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

IN RE: ACCOUNT OF JIM HILBURT
DOCKET NO. 2021-07
CLAIM OF JIM HILBURT

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 Opinion and Recommendation of the Hearing Examiner ("HEO"). We note that neither party filed Exceptions to the HEO. The Board finds the HEO appropriate, and we hereby adopt the HEO as our own, and, accordingly:

IT IS HEREBY ORDERED that the appeal of Claimant, Jim Hilburt, is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 12/16/22

By: 
Christopher Santa Maria, Chairman

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

In re: :
Account of Jim Hilburt : **Docket No. 2021-07**
Claim of Jim Hilburt :

OPINION AND RECOMMENDATION

Date of Hearing: September 14, 2022
Hearing Examiner: Jason C. Giurintano, Esquire
For the Claimant: Jim Hilburt, *pro se* (not present)
For PSERS: Clinton Webb, Esquire

I. Procedural History:

This matter is before the Public School Employees' Retirement Board (the "Board") on an appeal filed by Jim Hilburt ("Claimant"). Claimant filed an appeal and requested an administrative hearing on April 5, 2021, regarding out of state service. Counsel for PSERS filed an Answer to Claimant's appeal on April 22, 2021. On July 1, 2022, Board Secretary, Terrill Sanchez, appointed Jason C. Giurintano, Esquire, to act as a hearing examiner for the administrative hearing in connection with Claimant's appeal. The Board's Appeal Docket Clerk served a Notice of Hearing upon the parties on August 31, 2022, which scheduled the hearing on Claimant's appeal for September 14, 2022.¹

The hearing on Claimant's appeal convened, as scheduled, at 5 N. 5th Street, Harrisburg, PA 17101 at 10:00 a.m. Clinton Webb, Esquire, represented PSERS at the hearing. Claimant did not appear for the hearing. The record shows that the Hearing Examiner waiting 15 minutes for Claimant to arrive. (N.T. at 3).²

After Claimant's failure to appear for the hearing, PSERS presented testimony from the PSERS Docket Clerk who testified regarding the procedural history of the proper effectuation of service of the Notice of Hearing (N.T. at 4-11). PSERS effectuated proper service of the Hearing Notice via publication in the Pennsylvania Bulletin as well as through mail to Claimant's last known address on file with the Board. PSERS thereafter moved to dismiss Claimant's appeal pursuant to 1 Pa.Code §§ 35.177, 35.180, 35.187 and 22 Pa.Code § 201.8 as a result of Claimant's failure to appear for the hearing.

¹ A hearing notice letter dated July 1, 2022, was also sent to Claimant informing him of this hearing date.

² "N.T." refers to "notes of testimony" from the September 14, 2022, hearing.

II. Discussion:

As the appellant, Claimant bears the burden of establishing the relief he seeks under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. §8101 *et. seq.*. See, L. Draper v. PSERS, 2012 WL 8681657 at *1 (Pa. Cmwlth. October 26, 2012). See also Gierschick v. State Employee's Retirement Board, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); Wingert v. State Employes' Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Claimant must satisfy his burden by a preponderance of the evidence. Lansberry v. Pennsylvania Public Utility Commission, 578 A. 2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1992). A preponderance of the evidence is "such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence." Sigafoos v. Pennsylvania Bd. of Probation and Parole, 503 A. 2d 1076 (Pa. Cmwlth. 1986). Claimant's burden of proof has also been described as a 'more likely than not standard', or evidence which is sufficient to tip the mythical scales in her favor. Agostino v. Township of Collier, 968 A. 2d 258 (Pa. Cmwlth. 2009).

The hearing convened at 10:15 a.m. on September 14, 2022, 15 minutes after the scheduled start time, for the purpose of providing Claimant additional time to appear. The record is devoid of any communications with PSERS and/or the Hearing Examiner and Claimant prior to the date and time of the hearing regarding the reason for his absence from the proceeding. Based upon Claimant's absence, PSERS' counsel requested that the Hearing Examiner recommend to the Board that it dismiss Claimant's appeal, with prejudice, pursuant to 22 Pa.Code §201.8 and under the applicable General Rules of Administrative Practice and Procedure (1 Pa.Code §§35.177, 35.180 and 35.187(7)) due to Claimant having failed to sustain his burden of proof.

Section 201.8 of PSERS' regulations provides as follows:

§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).

22 Pa.Code §201.8.

Sections 35.177, 35.180 and 35.187(7) of the General Rules of Administrative Practice and Procedure, 1 Pa.Code §§35.177, 35.180 and 35.187(7), provide, in pertinent part:

§35.177. Scope and contents of motions.

After a hearing has commenced in a proceeding, a request may be made by motion for any procedural . . . ruling or relief desired. . . .

§35.180. Action on motions.

(a) The presiding officer. . . is authorized to rule upon any motion not formally acted upon by the agency head prior to the commencement of the hearing where immediate ruling is essential in order to proceed with the hearing, and upon any motion filed or made after the commencement of the hearing and prior to the submission of his proposed report in the proceedings, except that no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding shall be ruled upon by a presiding officer except as part of his proposed report submitted after the conclusion of the hearing. . . .

§35.187(7). Authority delegated to presiding officers.

Presiding officers designated by the agency head to preside at hearings shall have the authority, within the powers and subject to the regulations of the agency, as follows:

...
(7) To dispose of procedural matters but not, before their proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings.

1 Pa.Code §§35.177, 35.180 and 35.187(7). Consistent with 22 Pa.Code §201.8, the July 1, 2022, letter sent to Claimant specifically notified Claimant as follows:

If you do not appear at the hearing on the date and the time scheduled without good cause, the Hearing Examiner, upon motion, will recommend to the Board that your appeal be dismissed with prejudice. This means that the appeal will be terminated and that you will not be permitted to raise this issue to the Board in the future.

(Official Notice³).

At all material times, the address used to communicate with Claimant was the one on file with the Board. (Official Notice- Board Records). Based upon the foregoing, Claimant's absence from the hearing and resulting failure to present evidence to demonstrate that he is eligible for relief provides the Board with no basis in law or fact to grant him the relief he seeks. The Hearing Examiner, therefore, recommends that that the Board grant PSERS' request to dismiss Claimant's appeal under the authority of 22 Pa. Code §201.8, due to Claimant's failure to appear for her scheduled hearing and sustain his burden of proof.

³ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa.Code §35.173, which provides, in pertinent part, as follows:
§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa.Code §35.173.

In *Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987), the Pennsylvania Commonwealth Court explained:

"Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A. 2d at 994 n. 6.

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

In re: :
Account of Jim Hilburt : **Docket No. 2021-07**
Claim of Jim Hilburt :

RECOMMENDATION

AND NOW, this 18th day of October 2022, it is recommended that the appeal filed by Jim Hilburt be **DISMISSED**, with prejudice, pursuant to 22 Pa.Code §201.8, as a result of Claimant's failure, without good cause, to appear for his scheduled hearing.

s/Jason Giurintano

**Jason C. Giurintano, Esquire
Hearing Examiner**

For PSERS: Clinton Webb, Esquire
5 North Fifth Street
Harrisburg, PA 17101

Claimant: Jim Hilburt
Redacted

Docket Clerk: Julie Vitale | Appeal Docket Administrator
Public School Employees' Retirement Board
5 N 5th Street | Harrisburg, PA 17101-1905

Date of Mailing: 10/18/22