

Mail Date: OCT -13 2011

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

IN RE: ACCOUNT OF DOUGLAS GOERLITZ
DOCKET NO.: 2010-16
CLAIM OF DOUGLAS GOERLITZ

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board has carefully and independently reviewed the entire record of this proceeding, including the transcript, exhibits, briefs and the Opinion and Recommendation of the Hearing Examiner. Neither the Claimant nor PSERS filed exceptions in this matter.

The Board generally finds appropriate the Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Hearing Examiner's Opinion attached hereto except for Conclusion of Law No. 12 in which the Hearing Officer erred when she stated that "an annuitant may be returned to school service for a period not to exceed 95 full-day sessions in any school year without loss of his annuity." Section 8346(b) was amended on July 4, 2004, four months prior to Claimant's return to service in November 2004, to eliminate the 95 day limit. This amendment does not affect the outcome of Claimant's appeal. Conclusion of Law No. 12 is, therefore, amended to state:

12. When, in the judgment of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers or other personnel, an annuitant may be returned to school service for a period not to extend beyond the school year during which the emergency or shortage occurs, without loss of his annuity.

With the above modification we hereby adopt the Hearing Examiner's Opinion as our own, and accordingly:

IT IS HEREBY ORDERED that the Claimant's request that PSERS not consider him as having returned to active service and to have his State Employees' Retirement System annuity reinstated is DENIED.

Dated: OCT 13 2011

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

By: Melva Vogler
Melva Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re:

Account of Douglas Goerlitz

Claim of Douglas Goerlitz

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Docket No. 2010-16

LEGAL OFFICE AUG 19 2011

OPINION AND RECOMMENDATION

Date of Hearing: June 1, 2011
Hearing Examiner: Jackie Wiest Lutz, Esquire
For the Claimant: Douglas Goerlitz, *pro se*
For PSERS: Jennifer Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Douglas Goerlitz ("Claimant") from a decision of the Executive Staff Review Committee ("Committee") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request that PSERS *not* consider him as having returned to active service, and to have his State Employees' Retirement System ("SERS") annuity reinstated.

Claimant was notified of the Committee's decision by letter dated November 18, 2010. Claimant was notified that if he wished to appeal the Committee's decision to the Board he must file an appeal and request a formal administrative hearing within 30 days of the date of the letter.

Claimant filed a timely request for an administrative hearing on November 30, 2010. On December 16, 2010, David W. Speck, Assistant Deputy Chief Counsel, filed an Answer on behalf of PSERS.

On March 16, 2011, Jackie Wiest Lutz, Esquire was appointed by Secretary Jeffrey B. Clay to act as hearing examiner for Claimant's administrative hearing and to file an applicable report, in the nature of an opinion and recommendation, with Secretary Clay, in accordance with 1 Pa. Code §35.202.

On March 22, 2011, a hearing notice was issued by PSERS which scheduled the administrative hearing on Claimant's appeal for May 11, 2011. Subsequently, on April 27, 2011, a *Withdrawal/Notice of Appearance* was filed on behalf of PSERS in which David W. Speck, Esquire, withdrew his appearance on behalf of PSERS and Jennifer A. Mills, Esquire entered her appearance.

By letter dated April 28, 2011, Attorney Mills requested an unopposed continuance of the hearing scheduled for May 11, 2011 to allow sufficient time for her to prepare for the hearing. An Order granting this request was issued by the hearing examiner on May 6, 2011. The hearing was re-scheduled for June 1, 2011.

On June 1, 2011, the hearing was held as scheduled at 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing, *pro se*. Jennifer Mills, Esquire, represented PSERS.

Following the close of testimony, the parties were granted the opportunity to file post-hearing briefs.

