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

IN RE: ACCOUNT OF KARL R. SCHEIBENHOFER
DOCKET NO.: 2013-02
CLAIM OF KARL R. SCHEIBENHOFER

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Karl R. Scheibenhofer's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact, and that PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on August 5, 2013, and served a copy on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§33.32, 33.35-33.36. By letter dated August 5, 2013, PSERS notified Claimant that he had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. Claimant's response, therefore, had to be filed on or before September 4, 2013. See 1 Pa.Code §§31.11, 31.12, and 33.34. Claimant did not file a response to the motion.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. §504. The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa.Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa.Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved

in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa.Cmwlth. 1984).

“Summary judgment may be entered against a party who does not respond.”
Pa.R.C.P. 1035.3(d).

Because Claimant did not respond and, therefore, has not identified any facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, the Board finds that there are no disputed material facts.

The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant may purchase service credit for his employment with Youth Services Agency (“YSA”) during the 1999-2000 school year through the 2005-2006 school year.

FINDINGS OF FACT

Based on the record, the Board finds the following relevant facts not in dispute:

1. Claimant first became a member of PSERS on August 15, 2004 by virtue of his employment with the Palisades School District.
2. On November 15, 2010, Claimant filed an *Application to Purchase Credit for Part-Time Service* for service rendered with Youth Services Agency (“YSA”) from the 1999-2000 school year through the 2005-2006 school year (“Application”). (PSERS-1)
3. YSA is not a reporting unit of PSERS.
4. YSA is a private, non-profit entity. (PSERS-5)
5. YSA is a “private alternative education institution” as defined under 24 P.S. § 19-1901-E of the Pennsylvania Public School Code. (PSERS-5)

6. During the school years 1999-2000 through 2005-2006, YSA contracted with multiple public schools to provide an alternative education program. (PSERS-5)

7. Employees of YSA are not employees of the school entities that have contracted with Youth Services Agency to provide an alternative education program.

8. During the school years 1999-2000 through 2005-2006, Claimant was employed by YSA. (See PSERS-1, -3, and -5)

9. The service Claimant is seeking to purchase with PSERS is service performed by Claimant as an employee of YSA. (See PSERS-1, -3, and -5)

10. By letter dated July 1, 2011, PSERS denied the Application because "[o]nly service performed in a public school may be credited to [Claimant's] account. Credit for [his] service at [YSA] cannot be purchased because it is a private school." Appeal rights were provided. (PSERS-2)

11. By letter dated July 19, 2011, Claimant appealed to PSERS Executive Staff Review Committee ("ESRC") arguing that during his service to YSA he served as: (1) a teacher to at-risk students in grades 7-12; (2) a principal at Johnsville Alternative School for Centennial School District and The Barn for Central Bucks School District; and (3) a football and track coach at Palisades Middle and High Schools. (PSERS-3)

12. By letter dated January 7, 2013, the ESRC denied Claimant's request stating that he was not a "school employee" because the services he rendered were performed as an employee of YSA, a private, non-profit entity, and not as an employee of a "public school" that is a reporting unit of PSERS. (PSERS-4)

13. On February 4, 2013, Claimant filed an Appeal and Request for Administrative Hearing with the Public School Employees' Retirement Board. (PSERS-5)

14. Attached to Claimant's Appeal and Request for Administrative Hearing is a letter dated January 23, 2012 from Rebecca Dawson, Human Resource Director for YSA, stating in pertinent part:

This will advise that [Claimant] worked as a teacher/supervisor for YSA from 8/25/1999 to 12/13/2005.

[YSA] is a private non profit alternative school. During the time period that [Claimant] worked for YSA, we were contracted with local community schools to provide services to the "at risk" youth from these local school districts.

YSA follows the guidelines and curriculum of the local school district and the students are able to graduate with the diploma of their local community school upon successful completion of YSA's program.

