

Regulatory Analysis Form		RECEIVED This space for use by IRRC
(1) Agency State Employees' Retirement System		2008 APR 18 PM 3:24 INDEPENDENT REGULATORY REVIEW COMMISSION
(2) I.D. Number (Governor's Office Use) 31-7		IRRC Number: 2689.
(3) Short Title Priority of taxation, attachments and assignments of funds.		
(4) PA Code Cite 4 Pa. Code § 247.11	(5) Agency Contacts & Telephone Numbers Brian E. McDonough, Esq. (717) 783-7317 Robert Gentzel (717) 787-9657 David Durbin (717) 783-7310	
(6) Type of Rulemaking (Check One) <input checked="" type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Proposed Rulemaking Omitted		(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor
(8) Briefly explain the regulation in clear and nontechnical language. This new regulation sets priorities among conflicting demands of taxes, attachments and assignments on members' retirement benefits authorized by the State Employees' Retirement Code ("Retirement Code"), 71 Pa.C.S. §§ 5101 et seq. The court's decision in the <i>Marshall</i> case cited in (9) below has offered partial guidance in this area. The regulation would enable consistent application of the statute and could avoid litigation of priority issues.		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. Retirement Code Sections 5902(h). <i>Gail G. Marshall v. State Employees' Retirement System</i> , 887 A.2d 351 (Pa. Cmwlth. 2005).		

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

No.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulation sets priorities among conflicting demands on members' retirement benefits and could avoid future litigation.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

None, except continued non-regulation could result in significant litigation costs and delays.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

All members, their beneficiaries and survivors when there are conflicting demands on their retirement benefits. SERS membership currently exceeds 200,000.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

No one.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All members, their beneficiaries and their survivors when there are conflicting demands on their retirement benefits. SERS membership currently exceeds 200,000.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

Litigants, the State Employees' Retirement Board, its staff and Commonwealth Court.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

The regulation will save significant litigation costs and delays when there are conflicting demands upon retirement benefits.

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

None.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

The regulation could save significant litigation costs to the agency and its over 200,000 members.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

N/A

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

N/A

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

N/A

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

N/A

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

N/A

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

N/A

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

N/A

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation is anticipated to be effective upon final publication.

(31) Provide the schedule for continual review of the regulation.

N/A

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

[Signature]
BY: _____
(DEPUTY ATTORNEY GENERAL)

State Employees' Retirement System

(AGENCY)

[Signature]
BY: _____
Andrew C. Clark

DOCUMENT/FISCAL NOTE NO. 31-7

JAN 28 2008

JAN 4 2008

DATE OF APPROVAL

DATE OF ADOPTION: September 12, 2007

DATE OF APPROVAL

BY: *[Signature]*
Leonard Knepp

Acting Executive Director

TITLE: _____
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

Check if applicable. Copy not approved. Objections attached.

Check if applicable. No Attorney General approval or objection within 30 days after submission.

PROPOSED RULEMAKING
COMMONWEALTH OF PENNSYLVANIA

4 PA.CODE, CH. 247, SECTION 247.11

This new regulation sets priorities among conflicting demands of taxes, attachments and assignments on members' retirement benefits authorized by the State Employees' Retirement Code.

**Notice of Proposed Rulemaking
State Employees' Retirement Board
State Employees' Retirement System
(4 Pa. Code Chapter 247)**

Preamble

The State Employees' Retirement Board ("Board") proposes to amend 4 Pa. Code, Chapter 247 by adding Section 247.11 as a new regulation pertaining to the priority of taxation, attachment and assignments of funds.

A. Effective Date

The proposed regulation will go into effect upon publication in the *Pennsylvania Bulletin* as a final rulemaking.

B. Contact Person

For further information contact Robert Gentzel, Director of Communications and Policy, State Employees' Retirement System, 30 North Third Street, Suite 150, Harrisburg, PA 17101-1716, (717) 787-9657, or Brian E. McDonough, Deputy Chief Counsel, State Employees' Retirement System, 30 North Third Street, Suite 150, Harrisburg, PA 17101-1716, (717) 783-7317. Information regarding submitting comments on this proposal appears in Section H of this preamble.

C. Statutory Authority

This proposed rulemaking is being made under the authority of Section 5902(h) of the State Employees' Retirement Code ("Retirement Code"), 71 Pa.C.S. Sections 5101 *et seq.*

D. Background and Purpose

This new regulation sets priorities among conflicting demands of taxation, attachments and assignments on members' retirement benefits authorized by the Retirement Code. The court's decision in *Gail G. Marshall v. State Employees' Retirement System*, 887 A.2d 351 (Pa. Cmwlth. 2005) has offered partial guidance in this area. The regulation would enable consistent application of the statute and could avoid litigation of priority issues.

E. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the proposed regulation.

Benefits

The regulation is intended to alleviate confusion and prevent possible disputes with regard to conflicting demands on members' retirement benefits.

Costs

There are no costs to the Commonwealth, its citizens or state employees associated with this proposal.