On June 4, 2011, prior to the receipt of the hearing transcript, Claimant filed a *Post Hearing Brief*, which was accepted for filing by the hearing examiner as Claimant's initial brief. Upon receipt of the hearing transcript, the hearing examiner then notified the parties of the briefing schedule. Pursuant to the briefing schedule, PSERS was directed to file its responsive brief on or before July 13, 2011; and, Claimant was afforded the right to file a reply brief no later than July 25, 2011.

PSERS' brief was timely filed on July 13, 2011; Claimant filed a reply to PSERS' responsive brief by letter dated July 17, 2011, which was received by the hearing examiner on July 20, 2011.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant first became a member of the Public School Employees' Retirement System ("PSERS") by virtue of his employment with the Mountain View School District from September 1975 to December 1977. (N.T. 140-141; PSERS' Exhibit 12)
2. Claimant left his position with the Mountain View School District in December 1977 and commenced employment at that time with the Commonwealth of Pennsylvania, Department of Public Welfare's County Assistance Office in Montrose, PA as an Income Maintenance Case Worker. (N.T. 126-127; PSERS' Exhibit 1)
3. Shortly after commencing employment with the Commonwealth of Pennsylvania, Claimant elected and was granted Multiple Service Membership in PSERS and the State Employees' Retirement System ("SERS") on February 1, 1978. (N.T. 26; PSERS' Exhibits 12, 15 and 22)
4. Multiple Service Membership is available to individuals who have credited service with both PSERS and SERS. (N.T. 18)
5. By memo dated October 21, 1980 PSERS notified SERS of Claimant's amount of service credit with PSERS as of the time that Claimant elected Multiple Service Membership. (N.T. 26; PSERS' Exhibit 12)
6. Multiple Service members receive a combined retirement benefit that incorporates both their state service and their public school service; the annuity that they receive is based on their service in both retirement systems. (N.T. 18, 65)
7. A Multiple Service annuitant is considered to be both a PSERS retiree and a SERS retiree. (N.T. 71)

8. The Public School Employees' Retirement Code ("Retirement Code") allows an annuitant to return to service in an emergency capacity on a limited basis if the annuitant meets the criteria of the Retirement Code. (N.T. 16)
9. PSERS has a responsibility under the Retirement Code to comply with the terms of post-retirement employment; in order for PSERS to retain its tax qualification status with the IRS it needs to ensure that an annuitant only returns to service in an approved capacity as recognized by the Retirement Code. (N.T. 17)
10. PSERS has guidelines for return to service that have been created for PSERS' staff, PSERS' members and public school employers; the guidelines, which were first created in 2004, remain in existence today and are accessible to members and employers via PSERS' website. (N.T. 19-21; PSERS' Exhibit 10)
11. Pertinent to the Claimant, PSERS' Return to Service Guidelines and Clarifications provide as follows:

**PSERS Return to Service
Guidelines and Clarifications**

Employers and members often seek clarification regarding the eligibility for a public school retiree to be employed by a public school entity (including charter schools), community college or public university. Following is some general information that addresses the limited allowance of PSERS retirees to return to Pennsylvania public school employment without loss of their monthly retirement benefit. The Retirement Code specifically defines the ability of a PSERS retiree to be employed by a Pennsylvania public school in emergency, shortage of personnel and extracurricular situations. 24 Pa. C.S. § 8346(b), (b.1).

**General Questions About PSERS Retirees Returning
To Public School Employment**

Q: Is it possible for a retiree to return to Pennsylvania public school employment and continue to receive their PSERS monthly retirement benefit?

