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

**IN RE: ACCOUNT OF GWENDOLYN PORTER
DOCKET NO.: 2013-14
CLAIM OF GWENDOLYN PORTER**

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Gwendolyn Porter's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact and PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on December 8, 2014, and served a copy by First-Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated December 8, 2014, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under Pa. R.C.P. No. 1035.3. Claimant's response, therefore, had to be filed on or before January 7, 2015. See 1 Pa. Code §§ 31.11, 31.12, and 33.34. Claimant timely filed a response to the motion on January 7, 2015.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. See *Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the

non-moving party and give her the benefit of all reasonable inferences. See *Thompson v. Nason Hospital*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying “(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.” Pa.R.C.P. No. 1035.3(a). “An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.” Pa.R.C.P. No. 1035.3(b).

Because Claimant has not identified any facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant is required to return retirement benefits paid from September 13, 2010, through November 2012 as a result of her return to school service with the SDP during the 2010-2011 school year.

FINDINGS OF FACT

Based on the record, the Board finds the following relevant facts not in dispute:

1. Claimant was first enrolled in PSERS in April 1988 by virtue of her employment with the School District of Philadelphia (“SDP”).
2. On April 7, 2010, Claimant attended a Retirement Exit Counseling session. PSERS-1.

3. On June 25, 2010, PSERS received an "Application for Retirement" from Claimant indicating an effective date of resignation as August 5, 2010. PSERS-2.

4. By letter dated October 1, 2010, PSERS notified Claimant of her finalized retirement benefit based on 22.43 years of credited service, a final average salary of \$118,548.47 and an effective date of retirement of August 6, 2010. PSERS-3.

5. Beginning on September 13, 2010, Claimant returned to employment with SDP to fill several administrative needs on a per diem basis. PSERS-7

6. Claimant failed to contact PSERS upon her return to service with SDP. (see, Claimant's response to PSERS' motion)

7. PSERS was not aware of Claimant's September 13, 2010, return to employment with SDP until 2012.

8. Upon request from PSERS, SDP certified that Claimant provided school service to SDP from September 13, 2010, through June 30, 2012. (See *also* PSERS-7)

9. By letter dated November 8, 2012, PSERS notified Claimant that her post-retirement employment with the SDP since 2010 constituted a return to service under Section 8346 of the Public School Employees' Retirement Code, ("Retirement Code"), 24 Pa.C.S. § 8346. Claimant was notified of her appeal rights to PSERS' Executive Staff Review Committee ("ESRC"). PSERS-4¹

10. By letter dated November 13, 2012, PSERS notified Claimant that, because she returned to service in 2010, she was required to return \$287,901.44 in monthly annuity payments and contributions with interest. PSERS-5.

11. On December 7, 2012, Claimant appealed PSERS' November 8, 2012, determination to the ESRC.

¹ PSERS-4 contains a typo that Claimant's return to service date was September **23**, 2010, rather than September **13**, 2010.

12. On May 21, 2013, the ESRC determined that Claimant's employment with SDP after September 13, 2010, constituted a return to service under Section 8346 of the Retirement Code. Claimant was notified of her appeal rights to the Board. PSERS-6.

13. Claimant filed an appeal and request for an administrative hearing before the Board on July 22, 2013. PSERS-7.

14. On August 9, 2013, PSERS filed its Answer to Claimant's appeal and request for an administrative hearing. PSERS-8.

15. An administrative hearing is scheduled for this matter on March 18, 2015.

16. On December 8, 2014, PSERS filed a Motion for Summary Judgment.

17. On January 7, 2015, Claimant filed a response to PSERS' motion.

18. The matter is ripe for Board adjudication.

DISCUSSION

On April 7, 2010, Claimant terminated her employment with SDP after approximately 22.43 years of service. PSERS-3. Shortly thereafter, Claimant applied for retirement and began receiving a monthly benefit from PSERS. PSERS-2; PSERS-3. On September 13, 2010, Claimant began working for the SDP again, unbeknownst to PSERS. At the time, Claimant was an annuitant of PSERS. An "annuitant" is defined as any "member on or after the effective date of retirement until his annuity is terminated." 24 Pa.C.S. § 8102.

The Public School Employees' Retirement Code, 24 Pa.C.S. § 8101, et. seq., prohibits a member from being an active member and an annuitant simultaneously:

(a) *General Rule.*-- If an annuitant returns to school service . . . , any annuity payable to him under this part shall cease effective upon the date of his return to school service . . . [and] the present value of such annuity . . . shall be frozen as of the date such annuity ceases. . . .