Compliance Costs

The proposed amendment is not expected to impose any additional compliance costs on state employees.

F. Sunset Review

Not applicable.

G. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 18, 2008, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Finance Committee and the House State Government Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comments period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

H. Public Comments

Written Comments - Interested persons are invited to submit comments regarding the proposed regulation to Robert Gentzel, Director of Communications and Policy, State Employees' Retirement System, 30 North Third Street, Suite 150, Harrisburg, PA 17101-1716. Comments submitted by facsimile will not be accepted. The Board must receive comments, suggestions, or objections within 30 days of publication in the *Pennsylvania Bulletin*.

Electronic Comments - Comments may be submitted electronically to the Board at rgentzel@state.pa.us and must be received by the Board within 30 days of publication in the *Pennsylvania Bulletin*. A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgment of electronic comments is not received by the sender within two working days, the comments should be retransmitted to ensure receipt.

NICHOLAS J. MAIALE
Chairman
State Employees' Retirement Board

ANNEX "A"

(Deletions appear in brackets; new language is underscored)

4 Pa. Code Chapter 247

§ 247.11. Priority of taxation, attachments and assignments of funds.

(a) The right of a person to any benefit or right accrued or accruing under the provisions of the State Employees' Retirement Code, 71 Pa.C.S. §§ 5101-5956, as amended from time to time, and the moneys in the fund are subject to prior payment or forfeiture of rights, as set forth in Section 5953, in the following sequential priority to the extent such forfeitures and competing claims exist at the time the distribution is made :

- (1) For pension forfeitures, fines and restitution as provided by the act of July 8, 1978 (P.L. 752, No. 140), as amended from time to time, or pursuant to section 16(b) of Article V of the Constitution of Pennsylvania or as otherwise provided by law;
- (2) To the employer after certification by the head of the employer of the amount that the member is obligated to pay, and after review and approval by the employer's legal representative or upon receipt of an assignment from the member in the amount so certified;
- (3) To each appropriate taxing authority for money owed on account of taxes;

(4) To an alternate payee or attaching authority as set forth in an approved domestic relations order, order for support, or order for the enforcement of arrearages as described in Section 5953.1 of the Retirement Code;

(5) To the member directly or to an eligible retirement plan by way of an eligible rollover distribution.

(b) Payments from a member's retirement benefits under subsections (a)(2) and (a)(3) shall first be made from the entire accumulated deductions then standing to the credit of the member upon entering pay status. The remaining balance, if any, of payments due under subsections (a)(2) and (a)(3) and payments due under (a)(4) for orders for support and/or orders for the enforcement of arrearages shall be paid out of the monthly annuity payable to or on behalf of the member at the rate of up to 50% (as determined by SERS consistent with applicable law) of the gross monthly annuity until paid in full. The amount payable under subsection (a)(4) pursuant to an approved domestic relations order may be paid out of the monthly annuity paid to or on behalf of the member at the rate of up to 100% (as determined by SERS consistent with applicable law) of the member's remaining monthly annuity until paid in full. Unpaid amounts remaining after termination of an annuity paid to or on behalf of the member or, after the death of the member prior to receiving an annuity, shall be paid out of the remaining initial present value then standing to the credit of the member, if any.

(c) Payments pursuant to those pension forfeitures described in subsection (a)(1) shall be made pursuant to the operative forfeiture law.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gail G. Marshall, :
 :
 : Petitioner :
 :
 : v. : No. 464 C.D. 2005
 : Argued: September 15, 2005
 :
 : State Employees' Retirement System, :
 : Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

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RETIREMENT SYSTEM
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OPINION BY
JUDGE LEADBETTER

FILED: November 23, 2005

Gail Marshall appeals from an order of the State Employees' Retirement Board (Board) denying her claim, premised upon an Approved Domestic Relations order (ADRO), to fifty-percent of her ex-husband's State Employees' Retirement System (SERS) Option 4 lump sum withdrawal.¹ SERS denied the claim because it had permitted the assignment of the entire lump sum

¹ An ADRO "authorizes the attachment of a SERS member's retirement benefits for purposes of equitable distribution under the Divorce Code, 23 Pa. C.S. §§3101 - 3904" *Titler v. State Employees' Ret. Bd.*, 768 A.2d 899, 900 n.1 (Pa. Cmwlth. 2001). An "approved domestic relations order" is defined by the State Employees' Retirement Code (Retirement Code) as "[a]ny domestic relations order which has been determined to be approved in accordance with section 5953.1 (relating to approval of domestic relations orders)." 71 Pa. C.S. § 5102.

withdrawal to Penn State University pursuant to a provision in the State Employees' Retirement Code (Retirement Code),² which authorizes the assignment of a member's benefits to satisfy an obligation to the Commonwealth for the repayment of money owed on account of the member's employment. In this case, Mrs. Marshall's ex-husband, John Marshall, was convicted of stealing funds from Penn State, his employer, and his sentence included restitution in the amount of approximately \$387,000. We affirm.