A: No. The Retirement Code states that a retiree may not be employed by a Pennsylvania public school and receive a public school retirement benefit at the same time. The Retirement Code, however, does provide that a retiree, who has a bona fide break in service, may return to work for a Pennsylvania public school and continue to receive retirement benefits *if one of the following exceptions applies:*

1. Employment due to an emergency which increases the workload and creates a serious impairment of service to the public (hereafter referred to as Employment Emergency), or
2. Employment in the event of a shortage of appropriate subject certified teachers or other personnel (hereinafter referred to as Personnel Shortage), or
3. Employment in an extracurricular position (Extracurricular Position) under a separate contract

(PSERS' Exhibit 10)(emphasis added)

12. An individual must work as a per diem employee for at least 80 days of service in order to qualify for membership in PSERS for that particular year. (N.T. 43-44)

13. School employers generally do not withhold contributions for substitute teachers until the 80-day requirement is met; instead, school employers will report to PSERS the wages earned by the substitute teacher, without contributions withheld, which is known as "wage, no contribution" or "WNC". (N.T. 40-41, 43-44)

14. The 80-day threshold has no application to whether or not an annuitant is considered to be a return to service annuitant. (N.T. 44)

15. If PSERS discovers that an annuitant has returned to service in a non-approved/non-emergency capacity, the annuitant will be considered as having returned to service as of the first day of their employment regardless of whether they qualify for membership. (N.T. 44, 68)

16. Claimant retired from his SERS employment in 2001 with approximately 23 years of service; when he retired, he met with a retirement counselor and signed both a *Retirement Counseling Checklist* and a *Return to Service/Frozen Present Value Acknowledgment*. (N.T. 141-142; PSERS' Exhibits 1 and 2)

17. The *Return to Service/Frozen Present Value Acknowledgment* form notified Claimant, in pertinent part:

If you terminate service, elect to receive monthly retirement benefits and subsequently return to active service with any State Employees' Retirement System (SERS) participating employer or Public School Employees Retirement System employer (if you have elected Multiple Service), the following events will occur:

- **The retirement benefits you are receiving will cease effective with the date of your return to service.**
- Your annuity will be Frozen by calculating the value of your retirement benefit account based on your age at the time of your return to service. This "Frozen Present Value" is fixed and remains constant.

(N.T. 143; PSERS' Exhibit 2)(emphasis added)

18. Following his retirement from SERS employment, Claimant commenced employment on November 1, 2004 as a substitute teacher for the Mountain View School District. (N.T. 29-30; PSERS Exhibits 3)

19. On December 10, 2004, PSERS mailed Claimant a letter notifying him that PSERS recently received identifying information about him and his Pennsylvania school employment from the Mountain View School District; Claimant was notified, "You are now considered a member of PSERS," and was instructed to review the information provided and to notify PSERS immediately in writing if any of the listed information was incorrect. (N.T. 34; PSERS' Exhibit 3)

20. The identifying information listed Claimant as a part-time, per diem substitute teacher. (PSERS' Exhibit 3)

21. In 2004, PSERS maintained an imaging file for each of its members; PSERS had internal records that indicated that Claimant had elected multiple service at that time, but, nothing that identified Claimant as an annuitant. (N.T. 36-37)

22. It is not administratively feasible for PSERS to routinely review its imaging files to determine whether a newly enrolled member is an annuitant because PSERS has more than 500 public school employers, in addition to charter schools and intermediate units who enroll members on a daily basis. (N.T. 37)

23. From 2004 through 2010 Claimant worked as a substitute teacher at various times for the following School Districts: Elk Lake School District, Montrose Area School District, Mountain View School District and Susquehanna County Career Tech Center. (N.T. 29-30, 34, 87-114; PSERS' Exhibits 3 through 8)

24. During the 2004-2005 school years, Claimant worked 12 days as a part-time per diem employee at the Mountain View School District. (N.T. 107)

25. During the 2005-2006 school years, Claimant worked 13 days as a part-time per diem employee at the Mountain View School District. (N.T. 109)

26. During the 2006-2007 school years, Claimant worked 37 days as a part-time per diem employee at the Mountain View School District. (N.T. 109)

27. No retirement contributions were withheld from Claimant by the Mountain View School District for Claimant's work during the 2004-2005, 2005-2006 and 2006-2007 school years because Claimant was considered to be a part-time per diem employee.

