

Mail Date:

MAR 13 2017

Mail Date: _____

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

IN RE: ACCOUNT OF PATRICIA L. PALOTAS
DOCKET NO. 2014-16
CLAIM OF PATRICIA L. PALOTAS

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the Hearing Examiner's proposed Opinion and Recommendation (hereinafter referred to as the "HEO"), the Brief of Claimant, Patricia A. Palotas, the Public School Employees' Retirement System's ("PSERS") Brief to the Hearing Examiner, Claimant's Brief on Exceptions ("Claimant's Exceptions"), and the PSERS' Letter Brief on Exceptions.

The issue on appeal is whether Claimant is eligible to receive retirement credit with PSERS during the 2001-2002 school year through the 2005-2006 school year. Claimant asserts that she was employed by the School District of the City of Erie ("Erie School District" or "District") and not Perseus House, Inc. ("Perseus House"), which is a private entity that does not participate in PSERS. To receive credit with PSERS, Claimant must prove she was a "school employee," as defined by the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101 et seq. See 24 Pa.C.S. §§ 8102, 8302(a). The Hearing Examiner determined that Claimant failed to meet her burden and recommends that Claimant's request for service credit be denied.

Claimant excepts to the HEO on several grounds. She asserts that the Hearing Examiner erred when he failed to consider her testimony about the financial relationship between the Erie School District and Perseus House. (Claimant's Exceptions at 2.) The remaining exceptions advanced by Claimant

are essentially that the Hearing Examiner did not give proper weight to the evidence, namely that the Hearing Examiner: (1) erred “when he referenced documents wherein [she] listed Perseus House as her employer” because no evidence was presented regarding the definition of “employer” or “employee” or “how those definitions in the applications may differ” from the definitions at issue; and (2) failed to evaluate Claimant’s job duties, responsibilities, day-to-day activities, and the fact that School District employees evaluated Claimant.

The Hearing Examiner’s recommendations are not binding. The Hearing Examiner’s function is simply to conduct a hearing during which the parties can present evidence and expose their factual and legal arguments. His role also encompasses assisting the Board in analyzing and interpreting the evidence in light of statutory and case law by drafting an opinion which provides analysis of the facts and law and a recommendation based on that analysis. He is not the ultimate finder of fact. This Board remains the ultimate finder of fact, as it does in all appeals, and will afford the proper weight of this evidence. See *Dowler v. Pub. Sch. Employees’ Ret. Bd.*, 620 A.2d 639 (Pa. Cmwlt. 1993). Questions of resolving conflicts of evidence, witness credibility, and evidentiary weight are within the Board’s exclusive jurisdiction. *Wyland v. Pub. Sch. Employees’ Ret. Bd.*, 669 A.2d 1098, 1103 (Pa. Cmwlt. 1996) (citation omitted). Accordingly, the Board will address these issues in its opinion.

After review and consideration of the parties’ arguments, exceptions, and the HEO, the Board issues the following History, Findings of Fact, Conclusions of Law, Discussion, and Conclusion.

HISTORY

This matter is before the Board on appeal filed by Claimant from a September 25, 2014, decision by the Executive Staff Review Committee (“ESRC”) to deny Claimant’s request to purchase credit for services she rendered with Perseus House from August, 2001 through August, 2006.¹

On October 22, 2014, Claimant appealed the ESRC’s determination and requested an administrative hearing. PSERS filed an Answer on November 5, 2014. The Erie School District was granted permission to intervene in this matter by Order dated April 7, 2015. A formal administrative hearing was, thereafter, scheduled for November 5, 2015. The Hearing was continued by Order dated October 30, 2015, pursuant to Claimant’s request for a continuance. The hearing was rescheduled for February 17, 2016. By way of an Order dated December 28, 2015, the Erie School District was granted permission to participate at the hearing by telephone. Claimant requested a second continuance on February 8, 2016. The hearing was continued by Order dated February 9, 2016, and was rescheduled for May 18, 2016. On May 16, 2016, Claimant filed a Motion to permit three witnesses to testify at the hearing by telephone. PSERS objected to Claimant’s Motion and, by Order dated May 17, 2016, the Hearing Examiner sustained PSERS’ objections and denied Claimant’s Motion. The hearing occurred, as scheduled, on May 18, 2016 before Hearing Examiner Marc A. Moyer, Esquire.

Claimant participated in the hearing, was represented by legal counsel, Adam J. Williams, Esquire, and testified on her own behalf. Claimant offered twelve exhibits into evidence. The District was represented by Timothy S. Wachter, Esquire, but presented no testimony or evidence. PSERS was

¹ PSERS previously granted Claimant’s request to purchase the service on or about October 25, 2010 in error, believing it was service rendered for Perseus House Charter School, which is a PSERS participating employer. Upon discovery of the error, PSERS voided Claimant’s purchase and informed Claimant of the determination by letter dated October 21, 2013. Claimant timely appealed, and the ESRC upheld PSERS’ decision.

represented by Kathrin V. Smith, Esquire and presented its case through the testimony of PSERS Retirement Administrator, Steven Wolf. PSERS offered twenty-nine exhibits into evidence.

By Order dated June 15, 2016, Claimant and the Erie School District were directed to file their post-hearing briefs by July 15, 2016. PSERS was directed to file its post-hearing brief no later than August 15, 2016. Claimant and the District were directed to file any reply briefs no later than August 31, 2016. Claimant filed her post-hearing brief on or about July 14, 2016. PSERS filed its post-hearing brief on or about August 12, 2016. Neither Claimant nor the District filed reply briefs. The record in this matter was closed with the filing of Notes of Testimony (“N.T.”) and the filing of PSERS’ post-hearing brief. The Hearing Examiner issued the HEO on October 17, 2016. On November 14, 2016, Claimant filed Brief on Exceptions. PSERS filed its Letter Brief Opposing Claimant’s Exceptions on December 2, 2016. This matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant first enrolled with PSERS on or about September 20, 1999 by virtue of her hourly employment with Erie School District as a Mental Health Specialist. (PSERS-1; N.T. 34-35, 76-77, 80, 96).
2. As a Mental Health Specialist for the District, Claimant provided mental health assessments, individual counseling, teacher and administrator consultations, and training to the Erie School District as part of the Student Assistance Program. (N.T. 77).
3. Students were referred to Claimant through the Student Assistance Program, and the Erie School District paid for Claimant's training. (N.T. 78, 81).
4. Records pertaining to Claimant's students were maintained at Wayne Middle School within the Erie School District during the period Claimant worked at Wayne Middle School. (N.T. 80).
5. During the 1999-2000 and 2000-2001 school years, Claimant testified that she was supervised by Christina Christiansen, who was a member of the Behavioral Health Specialist Team of the Erie School District and who Claimant testified also performed Claimant's performance evaluations.² (N.T. 79, Exhibit N).
6. The Erie School District paid Claimant an hourly wage and did not provide Claimant with health care benefits during the 1999-2000 and 2000-2001 school years. (N.T. 81).
7. Claimant was reported and qualified for two full years of service credit with PSERS for the hourly school service rendered with the Erie School District

² The record does not reflect Ms. Christianson's position, duties, or actual employer. The phone list contained in Exhibit N, however, lists Ms. Christianson as part of the District's Behavioral Health Specialist Team with the title in 2004 as a Mental Health Specialist.

during the 1999-2000 and 2000-2001 school years. (PSERS-2; PSERS-6; N.T. 37-38).