(PSERS-5 at p. 10)

15. On February 22, 2013, PSERS filed an Answer and New Matter with a Notice to Plead, served on Claimant by regular first class mail in accordance with 1 Pa. Code §33.32. (PSERS-6)

16. Claimant did not file an answer to PSERS' New Matter.¹

17. On August 5, 2013, PSERS filed a Motion for Summary Judgment.

18. Claimant did not file a response to PSERS' Motion for Summary Judgment.

19. An administrative hearing is not scheduled in this matter.

20. This matter is ripe for Board adjudication.

¹ By failing to plead to PSERS' New Matter, Claimant may be deemed to have admitted PSERS' allegations in the New Matter, 1 Pa. Code §§ 35.35 and 35.39.

DISCUSSION

The issue in this appeal is whether Claimant is permitted under the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq., ("Retirement Code") to purchase service credit for his employment with YSA during the 1999-2000 school year through the 2005-2006 school year.

The Retirement Code permits an active member to purchase "previous school service," which is defined as "service rendered as a school employee." 24 Pa.C.S. §§ 8102 and 8303. A "school employee," is defined in pertinent part as a "person engaged in work relating to a public school for any governmental entity." 24 Pa.C.S. § 8102. (emphasis added) The Retirement Code contains the following definitions relevant in determining whether service is rendered as a "school employee:"

"Governmental entity." --Board of school directors, board of public education, intermediate unit board of directors, area vocational-technical board, any governing board of any agency or authority created by them, and the Commonwealth.

"Public school." --Any or all classes or schools within this Commonwealth conducted under the order and superintendence of the Department of Education including, but not limited to: all educational classes of any employer . . .

"Employer." --Any governmental entity directly responsible for the employment and payment of the school employee . . .

Id. (emphasis added)

Additionally, Section 211.2 of the Board's duly promulgated regulations states that the term "employer" shall also refer to "[a] governmental entity directly responsible for the employment and payment of the school employee and charged with the responsibility of providing public education within this Commonwealth." 22 Pa.Code § 211.2. The regulations also define "governmental entity" as including "any agency or authority, being a corporate body or body politic created by law, or any entity created by those agencies or authorities, charged with the responsibility of providing public education within this Commonwealth." *Id.*

Accordingly, to fall within the definition of “school employee” for the purpose of obtaining retirement credit, a member of PSERS must show that he was engaged in work relating to a “public school” for a “governmental entity.” *Golebieski v. Pub. Sch. Employees’ Ret. Bd.*, 636 A.2d 268 (Pa. Cmwlth. 1993); *Cain v. Pub. Sch. Employees’ Ret. Sys.*, 651 A.2d 660 (Pa. Cmwlth. 1994); *Thorpe v. Pub. Sch. Employees’ Ret. Bd.*, 879 A.2d 341 (Pa. Cmwlth. 2005).

Here, it is undisputed that Claimant was employed by YSA during the relevant time period. The issue, therefore, is whether the service Claimant rendered to YSA was service related to a “public school” for a “governmental entity.” Essentially, Claimant argues that the service is purchasable because the work he performed for YSA qualifies as work related to a “public school.” As a matter of law, Claimant’s argument must fail.

YSA is private, non-profit entity approved by the Pennsylvania Department of Education as a “private alternative education institution.” As a “private alternative education institution,” YSA contracted with multiple public schools to provide an “alternative education program.” A “private alternative education institution” is defined in the Pennsylvania Public School Code as “[a]n institution operated by an individual or a for-profit or not-for-profit entity to provide alternative education programs as defined in section 1901-C(1).” 24 P.S. § 19-1901-E.² Although the school districts are required to implement “alternate education programs,” the Public School Code permits the school districts to contract with “private alternative education institutions” to provide these services on the school district’s behalf. 24 P.S. § 19-1902-E. Unlike school districts, however, a “private alternative education institution” is not given the authority under the Public School Code to operate as a school or an alternative school such as a private school or charter school. See 24 P.S. §§ 19-1901-C, 19-1901-E and 19-1903-E; 22 Pa. Code § 11.6. Rather, the program serves the purpose of *temporarily* removing