(a.1) *Return of benefits.*-- In the event an annuitant whose annuity ceases pursuant to this section receives any annuity payment, including a lump sum payment pursuant to section 8345 (relating to member's options) on or after the date of his return to school service or entering State service, *the annuitant shall return to the board the amount so received plus statutory interest.*

24 Pa. C.S. § 8346. (emphasis added).); see *Account of Douglas Goerlitz*, Docket No. 2010-16, at 20 (PSERB October 13, 2011).² Sections 8346(b) and (b.1) of the Retirement Code recognize two exceptions to the return to service provision: (1) return to school service during an emergency or shortage of personnel; and (2) return to school service in a contracted extracurricular position. 24 Pa.C.S. § 8346(b) and (b.1).

The material facts are not in dispute in this matter. In June 2010, Claimant applied for retirement with PSERS. PSERS-2. By letter October 1, 2010, PSERS informed Claimant of her retirement benefits and warned her that she could return to school service in an emergency capacity, shortage of personnel or in an extracurricular position. PSERS-3. After receiving the information regarding Claimant's post-retirement service, on November 8, 2012, PSERS informed Claimant that the service "was not rendered in an approved capacity as per the PA Retirement Code" and, accordingly, PSERS was stopping Claimant's retirement benefit effective with her November 2012 benefit payment and would consider her as having returned to active employment as of September 23, 2010. PSERS-4. PSERS calculated that Claimant owed PSERS \$287,901.44, which was the amount she was overpaid in retirement benefits after her return to service. PSERS-5.

Claimant filed an Appeal and Request for Administrative Hearing, requesting that she should not be held accountable for "SDP's failure to advise [her] of the impact on her pension" when she returned to service on September 13, 2010, and that SDP failed to provide sufficient justification to PSERS supporting an exception to her return to service. PSERS-7. On December 8, 2014, PSERS filed a motion for summary

² "School service" is defined as "[s]ervice rendered as a school employee," and a "school employee" is defined as any "person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee...." 24 Pa.C.S. § 8102.

judgment, asserting that Claimant is not entitled to the relief she requests based on her reliance on statements made by SDP that her annuity would not be affected by her return to service. Claimant, in response, does not deny that she returned to service in September 2010. Nor does she deny that she failed to notify PSERS of her return to service.

Preliminarily, and as stated above, the Retirement Code prohibited Claimant from providing service to the SDP in other than an emergency, personnel shortage or extra-curricular capacity. Absent evidence to establish that Claimant returned to service in an approved capacity, the moment Claimant returned to school service on September 13, 2010, Claimant's status as an annuitant for purposes of the Retirement Code ended *by operation of law*. The Retirement Code further mandates that Claimant's annuity should have been suspended and the present value of the annuity frozen. 24 Pa.C.S. § 8346(a.1). It matters not what representations were made by SDP regarding her return because SDP's representations to Claimant regarding her post-retirement work cannot preclude the application of the Retirement Code's directive that Claimant's annuity was to cease as a matter of law.

Although the Board must liberally administer the retirement system in favor of its members, "a liberal administration of the retirement system does not permit the board to circumvent the express language of the Code. . . ." *Dowler v. Public School Employees' Retirement Board*, 620 A. 2d 639, 644 (Pa. Cmwlth. 1993). It is well established that the statutory mandates of the Retirement Code apply, even when a PSERS member may not have been provided adequate or correct information from PSERS, her employer, or a third party. *Tyson v. Public School Employees' Retirement System*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999); *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848, 852 (Pa. Cmwlth. 1989), *aff'd w/o op.*, 591 A.2d 1053 (Pa. 1991); *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870, 874 (Pa. Cmwlth. 1995).

In *Finnegan*, PSERS erroneously informed a member that she could purchase fifteen years of out-of-state service credit which would have provided the member with 30 years of active service. *Finnegan*, 560 A.2d at 849. The member relied on that information and made an irrevocable decision to retire. The Retirement Code, however,

restricted such purchases to twelve years. *Id.* As a result, the member received far smaller retirement benefits than she expected. On appeal, the Commonwealth Court affirmed PSERS' determination that the member was not permitted to purchase additional service credit because doing so would be tantamount to impermissibly permitting PSERS' employees to amend the statute. *Id.* at 851. Citing to *Finnegan*, the Commonwealth Court reached the same conclusion in *Cosgrove*, where it found that the statutory language of the Retirement Code prevents retirees from changing their retirement benefit elections, even under circumstances where members may have been misled by inadequate counseling by the State Employees' Retirement System. *Cosgrove*, 665 A.2d at 874.

