

Mail Date: MAY 03 2011

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

IN RE: ACCOUNT OF DENISE M. O'HARA  
DOCKET NO. 2010-02  
CLAIM OF DENISE M. O'HARA

**OPINION AND ORDER OF THE BOARD**

The Board has carefully and independently reviewed the entire record of this proceeding, including the Brief of the Public School Employees' Retirement System (the Claimant did not submit a brief) and the Opinion and Recommendation of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's Findings of Fact, Issue, Discussion, Conclusions of Law, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request to purchase credit for her unpaid leave of absence for the 1999-2000 and 2000-2001 school years is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: MAY 03 2011

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

LEGAL OFFICE JAN 19 2011

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

IN RE: ACCOUNT OF DENISE M. O'HARA  
DOCKET NO. 2010-02  
CLAIM OF DENISE M. O'HARA

BEFORE: Edward S. Finkelstein, Esquire

HEARING DATE: August 4, 2010

APPEARANCES: David W. Speck, Esquire  
For - Public School Employees' Retirement  
System

Denise M. O'Hara, *pro se* at hearing

Elizabeth C. Leo, Esquire - post hearing for  
Claimant

OPINION OF THE HEARING EXAMINER

FINDINGS OF FACT

1. Claimant was a contracted teacher with the Wyoming Valley School District (School District) in 1993. (N.T. 9).
2. Prior to that, Claimant was a day-to-day substitute since October 1988. (N.T. 10).
3. Claimant taught in the middle school, American history at one point, world history and honors world history, having various teaching assignments at the middle school level. (N.T. 10).
4. On June 18, 1999, Claimant and her family had gone to Knoebels Amusement Park and on their way home were involved in a head on collision with a drunk driver. (N.T. 10).

5. Claimant had just finished teaching for that school year. (N.T. 10).

6. Due to the injuries Claimant suffered, Claimant was out of work for the School District for two full school years following the accident. (N.T. 11).

7. During the first part of the first year of the leave, Claimant took family medical leave, and for the remainder of the school year, Claimant was on an unpaid leave of absence. (N.T. 11).

8. Claimant continued to pay her union dues and made monthly health insurance reimbursement payments to the School District during the leave. (PSERS Exhibit 5 [letters dated August 12, 1999<sup>1</sup> and December 7, 1999<sup>2</sup>], N.T. 11).

9. Following the first year of unpaid leave, Claimant applied for and was granted another year of unpaid medical leave by the School Board. (PSERS Exhibit 5 [letter dated May 18, 2000], N.T. 12).

10. Claimant returned to service with the School District in the Fall of 2001. (N.T. 13).

11. Claimant filed an application with the Public School Employees' Retirement System (PSERS) to purchase credit for

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<sup>1</sup> Claimant Exhibit 3.

<sup>2</sup> Claimant Exhibit 4.

full-time service for the 1999-2000 and 2000-2001 school years on February 12, 2008. (PSERS Exhibit 1).

12. Claimant received no salary from the School District for the 1999-2000 and 2000-2001 school years. (N.T. 28).

13. Claimant had 60 days of family medical leave during which she received no salary, but during which the School District paid for her health insurance benefits. After the 60 days expired, Claimant began reimbursing the School District \$553.32 per month for continued coverage under the School District's health insurance plan, beginning October 1999, which increased to \$614.64 per month for the following year. (Claimant Exhibit 5, N.T. 28-29).

14. Claimant's copy of the purchase of service application that she received from the School District contains additional information on an attached note that Claimant received no pay for the 1999-2000 (Step 7 - M+60 which would have been \$49,771) and 2000-2001 (Step 8 - M+60 which would have been \$52,578) school years. For the 2001-2002 school year after she had returned to service she was paid \$55,054 (Step 9 - M+60). (Claimant Exhibit 2).

15. In response to the cover letter that Claimant submitted with her purchase of service application (PSERS Exhibit 1, including letter and application), PSERS' Supervisor of Purchase of Service Section responded by letter dated August

5, 2008, stating that "in view of the fact that this period of time was [due to] an automobile accident, it cannot be purchased for retirement credit." (PSERS Exhibit 4, N.T. 74).

