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

IN RE: ACCOUNT OF H.B.
DOCKET NO. 2017-05
CLAIM OF H.B.

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation, and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to receive a disability retirement benefit is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 12/7/2018

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

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

IN RE:

**ACCOUNT OF H [REDACTED] B [REDACTED]
CLAIM OF H [REDACTED] B [REDACTED]**

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DOCKET NO. 2017-05

OPINION AND RECOMMENDATION

**Ruth D. Dunnewold
Hearing Officer**

**Date of Hearing: May 2, 2018
Hearing Officer: Ruth D. Dunnewold
For the Claimant: Michael J. Burns, Esquire
For PSERS: Dwight A. Decker, Jr., Esquire**

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal, filed by H [REDACTED] B [REDACTED] ("Claimant"). On April 6, 2017, Claimant appealed from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS"), dated March 10, 2017 ("ESRC denial letter"), that denied Claimant's request to change the terms of his retirement plan. On April 26, 2017, PSERS filed its Answer to Claimant's appeal.¹

By letter dated October 13, 2017, Ruth D. Dunnewold was appointed by the Board's Secretary, Glen R. Grell, to act as Hearing Officer for Claimant's administrative hearing. Additionally, by letter of October 13, 2017, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on his appeal was scheduled for April 19, 2018, in Harrisburg, PA. Thereafter, by letter dated March 26, 2018, PSERS made an unopposed request for a continuance of the hearing and provided a mutually-agreeable proposed hearing date for the rescheduling of the hearing. An Order Continuing and Rescheduling Hearing, dated March 28, 2018, continued the hearing and directed it be rescheduled for May 2, 2018.

The hearing was held as rescheduled at PSERS in Harrisburg. Claimant attended the hearing and was represented by Michael J. Burns, Esquire, while Dwight A. Decker, Jr., Esquire, Assistant Counsel, represented PSERS. At the close of the hearing, the parties elected to file post-hearing briefs. Thereafter, the hearing transcript was filed on May 22, 2018, and an Order Establishing Briefing Schedule, dated May 25, 2018, was issued. The dates set forth in the briefing schedule were amended by Order Amending Briefing Schedule dated June 18, 2018. The record was closed when August 13, 2018, the date by which Claimant was to have filed his reply brief, passed without his filing anything further. Accordingly, the matter is now before the Board for final disposition.

¹Megan E. Alley, Assistant Counsel, filed PSERS' Answer, but a Praecipe to Withdraw/Enter Appearance, filed March 26, 2018, withdrew Ms. Alley's appearance and entered the appearance of Dwight A. Decker, Jr., Assistant Counsel.

FINDINGS OF FACT

1. At all relevant times, H [REDACTED] B [REDACTED] (“Claimant”) was a member of PSERS by virtue of his employment with the School District of Philadelphia (“SDP”), where he began teaching on October 1, 2001; he had 11 total years of school service to his credit as of his service termination date, June 1, 2012. Joint Exhibits 10 – 16, 18, and 31; Notes of Testimony (“NT”) at 11, 16, 18, 84.

2. At all relevant times, Claimant’s address has been [REDACTED] [REDACTED], which remained his address at the time of the hearing. Joint Exhibit 2, p. 2; NT at 56.

3. When Claimant became a teacher, he received an Active Member Handbook from PSERS. Joint Exhibit 1; NT at 54.

4. The Active Member Handbook included an explanation of disability retirement. Joint Exhibit 1, pp. 16 – 17.

5. PSERS also mailed an Active Member Handbook to Claimant in June 2007. Joint Exhibits 1 and 2; NT at 112 – 113.

6. PSERS mailed the Spring, Summer and Fall 2007; Winter, Spring, Summer and Fall 2008; Winter, Spring and Fall 2009; and Winter and Spring 2010 editions of its Active Member Newsletter to Claimant. Joint Exhibit 9; NT at 113 – 114.

7. The Summer 2008, Winter 2008, Winter 2009, and Winter 2010 editions of PSERS’ Active Member Newsletter contained information about disability retirement. Joint Exhibit 3, p. 2; Joint Exhibit 4, p. 5; Joint Exhibit 5, pp. 4 and 5; Joint Exhibit 6, pp. 4 and 5.

8. At a minimum, PSERS mailed annual Statements of Account to Claimant for the school years 2004 – 2005, 2005 – 2006, 2006 – 2007, 2007 – 2008, 2008 – 2009, 2009 – 2010, and 2010 – 2011. Joint Exhibits 10 – 16.

9. Claimant’s annual Statements of Account for the school years 2004 – 2005, 2005 – 2006, 2006 – 2007, and 2007 – 2008 contained the following information about disability retirement:

Disability Retirement: A disability benefit is an actual retirement benefit. It is not an insurance policy that supplements your salary while you are unable to work.

A member who is granted a disability benefit will receive a monthly benefit payment for as long as the member is deemed disabled.

Disability benefits may be granted on a long- or short-term basis and may be reviewed at any time. Benefits are subject to approval, denial or renewal based on your medical information.

Joint Exhibit 10, third page; Joint Exhibit 11, third page; Joint Exhibit 12, third page; Joint Exhibit 13, third page.

10. Claimant's annual Statements of Account for the school years 2008 – 2009, 2009 – 2010, and 2010 – 2011 contained the following information about disability retirement:

Disability Retirement: A disability benefit is an actual retirement benefit. It is not an insurance policy that supplements your salary while you are unable to work. A member who is granted a disability benefit will receive a monthly benefit payment for as long as the member is deemed disabled. Disability benefits may be granted on a long- or short-term basis and may be reviewed at any time. Benefits are subject to approval, denial or renewal based on your medical information. You need to meet all three of the following requirements to apply for a disability benefit:

- have at least 5 years of credited service with PSERS
- apply to PSERS for disability benefits within 2 school years from the last day of service or paid leave
- provide medical documentation which proves that you are unable to do your job due to a disability

Joint Exhibit 14, third page; Joint Exhibit 15, third page; Joint Exhibit 16, third page.

11. On May 7, 2012, PSERS' Harrisburg office received a Request for Retirement Estimate from Claimant, signed May 3, 2012, setting forth a tentative date of retirement as "6-1-12 Immediate (OR LATER IF SCHOOL AGREES)" and identifying the type of estimate request as "regular." Joint Exhibit 17; NT at 59 – 60, 129 – 130.

12. On May 17, 2012, a Thursday, as he was setting up his classroom, Claimant was assaulted and knocked to the floor by two students; during the assault, Claimant hit his head, lost

consciousness, and sustained injuries to his rotator cuff. Joint Exhibits 24 and 31; NT at 11 – 12, 15, 17.

13. The following Monday, Claimant went to the union hall in Philadelphia, where he met with union officials and signed a resignation letter. Joint Exhibit 18; NT at 17, 19, 21 – 22, 23.

14. By letter dated May 18, 2012, Claimant resigned from his employment as a teacher with the SDP, effective May 25, 2012, seven days earlier than the tentative date of retirement, June 1, 2012, that Claimant had set forth on the Request for Retirement Estimate he had signed May 3, 2012. Joint Exhibits 17 and 18; NT 24.

15. On June 14, 2012, PSERS sent Claimant an Early Retirement Estimate, based on the tentative June 1, 2012 date of retirement, which included the following language in bold print:

For a disability retirement, you are required to file an *Application for Disability Retirement* within two school years of your last day of service.

Joint Exhibit 20 (bold and italicized font in original); NT at 131 – 132.

16. On July 19, 2012, Claimant and his wife attended a regular retirement exit counseling session, which was a group counseling session (“group exit counseling session”) conducted by Dominic Lizzi, a PSERS regional representative, at PSERS’ regional office in Warminster. Joint Exhibit 21, p. 7; Joint Exhibit 22; NT at 27, 107, 111, 112, 115, 117, 132.

17. Mr. Lizzi, who has been employed by PSERS as a regional representative for 26 years, follows a certain routine every time he conducts a regular retirement group exit counseling session, which is a small group session, limited to 10 people, who are permitted to bring someone along, such as a spouse. NT at 111, 112, 117, 134.