The facts are not in dispute. Mr. Marshall, who was employed by Penn State for approximately 35 years, was terminated from his employment in January 2001. In February 2001, Mr. and Mrs. Marshall were divorced. Thereafter, in May 2001, the Court of Common Pleas of Centre County entered a domestic relations order (DRO),³ designating Mrs. Marshall as an "alternate payee," entitled to receive fifty-percent of the marital property component of Mr. Marshall's retirement benefits, including fifty-percent of Mr. Marshall's Option 4 lump sum withdrawal and monthly annuity payments.⁴ The DRO defined Mr. Marshall's

² 71 Pa. C.S. §§ 5101 – 5956.

³ The Retirement Code defines a DRO as:

Any judgment, decree order, including approval of a property settlement agreement, entered . . . by a court of competent jurisdiction pursuant to a domestic relations law which relates to the marital property rights of the spouse or former spouse of a member, including the right to receive all or a portion of the moneys payable to that member under this part in furtherance of the equitable distribution of marital assets. . . .

71 Pa. C.S. § 5102.

⁴ See 42 Pa. C.S. § 5705 for the various retirement options. Apparently, Mr. Marshall's Option 4 lump sum withdrawal was the amount of his total accumulated deductions. See 42 Pa. C.S. § 5705(a)(4) (providing that a portion of the benefit "may be payable as a lump sum, except (Footnote continued on next page...)

retirement benefit as “all monies [payable]⁵ to or on behalf of Member by SERS, including any lump sum withdrawals or scheduled ad hoc increases” and provided that, “[t]he equitable distribution portion of the marital property component of Member’s retirement benefit, as set forth in Paragraph (7), shall be payable to Alternate Payee and shall commence as soon as administratively feasible on or about the date the Member actually enters pay status and SERS approves a [DRO] incorporating this Stipulation and Agreement” SERS’ Exhibit 3, R.R. 201a.

The DRO was approved by SERS in June 2001. In November of the same year, Mr. Marshall was sentenced for his theft in the Court of Common Pleas of Centre County and ordered to make restitution to Penn State.⁶ In December 2001, Mr. Marshall executed an assignment under the Retirement Code, assigning all sums to which he was entitled, to Penn State, in order to satisfy the balance of

(continued...)

that such lump sum payment shall not exceed an amount equal to the total accumulated deductions standing to the credit of the member.”).

An “alternate payee” is defined by the Retirement Code as “[a]ny spouse, former spouse, child or dependent of a member who is recognized by a domestic relations order as having a right to receive all or a portion of the moneys payable to that member under this part.” 71 Pa. C.S. § 5102 (emphasis added).

⁵ Neither party takes issue with this correction to the DRO. The DRO actually states “all monies to or on behalf of Member by SERS, including any lump sum withdrawals or scheduled ad hoc increases. . . .”

⁶ Mr. Marshall was jointly and severally liable for restitution. Apparently three other people were involved in the theft of funds. The court’s order required Mr. Marshall to, inter alia: (1) “make restitution to the Pennsylvania State University in the amount of [\$387,145.45]” if he had not already done so; and (2) “cooperate with efforts through the [University], the Centre County Probation Department and any and all pension authorities to have the total available pension proceeds earned during [his] employment at the [University] be assigned to and payable to the Centre County Probation Department for the purpose of satisfying the outstanding restitution obligation.” SERS’ Exhibit 9, R.R. 213a.

his restitution obligation.⁷ The assignment acknowledged that Mr. Marshall “will be entitled to a sum of money from [his] account with [SERS], of which [the court of common pleas had] previously ordered an unspecified sum to be assigned to [his] former wife, Gail Marshall, pursuant to a Court Order dated May 14, 2001” R.R. 287a. Penn State then informed SERS that partial restitution payments from Mr. Marshall and the others involved in the theft had reduced the amount owed to approximately \$267,000, and requested that that amount be withdrawn from Mr. Marshall’s SERS account.

Thereafter, in January 2002, Mr. Marshall completed an annuity application package, wherein he elected the retirement option required by the DRO and named Mrs. Marshall as his survivor annuitant. In August of the same year, SERS sent an initial benefit letter to Mr. Marshall, reflecting that Mr. Marshall’s Option 4 payment, totaling \$107,274.89,⁸ would be paid to Penn State and that his annuity payment of \$3,303.62 would be divided between Penn State and Mrs. Marshall; Penn State would receive \$1,651.81 monthly and Mrs. Marshall would receive \$1,257.58 monthly. Shortly thereafter, Penn State requested the entire annuity payment rather than the designated fifty percent. Around the same time, SERS received a copy of Mr. Marshall’s assignment and reviewed it for the first time. On August 20th, SERS sent Penn State a check for \$107,274.89, which

⁷ Common pleas’ sentencing order indicates that Mr. Marshall was convicted of theft by unlawful taking. Mr. Marshall’s assignment to Penn State states that he pled guilty to “multiple counts of theft by unlawful taking in violation of 18 Pa. C.S.A. Section 3925 [entitled, ‘Receiving stolen property’], multiple counts of criminal conspiracy in violation of 18 Pa. C.S.A. Section 903 [entitled, ‘Criminal conspiracy’], and one (1) count of criminal attempt, theft by unlawful taking in violation of 18 Pa. C.S.A. Sections 901 [entitled, ‘Criminal attempt’] and 3921 [entitled, ‘Theft by unlawful taking or disposition].” See Claimant’s Ex. 8, R.R. 286a.

