

Mail Date: MAR 23 2010

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

IN RE: ACCOUNT OF MATTHEW J. DANCHO
DOCKET NO. 2008-32
CLAIM OF MATTHEW J. DANCHO

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Opinion and Recommendation of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's History, Proposed Findings of Fact, Discussion, Proposed Conclusions of Law, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request to purchase credit for part-time service for the period October 1972 through June 1973 is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: MAR 23 2010

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

LEGAL OFFICE DEC 01 2009

**COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System**

In re :
Account of Matthew J. Dancho :
Claim of Matthew J. Dancho :
: **Docket No. 2008-32**

OPINION AND RECOMMENDATION

Date of Hearing: June 24, 2009
Hearing Officer: Linda C. Barrett, Esquire
For the Claimant: Matthew J. Dancho, pro se
For PSERS: David W. Speck, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Matthew Dancho ("Claimant") from a decision of the Executive Staff Review Committee ("Committee") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request to purchase service.

Claimant was notified of the Committee's decision by letter dated November 20, 2008. Claimant was informed that the Committee denied his request because Claimant did not render service with the Indiana University of Pennsylvania ("IUP") as an employee and IUP regarded his assistantship as part of his education.

On December 15, 2008, Claimant filed a timely request for Administrative Hearing, dated December 10, 2008. Thereafter, on December 29, 2008, David W. Speck, Esquire, on behalf of PSERS, filed an Answer to Claimant's Request for Administrative Hearing.

On May 22, 2009, a hearing notice was issued scheduling the administrative hearing on Claimant's appeal for June 24, 2009. The hearing was held as scheduled in the Fifth Floor conference room of PSERS, 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing and represented himself. David W. Speck, Esquire, represented PSERS.

Following the close of testimony, both parties requested the opportunity to file post-hearing briefs. On July 17, 2009, following receipt of the hearing transcript, a briefing schedule was established. Pursuant to the briefing schedule, Claimant was given until August 28, 2009 to file a supporting brief; PSERS was directed to file its brief no

later than thirty (30) days after service of Claimant's brief; and, Claimant was afforded the right to file a reply brief.

Claimant filed his brief on August 18, 2009. He did not serve counsel for PSERS. Additional time was provided to PSERS to file a responsive brief which was filed on October 2, 2009. Claimant did not file a reply brief.

This matter is ripe for disposition.

Proposed Findings of Fact

1. Claimant is Matthew J. Dancho ("Dancho"). (N.T. *passim*)¹
2. During the 1972-73 academic year, Claimant was enrolled in a Master's Degree program in Learning Resources and Mass Media at IUP. (N.T. 48).
3. Claimant's field of graduate study was the audio tutorial method of instruction. This form of instruction involved self-paced lessons for students to proceed through on their own rather than receiving direct instruction from a teacher. (N.T. 56).
4. This method of instruction uses teaching tools such as the tape recorder, filmstrip projector, and overhead projector. (N.T. 56).
5. While enrolled in this Master's Degree program, Claimant served as a teaching assistant during the 1972-1973 school year. Specifically, Claimant taught a class that required him to show undergraduate students contemplating or working in his same field of study how to use the same mass media that was part of the method of instruction for his graduate degree. (N.T. 48, 51-52, 56).
6. Claimant provided laboratory instruction to IUP undergraduates in the use of audio/visual and mass media equipment. (N.T. 49-50).
7. The laboratory instruction was related to Claimant's graduate field of study because it also involved the use of self-paced, self-instructional learning tools such as filmstrip and motion picture projectors. *Id.*
8. Claimant taught the use of the same media that he was writing about in his Master's Degree thesis, particularly the filmstrip projector. (N.T. 49, 51).

¹ N.T. refers to the Notes of Testimony from the June 24, 2009 hearing.

9. In order to understand the self-paced, self-instructional method of instruction using mass media, students must understand how to use the tools used to perform the instruction. (N.T. 51).

10. Claimant did not receive a performance evaluation for his graduate teaching duties during 1972-73. (N.T. 54; PSERS Exhibit 3).

11. Claimant did not receive a grade for his graduate student teaching duties. (N.T. 54; PSERS Exhibit 3).

12. Claimant received a stipend of \$1,352.00 and a tuition waiver. (N.T. 13, 21-22; PSERS Exhibits 2 and 3).

13. During the 1972-73 school year, IUP had two types of graduate assistantships for graduate students. (N.T. 61)

14. The IUP 1972-73 Graduate School Bulletin describes these two types of graduate assistantships as follows:

For full-time graduate students, two types of assistantships are available at Indiana: teaching assistantships and graduate student employment.