18. The routine Mr. Lizzi and other counselors follow in conducting regular retirement group exit counseling sessions is established by PSERS policy, is a regular process designed so that everything is covered, and is the same every time. NT at 115, 116 – 117, 118, 119, 131.

19. The routine Mr. Lizzi follows every time in conducting a regular retirement group exit counseling session is as follows:

a. Mr. Lizzi introduces himself, mentions that the program is designed for people going out on regular retirement, early or normal, and gives an overview of what he will cover during the program. NT at 116.

b. Next, Mr. Lizzi goes through the Early or Normal Retirement Estimate, pointing out that the type of estimate will be stated at the top of the estimate, explaining a regular retirement in detail, and covering each option set forth in the retirement estimate, including the two-year window for applying for a disability retirement. Joint Exhibit 20; NT at 117 – 118.

c. After reviewing the estimate, Mr. Lizzi goes through the Application for Retirement line by line, explaining every option and each section, including Section 13, “Member Certification,” which states “I understand that the terms of my retirement are binding unless I file an *Intent to Change the Terms of the Retirement Plan* within 30 days of the date of my initial benefit letter.” Joint Exhibit 21; NT at 116, 118, 119 – 120, 121.

d. Each member fills out their own Application; in accordance with PSERS policy, Mr. Lizzi never fills it out for anyone, and if someone asks him to, he refuses, and suggests, if the member has someone accompanying him, that the member have that person fill it out, or that the member reschedule the meeting so the member can bring someone along to help the member fill out the form. NT at 119.

e. Mr. Lizzi then goes item by item, starting with Section A, through the Retirement Exit Counseling Checklist (“Checklist”), which ties together everything he has discussed during the meeting. Joint Exhibit 22; NT at 116, 121.

f. As he goes through the Checklist, Mr. Lizzi explains each bullet, including the third bullet in Section A, which discusses the availability of disability retirement, and the fourth bullet in Section C, which explains that when the member receives the initial benefit letter, it will include an Intent to Change Document, and the member has 30 days from the date of that initial benefit letter to make any changes. Joint Exhibit 22; NT at 121, 124 – 125.

g. When he explains disability retirement, Mr. Lizzi says that he knows the members are there for regular retirement, but that a disability retirement is offered, so if the member or anyone the member knows cannot perform the job they're hired to do, have them contact PSERS and look into a disability retirement. NT at 121 – 122.

h. Mr. Lizzi never skips his explanation of disability retirement because it is part of his routine as he goes through the Checklist line by line. NT at 122.

i. If someone raises a question about disability retirement during the group exit counseling session, Mr. Lizzi asks them to speak to him about it at the end of the meeting, then he puts a note in the Comments section of their Checklist, and advises them not to turn their paperwork in at the end of the group exit counseling session, because PSERS policy requires one-on-one counseling in relation to a disability retirement. Joint Exhibit 22; NT at 112, 122, 126, 135.

j. As they go through the Checklist during the group exit counseling session, Mr. Lizzi suggests that members make notations on it, and while Mr. Lizzi never fills out a member's Checklist or makes any check marks on it, he does enter a number in the space in Section C in the phrase "Expected Finalized Benefit Letter in up to ___ months," he signs the Checklist, and he enters pertinent information in the Comments section. Joint Exhibit 22; NT at 122, 124, 125.

k. If Mr. Lizzi feels, during a group exit counseling session, that a member is out of it or seems like they don't understand, he would not ask them to turn their paperwork in, but might suggest they come to another group exit counseling session, bring someone along, and do the group exit counseling session again; he would also note it in the Comments section of the Checklist. Joint Exhibit 22; NT at 125 – 126.

l. At the end of every group exit counseling session, Mr. Lizzi goes around the room, checks everyone's paperwork, speaks to each member one-on-one, and finishes by having the member fill out and sign the Checklist, signing the Checklist himself, and making any pertinent notes in the Comments section of the Checklist. NT at 116, 122, 123, 124, 133, 134.

20. Mr. Lizzi followed the same routine on July 19, 2012, when he conducted the group exit counseling session Claimant and his wife attended. NT at 115, 116, 117, 118, 119, 121, 122.

21. Mr. Lizzi did not meet Claimant and his wife until after Mr. Lizzi made the presentation at the group exit counseling session on July 19, 2012, and Mr. Lizzi had never met them before. NT at 131, 134.

22. At the group exit counseling session on July 19, 2012, Claimant was concerned that should he die first, he wanted his wife to receive whatever he had been getting. NT at 27.

23. At the group exit counseling session on July 19, 2012, Claimant and Mr. Lizzi signed Claimant's Retirement Exit Counseling Checklist, and Claimant executed and turned in his Application for Retirement after selecting Option 2, which provided that "[u]pon your death, your survivor annuitant will receive the same monthly payment for life." Joint Exhibits 21 and 22; NT at 28, 65, 66, 123.

24. If Mr. Lizzi had noticed anything unusual about Claimant during the group exit counseling session on July 19, 2012, Mr. Lizzi would have made a note in the Comments section of Claimant's Checklist. NT at 125 – 126, 133 – 134.

25. Mr. Lizzi did not make any notes in the Comments section of Claimant's Checklist. Joint Exhibit 22; NT at 122 – 123, 125.

26. At the time of his retirement in July 2012, Claimant, through his attorney, Hal Banks, was working on obtaining Social Security disability and pursuing a workers' compensation claim. NT at 67.

27. On August 13, 2012, PSERS received a "complex"² letter from Claimant, dated August 9, 2012, in which Claimant questioned the figure of 134 days worked in the 2011 – 2012 school year, on which his Early Retirement Estimate was based, and outlined in detail why 134 days was incorrect and should be higher. Joint Exhibit 24; NT at 62 – 63, 64.

28. In his letter of August 9, 2012, Claimant stated that "I actually was then present every working day until the assault by a student of 05-17-2012. I had put in for June 1 retirement, but the District decided to have me use wage continuation the next week and my effective date of resignation/retirement is 05-25-2012." Joint Exhibit 24.

29. Claimant's letter of August 9, 2012, made no assertion that the District had compelled him to resign or that he had resigned under duress, nor did it inquire about the availability of, or making application for, a disability retirement with PSERS. *Id.*

30. On September 7, 2012, PSERS mailed Claimant a Finalized Retirement Benefit letter which included the following statement on the first page:

You selected Option 2 and decided to withdraw none of your contributions and interest. The terms of your retirement plan will be binding unless you file the enclosed *Intent to Change the Terms of Retirement Plan* (PSRS-1242) by October 10, 2012.

²Claimant himself characterized this letter as "complex." See NT at 64.

Joint Exhibit 25; NT at 126, 127 – 128.

31. The September 7, 2012 Finalized Retirement Benefit letter that PSERS mailed to Claimant enclosed the *Intent to Change the Terms of the Retirement Plan* form which Mr. Lizzi had explained at the group exit counseling session. Joint Exhibit 25; NT at 120 – 121, 127.

32. The *Intent to Change the Terms of the Retirement Plan* form that was enclosed with the Finalized Retirement Benefit letter stated, among other things, as follows:

This is an official document containing time sensitive material. Please read carefully.

PSERS must receive this form by **October 10, 2012** in order to change any of the following terms of your retirement:

* * *

2. A change in the retirement annuity type (i.e., early or normal retirement to disability retirement, or the reverse)

* * *

Joint Exhibit 25 (bold font in original); NT at 127.

33. The *Intent to Change the Terms of the Retirement Plan* form gave Claimant the option to make changes if he chose to do so, and gave him until October 10, 2012, to make any desired changes. *Id.*

34. Claimant did not return the *Intent to Change the Terms of the Retirement Plan* form to PSERS. NT at 127.

35. On January 4, 2013, Claimant called PSERS' Harrisburg office, stated that his health went downhill, so that he was fully disabled, inquired about a PSERS disability retirement, and a PSERS representative told him that because he had already retired, he was not eligible for a disability retirement and it was too late, at that point, for him to convert from a regular to a disability retirement. Transcript of Joint Exhibit 35, pp. 4 – 5, 6, 7.