16. Claimant appealed the denial of her purchase of service request to PSERS' Executive Staff Review Committee (ESRC) stating that "the leave granted to me was a special sick leave for restoration of health." (PSERS Exhibit 5).

17. By letter dated February 3, 2010, the ESRC again denied Claimant's request, as follows:

"You were not granted a type of an approved leave of absence that entitled you to receive additional service credit, including special sick leave since you did not receive compensation. Your employer approved your request for Family Medical Leave and an unpaid leave of absence due to restoration of health based on your specific request. You do not qualify under the Special Sick Leave Policy because the leave was an unpaid leave granted by the school district and you did not receive at least half of your salary through a school sponsored insurance program or workers' compensation."

(PSERS Exhibit 6; Hearing Examiner Exhibit 1).

18. Claimant was paid no salary and no retirement contributions were made on her behalf by either the School District or the Claimant during her 2-year leave of absence. (N.T. 75).

19. Even though a member may have certain rights with the employer during a leave, e.g. seniority, that does not necessarily give them the right to purchase credit for the leave with PSERS. (PSERS Exhibit 6, N.T. 76-77).

20. Claimant's leave did not fall under the provisions of the special sick leave policy because Claimant did not receive at least half her regular pay through workers' compensation or school-sponsored disability program. (PSERS Exhibit 6, N.T. 77).

21. Claimant received work loss benefits for the first year of absence from her personal auto insurance company, and not from workers' compensation or a school-sponsored disability insurance program. (N.T. 35-36).

22. During the leave of absence, Claimant was receiving physical therapy to rehabilitate herself from the severe injuries she sustained during the auto accident as well as her pregnancy that was complicated by the accident. (Claimant Exhibit 16, N.T. 36-37).

23. Claimant's PSERS Member Service Record shows that she received no service credit for the 1999-2000 and 2000-2001 school years. (Claimant Exhibit 15, N.T. 37-38).

24. Claimant did not receive any salary compensation from the School District during the period of the 2-year leave. (N.T. 49-50).

25. Neither Claimant nor the School District made any retirement contributions for Claimant during the period of the 2-year leave of absence. (N.T. 50, 51).

26. Prior to taking testimony in this case the Hearing Examiner advised the Claimant that she had the right to be represented by an attorney and she indicated that she was willing to proceed without the assistance of counsel. (N.T. 5)

27. Prior to taking testimony, the Hearing Examiner explained to the Claimant that she had the right to call witnesses to testify on her behalf and she acknowledged that fact. (N.T. 5)

28. Prior to the taking of testimony, the Hearing Examiner advised the Claimant that she had the right to subpoena witnesses to testify at the hearing on her behalf and the Claimant advised that she had written documentation from individuals whereupon the Hearing Examiner advised her that counsel for PSERS may or may not object to any hearsay evidence that she would attempt to submit. The Claimant understood the possible need to subpoena witnesses. (N.T. 6)

29. At the conclusion of the hearing, the Hearing Examiner advised the Claimant that although she did not have an attorney represent her at the hearing she could still have an attorney assist her in filing a brief on her behalf. (N.T. 92-93)

30. Because the Claimant was unable to reach a witness by telephone, the Hearing Examiner offered her the option of keeping the record open at the conclusion of the testimony on August 4, 2010. Counsel for PSERS objected. (N.T. 96)

31. After the conclusion of the hearing, Claimant contacted Attorney Elizabeth Leo who requested that the record be reopened for additional testimony but later withdrew her request for a further hearing.

32. Although the Claimant was to file an initial brief, she failed to do so and PSERS then filed its brief in this matter.

33. Upon receipt of PSERS' brief, the Hearing Examiner wrote to the Claimant's attorney, Elizabeth Leo, to permit her to file a reply brief. Attorney Leo wrote to the Hearing Examiner indicating that she was not going to file a reply brief and would stand by the testimony in the record on behalf of the Claimant.

#### ISSUE

Is the Claimant eligible to purchase credit for a 2-year leave of absence for the 1999-2000 and 2000-2001 school years while she was out for medical reasons?

