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

IN RE: ACCOUNT OF DANA E. OHLMANN  
DOCKET NO. 2016-16  
CLAIM OF DANA E. OHLMANN

**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 ("HEO"), Claimant's letter brief on exceptions, and the Public School Employees' Retirement System's letter brief on exceptions.

The HEO recommends that the Board dismiss Claimant's appeal with prejudice due to her failure, without good cause, to appear telephonically for the June 8, 2017 administrative hearing. Claimant excepts to the HEO on the basis that she claims that she was unavailable for the June 8, 2017 administrative hearing due to a June 7, 2017 automobile accident. Claimant represents that she was waiting for a call from the Hearing Examiner during the scheduled time for the hearing until 1:05 p.m. She claimed that she then left for medical treatment on June 8, 2017 after she did not receive a telephone call by 1:05 p.m. The record, however, establishes that the Hearing Examiner attempted to contact the Claimant at the pre-designated telephone number on multiple occasions, beginning at 1:00 p.m. but Claimant did not answer. By Order dated June 14, 2017, the Hearing Examiner directed Claimant to provide a sworn statement attesting to her involvement in an automobile accident and presentation for medical treatment and documentation substantiating her claim by June 30, 2017. Claimant failed to do so.

Section 201.8 of the Board's Rules and Regulations states that failure on the part of Claimant to appear for her scheduled hearing without good cause results in the dismissal of her appeal upon motion by PSERS. See 22 Pa. Code § 201.8. The general rule in Pennsylvania is that "where evidence which would properly be part of a case is within the

control of the party in whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him." *Haas v. Kasnot*, 92 A.2d 171 (Pa. 1952) (citations omitted); *see also Commonwealth v. Moore*, 309 A.2d 569, 570 (Pa. 1973).

Because Claimant has failed to provide the requested corroborating evidence that would reasonably be within her control and possession, Claimant has failed to establish good cause for her failure to appear telephonically for the June 8, 2017 administrative hearing. Consequently, the Board finds no error.

We hereby adopt the Hearing Examiner's Opinion and Recommendation as our own and, accordingly:

IT IS HEREBY ORDERED that the Public School Employees' Retirement System's Motion to Dismiss is GRANTED, and the appeal of Claimant, Dana E. Ohlmann, is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: September 15, 2017

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

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

**In re: Account of Dana E. Ohlmann :  
Claim of Dana E. Ohlmann :**

**Docket No. 2016-16**

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**OPINION AND RECOMMENDATION**

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**Date of Hearing: June 8, 2017**

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

**For the Claimant: Dana E. Ohlmann., *pro se* (not present)**

**For PSERS: Laura Vitale, Esquire**

**I. Procedural History:**

This matter is before the Public School Employees' Retirement Board (the "Board") on an appeal filed by Dana E. Ohlmann ("Claimant") from a determination of by the Public School Employees' Retirement System ("PSERS") to deny Claimant's request to change her membership class to T-F. Claimant filed an appeal from the denial and requested an administrative hearing on August 22, 2016. Counsel for PSERS filed an Answer to Claimant's appeal on August 26, 2016. On December 9, 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 December 9, 2016 which scheduled the hearing on Claimant's appeal for April 5, 2017, commencing at 1:00 p.m. at PSERS, 5 North Fifth Street, Harrisburg, PA 17101.

By email correspondence dated December 22, 2016, Claimant informed the Docket Clerk of her inability to attend the hearing in Harrisburg, Pennsylvania. On December 23, 2016, PSERS legal counsel, Assistant Deputy Chief Counsel, Kathrin V. Smith, Esquire wrote to the Hearing Examiner for the purpose of objecting to Claimant's telephonic testimony at the hearing should Claimant's December 22, 2016 correspondence be interpreted as a request by Claimant to participate at the hearing by telephone. On December 29, 2016, the Hearing Examiner scheduled a telephonic pre-hearing conference for March 15, 2017. At the telephonic pre-hearing conference, PSERS' counsel agreed to waive the objection to Claimant's participation at the hearing by telephone upon Claimant's submission of documentation from her treating physician which attested to her inability to attend a hearing in person due to her medical condition.

A notice of rescheduled hearing was served upon the parties by the Board's Docket Clerk on March 16, 2017 which scheduled the hearing for April 5, 2017. Claimant's physician, thereafter, submitted documentation to the Hearing Examiner on March 20, 2017 which attested to Claimant's inability to personally appear at the hearing. PSERS formally withdrew its objection to Claimant's telephonic testimony by letter dated March 20, 2017, and Claimant's participation at the hearing by telephone was granted by Order dated March 21, 2017.

By letter dated March 22, 2017, Claimant requested that the time of the hearing be changed from 1:00 p.m. on April 5, 2017, to after 3:00 p.m. due to her work schedule. PSERS objected to Claimant's request on March 23, 2017. By letter dated March 23, 2017, Claimant indicated that she would be able to participate at the hearing at 1:00 p.m. on April 5, 2017.

PSERS requested a continuance of the April 5, 2017 hearing by letter dated April 4, 2017. PSERS' request was granted by Order dated April 4, 2017. On April 7, 2017, the hearing was scheduled for June 8, 2017. On or about May 15, 2017, Claimant informed the Hearing Examiner and PSERS' counsel that she would not be able to attend the June 8, 2017 hearing. By Second Amended Order dated May 23, 2017, the Hearing Examiner once again granted Claimant the ability to participate at the June 8, 2017 hearing by telephone.

