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

IN RE: ACCOUNT OF BRETT A. MUSSER
DOCKET NO. 2021-03
CLAIM OF BRETT A. MUSSER


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 appropriate the HEO, and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to purchase credit for activated military service from September 17, 2008 – September 29, 2009 is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 08/16/24

Signed by:

By: _____
Richard Vague, Chairman

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EXECUTIVE OFFICE

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

IN RE:

**ACCOUNT OF BRETT A. MUSSER
CLAIM OF BRETT A. MUSSER**

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DOCKET NO. 2021-03

PROPOSED OPINION AND RECOMMENDATION

**Nolan B. Meeks
Hearing Officer**

Date of Hearing: July 28, 2022
Hearing Officer: Nolan B. Meeks, Esquire
For Claimant: Brett A. Musser, *pro se*
For PSERS: Cayla B. Jakubowitz, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal, filed by Brett A. Musser ("Claimant") on January 26, 2021. Claimant appealed from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request to purchase service credit for activated military service as untimely. On February 11, 2021, PSERS filed its Answer to Claimant's appeal.

By letter dated April 20, 2022, Interim Secretary Terrill J. Sanchez appointed the undersigned to act as hearing officer for Claimant's administrative appeal hearing.¹ By letter dated March 31, 2022, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing had been scheduled for July 28, 2022, at the offices of PSERS in Harrisburg. The hearing was held as scheduled. Claimant attended the hearing and represented himself *pro se*. Claimant testified on his own behalf and presented documentary evidence identified and admitted into the record as Claimant-1. PSERS was represented by Cayla B. Jakubowitz, Esquire, who presented PSERS case through the witness testimony of Gail Neiman along with documentary evidence identified and admitted into the records as PSERS-1 through PSERS-4. At the close of the hearing, the parties elected to file post-hearing briefs. The hearing transcript was filed on August 5, 2022, and the undersigned hearing officer issued a Briefing Schedule Order whereby Claimant's post-hearing brief was due on September 29, 2022, PSERS brief was due on October 31, 2022, and any reply brief was due on November 14, 2022. Both parties filed their respective briefs, and the record closed on November 14, 2022 when the deadline passed for the filing of a reply brief.

¹ This matter was originally assigned to Ember Jandebeur, Esquire to serve as hearing officer and notification was made to the parties in a letter dated March 31, 2022. The matter was later reassigned to the undersigned hearing examiner.

Accordingly, the matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant was employed by the Keystone Oaks School District from September of 1996 until June of 2020 as a teacher. (N.T. 10).
2. Claimant served in the Army National Guard from 2006-2014. (N.T. 30).
3. Claimant was deployed to Iraq in 2008. (N.T.31).
4. From September 2008 until September 2009 the Keystone Oaks School District reported to PSERS that Claimant was on a leave of absence for active military service. (N.T. 11).
5. The Keystone Oaks School District reported the leave of absence to PSERS as activated military leave, non-contributing, *i.e.*, contributions were not remitted to PSERS for claimant. (N.T. 11).
6. Because contributions were not remitted to PSERS, Claimant did not receive service credit with PSERS during this leave of absence. (N.T. 15).
7. Claimant returned to work as a teacher with the Keystone Oaks School District on September 30, 2009. (N.T. 31).
8. On October 29, 2009, PSERS mailed Claimant a Statement of Account for School Year 2008-2009. (N.T. 12; PSERS-1).
9. The statement of account stated that Claimant received 0.11 in total service credit for the 2008-2009 school year. (PSERS-1).
10. After he returned to Keystone Oaks School District from his leave of absence, Claimant continued to work as a teacher for the District until 2019 and ultimately left employment with the District in June of 2020. (N.T. 10).
11. Claimant is currently retired from PSERS and is receiving a monthly annuity.

(N.T. 11).

12. On March 18, 2019, PSERS received a form (PSRS-1305) entitled *Purchase of Intervening or Activated Military Service* from Claimant requesting to purchase his service credit for activated military leave. (PSERS-2).

13. Claimant sought to purchase his service credit for the time he was on activated military leave during the 2008-2009 and 2009-2010 school year. (PSERS-2).