In this case, upholding PSERS' decision is even more compelling than in *Finnegan* or *Cosgrove*, as the SDP, not PSERS, made the alleged misleading representations to Claimant.³ There is no assertion that PSERS provided Claimant with inaccurate information. Notably, PSERS advised Claimant during the counseling session on August 7, 2010, that:

- Working for a PSERS employer will cause pension to be frozen **except** under Act 2004-63:
 - ✓ Emergency or shortage.
 - ✓ Extracurricular activity.

(PSERS-1, Section E) (emphasis in original). PSERS' October 1, 2010, letter to Claimant notifying her of her finalized retirement benefit further warned Claimant that:

If you return to work, it is your responsibility to notify the employer that you are a PSERS retiree.

Act 2004-63 permits a PSERS retiree to be employed by a Pennsylvania public school (including charter schools) in an emergency or shortage of personnel and extracurricular situations (certain conditions apply) without loss of the retiree's monthly benefit.

³ On summary judgment, the Board must examine the record in the light most favorable to Claimant and give her the benefit of all reasonable inferences. The Board, therefore, assumes Claimant's assertions regarding SDP's assurances are true and accurate.

Employers must determine that an emergency or shortage exists and make a “good faith” effort to hire non-retirees first. Please refer to your *Retired Member Handbook* or PSERS’ Web for detailed information.

If a retiree’s return to service **does not** qualify under Act 2004-63, the retiree should immediately send a letter to PSERS. This letter should include the retiree’s return to service date so that the retiree’s monthly benefit may be stopped before an overpayment occurs.

Multiple Service members are further restricted from employment in a position covered by the State Employees’ Retirement System (SERS). If you do work in a SERS covered position, SERS rules prevail.

(PSERS-3) (emphasis in original). Claimant, therefore, was advised on numerous occasions of the return to service provisions and the consequences of returning. Despite these warnings, Claimant returned to work for two years and never inquired with PSERS as to whether her post-retirement work was permissible. Rather, Claimant relied on statements made by SDP that her return to service would not affect her continued receipt of monthly annuity payments. Claimant’s reliance on statements made by SDP, a third party, however, does not provide legal justification for this Board to ignore the mandates of the Retirement Code.

Pennsylvania law makes clear that a misrepresentation cannot negate or otherwise usurp the provisions of the Retirement Code. The Retirement Code plainly requires Claimant to return any annuity payments received after her return to service on September 13, 2010. 24 Pa.C.S. § 8346(a.1). Consequently, the Board is not authorized to forgive repayment under Section 8346(a.1) because such relief directly conflicts with the statutory mandates of the Retirement Code. *See Marinucci v. State Employees’ Retirement System*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004). *See generally Estate of Harry Rosenstein v. Public School Employees’ Retirement System*, 685 A.2d 624, 627 (Pa. Cmwlth. 1996); *Finnegan*, 560 A.2d 850. Moreover, as the Commonwealth Court has stated, the “Retirement Board lacks authority to grant equitable relief in conflict with the statutory mandates of the Retirement Code.” *Barringer v. State Employees’ Retirement Board*, 897 A.2d 163, 165 (Pa. Cmwlth. 2009). Nor may the Commonwealth Court revise the Retirement Code to achieve equitable results. *Id.*

Consequently, Claimant's annuity should have been suspended as of her return to service on September 13, 2010, and the present value of the annuity frozen. 24 Pa.C.S. § 8346(a) and (a.1). There exists no statutory or legal authority that would authorize the Board to grant Claimant the relief that she seeks. While a member is entitled to a liberal construction of the Retirement Code, Claimant has only those rights created by the Retirement Code and none beyond. See generally *Burris v. State Employees' Retirement Board*, 745 A.2d 704 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992); *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995).

For the above-stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant is required to return retirement benefits paid from September 13, 2010, through November 2012 as a result of her return to school service with the SDP during the 2010-2011 school year. Claimant's reliance on statements made by SDP is an equitable argument that, as a matter of law, cannot be entertained by this Board, and, therefore, is not properly brought in this forum. Accordingly, PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DENIED.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF GWENDOLYN PORTER
DOCKET NO.: 2013-14
CLAIM OF GWENDOLYN PORTER

ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, Claimant is required to return retirement benefits paid from September 13, 2010, through November 2012 as a result of her return to school service with the SDP during the 2010-2011 school year.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: Jan. 21, 2015

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