

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

Account of Mirek Chmielewski	:	Docket No. 2022-02
Claim of Mirek Chmielewski	:	

OPINION AND RECOMMENDATION

RECEIVED
JUL 30 2024
PSERB
EXECUTIVE OFFICE

Date of Hearing:	February 28, 2024
Hearing Examiner:	Debra Sue Rand, Esquire ¹
For the Claimant:	Mirek Chmielewski, <i>Pro se</i>
For PSERS:	Dwight A. Decker, Jr., Esquire

¹ This matter was administratively reassigned to the undersigned after Hearing Examiner Batson left Commonwealth employment.

HISTORY OF THE CASE

By way of background, Claimant previously appeared before the Public School Employees' Retirement Board ("Board") in a matter concerning the requested a recalculation of his estimated retirement benefit. *Account of Mirek Chmielewski*, 2018-20 (PSERB Dec. 10, 2020). In that appeal, it was established that Claimant's employer, the Capital Area Intermediate Unit ("CAIU"), made a reporting error in the 2006-07 school year that caused an inflated final average salary to be used and shown on Claimant's yearly statements of account from PSERS. *Chmielewski*, pp. 2-3, Findings of Fact ("FF") 4-6. That reporting error was detected and corrected when PSERS prepared a retirement estimate for Claimant in 2018. *Id.*, pp. 6, 10-11. Claimant appealed this correction to his retirement account to the Board, which denied his request to recalculate his estimated retirement benefit using the inflated final average salary shown on some of his statements of account. Claimant did not appeal the Board's determination.

In his present appeal, Claimant seeks to change his effective date of retirement and receive benefits retroactive to the date of his termination.

Claimant submitted his *Application for Retirement* on December 28, 2020. PSERS processed Claimant's *Application for Retirement* and mailed him a letter explaining the details of his finalized retirement benefit. Claimant then filed an appeal regarding his effective date of retirement. By letter dated January 28, 2022, the PSERS Executive Staff Review Committee ("ESRC") denied Claimant's appeal. Claimant filed an *Appeal and Request for Administrative Hearing*.

A hearing was held on February 28, 2024. The Notes of Testimony ("N.T.") were filed on March 15, 2024. Claimant filed his post-hearing brief on March 25, 2024, before the briefing schedule issued. On April 9, 2024, a briefing schedule issued. PSERS timely filed its brief on May 1, 2024. No reply brief was filed. The matter is now ready to be adjudicated.

FINDINGS OF FACT

1. At all relevant times, Claimant was a member of PSERS by virtue of his employment with the CAIU. (N.T. *passim*).
2. Claimant was on family medical leave from CAIU from August 2017 through November 2017 due to a situation with his wife. (N.T. 42).
3. Claimant's termination date with CAIU is November 22, 2017. (N.T. 42).
4. On November 22, 2017, Claimant called PSERS and requested a retirement estimate with an anticipated retirement date of December 1, 2017. (N.T. 42-43, 66; PSERS-1).
5. Claimant's November 22, 2017 call to PSERS was the first time he contacted PSERS about retiring. (N.T. 42).
6. On January 25, 2018 Claimant attended a PSERS exit counseling session conducted by two PSERS retirement representatives. (N.T. 43).
7. Claimant received his retirement estimate at the January 25, 2018 exit counseling session. (N.T. 44; PSERS-2).
8. The cover letter accompanying Claimant's estimate advised him that "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." (PSERS-2).
9. At exit counseling, the retirement counselors reviewed and explained the process for retiring with PSERS, which included reviewing the *Normal Retirement Estimate*, *Application for Retirement*, and *Retirement Exit Counseling Checklist* as well as explaining the 90-day deadline to receive retroactive benefits. (N.T. 44, 65; PSERS-2; PSERS-3; PSERS-4).
10. The *Retirement Exit Counseling Checklist* that Claimant received at exit counseling explained that "[i]n

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).

