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

IN RE: ACCOUNT OF M.M.
DOCKET NO. 2017-12 & 2018-19
CLAIM OF M.M.

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 proposed Memorandum Opinion and Recommendation of the Hearing Examiner ("HEO"), "Claimant's Appeal/Exceptions to the Hearing Officer's Memorandum Opinion and Recommendation," and the "Public School Employees' Retirement System's Brief Opposing Claimant's Appeal/Exceptions to the Hearing Officer's Memorandum Opinion and Recommendation."

The HEO recommends that the Board dismiss Claimant's appeals with prejudice due to Claimant's failure, without good cause, to appear for the March 5, 2019 administrative hearing. Claimant appeals/excepts to the HEO on the basis that he claims his requests to continue the hearing should have been granted, he had good cause to miss the hearing, and one of his appeals had merit.

Preliminarily, to the extent Claimant is attempting to respond to the Public School Employees' Retirement System's ("PSERS") March 5, 2019 Motion to Dismiss through his appeal/exceptions after the deadline to do so passed and the record was closed, Claimant's response is untimely and will not be considered. See 1 Pa. Code § 35.179. To the extent Claimant files an "Appeal," the appeal will not be considered, as appeals to the Board are not authorized. See *generally* 1 Pa. Code § 35.211; 22 Pa. Code § 201.1, et seq. Because the only filing that is authorized at this time is a brief on exceptions, this Board responds accordingly. See 1 Pa. Code § 35.211.

With respect to Claimant's exceptions, this Board will not consider any evidence Claimant attempts to offer in connection with his filing. The evidence was not presented to the Hearing Examiner, and the record is closed. Therefore, any consideration of such evidence is improper. See 1 Pa. Code §§ 35.162, 35.205, and 35.212. Moreover, Claimant's untimely evidence is inadmissible hearsay, objected to by PSERS, and cannot be used as the basis for any finding of fact. See Pa.R.E. 802; *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).

In addition, this Board will not consider the substantive merits of either of Claimant's appeals. The sole issue before this Board is whether the Hearing Examiner erred in recommending that Claimant's appeals be dismissed for failing to appear at his March 5, 2019 hearing without good cause. See *Draper v. Pub. Sch. Employees' Ret. Sys.*, 2012 Pa. Commw. Unpub. LEXIS 811, *3 (Pa. Cmwlth. 2012) (affirming the Board's rejection of a claimant's attempt to argue the merits of his case through the filing of exceptions to the HEO, which recommended the dismissal of claimant's appeal due to his failure to appear at his administrative hearing).

Claimant purports to except to the HEO, but he is really seeking reconsideration of the Hearing Examiner's February 27, 2019 and March 4, 2019 orders that denied his request to reschedule the March 5, 2019 hearing. The issue before this Board, again, is whether the HEO properly concluded that Claimant failed to meet his burden to prove that his *failure to appear* at the March 5, 2019 hearing was for good cause. This Board concludes that the Hearing Examiner correctly recommended dismissing Claimant's appeals. See 22 Pa. Code § 201.8(a); 1 Pa. Code §§ 35.177, 35.180, and 35.187(7). The existing record establishes that Claimant and his attorney were aware of the March 5th hearing and they were aware that their requests for continuance were denied; neither Claimant nor his attorney appeared for the hearing; neither Claimant nor his attorney explained their absence to the HEO or submitted credible evidence to the HEO excusing their absence in the time permitted for a response (or even provide any documentary evidence that would have supported their earlier requests for a continuance); and neither Claimant nor his attorney requested that the record remain open to do so. The record before this Board is, in fact, devoid of any

communication from Claimant or Claimant's counsel between the Hearing Examiner's March 4, 2019 order and Claimant's April 25, 2019 exceptions. This Board further notes that the record reflects, on behalf of Claimant, a lack of respect for the deadlines set throughout the pendency of these proceedings and for the time and resources of this Board, the Hearing Examiner, and PSERS' staff.

The Board, therefore, finds appropriate the HEO with the following modifications:

1. On page one, in the second paragraph of the Memorandum Opinion the third sentence is amended as follows: "Acting *pro se*, on July 9, 2019, at 4:35 p.m., Claimant filed a prehearing statement and requested that the prehearing conference scheduled for July 10, 2019 at 10:00 a.m. be rescheduled for July 17, 2018."