⁸ This amount comprises taxable and non-taxable payments totaling \$130,081.49, less federal withholding in the amount of \$22,806.60.

represented Mr. Marshall's entire Option 4 lump sum withdrawal. SERS then informed Mrs. Marshall that she would receive a monthly annuity payment in the amount of \$1,257.58, and that it had given Penn State one-hundred percent of Mr. Marshall's Option 4 lump sum withdrawal.⁹ Mrs. Marshall's subsequent appeal request was denied and her administrative appeal resulted in a hearing before a hearing examiner.

Of particular note, both Marshalls testified during the hearing that they assumed that, notwithstanding Mr. Marshall's execution of the assignment of benefits to Penn State, Mrs. Marshall would still receive her share of Mr. Marshall's retirement benefits in accordance with the ADRO and Penn State would receive the share of benefits otherwise due Mr. Marshall. Also of importance, the SERS representative testified that when a member has an agency debt to repay, it is

⁹ On July 25, 2003, common pleas entered an order which stated:

[P]ension funds which had been previously set aside and Ordered by this Court to be distributed to Gail C. Marshall [have been] inadvertently paid to [Penn State] by the State Employees' Retirement System, [therefore] it is Ordered that [Penn State] shall return to Gail C. Marshall the sum of \$50,419.59 and subtract same from the restitution credited on behalf of Defendant John C. Marshall.

R.R. 301a. Subsequently, pursuant to agreement of counsel, common pleas entered an order on August 14, 2003, vacating its order of July 25, in order that Mrs. Marshall's appeal from SERS' denial of her claim could be resolved. The court stated:

Following the conclusion of that process, the Petition [presumably Penn State's petition to vacate] may become moot, or in the alternative, the parties may request the Court to schedule an argument date. In the event an argument is held and the Court does not accept the positions advanced by Penn State, the Order of this Court dated July 25, 2003 may be reinstated.

R.R. 303a.

SERS' policy to withhold fifty percent of the member's monthly check. The SERS representative also implied that a lump sum payout is also applied to satisfy an agency debt. According to the SERS representative, if the total lump sum payout had not been paid over to Penn State, Mrs. Marshall would have received approximately \$54,000 of those funds. The hearing examiner ultimately denied Mrs. Marshall's claim.

Prior to reviewing the bases for the hearing examiner's decision, we note the statutory provisions applicable to the instant action. Pursuant to Section 5953 of the Retirement Code, 71 Pa. C.S. § 5953, SERS has the authority to set-off a member's benefits if the member owes money to the Commonwealth on account of his employment. A member's benefits may also be attached in favor of an "alternate payee." Section 5953 provides:

(a) General rule.—

(1) Except as provided in paragraphs (2), (3) and (4), the right of a person to any benefit or right accrued or accruing under the provisions of this part and the moneys in the fund are hereby exempt from any State or municipal tax, levy and sale, garnishment, attachment, spouse's election, or any other process whatsoever except for a set-off by the Commonwealth in the case provided in subparagraph (i), and shall be unassignable except:

(i) To the Commonwealth in the case of a member who is terminating State service and has been determined to be obligated to the Commonwealth for the repayment of money owed on account of his employment or to the fund on account of a loan from a credit union which has been satisfied by the board from the fund. . . .

(ii) To a credit union as security for a loan not to exceed \$750 and interest not to exceed 6% per annum discounted and/or fines thereon if the credit union is now or hereafter organized and incorporated under the laws of

this Commonwealth and the membership of such credit union is limited solely to officials and employees of the Commonwealth

(2) Rights under this part shall be subject to forfeiture as provided by the act of July 8, 1978 (P.L. 752, No. 140), known as the Public Employee Pension Forfeiture Act [Forfeiture Act], and by or pursuant to section 16(b) of Article V of the Constitution of Pennsylvania. . . .^[10]

(3) Rights under this part shall be subject to attachment in favor of an alternate payee as set forth in an approved domestic relations order.

. . . .

(b) Authorized payments from fund. — The board shall be authorized to pay from the fund:

(1) In the case of a member who is terminating service, the amount determined after certification by the head of the department that the member is so obligated, and after review and approval by the department or agency's legal representative or upon receipt of an assignment from the member in the amount so certified.

(Footnote added). Section 5953.1 of the Retirement Code, relating to the approval of domestic relations orders, provides, in part, that an order shall be certified as an approved order if it, inter alia, "[r]equires the system to provide no more than the total amount of benefits than the member would otherwise receive (determined on the basis of actuarial value)" 71 Pa. C.S. § 5953.1(a)(2).