(N.T. 109)

28. In December of 2006 PSERS mailed Claimant a *Statement of Account for School Year 2005 – 2006* showing the credits reported by his employers and his contributions and interest applied to his PSERS account as of June 30, 2006. (PSERS' Exhibit 4)

29. In December of 2007 PSERS mailed Claimant a *Statement of Account for School Year 2006 – 2007* showing the credits reported by his employers and his contributions and interest applied to his PSERS account as of June 30, 2007. (PSERS' Exhibit 5)

30. Both *Statement of Accounts* notified Claimant:

Multiple Service Information

You are a Multiple Service member. The State Employees' Retirement System (SERS) and Public School Employees' Retirement System (PSERS) maintain separate retirement accounts for you. No SERS account information is included on this Statement of Account. You will receive a separate Statement of Account from SERS. When you terminate employment, your benefit will be calculated using the SERS and PSERS information, and you will be paid one combined benefit.

(PSERS' Exhibits 4 and 5)

31. On January 24, 2008, the Mountain View School District began making retirement contributions for Claimant because Claimant started with the District long term that year and was anticipated to reach the 80-day threshold that year. (N.T. 114)

32. The Mountain View School District has a “sub caller system” in place which identifies annuitants in their system so that annuitants are contacted to substitute teach only in an emergency capacity. (N.T. 31-32, 100, 117-118)
33. Claimant was not identified as an annuitant in the District’s “sub caller system” and was not used in an emergency capacity. (N.T. 31-32)
34. In November of 2008 PSERS mailed Claimant a *Statement of Account for School Year 2007 – 2008* showing the credits reported by his employers and his contributions and interest applied to his PSERS account as of June 30, 2008. (PSERS’ Exhibit 6)
35. In October of 2009 PSERS mailed Claimant a *Statement of Account for School Year 2008 – 2009* showing the credits reported by his employers and his contributions and interest applied to his PSERS account as of June 30, 2009. (PSERS’ Exhibit 7)
36. In September of 2010 PSERS mailed Claimant a *Statement of Account for School Year 2009 – 2010* showing the credits reported by his employers and his contributions and interest applied to his PSERS account as of June 30, 2010. (PSERS’ Exhibit 8)
37. The 2008, 2009 and 2010 *Statement of Accounts* contained the same Multiple Service information as the 2006 and 2007 *Statement of Accounts*. (PSERS’ Exhibits 6-8)
38. On February 4, 2010, PSERS received an application for the *Purchase of Former Part-Time Uncredited Service* from Claimant; Claimant was requesting to purchase credit for his part-time service during the 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009 and 2009-2010 school years. (N.T. 24-25; PSERS’ Exhibit 11)
39. Claimant included with his application a spreadsheet that was prepared by the Montrose Area School District to show the number of days that Claimant worked and the

amount of money that Claimant earned for his part-time per diem service at the Montrose Area School District. (N.T. 25; PSERS' Exhibit 11)

40. When PSERS received and reviewed Claimant's application, PSERS realized that Claimant was a multiple service *annuitant* who was currently receiving an annuity. (N.T. 25)

41. On July 16, 2010, PSERS received in the normal course of its business a copy of a July 3, 2010 letter from SERS to Claimant which notified Claimant that SERS had been notified that Claimant is an active school employee with PSERS and has elected multiple service; that SERS has stopped his annuity; and, that Claimant would not be receiving his July 2010 annuity or any further annuity payments from SERS. (N.T. 27; PSERS' Exhibit 9)

42. SERS' July 3, 2010 letter to Claimant was in response to PSERS' actions as a result of Claimant's purchase of service application (N.T. 27; PSERS' Exhibit 15)

43. On July 16, 2010 PSERS received a letter from Claimant dated July 14, 2010 requesting that PSERS "[p]lease return the recent contributions to the respective school districts, and kindly notify SERS that this was done so I may have my annuity reinstated." (N.T. 28; PSERS' Exhibit 13)

44. Claimant's July 14, 2010 letter to PSERS had three letters attached to it; one letter was dated July 12, 2010, addressed to PSERS from the Mountain View School District.

