

Mail Date:

SEP 20 2017

Mail Date: \_\_\_\_\_

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

IN RE: ACCOUNT OF CARLOS J. RODRIGUEZ, JR.  
DOCKET NO. 2015-18  
CLAIM OF CARLOS J. RODRIGUEZ, JR.

**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 Order and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that the Board grants the Public School Employees' Retirement System's Motion to Dismiss, and the appeal of Claimant, Carlos J. Rodriguez, Jr., is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: September 15, 2017

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

RECEIVED

MAY 09 2017

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

PSERB  
EXECUTIVE OFFICE

**In Re:** :  
**Account of Carlos J. Rodriguez, Jr.** : **Docket No. 2015-18**  
**Claim of Carlos J. Rodriguez, Jr.** :  
:

---

**OPINION AND RECOMMENDATION**

---

**Date of Hearing:** April 26, 2017

**Hearing Examiner:** Marc A. Moyer, Esquire

**For the Claimant:** Carlos J. Rodriguez, Jr., *pro se* (not present)

**For PSERS:** Jennifer Mills, Esquire

**I. Procedural History:**

This matter is before the Public School Employees' Retirement Board (the "Board") on an appeal filed by Carlos J. Rodriguez, Jr. ("Claimant") from a determination of the Executive Staff Review Committee to deny Claimant's request to change the terms of his retirement from a normal retirement to a disability retirement. Claimant filed an appeal from the denial and requested an administrative hearing on October 22, 2015. Counsel for the Public School Employees' Retirement System ("PSERS") filed an Answer to Claimant's appeal on November 9, 2015.

On February 10, 2016, Board Secretary, Glen R. Grell, appointed Marc A. Moyer, Esquire to act as hearing examiner for the administrative hearing in connection with Claimant's appeal. The Board's Appeal Docket Clerk served a notice of hearing upon the parties on February 12, 2016 which scheduled the hearing on Claimant's appeal for May 25, 2016, commencing at 1:00 p.m. at PSERS, 5 North Fifth Street, Harrisburg, PA 17101.

By letter dated May 6, 2016, PSERS's counsel requested a continuance based, in part, upon a scheduling conflict and Claimant's continuing attempt to retain legal representation for the hearing. PSERS's request for a continuance was granted by Order dated May 9, 2016. A notice of rescheduled hearing was served upon the parties by the Board's Appeal Docket Clerk on May 11, 2016 which scheduled the hearing for August 15, 2016. By way of email correspondence written to the Board's Appeal Docket Clerk on August 11, 2016, Claimant requested a one-year continuance of the hearing due to his inability to retain legal representation. PSERS filed a response to Claimant's request on

August 11, 2016. PSERS did not oppose Claimant's continuance request, but objected to the requested duration thereof.

On December 11, 2016, Claimant requested that his appeal be dismissed due to his purported inability to retain pro bono legal representation. Claimant's request further stated "If [a continuance] cannot be granted, then I guess I'll show up at the hearing on the last date of April...". PSERS objected to Claimant's request on December 13, 2016 on the grounds that Claimant had sufficient time to retain legal counsel and that Claimant's request constituted a *de facto* request for an indefinite continuance of the hearing. By Order dated December 13, 2016, the Hearing Examiner denied Claimant's request to withdraw his appeal, without prejudice. The hearing was rescheduled for April 26, 2017 by way of a notice of rescheduled hearing served upon the parties on December 16, 2016. The hearing on Claimant's appeal was held, as scheduled, on April 26, 2017 at 5 N. 5<sup>th</sup> Street, Harrisburg, PA 17101. Jennifer Mills, Esquire represented PSERS at the hearing. Claimant did not appear for the hearing.

## **II. Discussion:**

Claimant was granted a hearing on his appeal from the Executive Staff Review Committee's decision to deny his request to change the terms of his retirement from a normal retirement to a disability retirement. As the appellant, Claimant bears the burden of establishing the relief he seeks under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. §8101 *et. seq.*. See, *L. Draper v. PSERS*, 2012 WL 8681657 at \*1 (Pa. Cmwlth. October 26, 2012). See also *Gierschick v. State Employee's Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Claimant must satisfy this

burden by a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1992). 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.” *Sigafoos v. Pennsylvania Bd. of Probation and Parole*, 503 A. 2d 1076 (Pa. Cmwlth. 1986). It has also been described as a ‘more likely than not standard’ or evidence which is sufficient to tip the mythical scales. *Agostino v. Township of Collier*, 968 A. 2d 258 (Pa. Cmwlth. 2009).