With this statutory framework in mind, we turn to the hearing examiner's decision. In denying the claim, the hearing examiner noted that SERS'

¹⁰ The Forfeiture Act does not apply in this case because Mr. Marshall's crime was not one of the enumerated offenses that trigger the Act's application. See generally Section 2 of the Forfeiture Act, Act of July 8, 1978, P.L. 752, as amended, 43 P.S. § 1312.

policy is to withhold one-hundred percent of a member's accumulated deductions to satisfy an agency debt and if a balance remains thereafter, then SERS withholds fifty percent of the member's monthly annuity check until the debt is repaid. Implicit in the hearing examiner's reasoning is that this policy, interpreting Section 5953 of the Retirement Code, is entitled to deference because it is not clearly erroneous or contrary to the statutory provision.

The hearing examiner also concluded, without citing to any specific authority, that Mrs. Marshall's interest in the retirement benefit at issue is derivative to Mr. Marshall's interest. Therefore, since Mr. Marshall accumulated the "debt" while earning the retirement benefit, he loses his right to the full retirement benefit because it is subject to set-off as a result of the debt. Consequently, once Mr. Marshall lost his right to a portion of the retirement benefit, Mrs. Marshall lost her right to that benefit as well, because the ADRO cannot provide Mrs. Marshall with greater rights in the lump sum withdrawal than those possessed by Mr. Marshall.

On appeal, the Board overruled Mrs. Marshall's exceptions, and adopted as its own, the hearing examiner's findings, conclusions and discussion. Due to several exceptions raised by Mrs. Marshall, however, the Board supplemented the hearing examiner's decision with additional conclusions and further discussion.

Specifically, the Board rejected the argument that the ADRO should be given priority because it preceded Mr. Marshall's restitution obligation. According to the Board, the fact that the DRO was entered prior to Mr. Marshall's sentencing and retirement does not serve to separate and attach a portion of the benefits for Mrs. Marshall, removing them from the reach of 71 Pa. C.S. § 5953. In

reaching this conclusion, the Board noted that the DRO provided that the marital property component of Mr. Marshall's retirement benefit was based in part on Mr. Marshall's retirement benefit "as of the effective date of retirement, calculated by using Mr. Marshall's final average salary on May 17, 1994, instead of Mr. Marshall's actual final average salary." Board's opinion at 3 (emphasis in original). The Board also took note that the DRO defined the "retirement benefit" as "all monies to [sic] or on behalf of [Mr. Marshall] by SERS, including any lump sum withdrawals" *Id.* at 4. The Board concluded that when the DRO was entered, the parties sought to attach Mr. Marshall's retirement benefit at the time he retired and, since the benefit divisible between the parties was based upon a formula that included Mr. Marshall's total years of service, the amount of the retirement benefit could not be determined or divided until actual retirement. Thus, the Board concluded that while the DRO granted Mrs. Marshall a right to a portion of the retirement benefit payable to Mr. Marshall, the formula adopted by the parties to determine Mrs. Marshall's share precluded a determination of that share until Mr. Marshall actually retired and SERS' calculated his benefit. In addition, since Mr. Marshall assigned his right to retirement benefits to Penn State prior to submitting his retirement application, the Board concluded:

The assignment neither uses a formula to calculate Penn State's share of the retirement proceeds nor bases the assignment on the benefit payable upon Mr. Marshall's retirement. In our opinion, Mr. Marshall's conveyance of his benefit right to Penn State is a present conveyance of vested rights that already exist, as opposed to the DRO's creation of an expectancy interest in the benefits available to Mr. Marshall at retirement after all relevant factors are applied to his benefit account.

Board's opinion at 6. Mrs. Marshall then proceeded with her appeal to this court.

On appeal, Mrs. Marshall first argues that SERS erred in paying the entire lump sum withdrawal to Penn State because the ADRO had already attached a portion of the benefit in her favor prior to Mr. Marshall incurring a restitution obligation or assigning his benefits to Penn State.¹¹ According to Mrs. Marshall, once the ADRO attached the funds, they were no longer a part of Mr. Marshall's retirement benefit. In support of this argument, Mrs. Marshall relies on *Titler v. State Employees' Retirement Board*, 768 A.2d 899 (Pa. Cmwlth. 2001).

Mrs. Marshall also argues that there is no legal authority which requires that the assignment to Penn State be given precedence over a pre-existing ADRO. Mrs. Marshall notes that Section 5953 is silent in this regard, failing to indicate any priority among claims. Moreover, she argues that her interest in the retirement benefits is as fully "vested" as Penn State's.

On the other hand, the Board begins by noting that it has interpreted and applied Section 5953 to allow it to withhold one-hundred percent of the member's accumulated deductions to satisfy an agency debt if the accumulated deductions have not already been paid to the member. This is what occurred here. The Board also notes the established principle that its policy and action must be upheld if it is not clearly erroneous or inconsistent with the statute.