36. As of February 21, 2013, Claimant had been managing his prescription coverage, having always written his checks for it on time, and when a question arose about whether he had missed a check, he called PSERS to ask questions about it. Transcript of Joint Exhibit 35, pp. 12 – 14; NT at 74.

37. On March 26, 2013, Claimant called PSERS' Harrisburg office, inquiring again about a disability retirement, and a PSERS representative reiterated that Claimant could only file for a disability before filing for a regular retirement, but suggested that Claimant could send a letter to the Harrisburg office, explaining the situation, if Claimant was still interested in pursuing a disability retirement. Transcript of Joint Exhibit 35, pp. 17, 19.

38. On April 13, 2013, Claimant signed a *W-4P Federal Tax Withholding Certificate for Annuity Payments* form, changing his Federal Income Tax withholding to the higher "single" rate, and submitted it to PSERS, which received it on April 17, 2013. Joint Exhibit 27; NT at 73.

39. On May 10, 2013, Claimant called PSERS' Harrisburg office, asking the PSERS representative who answered for assistance in changing Claimant's direct deposit because he had changed banks; Claimant and the PSERS representative discussed the proper form that should be used and when the change would become effective. Transcript of Joint Exhibit 35, pp. 26 – 28.

40. On May 21, 2013, Claimant signed an *Authorization for Direct Deposit – Electronic Transfer of Monthly Benefit* form, and submitted it to PSERS with a completed *Direct Deposit Authorization Form*, changing his bank to TD Bank, N.A. Joint Exhibit 28; Transcript of Joint Exhibit 35, pp. 26 – 28; NT at 73 – 74.

41. Claimant's workers' compensation claim settled in the summer of 2013 for \$75,000, with Claimant receiving \$60,000 after his attorney received 20% of the award; the reduction in the amount Claimant received "really scared" him. NT at 67 – 68.

42. Claimant submitted a letter, dated October 2, 2013, to AmeriHealth Administrators, in which he requested an extension of his COBRA benefits for an additional 11 months. Joint Exhibit 29; NT at 74.

43. In his October 2, 2013, to AmeriHealth Administrators, Claimant stated, among other things, that “I seemed on the mend and met with Mr. Lizzy [sic] at PSERS in July, 2012 and took a regular retirement, type “B”, so that my widow would receive the eleven-years of moneys should I pass away before her.” Joint Exhibit 29 (emphasis in original).

44. On December 19, 2013, Claimant called PSERS’ Harrisburg office and spoke with a PSERS representative about the possibility of Claimant’s returning to teaching at a school where he could work without affecting his retirement. Transcript of Joint Exhibit 35, pp. 29 – 33.

45. During that December 19, 2013 conversation, Claimant stated that he was talked into retiring because they had no money in the School District of Philadelphia. Transcript of Joint Exhibit 35, p. 30.

46. During that December 19, 2013 conversation, the PSERS representative mentioned disability retirement in passing, but Claimant did not pursue the reference. Transcript of Joint Exhibit 35, p. 31.

47. As part of his continued managing of his and his wife’s healthcare benefits, Claimant called PSERS’ Harrisburg office on January 10, 2014, and spoke with a PSERS representative about his wife’s expiring COBRA benefits, and when the PSERS representative referred him to the Health Options Program (“HOP”), Claimant indicated his familiarity with the HOP and discussed the “donut hole” he was already paying for through HOP, as well as the prescription coverage he would need for his wife. Transcript of Joint Exhibit 35, pp. 33 – 37.

48. Claimant called PSERS’ Harrisburg office on January 15, 2014, discussed with a PSERS representative the effect on his retirement if he were to return to work with various entities,

and explained to the PSERS representative, among other things, that he had retired after only 11 years because there was “[n]o money for labs and all that” and he saw “the writing was on the wall,” so he got out. Transcript of Joint Exhibit 35, pp. 38 – 45.

49. On March 7, 2014, Claimant signed a new *W-4P Federal Tax Withholding Certificate for Annuity Payments* form, changing his Federal Income Tax withholding so that he would have no tax withheld from his monthly benefit from PSERS, and submitted it to PSERS, which received it on March 10, 2014. Joint Exhibit 30; NT at 74 – 75.

50. On July 11, 2014, Claimant called PSERS’ Harrisburg office and spoke with a PSERS representative, to whom he explained, among other things, that he retired from teaching because it got to be too much for him, it wasn’t what he wanted anymore, and the school district ran out of money and tried to get rid of tenured teachers like him; he also discussed his desire to return to teaching as a substitute teacher through a third-party contractor, and inquired about the impact of such a return to teaching on his retirement benefit. Transcript of Joint Exhibit 35, pp. 46 – 49.

51. Claimant called PSERS’ Southeast Regional office on November 25, 2014, and he inquired about his wife’s survivor annuity benefit, mentioning to the PSERS representative that Claimant and Mr. Lizzi “set it up so that if I should die first, my wife gets the annuity” and he wanted to make sure “it’s for life.” Transcript of Joint Exhibit 35, pp. 54 – 56.

52. Claimant called PSERS’ Harrisburg office on March 12, 2015, and inquired about a COLA, and during the conversation, he stated, among other things, that things were a little tight, and he “foolishly retired in the summer” of 2012, before he went on disability; he acknowledged that he could not go back and change his retirement to a disability retirement; and he indicated that he had turned down substitute teaching because the money was not enough to cover a person to take care of his wife, which he was doing. Transcript of Joint Exhibit 35, pp. 57, 58, 62, 63, 64.

53. On March 30, 2015, Claimant called PSERS' Harrisburg office to discuss the impact on his PSERS retirement benefit if he were to open an accredited two-year post-secondary college. Transcript of Joint Exhibit 35, pp. 71 - 72, 73, 79, 80 – 81.

54. Claimant called PSERS' Harrisburg office on April 8, 2015, to again inquire about what schools he could work for without affecting his retirement. Transcript of Joint Exhibit 35, pp. 86, 88, 92.

55. Claimant called PSERS' Harrisburg office on December 28, 2015, inquiring for budget planning purposes about the changes in the medical deductions from his retirement benefit over the years, and expressing concern over the increasing percentage that healthcare would take from his monthly retirement benefit as time went on. Transcript of Joint Exhibit 35, pp. 116 – 117, 118, 122.

56. On April 20, 2016, Claimant called PSERS' Warminster office to inquire about disability retirement, and the PSERS representative told him to submit an *Application for Disability*, with a cover letter explaining his situation. Transcript of Joint Exhibit 35, pp. 123, 127, 129 – 130, 137 – 138, 141, 145 – 146.

57. On July 21, 2016, PSERS received a letter from Claimant dated July 20, 2016, along with an *Application for Disability Retirement* in Claimant's name. Joint Exhibits 31, 32; NT at 75 – 76.

58. By letter dated July 26, 2016, PSERS notified Claimant that he is not eligible for a disability benefit because his intent to change right ended on October 10, 2012, as stated in his initial benefit letter. Joint Exhibit 33; NT at 76 – 77.

59. Through his attorney, Claimant appealed PSERS' July 26, 2016, determination to the Executive Staff Review Committee ("ESRC"). NT at 77.

60. By letter dated March 10, 2017, the ESRC notified Claimant that it had reviewed his request to change the terms of his retirement plan and denied it because he did not file an *Intent to*

Change the Terms of the Retirement Plan form by his October 10, 2012, deadline, making his current retirement option selection irrevocable. Joint Exhibit 34; NT at 77 – 78.

61. On April 6, 2017, Claimant filed an Appeal and Request for Administrative Hearing. Official notice of filings of record.³

62. On April 26, 2017, PSERS filed its Answer to Claimant’s Appeal and Request for Administrative Hearing. PSERS Records.

63. A hearing on the appeal was held on May 2, 2018, before Hearing Examiner Ruth D. Dunnewold. NT, *passim*.

64. Claimant was present and represented by counsel at the hearing, and had the opportunity to be heard, present evidence on his own behalf, cross-examine witnesses, make a closing statement for the record, and file a post-hearing brief in support of his appeal. NT at 6 and *passim*.