#### DISCUSSION

Section 8302(b) of the Public School Employees' Retirement Code (Retirement Code), 24 Pa. C.S. §8302(b), permits a PSERS member to receive retirement credit for an



"approved leave of absence" in certain situations and under certain conditions. Section 8102 of the Retirement Code, 24 Pa. C.S. § 8102, defines an approved leave of absence as follows:

**§ 8102. Definitions.**

**"Approved leave of absence."** A leave of absence for activated military service or which has been approved by the employer for sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study.

Section 8302 of the Retirement Code, 24 Pa. C.S. § 8302, states in pertinent part:

**§ 8302. Credited School Service.**

- (b) **Approved leaves of absence.** - An active member shall receive credit for an approved leave of absence provided that:
- (1) the member returns for a period at least equal to the length of the leave or one year, whichever is less, to the school district which granted her leave, unless such condition is waived by the employer; and
  - (2) the proper contributions are made by the member and the employer.

The Rules and Regulations duly promulgated by the PSERS Board further clarify as follows:

**§213.2. Credited school service.**

(b) *Approved leaves of absence.* Credited service shall be granted to an *active member* for an approved leave of absence as authorized under sections 8102 and 8302 of the Retirement Code (relating to definitions

and credited school service). *Members may be granted other types of leaves of absence, not authorized by the Retirement Code, but the leaves will not entitle the member to any credited service during the period of the leave.*

Credited service for the approved leaves of absence shall be granted under the following conditions only:

(2) Proper current contributions, based on the salary as if the member had been in regular full-time employment during the period of the leave are made by the member and the employer if required. An employer may not be permitted to suspend the requirement of making its required contributions during the period of the leave. Current contributions made by the member during the period of the leave shall be transmitted through the school district on a monthly basis in the same manner as active members.

22 Pa. Code § 213.2 (emphasis added). In no other instance does the law permit the granting of PSERS retirement credit for a leave of absence.

Because the provisions of the Retirement Code and the regulations of the Board are limiting in nature, retirement credit for leaves of absence other than those listed above is not available. Here, Claimant took an unpaid leave of absence to recover from a car accident. Such a leave does not qualify in any of the categories listed above. Therefore, Claimant is not eligible to purchase service credit for the leave granted by the School District.

The Retirement Code requires that service and retirement credit must be tied to one another. There can be no retirement credit without school service. *Hoerner v. PSERB*, 684 A.2d 112

(Pa. 1996). The Hearing Examiner was willing to reopen the record for the Claimant to introduce testimony from the School District that they, in fact, had paid her for her school service for the 2-year leave of absence that she was on. However, apparently, the Claimant could not obtain such testimony from the School District. In *Hoerner*, the Pennsylvania Supreme Court conclusively determined that a member is entitled to receive credited service only up to the time such member is formally relieved of responsibilities and not up to the artificial date set forth in a termination or severance agreement. Regardless how an agreement is characterized by a School District and its employee, the Court held that the PSERS Board is not bound, in calculating retirement benefits, by such an agreement to which it was not a party. The Board is not bound by the employer's and employee's characterizations of payments and other (specifically *retirement*) terms made under their agreements, but is obligated to review such terms under the standards for retirement covered compensation and service credit set forth in the Retirement Code. The *Hoerner* case is on point with the facts in this case in that, here, Claimant seeks retirement credit for a period of time which she was on leave without pay to recover from her auto accident injuries. Had the School District paid her during that leave and made contributions to PSERS the outcome here may well have been different. The Hearing Examiner gave Claimant the opportunity to

permit the School District to correct an error if they had made an error; however, they never took further action on her behalf.

Only an "approved leave of absence" under the specific restrictions of the Retirement Code is entitled to retirement credit, so long as the proper retirement contributions are made by the employer and employee. 24 Pa.C.S. § 8302(b)(2). By definition, approved leaves of absence entitled to retirement credit include only activated military service, approved sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study. 24 Pa.C.S. § 8102. Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of specific matter in a statute implies the exclusion of other matters. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218 (Pa. 2002). Here, the unpaid leave Claimant is seeking in this case is not within the definition of an approved leave of absence under the Retirement Code and therefore cannot be considered as another type of approved leave of absence.