2. On page one, in the second paragraph, after the third sentence, add: "The July 10th pre-hearing conference was initiated, but Claimant failed to attend (N.T. 9)."

3. On page two, after the sentence "Claimant did not file an amended pre-hearing statement," add: "On August 13, 2018, just two days before the August 15, 2018 hearing, Claimant requested a continuance."

4. On page two, the first sentence of the first full paragraph of the Memorandum Opinion should read: "On September 21, 2018, Claimant filed an appeal that challenges PSERS' determination that Claimant could not change retirement options because his request was untimely (docket number 2018-19)."

5. On page three, the last full sentence on that page of the Memorandum Opinion is amended to read: "This request was neither filed with the Appeal Docket Clerk nor served on counsel for PSERS, though the undersigned hearing officer forwarded it to both on March 4, 2019. See 1 Pa. Code § 33.32 (requiring service upon all participants to a proceeding); Appointment of Hearing Examiner Letter ("All original filings . . . must be filed directly with the Docket Clerk. Copies of all filings and correspondence shall be served on the Hearing Examiner and all parties.

Documents not filed with the Docket Clerk may not be considered as part of the record.
(Emphasis in original).”

IT IS HEREBY ORDERED that the Public School Employees’ Retirement System’s Motion to Dismiss is GRANTED, and the appeals of Claimant, M.M., are DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES’
RETIREMENT BOARD

Dated: Dec 6, 2019

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

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PSERB
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE:	:	
	:	Docket No. 2017-12
Account of M [REDACTED] M [REDACTED]	:	
Claim of M [REDACTED] M [REDACTED]	:	Docket No. 2018-19
	:	

MEMORANDUM OPINION

These consolidated matters are before the Public School Employees' Retirement Board ("Board") on two appeals filed by M [REDACTED] M [REDACTED] ("Claimant"). On July 18, 2017, Claimant filed an appeal from a decision of the Public School Employees' Retirement System ("PSERS") to deny Claimant's application to reapply for renewal of disability benefits (docket number 2017-12). On July 6, 2017, PSERS filed its Answer to Claimant's appeal. By letter dated May 2, 2018, the Board's Secretary, Glen R. Grell, appointed a hearing officer for Claimant's administrative hearing. Additionally, by letter dated May 2, 2018, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on his appeal was scheduled for August 16, 2018, in Harrisburg, Pennsylvania.

Thereafter, by order dated June 27, 2018, the hearing officer granted PSERS's request and scheduled a telephonic prehearing conference for July 10, 2018 and required the parties to file prehearing statements by July 6, 2018. PSERS filed its prehearing statement on July 6, 2018, as directed. Acting *pro se*, on July 9, 2019, Claimant filed a prehearing statement and requested that the prehearing conference be rescheduled for July 17, 2018. By order dated July 17, 2018, the hearing officer granted the parties' agreed-upon request and rescheduled the hearing for August 15, 2018. By order dated July 31, 2018, the hearing officer rescheduled the prehearing conference for August 8, 2018, and directed the parties to file by August 6, 2018, amended prehearing statements to address Claimant's burden of proof and whether he may be able to sustain that burden

without expert testimony. PSERS filed its amended prehearing statement on August 1, 2018; Claimant did not file an amended prehearing statement. By order dated August 14, 2018, the hearing officer granted Claimant's request for a continuance and directed that by October 12, 2018, an attorney must enter an appearance on behalf of Claimant and propose dates in December or January when Claimant, counsel and necessary witnesses would be available for hearing. The hearing officer further directed, "If Claimant is unable to retain entry of appearance by counsel by October 12, 2018, the Hearing Examiner will re-schedule the hearing. No further continuances will be granted." No attorney entered an appearance on behalf of Claimant. However, on October 1, 2018, Secretary Grell appointed Thomas A. Blackburn to act as hearing officer.