³Under the General Rules of Administrative Practice and Procedure (“General Rules”), 1 Pa. Code § 31.1 *et seq.*, at 1 Pa. Code § 35.125(d)(1),

[t]he applications (including attached exhibits), complaints, orders to show cause and answers thereto and similar formal documents upon which hearings are fixed shall, without further action, be considered as parts of the record as pleadings.

However, under subsection (d)(2) of the same rule, “[i]n no event, except in the case of a noncontested proceeding, may the pleadings be considered as evidence of fact other than that of the filing thereof unless offered and received in evidence in under this part.” 1 Pa. Code § 35.125(d)(2). Based on this rule, Claimant’s Appeal and Request for Administrative Hearing filed April 6, 2017 is a part of the record as a pleading, but it is not evidence of any facts except its own filing unless it has been offered and received in evidence, which Claimant’s Appeal and Request for Administrative Hearing was not. *See* NT at 91 – 93.

Also, under the General Rules at 1 Pa. Code § 31.1 *et seq.*, at 1 Pa. Code § 35.173, a licensing board may take official notice of its own records. *See also Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987) (the doctrine of official notice allows an agency to take official notice of, among other things, reports and records in the agency’s files). Therefore, these two rules allow official notice to be taken of the documents filed as pleadings in this matter. Official notice of any further such filings will be denoted by a citation to “PSERS Records.”

CONCLUSIONS OF LAW

1. Claimant was afforded notice and an opportunity to be heard in connection with his appeal. Findings of Fact 57 – 64.
2. PSERS is a creature of statute which derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"), and has no authority to grant rights to members beyond those specifically set forth in the Retirement Code, because its members have only those rights created by the Retirement Code. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Bittenbender v. State Employees' Retirement Board*,⁴ 622 A.2d 403 (Pa. Cmwlth. 1992).
3. Claimant failed to demonstrate by a preponderance of the evidence that he lacked the mental capacity to enter his retirement contract with PSERS at the time he entered into it. Findings of Fact 1 – 56.
4. Claimant failed to demonstrate by a preponderance of the evidence that he entered his retirement contract with PSERS under duress that impacted his competency to contract. Findings of Fact 1 – 56.
5. Claimant failed to demonstrate by a preponderance of the evidence that he filed a timely request to change the terms of his early retirement to a disability retirement. Findings of Fact 1 – 56.
6. Claimant failed to demonstrate by a preponderance of the evidence that PSERS or PSERS' representative, Mr. Lizzi, failed to properly counsel Claimant about his retirement options. Findings of Fact 1 – 56.
7. Claimant is ineligible to apply for a disability retirement because at the time he first requested a disability retirement, he was an annuitant, and not an active or inactive member of PSERS,

⁴Cases interpreting provisions of the State Employees' Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions" of the Retirement Code. *Krill v. Pub. Sch. Employes' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

so his request was untimely and did not meet the eligibility requirements set forth in the Retirement Code. 24 Pa.C.S. §§ 8102, 8307(c); Findings of Fact 1 – 56.

DISCUSSION

In this matter, Claimant filed his application for a regular retirement in July 2012 and then retired, becoming an annuitant, but in July 2016, he filed an Application for Disability Retirement with a cover letter requesting that it be considered timely filed, or that his regular retirement be retroactively converted to a disability retirement. PSERS denied his request, leading to this appeal, in which he requests the same remedy.

In support of his claim, Claimant makes a number of assertions which can be categorized into two broad arguments. First, he argues that injuries he sustained on the job immediately before he retired, and/or duress and/or compulsion from his employer, the School District of Philadelphia, had a negative impact on his state of mind or mental status, rendering him mentally incapable of making any significant factual decisions as to his status as a retiree, so that his retirement contract with PSERS is void or voidable. Second, he argues that PSERS' processes failed, in that PSERS did not properly counsel him about his retirement options, with the result being that he erroneously selected a regular retirement instead of applying for a disability retirement. Based on these two arguments, Claimant asserts that he should be deemed to have timely filed an Application for Disability Retirement or, alternatively, that he should be allowed to convert his regular retirement to a disability retirement.

Claimant has the burden of proof in establishing his position. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999). In general, the degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Claimant's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950).

Claimant's mental state/duress

There is no dispute that, on May 17, 2012, as he was setting up his classroom, Claimant was assaulted and knocked to the floor by two students, and that during the assault, Claimant hit his head, lost consciousness, and sustained injuries to his rotator cuff. However, Claimant asserts that from that time on, he was in a "fog," NT at 13, 17, 106, or a "daze," NT at 16, 62, 78, and that

he was so confused, so bewildered and so unable to concentrate and focus, given his condition and the circumstances, that he was unable to make any significant factual decisions based on his status as a retiree. . .

NT at 9.

Fundamental to this issue is the well-established rule that the retirement system creates a contract between the public employer and its employees. *Kline v. Morrison*, 44 A.2d 267, 269 (Pa. 1945). When a member retires and elects a retirement option, he enters into a contract with the Board. *Estate of McGovern v. Commonwealth*, 517 A.2d 523, 526 (Pa. 1986), citing *Bowers v. State Employee's Retirement System*, 371 A.2d 1040 (Pa. Cmwlth. 1977). Moreover, if the benefit contract is freely entered into with an understanding of its terms, the contract cannot be set aside. *McGovern*, *supra*, citing *Buchan v. State Employee's Retirement Board*, 470 A.2d 208 (Pa. Cmwlth. 1984). In this case, by asking, because of asserted mental incompetence, that he be deemed to have filed a timely application for a disability retirement, or in the alternative, that he be given the right to convert his current ordinary retirement benefit to a disability retirement benefit, Claimant essentially challenges his retirement contract with PSERS, seeking to set it aside on the grounds that he lacked the mental capacity to enter into it.

This is not an issue of first impression. Indeed, the Court in the *McGovern* decision, *supra*, discussed the issue at length, indicating that "[u]nder Pennsylvania law, it is presumed that an adult is competent to enter into an agreement, and a signed document gives rise to 'the presumption that it

accurately expresses the state of mind of the signing party.” *McGovern*, 517 A.2d at 526. The real question, in a challenge to a signer’s mental capacity,

is the condition of the person at the very time he executed the instrument. . . a person’s mental capacity is best determined by his spoken words and his conduct, and. . . the testimony of persons who *observed such conduct on the date in question outranks testimony as to observations made prior to and subsequent to that date.* . . . “Mere mental weakness, if it does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence,” is insufficient to set aside a contract. . . . Finally, a presumption of mental incapacity does not arise merely because of an unreasonable or unnatural disposition of property.

McGovern, 517 A.2d at 526 (citations omitted) (emphasis in original).

The Supreme Court in *McGovern* stated that to rebut the presumption that a signed document accurately expressed the state of mind of the signing party, the challenger must present evidence of mental incompetency which is “clear, precise and convincing.” *McGovern*, 517 A.2d at 526, quoting *Elliott v. Clawson*, 204 A.2d 272 (Pa. 1964). Claimant, therefore, must demonstrate by “clear, precise and convincing” evidence that on the date he executed and turned in his Application for Retirement, he was not just suffering from mental weakness, but did not possess the mental competence to enter into an agreement.

Significantly, Claimant presented no medical evidence to support the state of his mental competence on July 19, 2012. Rather, the sole evidentiary support for his contention lies in his testimony and the testimony of his wife. Mental incompetence is established through evidence that the person is unable to understand the nature and consequences of a transaction. *Forman v. Public School Employes’ Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001). However, a claimant’s own testimony is insufficient, as a matter of law, to establish a claim of mental incompetence. *Id.* Therefore, Claimant’s testimony does not establish his claim that he lacked the mental competence to enter into the retirement contract with PSERS.