² An “alternative education program” is defined in pertinent part as a “program [that] is implemented by a school district, an area vocational-technical school, a group of school districts or an intermediate unit, which removes disruptive students from regular school programs in order to provide those students with a sound educational course of study and counseling designed to modify disruptive behavior and return the students to a regular school curriculum.” 24 P.S. § 19-1901-C.

persistently disruptive students from regular school programs at the school district with the goal of returning those students back to the school district. 24 P.S. § 19-1901-C. Moreover, a “private alternative education institution” is not subject to the order and superintendence of the Department of Education, only subject to regulation. See 24 P.S. §§ 19-1901-C, 19-1902-E(3) and 19-1903-E(c); 22 Pa. Code § 11.6. YSA, therefore, is not a “public school” as defined in the Retirement Code.

YSA is also not a “governmental entity.” YSA is not a board of school directors, board of public education, intermediate unit board of directors, area vocational-technical board, a governing board of an agency or authority created by a public school, the Commonwealth, an agency or authority, a corporate body or body politic created by law, or an entity created by an agency or authority charged with the responsibility of providing public education within the Commonwealth. YSA is not a reporting unit of PSERS. Consequently, YSA does not qualify as a “governmental entity,” a “public school,” or an “employer” as defined in the Retirement Code.

This case is not a matter of first impression. In *Golebieski*, the court determined that the claimant could not purchase service credit for the time he taught health and physical education for a school district because he was employed and paid by a private company, not the school district. *Golebieski*, 636 A.2d at 270. The court held that the fact that he conformed to the school’s established curriculum and taught classes to public school students was not determinative in whether he was a “school employee” under the Retirement Code. *Id.* In *Cain*, the Commonwealth Court held that service rendered at a private school is not purchasable because a private school is not a “public school” or “governmental entity” that is subject to the “order and superintendence of the Department of Education,” only subject to regulation. *Cain*, 651 A.2d at 662. In *Thorpe*, the Commonwealth Court held that the claimant was not entitled to purchase service credit for her employment with two nonprofit corporations that provided auxiliary services to nonpublic school students under a contract with the Philadelphia Intermediate Unit because such service was rendered to nonpublic schools and the entities that employed claimant were not governmental entities. *Thorpe*, 879 A.2d at 350.

For purposes of the Retirement Code, therefore, an individual is not considered an employee of a "governmental entity" merely because s/he renders service *similar* to public schools.

The service Claimant is seeking to purchase with PSERS is the service Claimant performed as an employee of YSA pursuant to YSA's alternative education program contracts with the multiple school districts. Because YSA is not a "governmental entity" and YSA's employees providing services under the "private alternative education program" are not employees of the school districts, Claimant did not render the services as a "school employee." Thus, Claimant is not permitted under the Retirement Code to purchase the service he rendered to YSA during the 1999-2000 school year through the 2005-2006 school year.

CONCLUSION

Because there are no disputed issues of relevant fact, the Board may address the legal arguments of the parties without the need for an administrative hearing to determine the facts.

As a matter of law, Claimant's appeal does not contain any facts, which, if proven, would form a basis for the conclusion that the service he rendered to YSA is purchasable under the Retirement Code. Rather, the facts and the law are clear that the service he rendered with YSA during the 1999-2000 through 2005-2006 school years was not: (1) related to a "public school;" or (2) rendered for a "governmental entity."

For the above stated reasons, PSERS' Motion for Summary Judgment is GRANTED and Claimant's Appeal and Request for Administrative Hearing is DENIED.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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ORDER

AND NOW, upon consideration of Claimant's Appeal and Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa.Code §201.6(b), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request to purchase service he rendered to Youth Services Agency during the 1999-2000 school year through the 2005-2006 school year.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 4, 2013

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