In addition, noting the language of the ADRO,¹² the Board contends that Mrs. Marshall's rights are derivative and, therefore, since Mr. Marshall's right

¹¹ This appeal only concerns Mr. Marshall's lump sum payment. Penn State did not appeal from the Board's order and no issue has been raised regarding Mrs. Marshall's receipt of a portion of the monthly annuity payment.

¹² Specifically:

Member's retirement benefit is defined as all monies [payable] to
or on behalf of Member by SERS

....

(Footnote continued on next page...)

to benefits is subject by statute to attachment/set-off for an agency debt, then so too is Mrs. Marshall's interest. According to the Board, once Mr. Marshall's benefits were subject to set-off by the Commonwealth, they were no longer part of his retirement benefit.

It is well settled that "retirement pension benefits, both vested and non-vested, are marital property subject to equitable distribution." *Brown v. Brown*, 669 A.2d 969, 972 (Pa. Super. 1995), *aff'd*, 547 Pa. 360, 690 A.2d 700 (1997).¹³ See also Wilder, Pa. Family Law Practice and Procedure, § 23-1 (3rd ed. 1993). Moreover, statutory provisions exempting pension benefits from levy, sale, garnishment, attachment and the like do not protect a member's pension benefits from equitable distribution. See generally *Young v. Young*, 507 Pa. 40, 488 A.2d 264 (1985); *Graham v. Graham*, 578 A.2d 459 (Pa. Super. 1990). Our Superior Court explained the rationale for this exception in *Graham*, stating:

(continued...)

In no event shall Alternate Payee have greater benefits or rights other than those which are available to Member. Alternate Payee is not entitled to any benefit not otherwise provided by SERS. Alternate Payee is only entitled to the specific benefits offered by SERS as provided in this Stipulation and Agreement. . . .

SERS' Ex. 3, ¶¶ 8, 13, R.R. 201a, 205a.

¹³ In *Brown*, the Superior Court observed that:

In formulating equitable distribution schemes, Pennsylvania courts apply either the immediate offset method, which divides the benefits at the time of the equitable distribution proceeding by assigning a present value to the marital portion of the pension, or the deferred distribution method, which requires the court to reserve jurisdiction over the benefits until they mature and enter pay status. . . . See *Zollars v. Zollars*, [579 A.2d 1328 (Pa. Super. 1990)] (use of deferred distribution not error when record did not show that ex-spouse could buy out non-employee spouse's share).

669 A.2d 972-73 (citations omitted).

First, [r]etirement funds . . . are created for the protection of not only the employee, but for the protection of his family as well. Hence, the provisions exempting assignments and attachments contained therein are to relieve the person exempted from the pressure of claims that are hostile to his *and to his dependents' essential needs*.

Second, we note that a family loses its ability to spend a portion of its income when that income is deferred and placed in a pension. It would be terribly unfair to read an exemption statute, which was created to protect a pension for the benefit of a retired employee's family, in such a way that the exemption would bar children or a former spouse from receiving support from the very fund created for their benefit, and would once again deny them the benefits of the income they sacrificed to a pension years before.

578 A.2d at 461 (citations and quotations omitted, emphasis deleted). The General Assembly, recognizing the uniqueness and importance of familial claims to pension benefits, enacted those provisions of the Retirement Code, which acknowledge and establish the rights of an alternate payee with respect to a member's benefits. Pursuant to Section 5953(a)(3), a member's benefits "shall be subject to attachment in favor of an alternate payee."¹⁴

Notwithstanding an alternate payee's established statutory right to a member's benefits via an ADRO, the Retirement Code lacks express language determining the priority between a claim by the Commonwealth for moneys owed by a member upon retirement as a result of his employment and a claim by the

¹⁴ Similarly, the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, et seq., as amended by the Retirement Equity Act of 1984, 29 U.S.C. § 1056(d), which is not applicable herein because a state pension is involved, contains provisions precluding the assignment or alienation of plan benefits. See 29 U.S.C. § 1056(d).

member's alternate payee. Neither party has cited to any authority on point in this regard nor has this court's research uncovered any relevant decisional law.¹⁵ Thus, we examine the statutory scheme to determine the nature of an alternate payee's rights and the priority of the claims in these circumstances. After a close reading of the statute, we conclude that contrary to Mrs. Marshall's assertion, a DRO does not serve to immediately attach funds in a member's retirement account, thereby severing, separating and securing the same such that they are protected from pre-maturation contingencies. Rather, we conclude that the statutory scheme supports the conclusion that an alternate payee's rights are derivative to the member's and subject to the same contingencies affecting the member's entitlement to benefits.