The alternative is to consider the testimony of persons who observed Claimant’s conduct on the date in question. *McGovern*, 517 A.2d at 526. Claimant’s wife, [REDACTED], who attended

the group exit counseling session with Claimant, is one such person. But her testimony in no way supports any finding that Claimant, on July 19, 2012, was unable to understand the nature and consequences of the transaction in which he executed and submitted his Application for Retirement. Mrs. ██████' testimony is neither medical nor expert testimony. Rather, it is the testimony of a layperson and is unreliable on this point because it simply parrots Claimant's testimony about being foggy and confused for almost two years after the assault. *See, for example*, NT at 106. Her testimony is unreliable, too, because she has a significant stake in the outcome here.

But aside from those factors, Mrs. ██████' testimony is not useful because she did not testify to any specifics about Claimant's condition *on the day they attended the group exit counseling*. She *did* testify that she at no time sought to have a guardian appointed for Claimant, NT at 108 and, in fact, she did not even think of having herself appointed as his guardian. NT at 108 – 109. This testimony strongly suggests that she was not concerned about Claimant's mental competency. Accordingly, Mrs. ██████' testimony does not support Claimant's contention about his mental status, either on the date of the group exit counseling session or at any other time.

When considering the testimony of persons who observed Claimant's conduct on the date in question, Mr. Lizzi's testimony about his interactions with Claimant on July 19, 2012, is relevant. In that regard, Mr. Lizzi testified that, after following his normal routine for a group exit counseling session on July 19, 2012, he met with Claimant and Claimant's wife, briefly, at the end of the group exit counseling session. He did not meet Claimant and his wife until after the presentation that he made during the group exit counseling session, had never met them before, and at the hearing, had no recollection of Claimant.

However, Mr. Lizzi testified credibly to his regular routine in conducting group exit counseling sessions, stating that if he feels, during a group exit counseling session, that a member is out of it or seems like they don't understand, he does not ask them to turn their paperwork in, but suggests they

come to another group exit counseling session, bring someone along, and do the group exit counseling session again. He also notes it in the Comments section of the Checklist provided to members attending a group exit counseling session. His routine practice is consistent with PSERS' policy about handling such situations. In Claimant's case, Claimant's wife was already accompanying him, so Claimant had back-up, and Mr. Lizzi both accepted Claimant's paperwork and made no notes in the Comments section of Claimant's Checklist. These circumstances support the finding that Mr. Lizzi noticed nothing unusual about Claimant at that time.

Aside from other persons' observations of Claimant at the time in question, his behavior at that time, in itself, also may be an indicator of his state of mind. *See McGovern* at 527 (McGovern's mailing of a check immediately after the meeting at which it was discussed is an act consistent with the determination that McGovern was mentally competent on the date in question). Per his own testimony, Claimant's only concern at the group exit counseling session on July 19, 2012, was that, should he die first, his wife should receive whatever he had been getting. At the group exit counseling session, Claimant executed and turned in his Application for Retirement after selecting Option 2, which provided that "[u]pon your death, your survivor annuitant will receive the same monthly payment for life." His choice of retirement option was consistent with his expressed concern and, therefore, is consistent with his having the appropriate mental capacity to select that retirement option.

Claimant also contends that his employer, the School District of Philadelphia ("SDP"), compelled him to retire, under duress that affected his mental competency. To support this argument, Claimant cited *Carrier v. William Penn Broadcasting Co.*, 233 A.2d 519, 521 (Pa. 1967), for the proposition that mutual assent to a contract does not exist when one of the contracting parties elicits the assent of the other contracting party by means of duress. Claimant's post-hearing brief at 8. When a member retires and elects a retirement option, he enters into a contract with the Board. *McGovern, supra*, 517 A.2d at 526. But nowhere has Claimant asserted that PSERS, the other party to Claimant's

retirement contract, engaged in compulsion or duress with regard to that retirement contract. And he has cited no legal basis for attributing conduct by the SDP to PSERS.

Even if Claimant could somehow successfully attribute to PSERS the duress or compulsion purportedly imposed on him by the SDP, the existence of any duress or compulsion is unsupported by the record. The facts found indicate the following with regard to Claimant's interactions with the SDP in the two months leading up to his submission of his Application for Retirement on July 19, 2012. On May 7, 2012, PSERS' Harrisburg office received a Request for Retirement Estimate from Claimant, signed May 3, 2012, setting forth a tentative date of retirement as "6-1-12 Immediate (OR LATER IF SCHOOL AGREES)" and identifying the type of estimate request as "regular." However, before the June 1, 2012 proposed retirement date, on Thursday, May 17, 2012, Claimant was assaulted and injured by two students. The following Monday, he went to the union hall in Philadelphia, where he met with union officials and signed a resignation letter. By that letter, dated May 18, 2012, Claimant resigned from his employment as a teacher with the SDP, effective May 25, 2012, just seven days earlier than the tentative retirement date he had set forth in his Request for Retirement Estimate.

Claimant asserts that, at that Monday meeting at the union hall, the SDP placed him under duress, in the form of threats that he would lose his retirement altogether if he did not resign at that time, so that Claimant felt compelled to sign the letter by which he resigned from SDP employment, effective May 25, 2012. It is his obligation to prove duress. In an effort to do so, in conjunction with his testimony about signing the resignation letter when he went to the union hall after he had been assaulted by the students, Claimant testified about a phone call he received from an SDP official the day after the assault; what others told him about why he should go to the union hall; and what others told him while he was at the union hall. It is this testimony that Claimant would use to support his duress argument.

However, Claimant's testimony about what others told him is hearsay. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). It is a well-established rule in the Commonwealth that hearsay to which no objection has been made cannot serve as the basis for a finding of fact unless it is corroborated by competent evidence in the record; a finding based solely on hearsay will not stand. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976); *see also Shapiro v. State Board of Accountancy*, 856 A.2d 864, 872 (Pa. Cmwlth. 2004), *appeal denied*, 872 A.2d 174 (Pa. 2005).

In the case of Claimant’s testimony about what others told him, PSERS objected to some of it, *see* NT at 17, lines 19 – 25, to NT 18, lines 1 – 6, but did not object to other instances. *See* NT at 21, lines 22 – 23. However, there is no other competent evidence in the record to corroborate the hearsay testimony to which PSERS did not object, and when PSERS did object to hearsay testimony on this subject, the objection was sustained. Accordingly, none of Claimant’s hearsay testimony is competent to support a finding of fact.

Even assuming for the sake of argument that Claimant’s hearsay testimony could be used, his argument that the SDP compelled him, through duress, to sign his resignation letter in May 2012 has little relevance to his mental capacity on July 19, 2012, when he actually submitted his Application for Retirement to PSERS. It is simply not credible that actions or words by SDP or union representatives when Claimant resigned, a full two months prior to Claimant’s attendance at the PSERS group exit counseling session, compelled Claimant to make the retirement choice he made on July 19, 2012. In other words, even if, in the week after May 17, 2012, the SDP and/or union placed duress on Claimant that accelerated his resignation from the SDP approximately one week earlier than he had already planned to retire, there is no evidence indicating that any duress by the SDP and/or union continued to impact Claimant on July 19, 2012. This is particularly true in light of the undisputed fact that Claimant had already requested an early retirement estimate in early May 2012, prior to the purported duress by the SDP and/or union that led to his resignation in the wake of his having been assaulted by students. He

was already interested in early retirement, so the fact that he took additional steps towards early retirement in the immediate aftermath of his being assaulted by students in no way supports his duress argument.

Additionally, Claimant has not met his burden of proof that duress, as defined by the courts, actually occurred. That definition is as follows; “duress” is

that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness. . . . The quality of firmness is assumed to exist in every person competent to contract, unless it appears that by reason of old age or other sufficient cause he is weak or infirm. . . . Where persons deal with each other on equal terms and at arm's length, there is a presumption that the person alleging duress possesses ordinary firmness. . . . Moreover, in the absence of threats of actual bodily harm there can be no duress where the contracting party is free to consult with counsel.

Young v. Pileggi, 455 A.2d 1228, 1230 (Pa. Super. 1983) (citations omitted). As indicated at length in Mr. Lizzi’s testimony, Claimant was not required to submit his retirement application and was free to consult with anyone he liked, including counsel, about choosing a retirement option. Besides that, Mr. Lizzi and Claimant dealt with each other on equal terms and at arm’s length, and Claimant’s wife was present on July 19, 2012, as well, so she and Claimant were free to confer. And as already discussed above, the evidence does not support any finding that Claimant lacked mental competence on July 19, 2012.