8. Claimant and the Erie School District made contributions to PSERS during the 1999-2000 and 2000-2001 school years. (PSERS-2; N.T. 35-38, 96).

9. Soon after the birth of her child, in or around June, 2001, Claimant testified that she approached Ms. Christianson and Dr. Robert Oliver, the Assistant Superintendent of the Erie School District, about the District's ability to provide her with health insurance. (N.T. 81).

10. Claimant testified that her understanding based on her conversation with Dr. Oliver was that the District was unable to provide her with health insurance benefits. (N.T. 81)

11. Claimant testified that she believed that the District could somehow give her insurance but only if she was transferred and employed by Perseus House. (N.T. 81-82, 96-98).

12. Neither Dr. Oliver nor Ms. Christianson testified at the hearing in this matter. *Transcript, passim.*

13. Claimant did not present corroborating evidence to substantiate her testimony regarding her conversation with Dr. Oliver and Ms. Christianson. *Transcript, passim.*

14. Perseus House is a private, non-profit entity that is not a reporting unit of PSERS. (PSERS-10; Exhibit D; N.T. 53, 71, 74-75).

15. Perseus House runs various community-based programs for the youth and has collaborated with the District on many projects; many of the community-based programs available within the Erie School District were joint ventures with Perseus House. (N.T. 94-95, 98, 100, 107-108)

16. Perseus House is not a payroll agent for other agencies. (N.T. 100)

17. Claimant decided to switch employment to Perseus House and she informed the District, in or around June, 2001, of her decision. (N.T. 98-99).

18. The District reported Claimant's termination date to PSERS as August 24, 2001. (PSERS-2, PSERS-3, PSERS-4; N.T. 36, 40, 42-43, 96-99.)

19. Claimant stopped making contributions and earning credited service with PSERS as of August 24, 2001, and she was aware that she was no longer enrolled in PSERS, upon her employment with Perseus House. (N.T. 96-97, 129; PSERS-4, PSERS-6).

20. Beginning with the 2001-2002 school year, Claimant began working for Perseus House under the title of Behavioral Specialist and was later identified as a SAP and MH Counselor for Perseus House. (PSERS-12, PSERS-14; N.T. 81, 86)³

21. Claimant testified that she was not interviewed by Perseus House prior to beginning service with Perseus House on August 27, 2001. (N.T. 86).

22. Prior to beginning service with Perseus House on August 27, 2001, Perseus House required Claimant to undergo a drug screening on August 15, 2001 and a physical TB test on August 22, 2001 as a condition for working at Perseus House. (PSERS-12; N.T. 104-105).

23. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant participated in a 6.5 hour orientation with Perseus

³ Claimant began rendering service with Perseus House on August 27, 2001 but her actual date of hire is not clear from the record. The District reported a termination date with PSERS of August 24, 2001. (Finding of Fact No. 18). The Perseus House, Inc. Personnel Form lists a date of hire as August 23, 2001 and a start date of August 27, 2001. (PSERS-13). The Highmark Blue Cross Blue Shield Enrollment Application lists a hire date of August 27, 2001 as does the Enrollment Form for the medical life insurance and the Premium Conversion Plan Agreement. (PSERS-16, PSERS-17, PSERS-18). Based on the record, however, it is clear that Claimant began orientation between August 23, 2001 and August 24, 2001 and completed medical screenings before beginning her service on August 27, 2001, which was a Monday.

House on August 23, 2001, during which she was provided with multiple new employee forms, a Perseus House Handbook, and Perseus House policies. (PSERS-12; N.T. 104-105).

24. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant was presented with and signed a "Perseus House Incorporated Position Description." (N.T. 104-105, 109; PSERS-14).

25. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Perseus House employee, Nick Viglione, signed Claimant's "Perseus House Incorporated Position Description" as her "Supervisor." (N.T. 104-105, 109; PSERS-14).

26. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant completed an Employee's Withholding Allowance Certificate ("W-4") that identified Perseus House as her employer for Federal income tax purposes. (PSERS-15; N.T. 116-117).

27. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant completed and submitted to Perseus House "Highmark Blue Cross Blue Shield Enrollment Applications" that identified Perseus House as her employer for purposes of enrolling her in the medical plan sponsored by Perseus House. (PSERS-16; PSERS-17; N.T. 117-119).

28. One of the Highmark Blue Cross Blue Shield Enrollment Applications signed by Claimant on August 23, 2001 stated as follows:

I certify that the information provided on this form is true to the best of my knowledge. Any person who knowingly and with intent to defraud any insurance company or other person, files an application for insurance, or other statement of claim, containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime, and subjects such person to criminal and civil penalties. I understand that this form enrolls those eligible persons listed above in the Medical Plan as described in the agreement between the plan and my employer. I authorized any payroll deductions required for the coverage and

recognize that I must formally enroll my dependents on this form or they will not be covered.

(PSERS-16; N.T. 118-119).

29. One of the Highmark Blue Cross Blue Shield Enrollment Applications signed by Claimant on August 23, 2001 stated as follows:

I HEREBY APPLY FOR BLUE CROSS/BLUE SHIELD POINT OF SERVICE (POS) HEALTH CARE PLAN COVERAGE FOR MYSELF AND MY ELIGIBLE DEPENDENTS WHO ARE LISTED ON THIS APPLICATION. I UNDERSTAND AND AGREE THAT OUR COVERAGE WILL BE CONTROLLED BY THE WRITTEN AGREEMENT BETWEEN THE PLAN AND MY EMPLOYER. I AUTHORIZE MY EMPLOYER TO MAKE DEDUCTIONS FROM MY EARNINGS, IF REQUIRED, FOR MY BLUE CROSS/BLUE SHIELD POINT OF SERVICE HEALTH CARE PLAN. THE UNDERSIGNED HEREBY AUTHORIZED ANY HEALTH CARE FACILITY OR PROVIDER TO RELEASE TO THE PLAN ALL INFORMATION RELATING TO PAST, PRESENT AND FUTURE HEALTH CARE EXAMINATIONS OR TREATMENTS RECEIVED BY EACH PERSON COVERED BY THIS APPLICATION. I RECOGNIZE THAT OUR COVERAGE WILL ONLY APPLY TO HOSPITAL ADMISSIONS WHICH OCCUR AND SERVICES WHICH ARE PROVIDED ON OR AFTER THE EFFECTIVE DATE OF OUR COVERAGE. ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT WHICH IS A CRIME AND SUBJECTS SUCH PERSON TO CRIMINAL AND CIVIL PENALTIES.

