

Mail Date:

JUN 02 2017

Mail Date: _____

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

IN RE: ACCOUNT OF PAUL D. MAKOVSKY
DOCKET NO. 2016-13
CLAIM OF PAUL D. MAKOVSKY


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 Hearing Examiner's Procedural History, Discussion, and Recommendation and, accordingly, we hereby adopt the Hearing Examiner's proposed Opinion and Recommendation 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, Paul D. Makovsky, is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: May 25, 2017

By: 
Nathan G. Mains, Vice Chairman

RECEIVED

FEB 13 2017

PSERS
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE:

Account of Paul D. Makovsky
Claim of Paul D. Makovsky

:
:
:
:
:

Docket No. 2016-13

OPINION AND RECOMMENDATION

Date of Hearing: January 25, 2017
Hearing Examiner: Jackie Wiest Lutz, Esquire
For the Claimant: Paul D. Makovsky, *pro se* (not present)
For PSERS: Kathrin V. Smith, Esquire

I. Procedural History:

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Paul D. Makovsky (Claimant) from a June 9, 2016 determination of the Executive Staff Review Committee that Claimant's request to purchase credit for non-qualifying part-time Pennsylvania public school service rendered for the Allentown School District must be denied.

Claimant's appeal was filed on June 22, 2016. Subsequently, on July 12, 2016, Kathrin V. Smith, Assistant Deputy Chief Counsel, filed an Answer on behalf of the Public School Employees Retirement System (PSERS).

On December 2, 2016, Jackie Wiest Lutz, Esquire was appointed by Glen R. Grell, Secretary of the Board, to act as hearing examiner for the administrative hearing in connection with Claimant's appeal. On the same date, the Board's Appeal Docket Clerk issued a notice of hearing scheduling the hearing on Claimant's appeal for January 25, 2017, commencing at 1:00 p.m. at PSERS, 5 North Fifth Street, Harrisburg, PA 17101.

On December 14, 2016, Claimant filed a request for phone hearing. On December 16, 2016, Attorney Smith, on behalf of PSERS, requested that a telephone conference be scheduled with the parties to discuss the logistics of Claimant's request for a phone hearing, and whether telephonic testimony is appropriate.

On December 21, 2016, an *Order Scheduling Conference Call* was issued by the hearing examiner, which scheduled a telephonic pre-hearing conference for January 10, 2017, commencing at 10:00 a.m. In preparation for the conference call, Claimant was directed to provide the Appeal Docket Clerk, counsel for PSERS and the hearing

examiner with medical documentation directly from Claimant's treating physician to substantiate Claimant's need for telephonic participation during his hearing.

A reminder notice of Claimant's scheduled hearing date was mailed to the Claimant by the Appeal Docket Clerk on or about January 4, 2017.

On the morning of the scheduled conference call, the hearing examiner received the following email communication from the Appeal Docket Clerk:

Good morning Ms. Lutz,

I received a lengthy voice mail from Claimant in the above-referenced matter yesterday around 9:00 PM. To summarize, Mr. Makovsky stated that he is unable to obtain the documentation from his physician to address his need for a telephonic hearing because he is fighting to keep his driver's license. He stated that he will attempt to attend the January 25 hearing in person. I am unsure if this voicemail indicates whether or not he will be participating in the telephonic conference scheduled for today at 10:00 AM, as his words were unclear. If you like, I can forward the voice mail to you, or we can simply wait to see if he participates in today's conference.

The telephonic pre-hearing conference proceeded as scheduled on January 10, 2017, commencing at 10:00 a.m. Claimant failed to participate in the conference call. An *Order Denying Request to Participate Telephonically During Hearing* was therefore issued by the hearing examiner that same day.

On January 24, 2017, the hearing examiner received another email communication from the Appeal Docket Clerk, as follows:

Good morning Ms. Lutz,

I received a voicemail this morning from Claimant in the above-referenced matter. He called our office after hours at 6:10 PM yesterday, January 23. He is verbally requesting a continuance. Due to the lateness of this request, I am unsure how to proceed.

If you would like to hear Mr. Makovsky's voice mail, please let me know, and I can try to forward his message to your phone.