This letter provides, in pertinent part, as follows:

Mr. Goerlitz is a day to day substitute for Mountain View School District. In January 2008 he was hired as a long term substitute for a teacher that was out on an FMLA/maternity leave. Because of the long term position I began to withhold retirement as I knew he would qualify and have been doing so since.

I was unaware of his SERS pension and should not have withheld PSERS retirement. Please refund Mr. Goerlitz his PSERS contributions and reinstate his SERS pension.

/s/ Diane Makosky

(PSERS' Exhibit 13, p. 2)

45. The July 12, 2010 letter does not indicate that Claimant was hired due to an Employment Emergency or Personnel Shortage. (PSERS' Exhibit 13, p. 2)

46. The second letter is dated July 9, 2010 and is addressed to Claimant from the Payroll Clerk at Montrose Area School District. This letter provides, in pertinent part:

Dear Mr. Goerlitz:

In regards to your letter dated July 7, 2010, I will stop taking PSERS contributions effective immediately and have completed a termination contract on the website.

You will need to call PSERS directly. . . in order to request a refund of your contributions. If it is determined by PSERS that these were taken in error, Montrose Area School District will received (sic) a refund of all contributions sent in on your behalf.

/s/ Alison Nichols
Payroll Clerk
Montrose Area School District

(PSERS' Exhibit 13, p. 3)

47. The third letter is a letter dated July 13, 2010 from Claimant to SERS, requesting reinstatement of his SERS annuity. (PSERS' Exhibit 13, p. 4)

48. Troy Peechatka ("Peechatka") is currently a Retirement Benefits Specialist Supervisor with PSERS; Peechatka has held this position for one year. (N.T. 15)

49. Prior to becoming a supervisor, Peechatka was an administrative officer with the Benefits Policy Center in PSERS' Bureau of Benefits Administration. (N.T. 15)

50. As an Administrative Officer, Peechatka's main responsibilities included reviewing and analyzing post-retirement employment requests and emergency employment. (N.T. 15)
51. Claimant's July 14, 2010 letter was provided to Peechatka for handling. (N.T. 31)
52. Upon Peechatka's review of Claimant's letter and its attachments, Peechatka contacted Diane Makosky of the Mountain View School District on July 19, 2010 for information regarding Claimant's post-retirement employment. (N.T. 31)
53. Peechatka learned from Ms. Makosky that Claimant was not identified as an annuitant in the Mountain View School District's system and was not used in an emergency capacity. (N.T. 31-32, 90, 93; PSERS' Exhibit 14)
54. Peechatka completed a source document following his telephone conversation with Ms. Makosky to document the conversation that transpired; the source document is maintained as a part of Claimant's PSERS member file. (N.T. 31-32; PSERS' Exhibit 14)
55. On July 31, 2010 and August 9, 2010, Claimant wrote letters to PSERS' staff requesting, in part, that he no longer be considered by PSERS or SERS as a Multiple Service Member. (PSERS' Exhibits 16 and 17)
56. By letter dated August 13, 2010, John P. Tucker, PSERS' Manager, Field Services Division, Bureau of Communications and Counseling responded to Claimant's July 31, 2010 and August 9, 2010 letters, denying his requests and notified Claimant of his right to appeal PSERS' decision to the Executive Staff Review Committee ("Committee"). (PSERS' Exhibit 15)
57. By letter dated August 18, 2010, Claimant filed an appeal with the Committee. (PSERS' Exhibit 18)

58. While Claimant's appeal was pending with the Committee, Claimant continued to write letters to PSERS' staff; the letters were provided to the Committee for review.