14. The March 18, 2019 request is the first time that Claimant submitted a request to purchase his activated military service credit. (N.T. 15-17, 22).

15. By letter dated April 4, 2019 ("April 2019 denial letter"), PSERS denied Claimant's request to purchase credit for activated military leave. (PSERS-3).

16. In the April 2019 denial letter, PSERS cited to the statutory requirement that a request to purchase credit for activated military leave must be made within one year of discharge. (PSERS-3).

17. Claimant appealed the denial to the ESRC. (PSERS-4).

18. By letter dated December 28, 2020, the ESRC notified Claimant that it denied his request to purchase service credit for activated military service because PSERS did not receive a Purchase of Intervening or Activated Military Service form from Claimant until March 18, 2019, which is more than one year from his September 30, 2009 return to employment.² (PSERS-4).

19. On January 26, 2021, Claimant filed an Appeal and Request for Administrative

² The ESRC's basis for the denial differed slightly from PSERS in that the ESRC, consistent with the relevant statutory provision, cited to the deadline being one year from the date of a members return to employment, rather than the date of discharge. (PSERS-3, 4).

Hearing. (PSERS Records³).

20. On February 11, 2021, PSERS filed its Answer to Claimant's Appeal and Request for Administrative Hearing. (PSERS Records).

21. A hearing on the appeal was held on July 28, 2022, before the undersigned hearing officer. (N.T. *passim*).

22. Claimant was present for her hearing, represented himself *pro se*, 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. (N.T. *passim*; Dkt. No. 2021-03)

³ Under 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 June 20, 2019 is a part of the record as a pleading, but it is not evidence of any facts except its own filing.

Also, under the General Rules at 1 Pa. Code § 35.173, an agency 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 her appeal. (Findings of Fact 15 - 22).

2. Claimant has the burden of proving the facts he alleges in support of his claim. *Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269 (Pa. Cmwlth. 1991); *Frantz v. State Employees Ret. Bd.*, 560 A.2d 284 (Pa. Cmwlth. 1989).

3. The preponderance of evidence standard is the correct burden of proof to be applied in this administrative action. *Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 602 A.2d 863 (Pa. 1998); *Suber v. Pa. Comm'n on Crime and Delinquency, Dep. Sheriff's Educ. and Training Bd.*, 885 A.2d 678 (Pa. Cmwlth. 2005).

4. The preponderance of evidence standard has been explained as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

5. PSERS is a creature of statute and PSERS' members have only those rights recognized by the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et seq.* ("Retirement Code") and none beyond. *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403 (Pa. Cmwlth. 1992); *Burris v. State Employees' Ret. Bd.*, 745 A.2d 704 (Pa. Cmwlth. 2000).

6. Full-time salaried school employees receive one year of credit for each school year or a corresponding fractional portion in accordance with the proportion of the full school year for which the PSERS member remitted contributions. 24 Pa.C.S. § 8302.

7. "Activated military service" is defined as:

Military service by a member of a reserve component of the armed forces, pursuant to an order on or after July 1, 1990, and prior to July 1, 2013, to enter into active military service, other than an order to enter into active duty to meet periodic training requirements, who was an active member of the system immediately preceding the order into active military service and to whom the military leave provisions of 51 Pa.C.S. Ch. 73 (relating to military leave of absence) do not apply.

24 Pa.C.S. § 8102 (defining "Activated military service").

8. A member who is granted a leave of absence for activated military service may discontinue his contributions to PSERS, and upon his return to employment have the right to purchase service credit in the amount equal to what he would have contributed but for the activated military service. 24 Pa.C.S. § 8302(b.1).

9. A member is required to provide written notification to PSERS of his desire to purchase service credit within one year after his return to employment. 24 Pa.C.S. § 8302(b.1)(3)(i).

10. Because Claimant returned from activated military service to employment on September 30, 2009 but did not provide PSERS with a written request to purchase service credit until March 18, 2019, his request is untimely. 24 Pa.C.S. § 8302(b.1)(3)(i).

11. Claimant has failed in his burden to establish that he requested to purchase service within the one-year statutory deadline. (F.F. 7-14).