PSERS regulations define an "active member" eligible to receive retirement credit, as follows:

*Active member* -

(i) A school employee for whom pickup contributions, AS DEFINED IN SECTION 8102 OF THE RETIREMENT CODE (emphasis added), are properly being made to the Fund, including those granted a sabbatical leave of absence, or who are on an approved leave of absence for professional study, as an exchange teacher, or service with a collective bargaining organization, under sections 8102 and 8302 (relating to

definitions; and credited school service) of the Retirement Code, or for whom the contributions otherwise required for current school service are not being made solely by reason of any provision in the Retirement Code relating to the limitations under sections 401(a)(17) or 415(b) of the Internal Revenue Code.

(ii) *The term excludes employees who are on leave of absence without pay.*

22 Pa.Code § 211.2(b) (emphasis added). Here, Claimant admits that the leave was without pay and therefore Claimant was not an active member eligible to receive credit for an "approved leave of absence."

Credited school service for an approved leave of absence shall only be granted to an active member, receiving remuneration and having the employee and employer contributions made during the paid leave. 24 Pa.C.S. § 8302(b). Members may be granted other types of leaves of absence, not authorized by the Retirement Code, but the leaves will not entitle the member to any credited service during the period of the leave. 22 Pa. Code § 213.2.

Here, Claimant suffered a severe auto accident on June 18, 1999. Due to the injuries Claimant suffered, Claimant was out of work for the School District for two full school years following the accident. (N.T. 11).

Claimant received no salary from the School District for the 1999-2000 and 2000-2001 school years. (N.T. 28). Claimant had 60 days of family medical leave during which she received no

salary, but during which the School District paid for her health insurance benefits. After the 60 days expired, Claimant began reimbursing the School District \$553.32 per month for continued coverage under the School District's health insurance plan, beginning October 1999, which increased to \$614.64 per month for the following year. (Claimant Exhibit 5, N.T. 28-29).

Claimant stopped being an active contributing member of PSERS in June 1999.

Claimant was in an *unpaid leave status* from June 1999 to September 2001. During that time she was no longer being reported an active contributing member to PSERS. When her unpaid leave status ended in September 2001, Claimant again became an active, contributing PSERS member. Again, the Hearing Examiner gave the Claimant an opportunity, after the hearing was concluded, to attempt to see if the School District would indicate that they had erred in not paying her while she was on leave those two years and that they would make the appropriate contributions to PSERS on her behalf and she was not able to obtain that cooperation from the School District. The Hearing Examiner had given the Claimant that opportunity because she indicated that the School District had always indicated that they would see that she received her proper benefits for those two years that she was out on leave. (N.T. 17)

An "active member" is defined in Retirement Code as "'a school employee for whom pickup contributions are being made to the fund..." 24 Pa.C.S. § 8102.

A "school employee" in turn is defined as "any person engage in work relating to a public school for any governmental entity and for which he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or person compensated on a fee basis."

*Id.* A teacher is an active member in PSERS while employed by a school district and making the required retirement contributions. *Lawrie v. Public School Employees' Retirement Board*, 595 A.2d 753 (Pa. Cmwlth. 1991), *appeal den.*, 608 A.2d 32. Conversely, a teacher is not an active, contributing member when on an unpaid leave of absence not receiving salary from the school district or making retirement contributions. For all of the reasons set forth herein, Claimant is not entitled to retirement credit for the period she was on an unpaid leave of absence from the School District from 1999 to 2001.

This Recommendation closely follows the brief of PSERS which has correctly set forth the facts and law that applies in this matter and there was little that the Hearing Examiner could add.

CONCLUSIONS OF LAW

1. Section 8302(b) of the Public School Employees' Retirement Code (Retirement Code), 24 Pa. C.S. §8302(b), permits a PSERS member to receive retirement credit for an "approved leave of absence" in certain situations and under certain conditions.

2. Section 8102 of the Retirement Code, 24 Pa. C.S. §8102, defines an "approved leave of absence" as follows: A leave of absence for activated military service or which has been approved by the employer for sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study.