(PSERS-17; N.T. 118-119).

30. Claimant obtained and used her health insurance coverage with Highmark Blue Cross Blue Shield as of September 1, 2001, under Perseus House's insurance plan. (N.T. 83, 119).

31. On August 23, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant completed a "Perseus House, Inc. Premium Conversion Plan Enrollment Form and Salary Conversion Agreement" for the

purpose of permitting Perseus House to deduct her health insurance premiums from her pay on a pre-tax basis. (PSERS-29; N.T. 120).

32. On August 24, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant completed a "Perseus House, Inc. Personnel Form" and circled "SCHOOL BASED" under "PROGRAM" and wrote in under "OTHER PROGRAM"— "SAP" to fill the position as "MH Specialist." (PSERS-13; N.T. 106).

33. Also on August 24, 2001 and prior to beginning service with Perseus House on August 27, 2001, Claimant executed a Perseus House, Inc. "Application For Employment" through which she agreed:

[a]ll employees are hired by Perseus House, Inc., not for any specific facility. I agree, if hired by Perseus House, Inc., that I may be transferred at will to any facility according to our organization's needs. In addition, if accepted for employment, I hereby agree to abide by the rules and regulations of Perseus House.

(PSERS 11; Exhibit J; N.T. 86-87).

34. On the day she began service with Perseus House on August 27, 2001, Claimant completed a "Voluntary Life and AD&D Enrollment Form" for life insurance through which she identified Perseus House as her employer. (PSERS 18; N.T. 122-123).

35. Claimant enrolled in the Perseus House 401(k) Retirement Plan on or about the time she began working at Perseus House on August 27, 2001 through which Claimant elected to contribute 4% of her pay to the Plan out of her paycheck issued by Perseus House. (PSERS 19; PSERS 20; N.T. 123-125).

36. Perseus House made employer contributions to Claimant's 401(k) Retirement Plan during the five years Claimant is also seeking retirement credit with PSERS. (N.T. 125).

37. Claimant testified that she provided Student Assistance Program services to Erie School District students through Perseus House on a full-time basis, beginning on or about August 27, 2001 through on or about August 22, 2006. (N.T. 80, 83; *See also* PSERS-13; PSER-17; PSERS-18; PSERS-23; PSERS-24; Exhibit M; N.T. 81-82, 86, 99, 107).

38. Claimant testified that Ms. Christiansen continued to supervise Claimant's work while she was assigned to the District during the period Claimant worked at Perseus House. (N.T. 83).

39. Perseus House employees, Nick Viglione and Mark DiPlacido, signed Claimant's performance evaluation of February 4, 2002, as Supervisor and Director of Administrative Operations, respectively, with input from the Erie School District. (PSERS-14; Exhibit L; N.T. 109-110).

40. Perseus House employees, Nick Viglione and Mark DiPlacido, completed Claimant's performance evaluations of January 29, 2004, January 20, 2005 and June 6, 2005, as Supervisor and Director of Administrative Operations, respectively. (PSERS-14; N.T. 110-114).

41. Perseus House employees, Joe Kujkowski and Mark DiPlacido, completed Claimant's performance evaluation of June 16, 2006, as Supervisor and Director of Administrative Operations, respectively. (PSERS-14; N.T. 113-114).

42. Claimant's Form W-2's for 2002, 2003, 2005, and 2006 identify Perseus House as her employer, indicate that Claimant had a "Retirement plan" with her employer, and show deductions for Pennsylvania's State Unemployment Insurance tax. (PSERS-27).

43. Claimant was paid by Perseus House for her services rendered to the Erie School District from 2001 through 2006. (N.T. 82-84; PSERS-27).

44. Claimant testified that she did not have an employment contract with the Erie School District between August 27, 2001 and August 22, 2006. (N.T. 137).

45. Claimant testified that she believed that she was placed at the Erie School District between August 27, 2001 and August 22, 2006 pursuant to a contract between Perseus House and the Erie School District. (N.T. 83-84, 94, 103).

46. Claimant testified that she believed that the District paid Perseus House her hourly wages and the costs associated with providing her health insurance through a contract between Perseus House and the Erie School District. (N.T. 83-84, 94).

47. Claimant testified that she did not know whether the Erie School District funded the employer contributions Perseus House made to her 401(k) Plan. (N.T. 160).

48. Claimant did not present corroborating evidence to substantiate her beliefs or testimony. *Transcript, passim.*

49. Claimant testified that she was assigned by Perseus House to provide services exclusively to students of the Erie School District during the period she worked for Perseus House. (N.T. 82-83).

50. Claimant testified that her duties and responsibilities as an employee of Perseus House when she was assigned to the Erie School District from August 27, 2001 through August 22, 2006 were identical to her duties and responsibilities when she was an employee of the Erie School District prior to August 24, 2001. (N.T. 83-84).

51. Beginning August 27, 2001, Claimant testified that the Erie School District provided her with her own office, School District badge, pager, and business cards during the period Perseus House assigned Claimant to the Erie School District. (N.T. 77-78, 82-83).

52. On or about December 20, 2001, Claimant requested to elect Class T-D membership with PSERS, and was denied because her “election ballot was received after [her] termination date of August 24, 2001.”⁴ (PSERS-3; PSERS-4; N.T. 40-43).

53. Claimant did not appeal the July 11, 2002 determination that held that she was ineligible for Class T-D membership because she terminated school service on August 24, 2001. (N.T. 43); see 1 Pa. Code § 35.20 (2001) (A PSERS’ determination becomes final and unappealable if an appeal from that determination is not filed within 10 days.).

54. Claimant testified that she was promoted to Clinical Team Leader during the 2005-2006 school year while she was still working at Perseus House. (N.T. 84-85).

55. On August 9, 2006, board records of the School Board of the Erie School District reflect under “Appointment:” “1.187 – Aug. 22 - Patti Palotas ----- TBD, Team Leader Student Assistance Program, appointment effective August 22, 2006 through School Year 2006-07 (position and benefits dependent on continuation of grant funding).” (PSERS-28).

56. By letter dated August 9, 2006, Claimant advised Perseus House of her intent to resign her position with Perseus House, effective August 21, 2006. (PSERS-23; N.T. 130-131).