The hearing on Claimant's appeal convened, as scheduled, on June 8, 2017 at 5 N. 5<sup>th</sup> Street, Harrisburg, PA 17101 at 1:00 p.m. Kathrin V. Smith, Esquire represented PSERS at the hearing. Claimant did not appear for the hearing. The record shows that the Hearing Examiner attempted to contact Claimant by telephone at the pre-designated

telephone number on multiple occasions at the hearing, from 1:00 p.m. through 1:45 p.m. However, Claimant did not answer her telephone. The record additionally shows that the Hearing Examiner left a voice mail message for Claimant which had asked her to contact the PSERS Docket Clerk upon her receipt thereof.

Based upon Claimant's failure to appear for the hearing, PSERS presented testimony from PSERS Docket Clerk, Laura Vitale, who testified regarding the procedural history of Claimant's appeal. PSERS, thereafter, moved to dismiss Claimant's appeal pursuant to 1 Pa.Code §§35.177, 35.180, 35.187 and 22 Pa.Code §201.8 as a result of Claimant's failure to appear for the hearing.

On June 9, 2017, Claimant wrote to the PSERS Docket Clerk to inform her that she had been in an automobile accident the day prior to the hearing, June 7, 2017. Claimant asserts that she waited to be contacted for her hearing until approximately 1:05 p.m. on June 8, 2017, but thereafter sought medical attention to address her accident injuries. Claimant attached to her correspondence a document entitled "Excuse from Work, School, or Physical Activity purportedly signed by an Emergency Department Registered Nurse at Aria Jefferson Health on June 8, 2017. The document does not indicate the time on which Claimant was treated, but indicated that Claimant was to be excused from "work" from June 8, 2017 through June 11, 2017. PSERS interpreted Claimant's correspondence as a response to its Motion to Dismiss her appeal and, by letter dated June 9, 2017, requested that Claimant be required to corroborate her accident and accident injuries prior to a determination being made on its Motion to Dismiss.

By Order dated June 14, 2017, the Hearing Examiner granted what he considered to be Claimant's request for a temporary stay of adjudication on PSERS' Motion to

Dismiss and request to reopen the record. The Order directed Claimant to file a sworn statement/affidavit with PSERS no later than June 30, 2017 which attested to her involvement in a motor vehicle accident on June 7, 2017 and her presentation for medical treatment on June 8, 2017 which precluded her from contacting PSERS prior to seeking medical attention and/or participating at the June 8, 2017 hearing by telephone. The Order further directed Claimant to attach to the sworn statement/affidavit all documentation which demonstrated her involvement in a motor vehicle accident on June 7, 2017 and her presentation for medical treatment on June 8, 2017 which precluded her from participating at the June 8, 2017 hearing. PSERS was directed to file a response to Claimant's submissions, if any, no later than July 17, 2017. Claimant did not file any documentation in accordance with the Hearing Examiner's June 14, 2017 Order.

## **II. Discussion:**

Claimant was granted a hearing on her appeal from PSERS' decision to deny her request to change the terms of her PSERS membership to T-F membership. As the appellant, Claimant bears the burden of establishing the relief she 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 Employes' Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Claimant must satisfy her 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). Claimant’s burden of proof has also been described as a ‘more likely than not standard’, or evidence which is sufficient to tip the mythical scales in her favor. *Agostino v. Township of Collier*, 968 A. 2d 258 (Pa. Cmwlth. 2009).

The hearing convened at 1:45 p.m. on June 8, 2017, 45 minutes after the scheduled start time, for the purpose of providing Claimant additional time to appear in person or by telephone. The record reflects that the Hearing Examiner attempted to contact Claimant by telephone at the pre-designated telephone number multiple times, beginning at 1:00 p.m., and that Claimant failed to answer the telephone on each occasion. The record is devoid of any communications between PSERS or the Hearing Examiner and Claimant prior to the date and time of the hearing regarding the reason for her absence from the proceeding. (N.T. 5-8) <sup>1</sup>. Based upon Claimant’s absence, PSERS’ 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 under 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 her 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.

(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).

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<sup>1</sup> “N.T.” refers to “notes of testimony” from the June 8, 2017 hearing.



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

April 7, 2017 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).

Despite being provided the opportunity to explain why she did not notify PSERS or the Hearing Examiner of her automobile accident at any time before the hearing pursuant to the Hearing Examiner’s June 14, 2017 Order, Claimant has failed to do so and, therefore, has failed to demonstrate good cause for failing to appear for the hearing. Based upon the foregoing, Claimant’s absence from the hearing and resulting failure to present evidence to demonstrate that she is eligible to modify her retirement selection provides the Board with no basis in law or fact to grant her the relief she seeks. The Hearing Examiner, therefore, recommends that that the Board grant PSERS' request to

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<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.

dismiss Claimant's appeal under the authority of 22 Pa. Code §201.8, due to Claimant's failure to appear for her scheduled hearing and sustain her burden of proof.

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

**In re: Account of Dana E. Ohlmann :  
Claim of Dana E. Ohlmann :**

**Docket No. 2016-16**

**RECOMMENDATION**

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




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

***For PSERS:***

Kathrin V. Smith, Esquire  
5 North Fifth Street  
Harrisburg, PA 17101

***Claimant:***

Dana E. Ohlmann  


***Date of Mailing:***

7/5/17