant contends that his employer did not provide him with an application for immediate annuity at the time of his resignation, and that PSERS therefore had an obligation to step in and provide him with the application under Section 8502(g). He argues that PSERS' failure to provide him with this application represents a breakdown in the system and a due-process violation that would justify the grant of *nunc pro tunc* relief.

Nunc pro tunc relief is an equitable remedy. *Radhames v. Tax Rev. Bd.*, 994 A.2d 1170, 1176 (Pa. Cmwlth. 2010). "The Board has no authority to grant equitable relief in contravention of the statutory mandates of the Retirement Code," including *nunc pro tunc* relief. *Marinucci v. State Emps. Ret. Sys.*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004); *see also, e.g., Forman*, 778 A.2d at 780. The Board simply does not possess the broad powers of equity enjoyed by courts of law.

Further, the requirements imposed by Sections 8506(i) and 8502(g) of the Retirement Code are directory, rather than mandatory, in nature.

While both mandatory and directory provisions of the legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for noncompliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.

JPay, Inc. v. Dep't. of Corr., 89 A.3d 756, 763 (Pa. Cmwlth. 2014).

Whether a statute is mandatory or directory must be determined by considering legislative intent gleaned from review of the entire statute and from considering the nature and object of the statute and the consequences of the construction of it one way or the other. If the thing directed to be done is the essence of the thing required, the statute is mandatory. If, however, the statute merely directs that certain proceedings be done in a certain manner or at a certain time, it is directory. Failure to follow a mandatory statute renders the proceedings void, whereas failure to follow a directory statute does not.

Thus, although failure to conform to a mandatory statutory provision renders the proceeding void, strict compliance with a directory provision is not essential to the validity of the transaction or proceeding involved.

* * *

A court must look to the intention and purpose of the statute in determining whether the word *shall* is to be given a permissive or imperative meaning. Generally, the provisions of a statute requiring public officers to act within a specified time are directory, unless time is of the essence of the thing to be done, or the statute indicates that the provision is to be regarded as mandatory.

In re Sale of Real Est. by Lackawanna Cnty. Tax Claim Bur., 22 A.3d 308, 314 (Pa. Cmwlth. 2011) (internal citations and punctuation omitted). The Commonwealth Court has expressly held that the Retirement Code provides no remedy for a violation of Sections 8506(i) or 8502(g). *Lawrie v. Pub. Sch. Emps. Ret. Bd.*, 595 A.2d 753, 757-58 (Pa. Cmwlth. 1991). Therefore, the sections relied upon by Claimant are directory rather than mandatory, and their breach does not entitle Claimant to any relief.

As a practical matter, if Claimant was unsure about how or when to apply for disability retirement, PSERS offered numerous avenues by which Claimant could achieve clarification, including a brochure, a website, online and in-person seminars, retirement counseling, and a call center an email address to which questions could be submitted. Moreover, it is a foundational legal principle that citizens are presumed to know the law. *See, e.g., Guadalupe v. Phila. Bd. of Pensions and Ret.*, 243 A.3d 1020, 1026 (Pa. Cmwlth. 2020) (collecting cases). That Claimant was not directly handed the application does not excuse his failure to timely apply for the benefit he seeks.

In light of the foregoing, the following order is respectfully proposed:

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

In Re: Account of J [Redacted] W [Redacted] :
Claim of J [Redacted] W [Redacted] : Docket No. 2021-02
:

RECOMMENDATION

AND NOW, this 14th day of December, 2023, 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 Claimant's appeal should be **DENIED** and the decision of PSERS be **AFFIRMED**.

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). 22 Pa. Code § 201.11(d). Exceptions shall be filed with the below-noted Appeal Docket Clerk and must be received by 30 days after the mailing date of this proposed opinion and recommendation. *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. 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 Clerk and the parties.

BY ORDER:

/s/ Travis S. Anderson

Travis S. Anderson
Hearing Examiner

For the agency: Dwight A. Decker, Jr., Esquire
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For Claimant: Eugene J. Julian, Esquire
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Date of Mailing: 12/15/23