⁴ On May 17, 2001, Act 2001-9 (“Act 9”) was signed into law that provided an opportunity for PSERS members to elect a new, optional class T-D membership under which retirement benefits would be calculated with a 2.5% multiplier, reduced the number of eligibility points for an active or inactive member to become vested in PSERS from 10 years to 5 years and opened a window for active members of PSERS to elect multiple service membership. (Act of May 17, 2001, P.L. 26, No. 9; see 24 Pa.C.S. § 8305.1) Act 9 required eligible members to file “a written notice with the board **on or before December 31, 2001, or before the termination of school service, or State service as applicable, whichever first occurs.**” 24 Pa.C.S. § 8305.1(b) (emphasis added).

57. Claimant further stated in the letter that she “deeply appreciated the support you and the Perseus House organization has provided. It has been a pleasure working with you. I know that we will continue our partnership in providing services that will promote the well being of the children of the city of Erie.” (PSERS-23).

58. By letter dated August 23, 2006, Claimant amended her August 9, 2006 resignation letter to modify her date of resignation “of full time employment” to August 25, 2006. Claimant stated in the letter the “I will be remaining an employee of Perseus House on a part time basis.” (PSERS-24; N.T. 132).

59. The Erie School District reenrolled Claimant in PSERS as a school employee in August, 2006 as a full-time, salaried employee and identified Claimant’s date of employment as August 22, 2006. (PSERS-5; N.T. 47, 90-91, 158-159).

60. By way of correspondence dated August 21, 2006, PSERS notified Claimant that she had been reenrolled in PSERS by the Erie School District and requested that Claimant “notify PSERS immediately” if the information was incorrect. (PSERS-5).

61. At no time did Claimant inform PSERS that the information that the Erie School District reported to PSERS in August, 2006 was in error. (N.T. 46-47).

62. The Erie School District began reporting Claimant’s school service rendered after August 22, 2006 to PSERS, and Claimant and the District began making contributions to PSERS on Claimant’s behalf following Claimant’s August, 2006 enrollment. (N.T. 60).

63. Erie School District did not report Claimant to PSERS and did not attempt to enroll Claimant in PSERS from on or about August 27, 2001 through August 22, 2006. (PSERS-6; N.T. 47-48, 51).

64. Claimant received a *Statement of Account for School Year 2005-2006* (July 1, 2005 to June 30, 2006) sent on or about December 22, 2006 listing Claimant's previously accrued two years of service with PSERS, as of the date of June 30, 2006. (PSERS-6; N.T. 49).

65. On or about November 1, 2007, Claimant submitted to PSERS an *Application to Purchase Credit for Part-Time Service (in Pennsylvania Public Schools)* on which she identified "Perseus House Inc." as her employer and through which she sought credit for her work at Perseus House from August, 2001 through August, 2006. (PSERS-7; Exhibit A; N.T. 51).

66. Perseus House completed the employer section of Claimant's purchase of service application and certified Claimant's employment, compensation, and hours. (Exhibit A; PSERS-7; N.T. 13, 14).

67. Claimant completed section C of the application certifying that she has "not received credit for this service in any other retirement system." (PSERS-7).

68. On or about November 19, 2014, Claimant completed a "Distribution Form" through which she requested a complete distribution of her Perseus House 401(k) plan through a direct rollover to the 403(b) plan sponsored by the Erie School District for its employees. (N.T. 126-127; PSERS-21; PSERS-22).

69. Claimant identified Perseus House as her employer on the "Distribution Form" and identified hire date of September 1, 2001 and a termination date of her employment from Perseus House as August 21, 2006. (PSERS-21; PSERS-22; N.T. 126-128).

70. PSERS provided Claimant with a *Statement of Amount Due* on or about February 7, 2011 through which it billed Claimant for 5 years of service credit from July 1, 2001 through June 30, 2006. (Exhibit C; N.T. 53).

71. PSERS provided Claimant with a *Statement of Account for School Year 2009-2010* (July 1, 2009 to June 30, 2010) on or about November 4, 2010 listing six years of service with PSERS, as of the date of June 30, 2010. (Exhibit G-1).

72. Claimant has not made any payments to PSERS in furtherance of her service purchase. (N.T. 54, 73).

73. In September/October, 2013, PSERS reviewed Claimant's 2007 application to purchase service credit after PSERS received correspondence from another PSERS member who identified Claimant by name when inquiring into why PSERS had denied the other member's similar request for service credit. (N.T. 56, 72-73).

74. By letter dated October 21, 2013, PSERS informed Claimant that it had voided her purchase of service credit and clarified that it had previously granted Claimant's request to purchase the service credit in error based upon PSERS' interpretation that the employer was Perseus House Charter School, rather than Perseus House, Inc. which is a non-profit organization that does not report to PSERS. Accordingly, PSERS determined that Claimant was not eligible to purchase the service because she was not an employee of a public school. (Exhibit D; PSERS-9; N.T. 55-57, 65-66, 72).

75. Claimant appealed PSERS' determination to the Executive Staff Review Committee ("ESRC") on or about November 10, 2013. (Exhibit E).

76. The ESRC upheld PSERS' determination and notified Claimant of its decision by letter dated September 25, 2014. (PSERS 10).

77. Claimant filed an appeal from the ESRC's determination on or about October 22, 2014, and requested an administrative hearing. (Official Notice-agency records).

78. Claimant was served with all pleadings, orders, and notices filed of record in this matter. (Official Notice-agency records).

79. Claimant participated in the May 18, 2016 hearing and was represented by legal counsel. (N.T. 5).

80. Claimant entered into a "Marital Property Settlement Agreement" (the "Settlement Agreement") with her former husband on or about November 15, 2011. (Exhibit H; N.T. 27-28).

81. Paragraph 25 of the Settlement Agreement states in pertinent part: "Husband waives any and all right, title and interest in any retirement accounts of Wife, including, but not limited to, her pension *through PSERS and her 401(k) through Perseus House.*" (Exhibit H, p. 9)(emphasis added).

82. Claimant testified that she did not pursue her former husband's business assets as part of the Settlement Agreement in exchange for her former husband not pursuing her PSERS retirement benefits based, in part, upon her belief that she had been credited with 5 years of service credit with PSERS despite her enrollment in Perseus House's 401(k) plan during the same time period. (Exhibit H; N.T. 27-28).

83. Claimant failed to establish that she experienced a monetary detriment or that she justifiably relied on PSERS' February 7, 2011 granting of her request for five years of service credit when she was negotiating the Settlement Agreement.

CONCLUSIONS OF LAW

1. Claimant has the burden of proof in this proceeding. *Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
2. A preponderance of the evidence is the correct burden of proof to be applied in this administrative action. *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A.2d 678, 681-82 (Pa. Cmwlth. 2005); *Lansberry v. Pennsylvania Pub. Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 602 A.2d 863 (Pa. 1992).
3. 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).
4. PSERS is a creature of statute and the rights of its members are derived from the provisions of the Public School Employees' Retirement Code ("Retirement Code"). 24 Pa.C.S. § 8101 et seq.; *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).
5. The authority of the Board to grant or deny Claimant's request is limited to the provisions of the Retirement Code, and the Board has no authority to grant Claimant rights beyond those specifically set forth in the Retirement Code. *Forman, supra*; *Burriss v. State Employees' Ret. Bd.*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403 (Pa. Cmwlth. 1992).
6. The Board has the legal authority to determine Claimant's employment status during the period of time in question for the purposes of membership in PSERS. See 22 Pa. Code § 215.5(d)(3).