11. Claimant did not file his *Application for Retirement* at exit counseling, but rather, took it home with him. (N.T. 46, 49; PSERS-4).
12. The *Application for Retirement* stated that “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).” (PSERS-4).
13. Approximately 50% of members that attend exit counseling do not file their applications at exit counseling. (N.T. 75, 84).
14. Claimant was unhappy with the final average salary shown on his *Normal Retirement Estimate* and did not want to retire based on the estimate he received at exit counseling. (N.T. 46-47, 53).
15. Claimant did not attempt to file, and PSERS did not refuse to accept, Claimant's *Application for Retirement* at the retirement counseling session. (N.T. 46, 49, 75).
16. After attending exit counseling, Claimant contacted an attorney about his estimated final average salary and ultimately appealed the calculation of his estimated final average salary to the Board. (N.T. 50-52); *see Account of Chmielewski*, 2018-20 (PSERB Dec. 10, 2020).
17. Claimant “assumed,” without consulting PSERS, that he could file his *Application for Retirement* after the 90-day deadline and receive retroactive payments. (N.T. 54).
18. Claimant's appeal of his estimated final average salary was ultimately resolved by Board Opinion on December 10, 2020. *See Chmielewski*, 2018-20.
19. Claimant submitted his *Application for Retirement* on December 28, 2020. (N.T. 46, 50, 73; PSERS-

4).

20. PSERS processed Claimant's *Application for Retirement* and mailed him a letter explaining the details of his finalized retirement benefit on January 11, 2021. (N.T. 50; PSERS- 5).
21. After receiving the January 11, 2021 letter, Claimant filed an appeal regarding his effective date of retirement. (N.T. 50-51).
22. By letter dated January 28, 2022, ESRC denied Claimant's appeal, explaining that an *Application for Retirement* must be filed within 90 days of termination of service to receive retroactive benefits and that filing an appeal does not prevent a member from taking action with regard to a retirement benefit and preserving the effective date of retirement. (N.T. 51; PSERS-6).
23. Claimant filed an *Appeal and Request for Administrative Hearing* from the denial of the appeal and the hearing was held on February 28, 2024.
24. Claimant received due process in the form of notice and an opportunity to be heard. (Case file; N.T. 1-89.)

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal. Findings of Fact Nos. 1, 23.
2. Claimant was afforded an opportunity to be heard in connection with his appeal. Finding of Fact No. 24.
3. Claimant has the burden of proof in this proceeding. *Gierschick v. State Employee's Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999).
4. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code ("Retirement Code"). *See* 24 Pa. C.S. § 8101, *et seq.*
5. PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Hughes v. Public School Employees' Retirement Board*, 662 A. 2d 701 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995).
6. Claimant has only those rights recognized by the Retirement Code and none beyond. *Hughes v. Public School Employees' Retirement Board*, 662 A. 2d 701 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995).
7. The Retirement Code defines "effective date of retirement" as "the first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date," or, if after 90 days, the date of filing such application or the date on the application, whichever is later. 24 Pa. C.S. § 8102.
8. To satisfy the Retirement Code and be timely filed, an application for retirement must be received by PSERS within 90 days of the date of termination of service. *Harasty v. Public School Employees' Retirement Board.*, 945 A.2d 783, 788 (Pa. Cmwlth. 2008); 1 Pa. Code § 31.11.
9. The Board cannot be estopped from applying the deadline for filing for a benefit. *See Trakes v. Public School Employees' Retirement System*, 768 A.2d 357, 367 (Pa. Cmwlth. 2001); *see also*

Finnegan v. Public School Employees' Retirement Board., 560 A.2d 848 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991).

10. The Board is prohibited from waiving statutory deadlines because the Retirement Code does not grant it such authority. *Forman v. Public School Employees' Retirement Board.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

11. Claimant did not satisfy his burden of proof that he filed his Application for Retirement within the prescribed statutory deadline. Findings of Fact Nos. 1-23.

DISCUSSION

Claimant asks the Board to change his effective date of retirement from December 28, 2020 to November 22, 2017, thereby paying him retroactive benefits to his date of termination of service. In making this request, Claimant is asking the Board to ignore the provisions of the Retirement Code that require application for retirement within 90 days of a member's termination of service to receive retroactive benefits. The Retirement Code defines "Effective Date of Retirement" as:

The first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date 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.