Teaching assistantships are utilized to supplement the instructional efforts of regular staff members by lecturing, instructing lab sections and tutoring. Graduate student workers perform a range of duties among which are: aiding faculty research, supporting instructional staff, and providing needed student services.

. . . The number of appointments and the size of the stipends awarded depend on the approval of budgeting requests and therefore may *vary* from year to year. Tuition fees are waived for teaching assistants.

(N.T. 61; PSERS Exhibit 9).

15. The goal of IUP's graduate assistantship program has always been to enrich the student's educational experience through performance of the assistantship. (N.T. 64; PSERS Exhibit 9, p. 4).

16. IUP's Policy on Graduate Assistantships states in pertinent part:

The graduate assistantship is viewed as part of the graduate student's education. The basic premise is that meaningful research, and university/public service experiences are an essential and integral part of a master's or doctoral program. Therefore, each graduate assistantship must be utilized only for assignments that fulfill IUP's missions in teaching, research, and public service, but are appropriately focused on the educational objectives of the student. Less challenging types of educational services should be performed by work-study students supported through departmental budgets.

(PSERS Exhibit 9, p. 4).

17. IUP considers the graduate assistantship to be part of the graduate student's education even though the graduate student does not receive academic credit for the assistantship. (N.T. 64; PSERS Exhibit 3).

18. IUP has not changed its goals for the graduate assistantship program and its stated purposes would have been the same in 1972-73 as they are presently. (N.T. 65).

19. In 1972-73 tuition and fees were waived for teaching assistants but not for graduate student workers. (N.T. 61; PSERS Exhibits 3 and 9).

20. Presently IUP refers to assistantships as graduate assistantships. Those awards made for persons who teach in classrooms are now called teaching associates. (N.T. 62).

21. Presently, teaching associates at IUP are doctoral students. (N.T. 62).

22. Enrollment as an IUP doctoral student was not a requirement for a teaching assistant at IUP for the 1972-73 school year. (N.T. 62).

23. Claimant was a teaching assistant and not a graduate student worker during the 1972-73 academic year. (N.T. 62-63).

24. For a graduate student to be a graduate assistant, the student must be enrolled in a degree-seeking program. (N.T. 65, 70; PSERS Exhibit 3).

25. A graduate assistantship includes both a stipend and a tuition waiver. (N.T. 66).

26. IUP provides no benefits such as retirement contributions, healthcare in connection with an assistantship. (N.T. 69).

27. The benefits offered to IUP employees - including healthcare, dental, vision, are not provided to graduate assistants. (N.T. 69-71).

28. Vacation and sick leave time are provided to permanent IUP employees, but are not provided to graduate assistants. (N.T. 71).

29. Claimant did not receive health insurance benefits, health insurance or paid leave. (N.T. 53-54)

30. The Public School Retirement System was established by the General Assembly's enactment of the Public School Retirement Code (Retirement Code), Act of July 18, 1917 (P.L. 1043, No. 343), and codified by the Act of June 1, 1959 (P.L. 350, No. 77), as amended, 24 Pa.C.S. § 8101, *et. seq., as amended*.

31. The term "previous school service" is defined by the Retirement Code as service which is rendered as a school employee. 24 Pa.C.S. § 8102.

32. The Retirement Code defines a school employee as any person “engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee”

24 Pa.C.S. § 8102.

33. An “employer” is defined under the Retirement Code as: Any governmental entity directly responsible for the employment and payment of the school employee and charged with the responsibility of providing public education within this Commonwealth, including but not limited to : “State-owned colleges and universities, the Pennsylvania State University, community colleges, area vocational-technical schools, intermediate units, the State Board of Education, Scotland School for Veterans’ Children, Thaddeus Stevens State School of Technology, and the Pennsylvania State Oral School for the Deaf.” 24 Pa.C.S. § 8102.

34. The Retirement Code permits PSERS members to purchase service credit and receive eligibility points for qualifying previous public school service. 24 Pa.C.S. § 8303(c).

35. On April 25, 2007, Claimant filed with the Public School Employees’ Retirement System (PSERS) an Application to Purchase Credit for Part-Time Service for the period October 1972 through June 1973. (PSERS Exhibit 1).