We begin our analysis by noting that:

An administrative agency has wide discretion in establishing rules, regulations and standards, and also in the performance of its administrative duties and functions. Where an agency has not abused its discretion

¹⁵ We do not find *Titler v. State Employees' Retirement Board*, 768 A.2d 899 (Pa. Cmwlth. 2001), relied upon by Mrs. Marshall, to be controlling here. There, the husband, a member of SERS, died before the parties' divorce was finalized. Prior to his death, husband changed his primary SERS beneficiary from wife to another relative. Despite the fact that the parties were still married when husband died, SERS intended to pay husband's death benefit to the most recently named beneficiary. At that point, a DRO had not been entered. Wife then commenced an administrative action before the Board seeking to be named husband's primary beneficiary. Wife's claim was denied.

On appeal, this court acknowledged that while husband's SERS account was a marital asset subject to equitable distribution, the Retirement Code did not preclude a member from changing his beneficiary or selecting a beneficiary different than one's spouse. The court observed that in order for an estranged spouse to protect her interest in a member's SERS account, the spouse should either obtain an injunction from common pleas to maintain the status quo or obtain a divorce decree and accompanying DRO, "which specifies the amount of the member's retirement benefit that SERS must distribute to an alternate payee." 768 A.2d at 902. Contrary to Mrs. Marshall, we do not read *Titler* to hold that a DRO serves to attach retirement funds when entered, thereby securing and setting aside benefits in the alternate payee's favor.

in the exercise of its duties or functions, we must defer to its expertise and cannot substitute judicial discretion for administrative discretion. In addition, we have consistently recognized that an administrative agency's interpretation of its own regulations is controlling unless the interpretation is plainly erroneous or inconsistent with either the regulation or the statute under which it is promulgated.

Daneker v. State Employees' Ret. Bd., 628 A.2d 491, 496-97 (Pa. Cmwlth. 1993) (citations and quotation omitted). Turning to the statute, we first note the definition of an "alternate payee," which is defined as, inter alia, a former spouse of a member "who is recognized by a [DRO] as having a right to receive all or a portion of the *moneys payable to that member* under this part." 71 Pa. C.S. § 5102 (emphasis added). Thus, the definition of an alternate payee incorporates the premise that an alternate payee's benefits are limited to those that are payable to the member. This premise is echoed in the definition of a "domestic relations order," which also recognizes the right of an alternate payee to receive "all or a portion of the *moneys payable to that member.*" *Id.* (emphasis added) Similarly, Section 5953.1 of the Retirement Code, relating to the approval of DROs, limits an alternate payee's rights "to no more than the total amount of benefits than the member would otherwise receive (determined on the basis of actuarial value)" 71 Pa. C.S. § 5953.1(a)(2). The DRO entered by common pleas in this case follows the statutory language, defining the "retirement benefit" subject to equitable distribution as "all monies [payable] to or on behalf of [Mr. Marshall], including any lump sum withdrawals" SERS' Ex. 3, R.R. at 201a. In addition, the DRO provides that the marital property component of Mr. Marshall's retirement benefit

is the coverture fraction¹⁶ multiplied by Mr. Marshall's retirement benefit as of the effective date of his retirement. *Id.*, R.R. at 200a.

Like the Board, we do not construe these statutory provisions, nor the DRO, to support the conclusion that a DRO or ADRO serves to attach and separate funds from a member's retirement benefits such that they are no longer a part of the benefit at the time of retirement. Rather, the language of both the statute and the DRO support the Board's construction that an alternate payee's rights are derivative to those of the member. Consequently, contingencies that affect the member's right to or amount of benefits will also impact the alternate payee's share of the member's benefits.¹⁷

¹⁶ The coverture fraction is that "portion of the value of the pension that is attributable to the marriage." *Berrington v. Berrington*, 534 Pa. 393, 398 n.5, 633 A.2d 589, 592 n.5 (1993).

¹⁷ While we did not find any controlling decisional law, one case worth noting is *Gaudet v. Sheet Metal Workers' National Pension Fund*, 216 F.Supp.2d 582 (E.D. La. 2002), *aff'd w/o op.* 71 F.App. 441 (5th Cir. 2003), *cert. denied*, 540 U.S. 1089 (2003). There, the husband embezzled funds from his union and its employee benefit plans. Notably, the amount embezzled exceeded the pension benefits husband would have been entitled to upon retirement. The husband's subsequent criminal sentence included restitution to the union in an amount in excess of 2.5 million dollars, which the district court ordered to be satisfied in part by husband relinquishing his pension funds. Since the issue of whether ERISA's anti-alienation provisions prevented relinquishment of the pension funds was not properly raised before the district court, the appellate court affirmed on appeal.

Several years after husband's conviction, the couple separated and entered into a DRO, which established wife as an alternate payee to one-half of the pension benefits "due and payable" to husband. When the fund refused to pay benefits, the parties then apparently filed a civil suit against various defendants, including the pension fund, contending that they were entitled to husband's pension benefits. In the context of a motion for summary judgment, the court examined various federal court decisions addressing ERISA's anti-alienation provisions and the exceptions thereto. The court ultimately held that husband was not entitled to any pension benefits because he had embezzled more than he was entitled to, i.e., no double dipping (as opposed to whether an off-set was proper). As a corollary, the court also held that while wife had an interest in one-half of husband's pension, her right was contingent upon husband being entitled to receive his retirement benefits. Accordingly, since the court had determined that husband had already received his pension, albeit through embezzlement, he was not entitled to (Footnote continued on next page...)