On the same date, the hearing examiner received a letter from Attorney Smith, on behalf of PSERS, which objected to the last-minute continuance, stating, in part:

PSERS objects to the last-minute, unsubstantiated request that is based on the same grounds that he previously asserted when he requested to participate in the administrative hearing by telephone. Mr. Makovsky was given an opportunity to participate in a conference call on January 10, 2017 to present his request for telephonic testimony and to submit medical evidence to support his claim. His request was denied because he failed to submit any documentation that supported his request and he failed to participate in the scheduled call. Absent evidence that an emergency continuance is required at this late hour, PSERS objects to Mr. Makovsky's request.

On January 24, 2017, an *Order Denying Request for Continuance* was issued by the hearing examiner.

On January 25, 2017, the hearing on Claimant's appeal was held as scheduled at 5 N. 5th Street, Harrisburg, PA 17101. Attorney Smith was present at the hearing on behalf of PSERS. Claimant did not appear for his scheduled hearing.

II. Discussion:

Claimant requested and was granted a hearing on his appeal from the Executive Staff Review Committee's decision to deny his request to purchase credit for non-qualifying part-time Pennsylvania public school service rendered for the Allentown School District.

As the moving party, Claimant bears the burden of establishing the relief that he seeks. 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).

On the afternoon of the scheduled hearing, the hearing examiner waited until 1:15 p.m. to open the proceeding to allow time for the Claimant to appear for his scheduled hearing. Claimant did not appear for his hearing, and the hearing proceeded in his absence.

Attorney Smith, on behalf of PSERS, called Laura Vitale, Appeal Docket Clerk, as a witness to testify regarding her communications with the Claimant.¹ Ms. Vitale testified that after she received the *Order Denying Request for Continuance* from the hearing examiner, she attempted to contact the Claimant on January 24, 2017 by phone at 3:11 p.m. at the telephone number that Claimant provided in his original message to her. Ms. Vitale testified that Claimant did not answer his phone, so she left a message for Claimant. Ms. Vitale identified herself, provided her contact information, and informed Claimant that his request for a continuance was denied. Ms. Vitale did not receive a call back from Claimant. (N.T.² 10)

Ms. Vitale testified that she later called Claimant again on January 24, 2017 at 4:00 p.m., but Claimant did not answer his phone. Ms. Vitale again left her name and telephone number and repeated her earlier message that his request for a continuance was denied. (N.T. 10)

¹ Hearing Transcript, pgs. 9-11.

² “N.T.” refers to “notes of testimony” from the January 25, 2017 hearing.

Ms. Vitale lastly testified that on January 25, 2017, the morning of the hearing, she again attempted to contact the Claimant by phone, but he did not answer his phone. Ms. Vitale left another message for Claimant advising him that his hearing was going to be held as scheduled, and that his request for a continuance was denied. (N.T. 11)

At the conclusion of Ms. Vitale's testimony, Attorney Smith, on behalf of PSERS, made an oral motion that the hearing examiner recommend that the Board dismiss Claimant's appeal, with prejudice, pursuant to 22 Pa. Code §201.8 and 1 Pa. Code §§35.177, 35.180 and 35.187(7), respectively, for failure on the part of the Claimant to appear for his scheduled hearing and carry 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.

(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 2, 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 Notice³ – Docket No. 2016-13).

³ 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 §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Claimant's failure to appear for his hearing and to present evidence to demonstrate that he is eligible to purchase credit for non-qualifying part-time Pennsylvania public school service rendered for the Allentown School District provides the Board with no basis in law or in fact to grant Claimant the relief that he seeks.

It is therefore recommended that that the Board grant PSERS' request to dismiss Claimant's appeal, under the authority of 22 Pa. Code § 201.8, for Claimant's failure to appear for his scheduled hearing and carry his burden of proof.

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.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the 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.

RECEIVED

FEB 13 2017

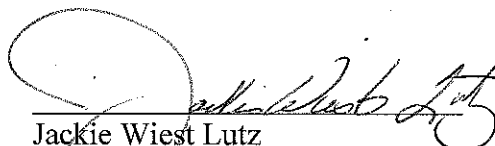
PSERS
EXECUTIVE OFFICE

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

IN RE: :
: :
Account of Paul D. Makovsky : Docket No. 2016-13
Claim of Paul D. Makovsky :
:

RECOMMENDATION

AND NOW, this 10th day of February 2017, it is recommended that the appeal filed by Paul D. Makovsky be **DISMISSED**, with prejudice, under the authority of 22 Pa. Code § 201.8, due to Claimant's failure, without good cause, to appear for his scheduled hearing.


Jackie Wiest Lutz
Chief Hearing Officer

Date of Mailing: February 10, 2017