36. The Application sought service credit for employment as a graduate assistant provided to Indiana University of Pennsylvania (IUP) for the period October 1972 through June 1973. (PSERS Exhibit 1).

37. Claimant signed the Application on March 27, 2007 and Claire Pinkerton, the IUP Director of Payroll signed the Application on April 23, 2007. (PSERS Exhibit 1).

38. On June 19, 2007, Cheryl K. Class from PSERS Purchase of Service Section notified Claimant by letter that his request to purchase service rendered in school year 1972-1973 as a Graduate Assistant at IUP was denied. The letter explained Claimant's appeal rights. (PSERS Exhibit 2).

39. Claimant appealed this decision to the Executive Staff Review Committee ("Committee"). (N.T. *passim*).

40. The Committee reviewed Claimant's request to purchase credit for part-time service for October 1972 through June 1973. (N.T. 83-84; PSERS Exhibit 4).

41. On November 20, 2008, the Committee notified Claimant that he was not eligible to purchase service for his graduate teaching duties while at IUP for the period October 1972 through June 1973. (N.T. 85; PSERS Exhibit 4).

42. Claimant's purchase of service request was denied for two reasons: (1) he did not render service to IUP as employee; and, (2) IUP regarded his assistantship as part of his education. (N.T. 85; PSERS Exhibit 4).

43. Claimant filed an administrative appeal on December 15, 2008. (Agency Record).

44. PSERS filed its Answer on December 28, 2008. (Agency Record).

45. PSERS submitted a Request for Hearing Officer to the Office of General Counsel and a hearing officer was identified by the Governor's Office of General Counsel. (Agency Record).

46. On May 20, 2009, Executive Secretary Jeffrey Clay issued an appointment letter. (Agency Record).

47. On May 22, 2009 PSERS notified Claimant that his administrative hearing would take place on June 24, 2009. (PSERS Exhibit 6).

48. Claimant appeared *pro se* at his hearing. David W. Speck, Esquire appeared on behalf of PSERS. (N.T. *passim*)

49. Claimant had the opportunity to testify, call and cross-examine witnesses and introduce exhibits. *Id.*

50. The parties were given an opportunity to file post hearing briefs. Claimant filed a brief on August 18, 2009 but did not serve a copy upon counsel for PSERS. PSERS was given additional time to file its brief which was provided to the Hearing Officer on October 2, 2009. Claimant did not file a reply brief. (Agency Record).

DISCUSSION

Claimant maintains that he is entitled to purchase credit for his service as a graduate teaching assistant at IUP during the 1972-1973 school year. Claimant urges the Board to follow the analysis adopted by the Commonwealth Court in *Kapilian v. State Employees' Retirement System*, 600 A.2d 698 (Pa. Cmwlth. 1991) (containing a discussion of "students as employees" in the State Employees' Retirement Code administered by the State Employees' Retirement System (SERS)).² PSERS takes the position that Claimant

² In many instances, the State Employees' Retirement ("SERS") Code, 71 Pa. C.S. §§ 5101-5956, has provisions that are analogous to those in the Public School Employees' Retirement Code. Consequently, court opinions containing interpretations of either the PSERS Code or the SERS Code on provisions which are identical in each Code are applicable to the interpretation of the other system. *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624 (Pa. Cmwlth. 1996).

is not eligible for purchase with PSERS because he did not render service to IUP as an employee and IUP regards his assistantship as an integral part of his education.

In support of its position that Claimant did not render service to IUP as an employee of the University, PSERS called Donna Griffith, the Assistant Dean for Administration of the School of Graduate Studies and Research at IUP to testify about the historical operation of the graduate assistant program at the university. (N.T. 60). Assistant Dean Griffith established that she was familiar with the documents related to the graduate assistant program she now administers and obtained background information from the Graduate Dean about the operation of the program in 1972-73. (N.T. 60, 75). Based on her familiarity with the documents describing the graduate teaching program at IUP during the period in question and the program as it exists today, Assistant Dean Griffiths established that Claimant was a teaching assistant at IUP during the 1972-1973 academic year. (Findings of Fact Nos. 13-29).