24 Pa. C.S. § 8102. The "date of termination of service" applicable to this case is November 22, 2017, the date CAIU terminated Claimant. (N.T. 42). Based on the November 22, 2017 date of termination of service, Claimant's 90-day deadline to file his retirement application was February 20, 2018. 24 Pa. C.S. § 8102 ("effective date of retirement"). Claimant does not dispute that he filed his *Application for Retirement* on December 28, 2020. (N.T. 50, 73; PSERS-4). Nevertheless, he asks the Board to waive the 90-day deadline contained in the Retirement Code.

The Board does not have authority to circumvent the express language of the Retirement Code and ignore the statutorily mandated eligibility requirements for retirement. *Marinucci v. State Employees' Retirement System*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004).² In *Marinucci*, the claimant filed a disability retirement application after the date of her termination from the Pennsylvania Department of Auditor General. The State Employees' Retirement Board ("SERS Board") denied

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

the claimant her retirement benefits due to her untimely application. The claimant appealed the decision and argued that her obligation to file her application was satisfied by various letters and attachments that she had sent to the State Employees' Retirement System prior to her termination. The Commonwealth Court disagreed, explaining that the law expressly requires that, to be eligible for disability retirement benefits, a member must file a signed retirement application prior to termination. *Id.* at 47. The Court went on to state that neither it nor the SERS Board has the authority to grant equitable relief in the matter because the statute is clear and free from ambiguity, explaining that "it is for the legislature, not the judiciary, to revise and amend the statute to address Claimant's circumstances." *Id.*

So strong is this case law that even in circumstances that might normally justify *nunc pro tunc* relief, a claimant cannot prevail. In *Forman Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001), the claimant filed an application for retirement on September 2, 1998. PSERS later notified her that she was ineligible to retire because she had missed the statutory deadline. Forman appealed the decision and argued that mental incapacity resulting from, among other things, her struggle with breast cancer, prevented her from filing her application in a timely manner. The Commonwealth Court denied her appeal. The Court, in doing so, concluded that Act 41, which had established an early retirement window applicable to, *inter alia*, that claimant, created a specific window of opportunity without exception, and that the Board "has no authority to grant rights beyond those specifically set forth in the retirement code." *Id.* at 780. The Court further explained:

Moreover, assuming arguendo the presence of factors warranting the grant of the requested [*nunc pro tunc*] relief no legal argument has been presented establishing that PSERB has the authority to take an untimely filed retirement application and "deem it" timely filed. Such conduct suggests that PSERB has the authority to "re-open" a legislatively crafted retirement window and allow an untimely application to be "deemed" timely filed. The retirement

code does not grant PSERB such authority; therefore, PSERB is precluded from taking such action, since the retirement system is a creature of the legislature and its members have only those rights created by the retirement benefit statute.

Id.

Forman is instructive here because Claimant is asking the Board to waive the statutory deadline for filing an application for retirement. He admits that his request is based on his testimony that he *assumed*, without consulting PSERS, that he could receive retroactive benefits when he later decided to file a retirement application. (N.T. 54).³ However, as *Forman* clearly establishes, there is no exception to the deadline for filing a retirement application. Consequently, he cannot prevail on his claim.

³ This testimony is contradicted by the information provided to him both orally and in writing by PSERS (N.T. 44, 65; PSERS-2; PSERS-3; PSERS-4) and by his testimony that he did not want to retire at that time (N.T. 49, 53).

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

Account of Mirek Chmielewski	:	Docket No. 2022-02
Claim of Mirek Chmielewski	:	

RECOMMENDATION

NOW, July 22, 2024, 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 August 30, 2024**. *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 brief on exceptions within 20 days after the time limit 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).

/s/Debra Sue Rand
Debra Sue Rand
Chief Hearing Examiner

For Claimant:

Mirek Chmielewski


For PSERS:

Dwight A. Decker, Jr., Esquire
Public School Employees' Retirement System
5 North 5th Street
Harrisburg, PA 17101

Appeal Docket Administrator:

Kitzi Chappelle, Appeal Docket Administrator
Public School Employees' Retirement Board
5 North 5th Street
Harrisburg, PA 17101-1905

Date of mailing: 7/30/24

JUN 17 2025

Mail Date: _____

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF MIREK CHMIELEWSKI
DOCKET NO. 2022-02
CLAIM OF MIREK CHMIELEWSKI

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 his effective date of retirement is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 6/13/2025

By: _____

Richard Vague, Chairman