The hearing convened at 1:30 p.m. on April 26, 2017, 30 minutes after the scheduled start time, for the purpose of providing Claimant additional time to appear. Claimant did not appear for his hearing, and the record is devoid of any communications with PSERS or the Hearing Examiner by Claimant regarding the reason for his absence from the proceeding. (N.T. 2)<sup>1</sup>. Based upon Claimant’s absence, PSERS’s counsel requested that the Hearing Examiner recommend to the Board that it dismiss Claimant's appeal, with prejudice, pursuant to 22 Pa.Code §201.8 and the applicable General Rules of Administrative Practice and Procedure (1 Pa.Code §§35.177, 35.180 and 35.187(7)) due to Claimant having failed to sustain his burden of proof.

Section 201.8 of PSERS’ regulations provides as follows:

**§201.8. Dismissal for nonappearance**

(a) Whenever a claimant fails to appear, either in person or through counsel, for a scheduled hearing without good cause, the hearing examiner will issue a recommendation to dismiss the case, without considering the merits of the claim.

---

<sup>1</sup> “N.T.” refers to “notes of testimony” from the April 26, 2017 hearing.

(b) This section supplements 1 Pa.Code §§35.125, 35.187 and 35.205 (relating to order of procedure; authority delegated to presiding officers; and contents of proposed reports).

22 Pa.Code §201.8.

Sections 35.177, 35.180 and 35.187(7) of the General Rules of Administrative Practice and Procedure, 1 Pa.Code §§35.177, 35.180 and 35.187(7), provide, in pertinent part:

**§35.177. Scope and contents of motions.**

After a hearing has commenced in a proceeding, a request may be made by motion for any procedural . . . ruling or relief desired. . . .

**§35.180. Action on motions.**

(a) The presiding officer. . . is authorized to rule upon any motion not formally acted upon by the agency head prior to the commencement of the hearing where immediate ruling is essential in order to proceed with the hearing, and upon any motion filed or made after the commencement of the hearing and prior to the submission of his proposed report in the proceedings, except that no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding shall be ruled upon by a presiding officer except as part of his proposed report submitted after the conclusion of the hearing. . . .

**§35.187(7). Authority delegated to presiding officers.**

Presiding officers designated by the agency head to preside at hearings shall have the authority, within the powers and subject to the regulations of the agency, as follows:

...  
(7) To dispose of procedural matters but not, before their proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings.

1 Pa.Code §§35.177, 35.180 and 35.187(7). Consistent with 22 Pa.Code §201.8, the December 16, 2016 hearing notice specifically notified Claimant as follows:

If you do not appear at the hearing on the date and the time scheduled without good cause, the Hearing Examiner, upon motion, will recommend to the Board that your appeal be dismissed with prejudice. This means that the appeal will be terminated and that you will not be permitted to raise this issue to the Board in the future.

(Official Notice<sup>2</sup> – Docket No. 2015-18). Based on the foregoing, Claimant's failure to appear for the hearing and present evidence to demonstrate that he is eligible to modify his retirement selection provides the Board with no basis in law or in fact to grant him the relief he seeks. It is, therefore, recommended that that the Board grant PSERS's request to dismiss Claimant's appeal under the authority of 22 Pa. Code §201.8, due to Claimant's failure to appear for his scheduled hearing and carry his burden of proof.

---

<sup>2</sup> Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa.Code §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa.Code §35.173.

In *Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987), the Pennsylvania Commonwealth Court explained:

“Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

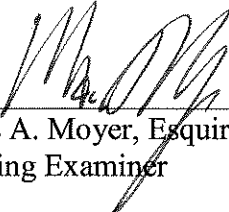
521 A. 2d at 994 n. 6.

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

**In Re:** :  
**Account of Carlos J. Rodriguez, Jr.** : **Docket No. 2015-18**  
**Claim of Carlos J. Rodriguez, Jr.** :  
:

**RECOMMENDATION**

**AND NOW**, this **5th** day of **May, 2017**, it is recommended that the appeal filed by Carlos J. Rodriguez, Jr. be **DISMISSED**, with prejudice, pursuant to 22 Pa.Code §201.8, as a result of Claimant's failure, without good cause, to appear for his scheduled hearing.

  
\_\_\_\_\_  
Marc A. Moyer, Esquire  
Hearing Examiner

Date of Mailing: 5/8/17