The record clearly establishes that Claimant did not receive compensation as an officer, administrator or employee of IUP, but rather received a stipend for fulfilling his teaching responsibilities in connection with a graduate teaching assistantship related to his enrollment in the Master's Degree program at IUP. (Findings of Fact Nos. 5, 12). Moreover, the purposes of the graduate assistantship program at IUP have not changed since the 1972-73 academic year. (Findings of Fact No. 18). For a graduate student to be a graduate assistant, the student must be enrolled in a degree-seeking program. (Findings of Fact No. 24; PSERS Exhibit 3; N.T. 65, 70). A graduate assistantship includes both a stipend and tuition waiver. (Findings of Fact No. 25). There are no employee benefits - retirement, healthcare - in connection with an assistantship and Claimant earned none.

(Findings of Fact No. 26-29). He was not evaluated and he did not receive a grade for his assistantship. (Findings of Fact Nos. 10-11).

Claimant's graduate assistantship was directly related to his enrollment in the Master's Degree program. His undergraduate teaching responsibilities were compatible with the work he was conducting at the graduate level in the field of self-paced, self-instructional method of using mass media. The course he taught to undergraduates required him to instruct these students in the same pedagogy he was studying and writing about in his thesis. (Findings of Fact Nos. 5-9).

Although Claimant relies on *Kapilian*³ to ascertain whether a graduate assistant is an employee of the educational institution providing the assistantship, the case that most directly guides the result here is *Simmonds v. State Employees' Retirement System*, 548 Pa. 219, 696 A.2d. 801 (Pa. 1997). In *Simmonds*, a medical resident who served as a resident at Penn State University Medical Center at Hershey ("Penn State-Hershey") for one year. Following her residency she became an assistant professor of medicine at Penn State-Hershey and enrolled in SERS. Dr. Simmonds later attempted to purchase state service credit for her year as a resident. The SERS Board denied her request. Following an administrative hearing, a hearing examiner concluded that residents at Penn State-Hershey were not state employees for the purpose of receiving service credit within SERS. The SERS Board affirmed the decision of the hearing examiner holding that, although medical resident appeared to have employee status, the purpose of medical

³ At the hearing and in his brief, Claimant also offered the dissent of Senior Judge Della Porta in *Cain v. Public School Employees' Retirement System*, 651 A.2d. 660 (Pa. Cmwlth. 1984), *allocatur denied*, 651 A.2d. 660 (1995), to support his position that he is entitled to purchase service credit. However, *Cain* involved a request to purchase service for work in an approved private school which did not fall within the definitions contained in Section 8102 relating to school employee and public school. 24 Pa.C.S. § 8102. Senior Judge Della Porta's dissent suggested application of a more liberal construction of these definitions. The majority did not agree.

residencies was to enhance education of the medical residents. 548 Pa. at 222; 696 A.2d at 802.

The Commonwealth Court reversed the Board's decision holding that medical residents were state employees entitled to purchase state credit pursuant to SERS' Retirement Code, 71 Pa.C.S. § 5101 *et seq. Id.* On appeal, the Pennsylvania Supreme Court reversed the Commonwealth Court's order and reinstated the SERS' Board's denial of service credit. 696 A.2d at 802. The Supreme Court made this ruling in spite of the fact that Simmonds was enrolled in an accredited educational program to obtain certification in a medical sub-specialty and received a substantial salary, fringe benefits and supervised medical professionals. 548 Pa. 225; 696 A.2d at 803-804.

Here, Claimant was enrolled in a Master's Degree program and would not have been eligible to receive the assistantship without being a graduate student. (Findings of Fact Nos. 2, 5, 14, 16). The teaching duties performed by Claimant were not designed solely to meet the needs of the undergraduate students but were also to ensure that Claimant obtained the education and training required by IUP to be awarded his Master's degree. (Findings of Fact Nos. 3-8, 15-18). Moreover, the small stipend that Claimant received is certainly not equivalent to compensation received by a full-time IUP employee and Claimant did not receive the benefits of an IUP employee. By way of comparison, Claimant did not receive the salary and fringe benefits that Dr. Simmonds did and Claimant certainly did not supervise any IUP employees nor was he required to receive a special certification in connection with his Master's Degree program. Therefore, it follows that because Claimant's relationship with IUP was even less like the relationship Dr. Simmonds had with Penn-State Hershey that did not qualify under the

Court's analysis in *Simmonds*, Claimant is not entitled to receive retirement credit for his graduate assistantship.