In reaching this conclusion, we note that Mrs. Marshall's focus on the fact that her interest arose or vested prior to the assignment to Penn State is misplaced. While Mrs. Marshall is correct that she had a vested interest in Mr. Marshall's pension, under the plain language of the statutes she is limited to her share of those benefits "payable to the member" under the Retirement Code. Moreover, we find it significant that the Commonwealth is statutorily entitled to a set-off against the member's retirement benefits, while an alternate payee is entitled only to attach the benefits payable to the member. Since funds which are set-off never come into the possession of the debtor, they would never become available for attachment. This distinction reinforces the conclusion based upon the statutory language discussed above that the General Assembly intended SERS to satisfy obligations to the Commonwealth before paying amounts subject to attachment or assignment to other creditors under Section 5953. Because the nature of Mrs. Marshall's right is different from that of the Commonwealth, it is irrelevant that the assignment/paperwork executed to accomplish the set-off occurred after the ADRO.¹⁸

The Board's interpretation of Section 5953 is not only consistent with the statutory language but is consistent with sound policy as well. Accepting Mrs. Marshall's interpretation would put divorced spouses who have obtained a DRO in

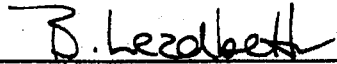
(continued...)

any money from the fund. Therefore, the court held that wife's action for her interest should be against husband—"who through his own actions reaped the entirety of his pension benefits before they were due." *Id.* at 591.

¹⁸ If the Commonwealth's right were based upon Mr. Marshall's assignment to it, Mrs. Marshall's argument would have some merit. *See generally* Restatement (Second) of Contracts § 342 (1981). However, the Commonwealth's right under the statute is not in any way dependent upon an assignment by the member.

a better position than dependents of an indebted member whose marriage has remained intact, or of widow(er)s of indebted members. All of these persons have been harmed by the member's conduct, sometimes wrongful conduct of which the dependents were unaware, and they are equally deserving of sympathy. There is simply no reason to believe that the General Assembly intended to mitigate that harm for only one class of dependents—those who have obtained a divorce. In addition, subordinating the debt to the Commonwealth in favor of the marital debt recognized in a DRO creates an incentive for manipulation of the system. Specifically, a couple who has reaped the benefits of a SERS' member's theft from an employer could subsequently obtain a divorce in order to protect and shelter a substantial portion of the funds subject to set-off under Section 5953. While we do not in any way suggest that such collusion occurred here, the fact that it could occur is yet another reason to conclude that the legislature did not intend to create a divorce loophole in the Commonwealth's right to set-off.

For the foregoing reasons, we conclude that the Board's interpretation is neither plainly erroneous nor inconsistent with the statute it is charged to enforce. Accordingly, we affirm the order of the Board.



BONNIE BRIGANCE LEADBETTER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gail G. Marshall,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 464 C.D. 2005
	:	
State Employees' Retirement System,	:	
Respondent	:	

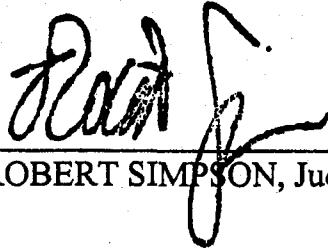
ORDER

AND NOW, this 23rd day of November, 2005, the order of the State Employees' Retirement Board in the above-captioned action is hereby affirmed.

B. Leadbetter
BONNIE BRIGANCE LEADBETTER, Judge

Certified from the Record
NOV 23 2005
and Order Exit

here, the statute lacks express controlling provisions. Borough of Pitcairn v. Westwood, 848 A.2d 158 (Pa. Cmwlth. 2004) (statutes are never presumed to make any innovation in the rules and principles of the common law beyond what is expressly declared in their provisions).

A handwritten signature in black ink, appearing to read "Robert Simpson", written over a horizontal line.

ROBERT SIMPSON, Judge

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

I.D. NUMBER: 31-7
SUBJECT: PRIORITY OF TAXATION, ATTACHMENTS AND ASSIGNMENT OF FUNDS
AGENCY: STATE EMPLOYEES' RETIREMENT SYSTEM

TYPE OF REGULATION

- X Proposed Regulation
Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
	<u>Richard Hill</u>	HOUSE COMMITTEE ON STATE GOVERNMENT
	<u>R.H. [Signature]</u>	MAJORITY CHAIRMAN <u>Babette Josephs</u>
	<u>[Signature]</u>	SENATE COMMITTEE ON FINANCE
	<u>Gregory Crozier</u>	MAJORITY CHAIRMAN <u>Patrick M. Browne</u>
	<u>matotiu</u>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
	<u>4/18/08 C. Lee Brown</u>	LEGISLATIVE REFERENCE BUREAU (for Proposed only)