Based on the definition of “duress,” then, there is no evidence in the record that would demonstrate that Claimant at any point was subjected to a degree of restraint or danger, either actually inflicted or threatened and impending, which was sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness. Likewise, there is no evidence that Claimant did not possess the mind of a person of ordinary firmness. Because Claimant has not demonstrated facts that meet the definition of “duress,” Claimant’s duress argument fails.

Furthermore, as alluded to above, the Court in *McGovern, supra*, stated that the individual’s conduct on the date in question outranks testimony as to observations made prior to and subsequent to

that date. *McGovern*, 517 A.2d at 526. That means that what occurred at the group exit counseling session on July 19, 2012, far outweighs anything that occurred in May 2012, in terms of determining Claimant's mental status on July 19, 2012. Accordingly, even if the evidence of what occurred with the SDP or the union in May 2012 were not hearsay, Claimant has not succeeded in demonstrating the relevance of anything that occurred with the SDP or the union in May 2012, two months prior to Claimant's selection of a retirement option.

And finally, there is a great deal of other evidence in the record that suggests Claimant was not compelled, under duress, to resign from his employment with the SDP. For example, Claimant wrote a letter to PSERS, dated August 9, 2012, in which Claimant stated that "I actually was then present every working day until the assault by a student of 05-17-2012. I had put in for June 1 retirement, but the District decided to have me use wage continuation the next week and my effective date of resignation/retirement is 05-25-2012." That letter made no assertion that the District had compelled him to resign or that he had resigned under duress.

Likewise, in subsequent interactions with other entities, Claimant gave varying reasons for his resignation from the SDP: he was talked into retiring because they had no money in the School District of Philadelphia; he had retired after only 11 years because there was "[n]o money for labs and all that" and he saw "the writing was on the wall," so he got out; and he retired from teaching because it got to be too much for him, it wasn't what he wanted anymore, and the school district ran out of money and tried to get rid of tenured teachers like him. None of these reasons suggests that the SDP exercised duress to compel Claimant sign his May 18, 2012 resignation letter, so these other evidentiary records contradict and weaken Claimant's duress argument. Accordingly, Claimant has not sustained his burden of proving duress.

Whatever may be said about Claimant's choice, on July 19, 2012, of a regular retirement instead of applying for a disability retirement,⁵ that choice, without more evidence than is available in the record here, cannot be said to have been made by someone who lacked the mental competence, for whatever reason, to make a choice. Claimant's evidence does not tip the evidentiary scales even slightly in favor of a finding that he lacked the mental competency to select his retirement option on July 19, 2012. Therefore, Claimant has failed to prove, by "clear, precise and convincing evidence," *McGovern*, 517 A.2d at 526, that on July 19, 2012, he lacked the mental capacity to contract, thereby invalidating the choice of retirement option he made on that date. Accordingly, his first argument fails because Claimant has not sustained his burden of proving that he lacked the mental capacity to contract.

Failure in PSERS' processes/lack of proper counseling from PSERS

Claimant also argues that PSERS' processes failed, in that PSERS did not properly counsel him about his retirement options, so that Claimant erroneously selected a regular retirement instead of applying for a disability retirement. Asserting various equitable remedies, such as estoppel and *nunc pro tunc* relief, Claimant maintains that this purported failure on PSERS's part justifies Claimant's filing of an Application for Disability Retirement now, six years later.

However, Claimant did not meet his burden of proving that failures occurred in PSERS' processes in providing information to him, counseling him, or handling his retirement application. Rather, the evidence indicates that, via PSERS' routine publications and mailings to its members, including Claimant, PSERS provided numerous explanations, over the course of Claimant's years as an active member of PSERS, of the availability of disability retirements. For example, when Claimant became a teacher, he received an Active Member Handbook from PSERS, and PSERS also mailed an Active Member Handbook to Claimant in June 2007; both of these included an explanation of

⁵The question of whether Claimant actually would have qualified for a disability retirement benefit on July 19, 2012, is not at issue in this appeal.

disability retirement. Additionally, PSERS mailed the Spring, Summer and Fall 2007; Winter, Spring, Summer and Fall 2008; Winter, Spring and Fall 2009; and Winter and Spring 2010 editions of its Active Member Newsletter to Claimant. Of those, the Summer 2008, Winter 2008, Winter 2009, and Winter 2010 editions of PSERS' Active Member Newsletter contained information about disability retirement.

Moreover, PSERS mailed annual Statements of Account to Claimant for the school years 2004 – 2005, 2005 – 2006, 2006 – 2007, 2007 – 2008, 2008 – 2009, 2009 – 2010, and 2010 – 2011, all of which contained information about disability retirements. In fact, Claimant's annual Statements of Account for the school years 2008 – 2009, 2009 – 2010, and 2010 – 2011 contained extensive information about disability retirement, including the fact that, to qualify, an applicant for a disability retirement would need to have at least five years of credited service with PSERS, apply to PSERS for disability benefits within two school years from the last day of service or paid leave, and provide medical documentation which proves that the applicant is unable to do his or her job due to a disability.

And most specifically, supplementing all of the foregoing, on September 7, 2012, PSERS mailed Claimant a Finalized Retirement Benefit letter which included the following statement on the first page:

You selected Option 2 and decided to withdraw none of your contributions and interest. The terms of your retirement plan will be binding unless you file the enclosed *Intent to Change the Terms of Retirement Plan* (PSRS-1242) by October 10, 2012.

Joint Exhibit 25. The Finalized Retirement Benefit letter also enclosed an *Intent to Change the Terms of the Retirement Plan* form, a form that Mr. Lizzi had explained at the group exit counseling session. That form stated, among other things, as follows:

This is an official document containing time sensitive material. Please read carefully.

PSERS must receive this form by **October 10, 2012** in order to change any of the following terms of your retirement:

* * *

2. A change in the retirement annuity type (i.e., early or normal retirement to disability retirement, or the reverse)

* * *

Joint Exhibit 25 (bold font in original). This form clearly gave Claimant notice of his option to make changes if he chose to do so, and gave him until October 10, 2012, to make any desired changes.

Although Claimant did not return the *Intent to Change the Terms of the Retirement Plan* form to PSERS, the evidence indicates it was mailed to him. Indeed, Claimant did not contest that fact; he simply testified that he does not *remember* receiving it. That is not the same thing as testifying that he did not receive it. Furthermore, under the evidentiary rule known as the “mailbox rule,” the deposit in the post office of a properly addressed, prepaid letter raises a presumption that it reached its destination by due course of mail, and mailing a letter in such way is prima facie evidence that it was received by the person to whom it was addressed. *C.f. In re Cameron's Estate*, 130 A.2d 173, 177 (Pa. 1957) (citations omitted). Claimant presented no evidence to rebut that presumption. Accordingly, the evidence indicates that Claimant received the Finalized Retirement Benefit letter enclosed the *Intent to Change the Terms of the Retirement Plan* form, and had 30 days to change his retirement option, but did not avail himself of that opportunity.

Based on all of these mailings to Claimant over the years, and most importantly, based on this last mailing which explicitly provided him with the chance to change his retirement option, PSERS plainly provided Claimant with ample written notice of the availability of a disability retirement, the manner in which a member could apply for it, and even an opportunity to change his regular retirement to a disability retirement before his regular retirement was finalized. Under the Retirement Code at 24

Pa.C.S. § 8103.1,⁶ notice to PSERS' members through newsletters and other mailings is deemed to be sufficient notice "for all purposes." Therefore, through its mailings to Claimant, PSERS, as a matter of law, provided Claimant with adequate and appropriate notice of the availability of and qualification requirements for a disability retirement. Consequently, Claimant has failed to prove that any failures occurred in PSERS' processes pertaining to notice to Claimant about his retirement options and the timeframes in which he was required to act.