On September 21, 2018, Claimant filed an appeal that appears to challenge an unspecified decision of PSERS to deny another application for retirement benefits (docket number 2018-19). On October 5, 2018, PSERS filed an answer to this appeal. By order dated October 26, 2018, Secretary Grell consolidated the two matters for hearing. By letter dated November 16, 2018, Secretary Grell appointed Mr. Blackburn to act as hearing officer for this matter as well. By letter of November 16, 2018, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on his consolidated appeals was scheduled for March 5, 2018, in Harrisburg, Pennsylvania. The notice instructed that "Any request for a continuance of the hearing date must be made in writing and filed with the Docket Clerk, with a copy to the Hearing Examiner and counsel for the Retirement System. ... If your request to reschedule is not granted by the Hearing Examiner and you do not appear at the hearing, the Hearing Examiner, upon motion, will recommend to the Board that your appeal be dismissed with prejudice."

On February 26, 2019, an attorney purporting to represent Claimant faxed to the hearing officer a letter requesting a continuance of the scheduled hearing, because the lawyer had "just

been engaged to represent the claimant” and required a continuance for “sufficient time to investigate and prepare for the hearing.” The letter was not filed with the Docket Clerk, and the lawyer did not enter an appearance. On February 26, 2019, PSERS opposed the request for continuance. PSERS first noted that the August 14, 2018, order recited that there would be no further continuance; the order had given Claimant more than enough time to secure counsel. PSERS also argued that delaying the hearing would prejudice PSERS as its witnesses would not be available for a continuance less than a month and its counsel would not be available for hearing if continued more than a month nor for briefing due to her anticipated maternity leave. Overlooking the failure of Claimant’s attorney to enter an appearance or file the request with the Docket Clerk, by order dated February 27, 2019, the hearing officer ruled upon the request for continuance. The hearing officer denied the request for continuance, finding that Claimant had been given more than ample opportunity to timely retain counsel and prepare for the hearing. He had been given notice in August 2018 that by October he was to retain counsel and provide available dates for hearing but did not do so; in November 2018 Claimant was given almost four months’ advance notice of the hearing date and waited until almost the last week to take any action.

On March 1, 2019, Claimant faxed to the hearing officer a request to reconsider the denial of his request for continuance. Claimant described his efforts in “September through October and into November” to find counsel, then located the lawyer who had requested the continuance “and retained him on February 26. Unfortunately, he was not available on the day scheduled.” Claimant also asserted that he is the caretaker for his elderly mother who is scheduled for open heart surgery on March 5. This request was neither filed with the Docket Clerk nor served on counsel for PSERS, though the undersigned hearing officer forwarded it to both. On March 4, 2019, PSERS filed its opposition to the request for reconsideration. Again overlooking Claimant’s failure to file

this request with the Docket Clerk or serve a copy upon counsel for PSERS, by order dated March 4, 2019, the hearing officer ruled on Claimant's request for reconsideration. The hearing officer denied Claimant's request for reconsideration, because Claimant had not explained his efforts to obtain legal representation in November or December 2018 or January or earlier in February 2019 or otherwise why he was unable to retain the identified attorney sooner than one week before hearing and because Claimant did not assert the family medical condition at the time of the request for continuance when he could have done so and did not provide any documentation of an urgent rescheduling.

The hearing was held as scheduled at PSERS in Harrisburg on March 5, 2019, before the undersigned hearing officer. Claimant did not attend the hearing nor did any attorney on his behalf. Cayla B. Jakubowitz, Esquire, Assistant Counsel, represented PSERS. PSERS presented the testimony of its Appeal Docket Clerk to establish that Claimant had not contacted her that day or the prior day or week. (N.T. 6-8). Based upon Claimant's failure to appear for the hearing, PSERS moved to dismiss the appeals. PSERS did not request to file a brief. Claimant has not subsequently filed a request to reopen the record or made any other filing. In the absence of briefs, the record was closed on March 13, 2019, with the filing of the hearing transcript.

In these consolidated matters, Claimant filed two appeals. First, he appealed from the denial of his application for renewal of disability benefits. While that appeal was pending, Claimant also appealed the denial of a separate application for retirement benefits. The appeals were consolidated for purposes of hearing. Claimant has the burden of proof in establishing his position. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999).