7. To determine if a person is a “school employee,” for the purpose of obtaining retirement credit, a PSERS member must establish that she was hired, compensated, controlled, and engaged in work relating to a “public school” by a “governmental entity.” *Hawes v. Pub. Sch. Employees’ Ret. Bd.*, 778 A.2d 1277 (Pa. Cmwlth. 2001); *Golebieski v. Pub. Sch. Employees’ Ret. Bd.*, 636 A.2d 268, 270 (Pa. Cmwlth. 1993).

8. Claimant failed in her burden of proving she was directly employed by the District from August, 2001 through August, 2006 as a “school employee.” (Findings of Fact Nos. 13, 17-20, 22-37, 39-44, 48, 52-63, 68-69); see *Hawes*, 778 A.2d 1277; *Golebieski*, 636 A.2d 268.

9. Claimant was an employee of Perseus House from August, 2001 through August, 2006. (Findings of Fact Nos. 13, 17-20, 22-37, 39-44, 48, 52-63, 68-69).

10. Perseus House is not a “governmental entity” or a “public school” and is not a reporting unit of PSERS whose employees are eligible for membership. (Findings of Fact Nos. 14-16); 24 Pa.C.S. § 8102; *Cain v. Pub. Sch. Employees’ Ret. Sys.*, 651 A.2d 660 (Pa.Cmwlth. 1994); *Golebieski*, 636 A.2d 268.

11. Claimant is not entitled to receive credit with PSERS for the service she rendered while she was an employee of Perseus House. 24 Pa.C.S. § 8102; *Hawes*, 778 A.2d 1277; *Cain*, 651 A.2d 660; *Golebieski*, 636 A.2d 268.

12. PSERS is not estopped from denying service credit to Claimant for the service she rendered while she was an employee of Perseus House. (Findings of Fact Nos. 80-83); *Forman, supra*; *Cosgrove v. State Employees’ Ret. Bd.*, 665 A.2d 870 (Pa. Cmwlth. 1995); *Tyson v. Pub. Sch. Employees’ Ret. Sys.*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999); *Finnegan v. Pub. Sch. Employees’ Ret. Bd.*, 560 A.2d 848, 850-851 (Pa. Cmwlth. 1989).

13. Claimant has been afforded reasonable notice of the grounds upon which PSERS denied her claim, and she has been provided an adequate opportunity to be heard in this proceeding. (Findings of Fact Nos. 52-53, 74-79).

DISCUSSION

Claimant requests to purchase service credit for the five-year period she rendered service for Perseus House, from August 27, 2001 through August 22, 2006. Claimant had previously been employed by the Erie School District as a Mental Health Specialist as part of its Student Assistance Program, from September 20, 1999 through August 24, 2001, and was enrolled as a PSERS member during that period earning school service. Claimant then switched employers from the Erie School District to Perseus House in August, 2001 and is seeking credited service for that time with PSERS.

Claimant does not dispute that Perseus House is a non-profit, private entity that is not a participating member of PSERS. Instead, Claimant asserts that she remained an employee of the Erie School District during the entire period she worked for Perseus House and that Perseus House acted merely as a conduit through which her wages were paid and benefits were provided, including health insurance. Relying on *Hawes*, 778 A.2d 1277, Claimant contends that “[h]er relationship with Perseus House was merely a **farce** so that she could receive health insurance benefits, as her job remained identical, and the School District paid her employment expense.” (Brief of Claimant, Patricia A. Palotas, at 17) (emphasis added). PSERS argues, and the Hearing Examiner agreed, that, based on the totality of the circumstances, Claimant formally terminated service with the District and began employment with Perseus House beginning in August, 2001 through August, 2006. Thus, the resolution of this appeal turns on whether: (1) Claimant remained employed by the District; or (2) Claimant formally terminated service with the District and began employment with Perseus House.⁵

⁵ This Board refuses to recognize Claimant’s assertion that her employment with Perseus House was simply a “farce” to obtain health care benefits as a valid legal argument or that *Hawes* supports such a claim. Counsel’s effort to substantiate Claimant’s request for retirement credit may fail to contemplate the implication of such legal maneuvering. (PSERS-16, PSERS-17; see 18 Pa.C.S. §

Statutory/Regulatory Framework

It is well established that a PSERS member's right to benefits is strictly limited to those specifically set forth by the Retirement Code. See *Forman*, 778 A.2d 778, 780; *Burris*, 745 A.2d 704, 706; *Bittenbender*, 622 A.2d 403. PSERS is required to construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa.C.S. § 1921(a), (b). Pertinent to Claimant's claim, the Retirement Code defines a "school employee" as any "person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an . . . employee." 24 Pa.C.S. § 8102. 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). Accordingly, to fall within the definition of a "school employee," for the purpose of obtaining retirement credit, a PSERS member

4117 (insurance fraud); 24 Pa.C.S. § 8534 (misdemeanor for knowingly making any false statement or falsifying or permitting to be falsified any record or records of this system in any attempt to defraud the system as a result of such act); 18 Pa.C.S. § 4904(a) (misdemeanor for making a false statement in a filing with an agency); see also 24 Pa.C.S. § 8507(a) (the provision of erroneous information upon entrance into the system shall result in the forfeiture of the member's right to subsequently assert any right to benefits based on erroneous information or on any of the required information which she failed to provide).

must show that she was hired, compensated, controlled, and engaged in work relating to a “public school” for a “governmental entity.” *Golebieski*, 636 A.2d 268, 270. *Cain*, 651 A.2d 660; *Thorpe v. Pub. Sch. Employees’ Ret. Bd.*, 879 A.2d 341 (Pa. Cmwlth. 2005).

Employee Analysis

Claimant relies heavily upon the Commonwealth Court’s analysis in *Hawes* in support of her position. In *Hawes*, PSERS denied an application for one year of service credit as a resource room teacher (the “teacher”) because the teacher’s salary was not paid by the school district for which she claimed the credit. 778 A.2d at 1278. The teacher, however, applied for a position at the school district, the school district interviewed her, and then it hired her through a third party (the “third party”) with whom the district had a contract. *Id.* The terms of the contract expressly required the district to pay the third party for supplying the teacher an amount equal to the teacher’s base salary, plus a flat fee and a fee based upon a percentage of the teacher’s base salary. *Id.* at 1280-81. The teacher’s salary was also subject to a collective bargaining agreement to which the school district was a party, such that the school district, and not the third party, was responsible for determining the teacher’s salary. *Id.* at 1281. Further, any dispute regarding the amount of the teacher’s salary was addressed by the school district, and not the third party. *Id.* The school district subsequently hired the teacher on a full-time basis the following year and the district’s board of directors formally approved the hiring of the teacher and entered into a written contract with the teacher. *Id.* at 1279.