Despite the adequacy, under the Retirement Code at 24 Pa.C.S. § 8103.1, of the many written notices provided to Claimant, he further argues that at the group exit counseling session in July 2012, Mr. Lizzi did not provide him with accurate or complete information about filing for a disability retirement. But the evidence does not support Claimant's assertion. The evidence may be summarized as follows.

Mr. Lizzi testified credibly about the routine he follows for the presentation he makes every time at group exit counseling sessions. He begins by introducing himself, mentions that the program is designed for people going out on regular retirement, early or normal, and gives an overview of what he will cover during the program. Then he reviews the Early or Normal Retirement Estimate, explaining a regular retirement in detail, and covering each option set forth in the retirement estimate, including a reference to the two-year window for applying for a disability retirement. After reviewing the estimate, Mr. Lizzi goes through the Application for Retirement line by line, explaining every option and each section, including Section 13, "Member Certification," which states "I understand that

§ 8103.1. Notice to Members.

Notice by publication, including, but not limited to, newsletters, newspapers, forms, first class mail, letters, manuals and electronic notice, including, but not limited to, e-mail or publicly accessible Internet websites, distributed or made available to members in a manner reasonably calculated to give actual notice of the provisions of this part that require notice to members shall be deemed sufficient notice for all purposes.

24 Pa.C.S. § 8103.1.

the terms of my retirement are binding unless I file an *Intent to Change the Terms of the Retirement Plan* within 30 days of the date of my initial benefit letter.”

During the group exit counseling session, each member fills out their own Application; in accordance with PSERS policy, Mr. Lizzi never fills it out for anyone, and if someone asks him to, he refuses, and suggests, if the member has someone accompanying him, that the member have that person fill it out, or that the member reschedule the meeting so the member can bring someone along to help the member fill out the form. Mr. Lizzi then goes item by item, starting with Section A, through the Retirement Exit Counseling Checklist (“Checklist”), which ties together everything he has discussed during the meeting. As he goes through the Checklist, Mr. Lizzi explains each bullet, including the third bullet in Section A, which discusses the availability of disability retirement, and the fourth bullet in Section C, which explains that when the member receives the initial benefit letter, it will include an Intent to Change Document, and the member has 30 days from the date of that letter to make any changes.

When he explains disability retirement, Mr. Lizzi says that he knows the members are there for regular retirement, but that a disability retirement is offered, so if the member or anyone the member knows cannot perform the job they’re hired to do, have them contact PSERS and look into a disability retirement. He never skips his explanation of disability retirement because it is part of his routine as he goes through the Checklist line by line. Also, if someone raises a question about disability retirement during the group exit counseling session, Mr. Lizzi asks them to speak to him about it at the end of the meeting, then he puts a note in the Comments section of their Checklist, and advises them not to turn their paperwork in at the end of the group exit counseling session, because PSERS policy requires one-on-one counseling in relation to a disability retirement.

As they go through the Checklist during the group exit counseling session, Mr. Lizzi suggests that members make notations on it, and while Mr. Lizzi never fills out a member’s Checklist or makes

any check marks on it, he does enter a number in the space in Section C in the phrase “Expected Finalized Benefit Letter in up to ___ months,” he signs the Checklist, and he enters pertinent information in the Comments section. That is true if Mr. Lizzi feels, during a group exit counseling session, that a member is out of it or seems like they don’t understand; in that case, he would not ask them to turn their paperwork in, but might suggest they come to another group exit counseling session, bring someone along, and do the group exit counseling session again; he would also note it in the Comments section of the Checklist.

At the end of every group exit counseling session, Mr. Lizzi goes around the room, checks everyone’s paperwork, speaks to each member one-on-one, and finishes by having the member fill out and sign the Checklist, signing the Checklist himself, and making any pertinent notes in the Comments section of the checklist. This is the same routine he followed on July 19, 2012, when he conducted the group exit counseling session Claimant and his wife attended. This evidence of Mr. Lizzi’s routine practice, as directed by PSERS’ policy, is relevant to prove that his conduct on July 19, 2012, was in conformity with that routine practice. *Hoffman v. SERS*, 915 A.2d 674, 680 (Pa. Cmwlth. 2006).

On the other hand, Claimant’s testimony about the group exit counseling sessions was unreliable for several reasons. First, it was self-serving. But more importantly, his testimony was unreliable because it was peppered with inconsistencies and repeated statements about how poor his memory was *at the time of the hearing*. For example, Claimant testified that all he could recall of the July 2012 group exit counseling session was signing, NT at 27, and added that “the only thing I remember” is being concerned that should he die first, he wanted his wife to receive whatever he had been getting. *Id.* Yet, inconsistently, despite stating that those things were all he could remember, Claimant then went on to describe additional things about the group exit counseling session. *See, for example*, NT at 28, 29. Based on his own testimony, then, *at the hearing*, Claimant had a poor or inconsistent memory of the group exit counseling session, so he cannot be considered a reliable

witness, nor can his testimony provide any reliable insight into what actually occurred at that group exit counseling session. Accordingly, Claimant's testimony does not successfully counter Mr. Lizzi's account of his routine practice in presenting all of the information at a group exit counseling session. Therefore, Claimant has failed to prove that there were any deficiencies in the information that Mr. Lizzi presented at the group exit counseling session in July 2012.

Availability of remedy

Claimant's request to have a late-filed Application for Disability Retirement accepted as timely now is, essentially, a request for *nunc pro tunc* relief, a form of equitable relief that the courts grant in certain extraordinary and limited circumstances, allowing an untimely appeal to be deemed to have been filed in a timely manner. *Cf. Com. v. Stock*, 679 A.2d 760, 763 – 764 (Pa. 1996); *West Penn Power Co. v. Goddard*, 333 A.2d 909, 912 (Pa. 1975). Claimant's *nunc pro tunc* argument essentially asserts that the Board should exercise equity powers to fashion a remedy – either consider his Application for Disability to be timely filed, or retroactively convert his regular retirement to a disability retirement – that is not found within the Retirement Code. Similarly, Claimant's assertion that there were deficiencies in the information Mr. Lizzi provided at the group exit counseling session is, at its heart, an equitable estoppel argument, in that he asserts that the Board should be estopped from enforcing the provisions of the Retirement Code because Claimant justifiably relied on misrepresentations by, or a lack of information from, PSERS through Mr. Lizzi.

But Claimant cannot prevail in either argument, because, while a retirement system must be liberally administered in favor of its members, *Marinucci v. State Employees' Retirement Board*, 863 A.2d 43 (Pa. Cmwlth. 2004), “a liberal administration of the retirement system does not permit the board to circumvent the express language of the Code. . . .” *Id.*, quoting *Dowler v. Public School Employes' Retirement Board*, 620 A.2d 639, 644 (Pa. Cmwlth. 1993). And the Retirement Code contains no statutory language authorizing the Board to exercise any sort of equity powers.

“Equity,” in the context of the law and judicial proceedings, has a specific technical meaning.

It means

recourse to principles of justice to correct or supplement the law as applied to particular circumstances; specif., the judicial prevention of hardship that would otherwise ensue. . . [for example,] <the judge decided the case by equity because the statute did not fully address the issues>.

BLACK’S LAW DICTIONARY 656 (10th ed. 2014). However, the Commonwealth Court in *Marinucci* held that the Board has no authority to grant equitable relief in contravention of the statutory mandates of the Retirement Code. *Marinucci, supra*, 863 A.2d at 47, citing *Rowan v. Pennsylvania State Employees’ Retirement Board*, 685 A.2d 238, 240 (Pa. Cmwlth. 1996). That means that “[t]he Retirement Code cannot be revised by the courts [or by the Board] to achieve equitable results.” *Marinucci, supra*, 863 A.2d at 47, citing *Mager v. State Employees’ Retirement Board*, 849 A.2d 287, 292 – 293 (Pa. Cmwlth. 2004) (*Mager*, in turn, citing *Jones v. State Employees’ Retirement Board*, 830 A.2d 607 (Pa. Cmwlth. 2003), *petition for allowance of appeal denied*, 847 A.2d 1289 (Pa. 2004)).