(N.T. 49-50; PSERS' Exhibits 20 and 21)

59. At its November 2, 2010 meeting, the Committee reviewed Claimant's requests that PSERS not consider him as having returned to active service and that Claimant's SERS annuity be reinstated, but, denied Claimant's request. (PSERS' Exhibit 22)

60. The Committee denied Claimant's request because Claimant was a Multiple Service Member who was receiving an annuity that was based on both SERS and PSERS service and had returned to service in a non-emergency capacity. (N.T. 56; PSERS' Exhibit 22)

61. Claimant was notified of his right to appeal the Committee's decision to the Board. (PSERS' Exhibit 22)

62. Claimant filed a timely appeal and was granted an administrative hearing and an opportunity to be heard. (Transcript, *passim*)

CONCLUSIONS OF LAW

1. Claimant was afforded due process. (Findings of Fact Nos. 55-62)
2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
3. A preponderance of the evidence is the correct burden of proof to be applied in this administrative action. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A. 2d 678 (Pa. Cmwlth. 2005).
4. 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 Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986); *A.B. v. Slippery Rock Area School District*, 906 A. 2d 674 (Pa. Cmwlth. 2006).
5. PSERS is a creature of statute and derives its authority from the provisions of the Retirement Code. 24 Pa.C.S. §§8101 *et. seq.*
6. The authority of the Board to grant or deny Claimant's request is limited to the provisions of the Retirement Code; the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

7. The Retirement Code defines an “annuitant” as “[a]ny member on or after the effective date of retirement until his annuity is terminated.” 24 Pa. C.S. §8102.
8. “Multiple Service” is defined as “[c]redited service of a member who has elected to combine his credited service in both the Public School Employees’ Retirement System and the State Employees’ Retirement System.” 24 Pa. C.S. §8102.
9. When an annuitant returns to school service or enters or has entered State service and elects multiple service membership, any annuity payable to him shall cease effective upon the date of his return to school service or entering State service. 24 Pa. C.S. §8346(a).
10. School service is “service rendered as a school employee.” 24 Pa. C.S. §8102.
11. A school employee is defined under the Retirement Code to mean a person “engaged in work relating to a public school. . . for which work he is receiving regular remuneration as an . . . employee. . . .” 24 Pa. C.S. §8102.
12. When, in the judgment of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers, an annuitant may be returned to school service for a period not to exceed 95 full-day sessions in any school year without loss of his annuity. 24 Pa. C.S. §8346(b).
13. Claimant has failed in his burden to show that his return to school service in November of 2004 was the result of an Employment Emergency or Personnel Shortage. (Findings of Fact Nos. 1-54)

DISCUSSION

Claimant does not dispute that he returned to school service as a substitute teacher after he retired from his SERS employment. Rather, he argues that his return to service was not full time and that “he always thought of [himself] as emergency personnel as did the other schools [he] subbed for,” including the “sub caller” at Mountain View School District. (Claimant’s Reply Brief, un-numbered p. 1)

Claimant argues in his initial brief that PSERS failed to establish that he returned to full time service and that PSERS failed to provide documentation and testimony that the Mountain View School District’s superintendent had been contacted according to normal operating procedures to provide any substantiation relating to whether the long term position was or was not an emergency placement. Claimant is asking the Board to enter an Order which fully restores his SERS retirement benefits; fully reimburses him for lost benefits, including reimbursement for lost medical coverage; fully refunds PSERS contributions made in 2007-2008 to Claimant and the Mountain View School District; and, to reimburse Claimant for legal, travel and other time spent defending the loss of benefits. (Claimant’s Post-Hearing Brief) The Board lacks authority to grant Claimant the relief that he seeks.

It has long been recognized that the party who maintains the existence of certain facts must prove those facts. *South Hills Health System v. Department of Public Welfare*, 510 A.2d 934 (Pa. Cmwlt. 1986). Thus, Claimant – not PSERS – bears the burden of proof in this proceeding. *Wingert v. State Employees’ Retirement Board*, 589 A.2d 269 (Pa. Cmwlt. 1991).