The *Simmonds* Court also rejected the Commonwealth Court's reliance on *Kapilian* as it was applied to Dr. Simmonds situation. Factually distinguishable to the present case, *Kapilian* involved a request to purchase non-state credit pursuant to § 5304(c)(3) of the SERS' Retirement Code, 71 Pa.C.S. § 5304(c)(3) based on time Kapilian spent as a graduate teaching assistant at the University of Illinois. The SERS Board denied the request, finding that Kapilian was a student rather than an employee. The Commonwealth Court reversed ruling that Kapilian's time as a graduate teaching assistant in Illinois was creditable non-state service under the SERS' Retirement Code "because a Pennsylvania employee with Kapilian's circumstances would be eligible for only a proportional amount of credited service Kapilian is entitled to purchase only a like proportional amount.", 600 A.2d at 700. As part of its analysis in *Simmonds*, the Supreme Court found that reliance on *Kapilian* was based on a "gratuitous conclusion which was clearly obiter dictum." *Simmonds*, 548 Pa. at 226, 696 A.2d at 804.

Rather the Supreme Court found that "the purpose and intent of the [SERS] Retirement Code is not served by considering medical residents as state employees," *Simmonds, id.* This analysis is equally applicable here. Classification of graduate students as state employees would increase the financial burden of state institutions where graduate students teach as part of their training. Funding retirement accounts in this situation for individuals who are essentially students does not make sense. And like SERS, would create and the additional administrative burden on PSERS to "enroll

individuals in the system who would generally be employed by the state institution for only one year. *Simmonds*, 548 Pa. at 226; 696 A.2d at 804.

Alternatively, Claimant argues that PSERS has inequitably applied the service purchase provisions of its Retirement Code in this instance because he was awarded credit for the period July-August 1978. (Claimant's Brief, p. 2). In support of this argument, Claimant appended an incomplete Application to Purchase Credit for Part-Time Service dated June 7, 2007 and a March 3, 2008 letter from PSERS acknowledging receipt of his request to purchase "Former Uncredited Part-Time." (Claimant's Brief, Documents 3 and 4). These documents were not offered or admitted at the hearing. (N.T. *passim*). During his testimony, Claimant did allude to prior service credit (N.T. 45-46), but the facts related to this situation were not fully developed at the hearing. Therefore, the facts supporting this argument were not sufficiently preserved to consider this alternate argument as viable.

Proposed Conclusions of Law

1. Claimant was afforded an opportunity to be heard in connection with his appeal. (Findings of Fact Nos. 43-50).

2. The Retirement Code permits PSERS members to purchase service credit and receive eligibility points for qualifying previous public school service. 24 Pa.C.S. § 8303(c). The term "previous school service" is defined as service which is rendered as a *school employee*.

3. A "school employee" is defined in Section 8102 as any person who is engaged in work relating to a public school for any governmental entity and is receiving regular remuneration for work performed as an officer, administrator or *employee*.

excluding, however, any independent contractor or a person compensated on a fee basis.

24 Pa.C.S. § 8102.


4. Claimant did not receive compensation as an officer, administrator or employee of IUP, but received a stipend for the performance of a graduate teaching assistantship in connection with his Master's Degree program. (Findings of Fact No. 12).

5. Claimant was not an employee of IUP, but a student engaged in pursuing a graduate degree who held a teaching assistantship in connection with his degree program. (Findings of Fact Nos. 1-34).

6. Claimant was not a school employee as contemplated by PSERS Retirement Code. Claimant is not eligible to purchase service with PSERS. (Findings of Fact Nos. 1-34; *Simmonds, supra*).

RECOMMENDATION

I recommend that Claimant Matthew Dancho's request to purchase part-time service credit for the period October 1972 through June 1973 be **DENIED**.

BY: 
Linda C. Barrett
Hearing Officer

Date Mailed: November 30, 2009

Copies mailed to:

Matthew J. Dancho

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David W. Speck
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COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System

In re :
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: Docket No. 2008-32

ORDER

AND NOW, this ____ day of _____, 2009 based upon the foregoing Findings of Fact, Conclusions of Law, and Discussion and the Recommendation of the Impartial Hearing Officer dated November 30, 2009, the Board adopts the Proposed Report of the Hearing Officer and hereby **DENIES** Claimant Matthew Dancho's request to purchase part-time service credit for the period October 1972 through June 1973.

BY ORDER:

For the Public School Employees'
Retirement Board