PSERS is a creature of statute, and the employee has *only* those rights created by the statute and none beyond it. *Forman Public School Employees’ Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Marinucci, supra*, 863 A.2d at 47. Because the Retirement Code does not confer any equity powers on the Board, not even the liberal administration of the retirement system in favor of its members can permit the Board to circumvent the express language of the Retirement Code, so the Board has no equity powers by which it may provide an employee with a right that the Retirement Code does not explicitly provide. *Marinucci, supra*, 863 A.2d at 47.

Indeed, with regard to *nunc pro tunc* relief, the court in *Forman v. PSERS*, 778 A.2d 778 (Pa. Cmwlth. 2001), stated that

no legal argument has been presented establishing that PSERB has the authority to take an untimely filed retirement application and “deem it” timely filed. . . . The retirement code does not grant PSERB such authority; therefore, PSERB is precluded from taking

such action, since the retirement system is a creature of the legislature and its members have only those rights created by the retirement benefit statute. *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995).

Forman, 778 A.2d at 780. The court's statement aptly describes this matter as well. Claimant has presented no legal argument or legal authority that would allow the Board to deem his untimely filed Application for Disability Retirement to have been timely filed. Rather, the Board's powers are delineated by the provisions of the Retirement Code, and no provision permitting "deemed timely" filing exists. Therefore, even if Claimant had successfully proved a factual basis for providing him with *nunc pro tunc* relief, the Board is precluded from taking such action because it is not statutorily authorized to do so.

With regard to estoppel, the court in *Finnegan v. Com., PSERB*, 560 A.2d 848 (Pa. Cmwlth. 1989), ruled, as a matter of law, that the Board cannot be estopped from asserting a statutory provision because allowing estoppel against the Board based on an employee's misstatement or misstatements "would be tantamount to giving employee errors the effect of amending the substance of a statute." *Id.* at 851. In other words, 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 are acts that require legislative or executive action. *Finnegan* at 850.

Here, Claimant seeks to file an Application for Disability Retirement more than four years after he actually retired. With regard to eligibility for disability annuities, the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et seq.* ("Retirement Code"), at 24 Pa.C.S. § 8307, provides as follows:

§ 8307. Eligibility for annuities.

* * *

(c) **Disability annuity.** — An active or inactive member who has credit for at least five years of service shall, upon filing of a proper application, be entitled to a disability annuity if he becomes mentally or physically incapable of continuing to perform the duties for which he is employed and qualifies for an annuity in accordance

with the provisions of section 8505(c)(1) (relating to duties of board regarding applications and elections of members and participants).

24 Pa.C.S. § 8307(c). Under this language, only an active member or an inactive member is statutorily entitled, upon meeting the other requirements of this provision, to a disability annuity.

Underlying section 8307(c) of the Retirement Code are the following relevant definitions:

§ 8102. Definitions.

* * *

“Active member.” —A school employee for whom pickup contributions are being made to the fund or for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part relating to the limitations under section 401(a)(17) or 415 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 401(a)(17) or 415).

* * *

“Annuitant.” —Any member on or after the effective date of retirement until his annuity is terminated.

* * *

“Inactive member.” A member for whom no pickup contributions are being made to the fund, except in the case of an active member for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part relating to the limitations under section 401(a)(17) or 415 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 401(a)(17) or 415) or because the member is on USERRA leave, who has accumulated deductions standing to his credit in the fund and for whom contributions have been made within the last two school years or a multiple service member who is active in the State Employees’ Retirement System.

* * *

24 Pa.C.S. § 8102.

Based on these definitions, when Claimant applied for a disability retirement in July 2016, he was neither an active member nor an inactive member. Rather, he was an annuitant because his effective date of retirement occurred in 2012. But under 24 Pa.C.S. § 8307(c), only an active member or an inactive member is authorized to apply for a disability retirement. Therefore, if Claimant were allowed to apply for a disability retirement as an annuitant, it would violate this provision of the

Retirement Code – it would be in violation of positive law. It would rewrite the Retirement Code, which only the legislature can do.

Furthermore, under the Retirement Code at 24 Pa.C.S. § 8507(j), there are a limited number of situations in which an annuitant is permitted to change the benefit option selected at retirement; none of those applies here. The Board, in its regulations at 22 Pa. Code § 213.45, effectively added a permissible window of opportunity to the otherwise irrevocable nature of the option election by allowing the annuitant the aforementioned 30-day period for changing the retirement option, including to a disability retirement, before the retirement choice is finalized. Granting Claimant the relief requested would violate both of these provisions. Since, under *Finnegan*, the Board cannot be estopped from asserting a statutory provision if it would result in a violation of positive law, estoppel is not a remedy available to Claimant even if he had successfully proved a factual basis for applying it.

Referring to the Retirement Code at 24 Pa.C.S. § 8534(b), Claimant asserts that the Retirement Code “does permit some corrective process.” Claimant’s post-hearing brief at 9, paragraph 20. The cited provision reads as follows:

Should any change or mistake in records result in any member, participant, beneficiary, survivor annuitant or successor payee receiving from the system or plan more or less than he would have been entitled to receive had the records been correct, then regardless of the intentional or unintentional nature of the error and upon the discovery of such error, the board shall correct the error.

24 Pa.C.S. § 8534(b). This provision is a “legislative directive to the Board to correct errors in its records.” *Hughes v. PSERB*, 662 A.2d 701, 707 (Pa. Cmwlth. 1995).

But 24 Pa.C.S. § 8534(b) does not apply here. First of all, Claimant has not pointed to any error in PSERS’ records that needs to be corrected in this matter. Secondly, the fact that Claimant filed an application for a regular retirement in 2012 and subsequently decided that *he* made an error and should have applied for a disability retirement does not constitute an error in *PSERS*’ records. Indeed, the “burden is upon the member to be certain that PSERS records are accurate *before* the member retires.”

Hughes at 707 (emphasis added). In this case, Claimant did not demonstrate or even allege any errors in PSERS' records that he should have caught before he retired, nor has he demonstrated or even alleged any errors in PSERS' records that occurred after he retired. Accordingly, there is nothing to correct pursuant to this provision.

CONCLUSION

PSERS is a creature of statute which derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). Consequently, Claimant has only those rights created by the Retirement Code and none beyond that. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burris v. State Employees' Retirement Board*, 745A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992). Likewise, the Board has no equity powers by which it may provide an employee with a right that the Retirement Code does not explicitly provide. *Marinucci, supra*, 863 A.2d at 47.

Based on all of the above, the facts of record support the conclusion that Claimant did not timely file an Application for Disability Retirement, and that his failure to do so was neither the result of mental incapacity nor any failure of process on PSERS' part. Moreover, the Retirement Code does not authorize the Board to provide any remedy that would allow the Board to find that Claimant timely filed an Application for Disability Retirement when, in fact, he did not do so. Claimant is ineligible to apply for a disability retirement because at the time he first requested a disability retirement, he was an annuitant, and not an active or inactive member of PSERS, so his request was untimely and did not meet the eligibility requirements set forth in the Retirement Code. Based upon all of the foregoing, the following recommendation will be made to the Board:

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

IN RE:

**ACCOUNT OF H [REDACTED] B [REDACTED]
CLAIM OF H [REDACTED] B [REDACTED]**

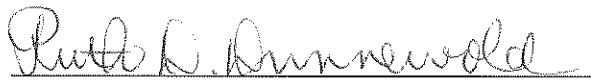
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DOCKET NO. 2017-05

RECOMMENDATION

AND NOW, this 3rd day of **October, 2018**, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Hearing Officer for the Public School Employees' Retirement Board recommends that the Board

- (1) **DENY** Claimant's request to change his effective date of retirement;
- (2) **DENY** Claimant's request to deem his filing of an Application for Disability Retirement to have been timely;
- (3) **DENY** Claimant's request to convert his early retirement to a disability retirement; and
- (4) **DISMISS** Claimant's administrative appeal.



Ruth D. Dunnewold
Hearing Officer

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Docket Clerk: Laura Vitale, Appeal Docket Clerk
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

5 N. 5th St.
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Date of mailing:

10/3/18.