3. Section 8302 of the Retirement Code, 24 Pa. C.S. § 8302, provides that:

**§ 8302. Credited School Service.**

**(c) Approved leaves of absence.** - An active member shall receive credit for an approved leave of absence provided that:

- (1) the member returns for a period at least equal to the length of the leave or one year, whichever is less, to the school district which granted her leave, unless such condition is waived by the employer; and
- (2) *the proper contributions are made by the member and the employer.*

24 Pa. C.S. § 8302 (emphasis added).



4. The Rules and Regulations duly promulgated by the PSERS Board further clarify as follows:

**§213.2. Credited school service.**

(b) *Approved leaves of absence.* Credited service shall be granted to an *active member* for an approved leave of absence as authorized under sections 8102 and 8302 of the Retirement Code (relating to definitions and credited school service). *Members may be granted other types of leaves of absence, not authorized by the Retirement Code, but the leaves will not entitle the member to any credited service during the period of the leave.*

Credited service for the approved leaves of absence shall be granted under the following conditions only:

(2) *Proper current contributions, based on the salary as if the member had been in regular full-time employment during the period of the leave are made by the member and the employer if required. An employer may not be permitted to suspend the requirement of making its required contributions during the period of the leave. Current contributions made by the member during the period of the leave shall be transmitted through the school district on a monthly basis in the same manner as active members.*

22 Pa. Code § 213.2 (emphasis added).

5. Claimant took an unpaid leave of absence to recover from a car accident. Such a leave does not qualify in any of the categories listed above. Accordingly, Claimant is not eligible to purchase service credit for the leave granted by the School District.

6. Claimant does not qualify for even up to one year of service credit under the Special Sick Leave Policy because the leave was an unpaid leave granted by the school district and she

did not receive at least half of her salary through a school sponsored insurance program or workers' compensation.

7. Only an "approved leave of absence" under the specific restrictions of the Retirement Code is entitled to retirement credit, so long as the proper retirement contributions are made by the employer and employee. 24 Pa.C.S. §8302(b)(2).

8. By definition, approved leaves of absence entitled to retirement credit include only activated military service, approved sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study. 24 Pa.C.S. §8102.

9. Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of specific matter in a statute implies the exclusion of other matters. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218 (Pa. 2002). Here, the unpaid leave Claimant is seeking in this case is not within the definition of an approved leave of absence under the Retirement Code and therefore cannot be considered as another type of approved leave of absence.

10. PSERS regulations define an "active member" eligible to receive retirement credit as (i) a school employee for whom pickup contributions are properly being made to the Fund, including those on an approved leave of and (ii) *the term*

excludes employees who are on leave of absence without pay. 22 Pa.Code § 211.2(b) (emphasis added).

11. Claimant's leave was without pay and therefore Claimant was not an active member eligible to receive credit for an "approved leave of absence."

12. Members may be granted other types of leaves of absence, not authorized by the Retirement Code, but the leaves will not entitle the member to any credited service during the period of the leave. 22 Pa. Code §213.2.

13. An "active member" is defined in Retirement Code as "a school employee for whom pickup contributions are being made to the fund..." 24 Pa.C.S. §8102 (emphasis added).

14. A "school employee" in turn is defined as "any person engaged in work relating to a public school for any governmental entity and for which he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or person compensated on a fee basis." 24 Pa.C.S. §8102 (emphasis added).

13. A teacher is an active member in PSERS while employed by a school district and making the required retirement contributions. *Lawrie v. Public School Employees' Retirement Board*, 595 A.2d 753 (Pa. Cmwlth. 1991), appeal den., 530 Pa. 657, 608 A.2d 32.

16. A teacher is not an active, contributing member when on an unpaid leave of absence not receiving salary from the school district or making retirement contributions.

17. Claimant is not entitled to retirement credit for the period she was on an unpaid leave of absence from the School District from the 1999-2000 to 2000-2001 school years.

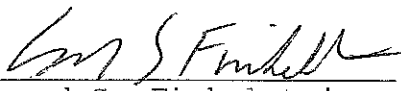
18. Recovery from an automobile accident is not the type of leave that can receive retirement credit.

19. Both the receipt of salary and retirement contributions are requirements for the purchase of service credit for an approved leave of absence.

RECOMMENDATION

The Claimant's request to purchase credit for her unpaid leave of absence for the 1999-2000 and 2000-2001 school years should be denied and her administrative appeal dismissed with prejudice.

Dated: January 18, 2011

  
Edward S. Finkelstein  
Hearing Examiner