In *Hawes*, the third party played no role in the hiring or supervising of the teacher and the school district provided the teacher all of her teaching assignments. 778 A.2d at 1282. The teacher’s paychecks were issued by the third party, which also deducted the appropriate taxes. *Id.* at 1279. The third party also issued the teacher’s W-2 forms, and the teacher identified the third party as her employer on her income tax return. *Id.* The teacher, however,

performed no duties for the third party and all of her duties were related to the school district. *Id.* at 1280. *Notably, the teacher had virtually no contact with the third party, never submitted an employment application to the third party, and was not aware of the third party's existence until after she was employed. Id.*

The Commonwealth Court in *Hawes* cited to its prior decision in *Golebieski* in which it explained in similar context that “to ‘work for’ someone is to enter into an employment relationship with that person, in the sense of providing services in exchange for compensation.” In finding that the teacher was not a school employee in *Golebieski* and, therefore, was not entitled to purchase service credit in that case, the Commonwealth Court considered it crucial to that decision that the claimant was paid solely by an employer other than the school district, and that the claimant had other duties for the employer that were not related to the school district. *Hawes*, 778 A.2d at 1280 (citing *Golebieski*, 636 A.2d at 270).⁶ The Commonwealth Court held that the teacher in *Hawes* was distinguishable from *Golebieski* and determined that she was employed by the school district because the record was devoid of any evidence that the third party actually held itself as the teacher’s employer. The Court further held that the school district “may not evade its statutorily mandated responsibilities in funneling the compensation that it pays to its teachers through a private entity and entering a contract with that entity which states that it, rather than the district, is the employer of the teachers.” *Hawes*, 778 A.2d at 1281-82.

In this case, Claimant asserts that she continued to be a “school employee” of the Erie School District despite her relationship with Perseus House that began in August, 2001, and that she continued to be an employee of the District through August, 2006 by virtue of her continuing association with the District. In particular, Claimant asserts that she was never interviewed by

⁶ The Commonwealth Court held in *Golebieski* that the claimant was a private employee for all services, and credit with PSERS was not given even for the services that appeared to be school-related. 626 A.2d at 270.

Perseus House prior to beginning her work for that organization and her work at Perseus House was identical to the work she performed while employed with the Erie School District during the 1999 through 2001 school years. Claimant also relies on the fact that she only saw students from the District while at Perseus House, that the students records remained with the District, that she continued to be supervised by the District, that she contacted the District in the event she was ill, that her work office remained at Wayne Middle School, that the telephone directory identified her business office as being at Wayne Middle School,⁷ and that she retained her Erie School District Badge, pager, and business cards while working for Perseus House. Claimant also testified that she *believed* Perseus House was merely a conduit for her pay and benefits as in *Hawes*.

Claimant argues that the Hearing Examiner failed to give proper weight to such facts that she believes supports a finding that she was an employee of the District. It is Claimant's burden, however, to establish the facts she asserts. *Wingert*, 589 A.2d 269. Claimant failed to produce any written agreements between Perseus House and the Erie School District similar to those in *Hawes* showing that the Erie School District, and not Perseus House, paid her wages and/or paid for her benefits and/or had the authority to terminate Claimant from her employment. Nor did Claimant produce any testimony from either entity establishing the District's relationship with Claimant during the five years or how disputes involving her pay and benefits would be resolved as in *Hawes*. Instead, the totality of Claimant's evidence consists of her subjective belief that a contract/agreement regarding her specific employment existed between the entities that defined their relationship and the source of payment for Claimant's wages and benefits. Although the Board acknowledges that a contractual relationship may have existed between the parties, this Board cannot create a finding of fact based on Claimant's belief without substantial, corroborating

⁷ Notably, Nick Viglione and Joe Kujkowski are also listed on the telephone directories. (Exhibit N)

evidence.⁸ Circumstantial evidence cannot support an employee/employer relationship when granting retirement credit.

Moreover, Claimant acknowledged that Perseus House runs various community-based programs for the youth and has collaborated with the District on many projects with many of the community-based programs available within the Erie School District as joint ventures. (N.T 94-95, 98, 100, 107-108). Indeed, Claimant's evaluations, signed by Perseus House employees, state as the "Basic Function":

To provide comprehensive mental-health screening, intervention and consultation services to students and their families. To participate as a member of the Student Assistance Core Team. To provide consultation to school district staff as assigned, employing responsible and professional clinical judgment in an ethical manner in support of the organizations mission and vision.

(PSERS-14). Thus, based on Claimant's testimony and the documentary evidence, it is not as untenable as Claimant posits for Perseus House to have assigned Claimant as its employee to the District through Perseus House's programs to "provide consultation to school district staff as assigned." (PSERS-14; see PSERS-13).

Claimant also excepts to the HEO claiming that the Hearing Examiner failed to rely on statements purportedly made by Mr. Oliver regarding the financial relationship between the District and Perseus House. Mr. Oliver, however, did not testify. Claimant's testimony of what Mr. Oliver told her, alone, cannot support a finding of fact because it is based on third-party statements that she claims were made to her. Because the testimony is not based on personal knowledge of the financial relationship between the entities and it is not corroborated with witness testimony or documentary evidence, Claimant's exception on this issue must be overruled and dismissed. See *Walker v.*

⁸ The general rule in Pennsylvania is that if a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference. *Commonwealth v. Moore*, 309 A.2d 569, 570 (Pa. 1973).

Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). (Hearsay not subject to an exception which is not objected to may be admitted; however, it may not form the basis of a factual finding unless it is supported by other admissible evidence.)

Conversely, the record contains documents, including financial documents, that identify Perseus House as Claimant's employer expressly on their face or through their application. Perseus House is identified as Claimant's employer on her W-4 forms. (PSERS-15, PSERS-27). Perseus House is also identified as Claimant's employer on its Payroll Register. (PSERS-26). The record also contains numerous documents related to Claimant's benefits through Perseus House that expressly identify Perseus House as her employer. Claimant executed Highmark Blue Cross/ Blue Shield Enrollment Applications through which she obtained and used health insurance benefits as a participant in Perseus House's health care program. (PSERS-17, PSERS-18). Claimant also identified Perseus House as her employer on an Enrollment Form and in a Salary Conversion Agreement for the purpose of permitting Perseus House to deduct her premium payments from her pay. (PSERS-29). She also obtained life insurance through Perseus House and became a participant in Perseus House's 401(k) Plan to which Perseus House could only contribute as Claimant's employer under the Internal Revenue Code. (PSERS-19, PSERS-20). Claimant also identified Perseus House as her employer on a Distribution Form for the purpose of rolling over her 401(k) Plan to the 403(b) plan sponsored by the Erie School District for its employees. (PSERS-21, PSERS-22).