The Commonwealth Court has recognized that the Board has only the authority that is granted to it under the Retirement Code. *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992). Pertinent to Claimant's claim, the Retirement Code provides as follows:

§8346. Termination of annuities.

(a) General rule. -- If an *annuitant* returns to *school service* or enters or has entered State service and elects multiple service membership, *any annuity payable to him under this part shall cease* effective upon the date of his return to school service. . . and in the case of an annuity. . . the present value of such annuity, . . . shall be frozen as of the date such annuity ceases.

24 Pa. C.S. §8346(a).

The Retirement Code defines an "annuitant" as "[a]ny member on or after the effective date of retirement until his annuity is terminated." 24 Pa. C.S. §8102. School service is "service rendered as a school employee." 24 Pa. C.S. §8102. "Multiple Service" is defined as "[c]redited service of a member who has elected to combine his credited service in both the Public School Employees' Retirement System and the State Employees' Retirement System." 24 Pa. C.S. §8102. The annuity that a multiple service annuitant, like Claimant, receives is based on both SERS and PSERS service; thus, when Claimant retired from SERS employment in 2001 he was both a SERS and PSERS annuitant.

The Retirement Code recognizes three instances in which an annuitant, who is collecting a retirement annuity from PSERS, can return to service and continue to collect both his annuity and his salary: (1) when an emergency creates an increase in the work load such that there is serious impairment of service to the public ("Employment

Emergency”); (2) when there is a shortage of appropriate subject certified teachers (“Personnel Shortage”); and, (3) when an annuitant is employed under separate contract by a school entity or charter school in an extracurricular position outside regular instructional hours and not part of a mandated curriculum (“Extracurricular Position.”). 24 Pa.C.S. §8346(b) and (b.1). None of these scenarios is applicable here.

PSERS’ Return to Service Guidelines and Clarifications provide notice to school employers that an employer is to make a bona fide effort to fill a position with a non-retired individual before employing a retiree to resolve an employment emergency or personnel shortage. (PSERS’ Exhibit 10, p. 2) Even though Claimant thought of himself as emergency personnel *in 2008* and assumed that the Mountain View School District did so too, the record does not support this conclusion.

The evidence reveals that the Mountain View School District *did not know that Claimant was an annuitant.*¹ Because the School District did not know that Claimant was an annuitant, Claimant was not identified as an annuitant in the School District’s “sub caller system” and was not used in an emergency capacity in 2008. Claimant’s own exhibit supports this conclusion.²

¹ Claimant argues that the Mountain View School District should have known from his employment application that he was a SERS annuitant. However, the employer information provided by Claimant on his application simply reads: “Susq. CAO 33 Spruce St. Montrose, PA 18801.” Nothing in this description stands out as identifying Claimant as a retired Commonwealth employee.

² During the hearing, Claimant introduced into evidence an e-mail exchange between Dr. Andrew Chichura, the District’s Superintendent, Jim Mirabelli and Eliza Vagni regarding their inability to sign off that Claimant’s employment *in 2008* was as an emergency hire. Claimant testified that he obtained a copy of this e-mail exchange from his employment file at the School District. In pertinent part, the August 18, 2010 e-mail exchange from Dr. Chichura to Ms. Vagni provides as follows:

Ms. Vagni

Mr. Goerlitz had not notified the school district that he was retired from the SERS and subsequently ran into a problem with the long term substitute position at Mountain View and his SERS retirement. Do you

Moreover, even though Claimant focuses his argument on his return to service in 2008, the pivotal inquiry really hinges on what Claimant's status when he returned to school service in *November of 2004*. A PSERS member cannot simultaneously be an active member and an annuitant. Absent evidence to establish that Claimant returned to service in November of 2004 as the result of an Employment Emergency, a Personnel Shortage or under separate contract in an Extracurricular Position, the moment Claimant returned to school service in *November of 2004*, Claimant's status as an annuitant for purposes of the Retirement Code ended *by operation of law*. It matters not whether Claimant returned to service in a full-time or part-time capacity at that time because section 8346(a) of the Retirement Code does not distinguish between full-time and part-time service.