It is well established that the requirements of due process of law apply to administrative proceedings. *First National Bank of Pike County v. Department of Banking and Bank of*

Matamoras, Intervening, 300 A.2d 832, 824 (Pa. Cmwlth. 1973). Due process requires that a person be provided notice and an opportunity to be heard prior to an adjudication affecting that person's rights. *Goetz v. Department of Environmental Resources*, 613 A.2d 65, 67 (Pa. Cmwlth. 1992), *appeal denied*, 533 Pa. 663, 625 A.2d 1196 (1993); *Celane v. Commonwealth, Insurance Commissioner*, 415 A.2d 130, 132 (Pa. Cmwlth. 1980). The courts have recognized the inherent power of agencies to control their own dockets through the dismissal of appeals where parties have failed to comply with a rule or order and where parties have failed to move the appeal forward. *Barr Street Corp. v. Dept. of Public Welfare*, 881 A.2d 1278, 1284-85 (Pa. Cmwlth. 2005). Dismissal of an administrative appeal upon the appellant's failure to prosecute the appeal or failure to appear at a hearing without good cause and to comply with multiple orders issued by the tribunal does not violate due process. *Goetz* 613 A.2d at 67; *Burch v. Dept. of Pub. Welfare*, 815 A.2d 1143, 1145-46 (Pa. Cmwlth. 1993); *Fountain Capital Fund, Inc. v. Pennsylvania Securities Commission*, 948 A.2d 208, 214 (Pa. Cmwlth. 2008).

After the hearing was called to order and as provided in 1 Pa. Code §§ 35.177, 35.180 (relating to scope and contents of motions; action on motions)¹ PSERS moved to dismiss Claimant's appeals upon his failure to appear at the scheduled hearing. Its regulations provide:

§ 201.8. Dismissal for nonappearance.

(a) **Whenever a claimant fails to appear**, either in person or through counsel, for a scheduled hearing **without good cause, the hearing examiner will issue a recommendation to dismiss the case**, without considering the merits of the claim.

(b) This section supplements 1 Pa. Code §§ 35.125, 35.187 and 35.205 (relating to order of procedure; authority delegated to presiding officers; and contents of proposed reports).

¹ Consistent with the provisions of 1 Pa. Code § 35.187(7) (presiding officer has authority to dispose of procedural matters but not before proposed report to dispose of motion made during hearing to dismiss proceedings), the hearing officer deferred ruling upon the motion until this memorandum opinion and recommendation.

22 Pa. Code § 201.8 (emphasis supplied).

As described above, neither Claimant nor an attorney representing him appeared at the hearing on March 5, 2019. Claimant and the attorney purportedly representing him were well aware of the hearing scheduled for that date, as the attorney requested a continuance and Claimant requested reconsideration of the denial of the continuance request. Continuance was denied and reconsideration of that denial was also denied. Claimant was previously notified that if he requested a continuance and it was denied, upon his failure to appear for the hearing the hearing officer would recommend dismissing his appeals. Despite his request for continuance being denied and his request for reconsideration of that denial also being denied, Claimant did not appear for the hearing. Claimant has not subsequently explained his failure to appear, nor has he requested that the record be reopened.

Accordingly, it is appropriate for the hearing examiner to recommend that Claimant's appeals be dismissed with prejudice without consideration of the merits. *See, Draper v. Public School Employees' Retirement System*, 2012 WL 8681657, docket no. 872 C.D. 2012 (Pa. Cmwlth. Oct. 26, 2012) (unreported memorandum opinion) (PSERB properly dismissed appeal where claimant failed to appear at hearing and thus failed to carry burden of proof as matter of law and failed to establish good cause for failure to appear).

Based upon the foregoing, the following recommendation will be made to the Board.

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

IN RE: :
: **Docket No. 2017-12**
Account of M [REDACTED] **M** [REDACTED] :
Claim of M [REDACTED] **M** [REDACTED] : **Docket No. 2018-19**
:

RECOMMENDATION

AND NOW, this 29th day of **March, 2019**, 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: **DISMISS** Claimant's administrative appeals.



Thomas A. Blackburn
Hearing Officer

Claimant: Mr. M [REDACTED] M [REDACTED]
[REDACTED]

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Date of mailing: 3/29/19