Administrative forms within the record also identify Perseus House as Claimant's employer and provide substantive information that is ordinarily associated with an employer/employee relationship. Unlike the teacher in *Hawes*, who was not even aware of the third party's existence, for example, Claimant in this case voluntarily switched to Perseus House and completed the numerous employment forms, including an Application for Employment for Perseus House. (PSERS-11). Although Claimant testified that she provided

services exclusively to Erie School District students, she acknowledged through her signature on the Application that “if hired by Perseus House, Inc. ... [she] may be transferred at will to any facility according to our organization’s needs.” (Exhibit J).

Claimant additionally signed Perseus House’s Employee Initial Orientation Checklist and admitted to being *required* to undergo a new employee orientation at Perseus House. (PSERS-12; N.T. 104-106). The record also contains a Perseus House Personnel Form that Claimant filled out requesting to continue to work in the District’s SAP Program under Perseus House’s School Based Program. (PSERS-13, N.T. 106-108). Unlike the third party in *Hawes* which played **no role** in supervising the school teacher in that case, the record in this matter shows that Claimant was evaluated by Perseus House personnel. (PSERS-14). Claimant asserts that the signing of the assessment forms by Perseus House staff were merely “bookkeeping formalities”, yet she offered no substantive evidence to support that assertion.

Claimant also submitted a letter of resignation to Perseus House on August 9, 2006, and later amended that letter on August 23, 2006, through which she expressly acknowledged she was an employee of Perseus House. (PSERS-23, PSERS-24). Significantly, her letter of resignation was triggered not by a “promotion” as characterized by Claimant (Brief of Claimant at p. 12-13), but by the “Appointment” by the District’s School Board to the position of Team Leader of the SAP effective August 22, 2006. (PSERS-28). Following that “Appointment,” Claimant was then enrolled in PSERS effective August 22, 2006. Unlike the situation presented in *Hawes*, therefore, the record establishes that Claimant precipitated her switch in employment to Perseus House in August, 2001 and her voluntary termination in August, 2006 that resulted in her re-enrollment in PSERS. She chose to change employers for a more advantageous employee benefit package. The teacher in *Hawes* was not attempting to manipulate receipt of benefit packages from separate employers for the same work. Thus, there are significant differences between this case and *Hawes* that,

when considered in the aggregate, undermine Claimant's contention that she was employed by the Erie School District from August, 2001 through August, 2006.

Claimant insists that the aforementioned documents are irrelevant and the focus should be on the type of work performed by Claimant in determining by whom she was employed. We do not agree with Claimant that the Retirement Code dictates such an analysis. See *Golebieski*, 636 A.2d 268. In *Golebieski*, the Commonwealth 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. 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. 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. 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.

Claimant also argues that because no evidence was presented regarding the definition of "employer" or "employee" or "how those definitions in the applications may differ" from the definitions at issue, the listing of Perseus House as Claimant's employer on such forms should not be determinative and is insufficient to establish an employment relationship. This Board finds no support,

and Claimant has failed to provide any legal citation, for the proposition that employment forms commonly used during the normal course of employment should not be considered when determining who Claimant's employer is. See 22 Pa. Code § 215.5(d)(3) ("In cases of doubt, the Board will determine whether any person is a school employee within the meaning of the Retirement Code."). In interpreting the Retirement Code, this Board may consider relevant documentary evidence that addresses which employer held itself out as Claimant's employer. See *Golebieski*, 636 A.2d 270 ("As stated by the Board: 'In common parlance to 'work for' someone is to enter into an employment relationship with that person, in the sense of providing services in exchange for compensation.'"). Such evidence was admitted without objection to authenticity or foundation. Claimant cannot object after the record has closed that the documentary evidence lacks a foundation for reliability. Claimant was afforded an opportunity to present testimony and evidence and exploited that opportunity.

Furthermore, Claimant's cessation of participation from PSERS, notification of such cessation and termination date, and her subsequent re-enrollment also supports a finding that she terminated her employment with the Erie School District on August 24, 2001 and began new employment with Perseus House. The Retirement Code defines "date of termination of service" as: "[t]he last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his employer or two years following the last day of service for which contributions were made, whichever is earliest." 24 Pa.C.S. § 8102. Claimant was notified on July 11, 2002 that her request for Class T-D membership was denied because her election ballot was "received after [her] termination date of August 24, 2001." (PSERS-4). To have a "date of termination of service" of August 24, 2001, Claimant had to have been terminated from all "school service" as of August 24, 2001. Erie School District reported such date to PSERS as Claimant's termination date and did not reenroll her until August 22, 2006 after the Erie

School District hired her as its Team Leader of the SAP Program at the School Board's August 9, 2006 meeting. (PSERS-28). Claimant also received periodic notifications from PSERS through which her lack of participation in PSERS from 2001 through 2006 was clearly evident. Claimant has not asserted in this case that the Erie School District should have continued to make contribution payments to PSERS during the period she was with Perseus House, as asserted by the teacher in *Hawes*. Nonetheless, Claimant would not have had to request her appointment, notify Perseus House of her termination, and the Erie School District would not have had to appoint her as a Student Assistance Program Team Leader, had Claimant always been a District employee. Thus, Claimant re-enrolled with PSERS upon her date of hire with the Erie School District after she had previously experienced a termination with all school employers. (PSERS-4, PSERS-5).

Here, the evidence presented supports a conclusion that Perseus House, not the District, was the entity ***directly responsible*** for hiring Claimant, paying her salary, providing her with employment benefits such as health care and retirement benefits, remitting taxes, providing unemployment compensation coverage, and terminating Claimant's employment. Her motivation for switching employers is not relevant when determining if she experienced a bona fide break in service. Based on the record *Claimant created*, if a dispute arose over her employment, Perseus House, not the District, would be the responsible entity.

Given the totality of the circumstances and the manner in which the facts of this particular case played out, the evidence of record leads to the inevitable conclusion that Claimant formally terminated her employment relationship with the Erie School District on August 24, 2001. Claimant has neither established that the Erie School District remained her employer after that date nor that the Erie School District maintained any authority to unilaterally remove her from her employment with Perseus House.