Notably, when Claimant retired from his SERS employment in 2001 he signed an acknowledgment form which clearly notified him:

If you terminate service, elect to receive monthly retirement benefits and subsequently return to active service with any State Employees' Retirement System (SERS) participating employer or Public School Employees Retirement System employer (if you have

recall the circumstances involved with his serving as a Long Term substitute in 2008-2009. . . ? I would like to get this resolved but cannot verify that the position was posted on the district web-site or advertised for substitutes. *At this point I cannot verify and sign-off that it was an emergency hire. . . .*

Specifically, why was he chosen over other certified applicants? What other candidates were considered? Why was he selected over others listed on the substitute list? How many other candidates were offered & turned down the offer?

Thank you for whatever information you may be able to provide. *I would like to be able to sign off on the emergency hire form but cannot justify at this time.*

(Claimant's Exhibit 3)

elected Multiple Service), the following events will occur:

- **The retirement benefits you are receiving will cease effective with the date of your return to service.**

(PSERS' Exhibit 2)

This notification contains no distinction between returning to service part-time or full-time.

Additionally, the record reveals that PSERS mailed correspondence to Claimant on December 10, 2004 which notified Claimant:

The Public School Employees' Retirement System (PSERS) recently received basic identifying information about you *and your Pennsylvania school employment* from the Mountain View S.D.

When you first enter Pennsylvania school service, your employer submits this information to open your PSERS account. You are now considered a member of PSERS. . .

(PSERS' Exhibit 3)

In addition to this correspondence, the record reveals that annual *Statement of Accounts* were mailed to Claimant from PSERS for School years 2005-2006, 2006-2007, 2007-2008, 2008-2009 and 2009-2010. *Statement of Accounts* are sent only to active members of PSERS. Each *Statement of Account* shows Claimant's total contributions for that year and contains information regarding Claimant's *Multiple Service Membership*. Claimant was informed that *when he terminates employment he will be paid one combined benefit using both SERS and PSERS information*. Claimant should have realized when he received these statements that *he was already receiving a combined PSERS and SERS benefit*. Claimant was clearly on notice from these mailings that he was considered as having returned to school service *and* as an active PSERS member. The *Statement of*

Accounts contained a PSERS toll free number for Claimant to call for further information or if he had any questions about the estimates provided. Claimant made no inquiry of PSERS.

Although the Board must liberally administer the retirement system in favor of its members, “a liberal administration of the retirement system does not permit the board to circumvent the express language of the Code. . . .” *Dowler v. Public School Employees’ Retirement Board*, 620 A. 2d 639, 644 (Pa. Cmwlth. 1993).

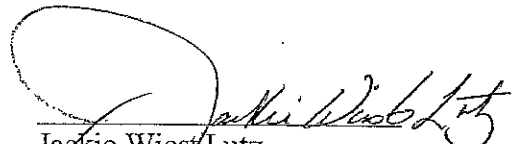
Claimant has failed in his burden to produce evidence or to cite to any statutory or legal authority that would authorize the Board to grant Claimant the relief that he seeks. For these reasons, it is recommended as follows:

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: :
Account of Douglas Goerlitz :
Claim of Douglas Goerlitz : Docket No. 2010-16
:

RECOMMENDATION

AND NOW, this 18th day of August 2011, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Examiner for the Public School Employees' Retirement System recommends that Claimant's request that PSERS *not* consider him as having returned to active service and to have his State Employees' Retirement System ("SERS") annuity reinstated should be **DENIED**.


Jackie Wiest Lutz
Hearing Examiner

Date of Mailing: August 18, 2011