Equitable Estoppel Analysis

Claimant additionally claims that PSERS is estopped from denying her the additional service credit she seeks based upon the erroneous information she was provided by PSERS when it informed her that it had granted her five years of additional service credit in response to her Application to Purchase Credit for Part-Time Service she submitted in 2007. By letter dated October 21, 2013, PSERS informed Claimant that it had voided her purchase of five years of service credit that was previously approved and, by way of explanation, indicated that it had erroneously approved her application based upon PSERS' mistaken belief that Claimant had been an employee of the Perseus House Charter School, rather than an employee of Perseus House. PSERS explained that Claimant was not eligible to purchase the service under the Retirement Code because she was not an employee of a public school that was a PSERS reporting unit when she worked at Perseus House.

Claimant asserts that she relied upon the fact of her additional service when she negotiated her Marital Property Settlement Agreement as part of her divorce from her former husband. More specifically, Claimant testified that she did not pursue her former husband's business assets as part of the Settlement Agreement in exchange for her former husband not pursuing her PSERS retirement benefits based, in part, upon her belief that she had been credited with five years of service credit.

It is well established that the statutory provisions of the Retirement Code strictly apply, even when the Claimant may not have been provided adequate or correct information from PSERS, her employer, or from a third party. *Tyson*, 737 A.2d at 328; *Finnegan*, 560 A.2d at 850-851; *Cosgrove*, 665 A.2d 870. In *Finnegan*, PSERS erroneously informed a member that she could purchase fifteen years of out-of-state service credit which would have provided the member with 30 years of active service. *Finnegan*, 560 A.2d at 849. The member relied on that information and made an irrevocable decision to retire. The Retirement

Code, however, restricted such purchases to twelve years. *Id.* As a result, the member received far smaller retirement benefits than she expected. On appeal, the Commonwealth Court affirmed PSERS' determination that the member was not permitted to purchase additional service credit. The Court explained that while the doctrine of equitable estoppel is applicable to governmental agencies, there are limited situations in which estoppel cannot be invoked against the Commonwealth. More specifically, the government cannot be subject to the acts of its agents and employees if those acts are outside the agent's powers, in violation of positive law, or acts that require legislative or executive action. Accordingly, the *Finnegan* court held that, as a matter of law, PSERS could not be estopped from asserting a statutory provision of the Retirement Code because doing so would be tantamount to giving employee errors the effect of amending the substance of a statute. *Finnegan*, 560 A.2d at 851; *see also Hughes v. Pub. Sch. Employees' Ret. Bd.*, 662 A.2d 701, 705 n. 5. Citing to *Finnegan*, the Commonwealth Court reached the same conclusion in *Cosgrove*, where it found that the statutory language of the Retirement Code prevents retirees from changing their retirement benefit elections, even under circumstances where members may have been misled by inadequate counseling by the State Employees' Retirement System. *Cosgrove*, 665 A.2d 870, 874.

Because Claimant is found to not have been a public school employee for the period in question as set forth above, and because Claimant's estoppel claim is predicated upon PSERS' error in granting Claimant service credit that is not permitted under the Retirement Code, PSERS cannot now be estopped as a matter of law from correcting its error. Even if the Board was permitted to give equitable relief, Claimant has not established that she justifiably relied upon the granting of service. The record fails to establish by clear and convincing evidence that Claimant waived her rights to a portion of her husband's interest in Ashton & Palotas Flooring Gallery based specifically upon PSERS' error, as opposed to Paragraphs 25 and 26 being included in the Settlement Agreement as part of a broader settlement and compromise of Claimant's marital assets.

Absent any evidence that her husband's interest in Ashton & Palotas Flooring Gallery had any monetary value, Claimant similarly failed to establish that she experienced a monetary detriment as a result of her purported justifiable reliance on PSERS' error. See *Hughes*, 662 A.2d 701, 705; *Matter of Larsen*, 616 A.2d 529, 532 (Pa.1992) (requiring "testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.")(quoting *Matter of Chiovero*, 570 A.2d 57, 60 (Pa.1990)). Instead, Claimant's position flows from a presumption that she is entitled to an inflated value of pensionable service to be counted in two different retirement systems for the same period of time—retirement systems that were both specifically addressed and waived in the Settlement Agreement.

Claimant also certified on her purchase of service application dated August 30, 2007 that she "[has] not received credit for this service in any other retirement system." (PSERS-7). PSERS, therefore, cannot be bound by Claimant's erroneous and false certifications that she presented to PSERS or during her divorce matter.

CONCLUSION

As the party appealing from the determination of the ESRC's decision, Claimant bears the burden of establishing that she is entitled to the service credit she seeks under the Retirement Code. *Gierschick*, 733 A.2d at 32; *Wingert*, 589 A.2d at 271. The degree of proof required for Claimant to prevail on her claim is a preponderance of the evidence. Claimant must satisfy her burden of proof with evidence that is substantial and legally credible, not with mere "suspicion" or by only a "scintilla" of evidence. *Lansberry*, 578 A. 2d at 602. Claimant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *Id.* at 601-602.

To be eligible for mandatory membership in PSERS during the relevant time, Claimant must demonstrate that she was hired and compensated by a "school employer" to render "school service" as a "school employee." In other words, there must be an employee/employer relationship between the "school employee" and the "school employer" before retirement credit is due. The Retirement Code requires that the employer be the entity "***directly responsible*** for the employment and payment of the school employee." 24 Pa.C.S. § 8102 (relating to definition of "employer"). The mere fact that Claimant's job responsibilities at Perseus House were identical to her prior job responsibilities with the Erie School District, that she retained certain School District items such as a badge and pager, and that she continued to have a business office located at the District are not dispositive of Claimant continuing to have an actual employment relationship with the District for purposes of the Retirement Code. Claimant's continuing close relationship with the School District while at Perseus House could have existed for equally plausible reasons outside the context of an employer/employee relationship based upon the types of services Perseus House provided. The potential co-mingling of functions between the two entities, however, does not reclassify Claimant's service into pensionable credit under the Retirement Code.

Here, Claimant **chose** to change employers, **knew** the entire five years that the District terminated her PSERS service as of August 24, 2001, and already **received** retirement credit under a 401(k) retirement plan sponsored by Perseus House for the same time period. Essentially, Claimant searched for employee benefits that were more advantageous to her than those provided to her as an employee of the Erie School District. The Retirement Code does not permit Claimant to reap the rewards of two employers for the same work. Upon balancing the foregoing evidence, the Board finds that Claimant has not established by a preponderance of the evidence that she continued to maintain an employment relationship with the Erie School District during the period she worked for Perseus House so as to be considered a “school employee” under the Retirement Code.

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

IN RE: ACCOUNT OF PATRICIA L. PALOTAS
DOCKET NO. 2014-16
CLAIM OF PATRICIA L. PALOTAS

ORDER

IT IS HEREBY ORDERED that Claimant's request that the Board grant her service credit for the period between August, 2001 and August ,2006 when she was a Perseus House employee is DENIED; and Claimant's Appeal and Request for Administrative Hearing is DISMISSED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: March 10, 2017

By: Melva Vogler
Melva Vogler, Chairman