DISCUSSION

Before the Board is the issue of whether Claimant is eligible to purchase service credit for activated military service. On March 18, 2019, Claimant submitted a *Purchase of Intervening or Activated Military Service* form to PSERS, wherein Claimant sought to purchase service credit for activated military service from September 2008 through September 2009. PSERS denied Claimant's request because the request was made more than one year after the statutory deadline. Claimant appealed, and PSERS' ERSC affirmed the denial on the same basis. Claimant now appeals to the Board.

It is well established that Claimant bears the burden of establishing the facts necessary to sustain his claim.⁴ *See, Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Further, it is well established that the PSERS is a creature of the Legislature and its members only have those rights created by the Retirement Code and none beyond. *See, e.g., Burris v. State Employees' Ret. Bd.*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992); *Hughes v. Public Sch. Employees' Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlth. 1995), *allocator denied*, 668 A.2d 1139 (Pa. 1996). While a member is entitled to a liberal construction of the Retirement Code, PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Bittenbender*, 622 A.2d at 405; *Forman v. Public Sch. Employees' Ret. Bd.*, 778 A.2d 778, 779 (Pa. Cmwlth. 2011). Equitable relief is not an available remedy under the Retirement Code. *Finnegan v. Public School Employees' Ret. Bd.*, 560 A.2d 848, 851 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa.

⁴ 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).

1991).

The Retirement Code provides the following regarding service credit and activated military service:

§ 8302. Credited school service

(b.1) Optional credit for leave of absence for activated military service.--

(1) Notwithstanding any other provision of this part to the contrary, a member who is granted leave of absence for activated military service shall be entitled to exercise any one of the following options in regard thereto:

(i) He may continue to make payments into the fund as provided for in this part during the period of his leave of absence for activated military service.

(ii) He may discontinue making payments into the fund during the period of his leave of absence for activated military service. In such event, the employer shall continue to make its contributions during this period. The employee's retirement rights shall be determined by completely disregarding the period of his leave of absence for activated military leave for all purposes.

(2) Any member desiring to exercise option (i) in paragraph (1) shall file in writing with the board such an election within 60 days after the commencement of his leave of absence for activated military service or within 60 days after the effective date of this subsection, whichever shall later occur. Any member who does not exercise option (i) in this manner will be deemed to have exercised option (ii).

(3) Any member who has exercised option (ii) in paragraph (1), but who, upon the expiration of his leave of absence for activated military service, returns to his employment and desires to receive the benefits of option (i), shall have the right to receive such benefits if he shall comply with the following requirements:

(i) He shall, within one year after he returns to his employment, give written notice to the board of his desire to receive the benefits of option (i).

(ii) He shall pay into the fund an amount equal to the total payments he would have made had he exercised option (i), plus statutory interest that would have been credited to his members' savings account, had such contributions been credited with statutory interest during the period the contributions would have been made and during all periods of subsequent school and State service up to the date of payment. Upon certification of the amount due, payment may be made in a lump sum within 90 days or, in the case of an active member, it may be amortized with statutory interest through salary deductions or by personal checks in amounts

agreed upon by the member and board.

(4) This subsection shall apply to leaves of absence for activated military service that commence on or before June 30, 2013.

24 Pa.C.S. 8302(emphasis added). Thus, if a member is on a non-contributing leave of absence for activated military service and desires to purchase service credit, he must notify PSERS within one year of his return to work.

The facts in this case are straightforward. Claimant was employed as a teacher by the Keystone Oaks School District from 1996 until 2020 and was a contributing PSERS member. Claimant also served in the Army National Guard from 2006 through 2014, and was deployed to Iraq in 2008. Consequently, claimant took a leave of absence for activated military service from September 2008 through September 2009. During this time, Claimant was a non-contributing member. Claimant returned to full-time employment as a teacher with District on September 30, 2009 where he remained employed until June 2020. On March 18, 2019, Claimant submitted a *Purchase of Intervening or Activated Military Service* form to PSERS, wherein Claimant sought to purchase service credit for activated military service from September 2008 through September 2009.

The Board is required to follow the plain, unambiguous language of the Retirement Code. *Kirsch v. Public School Employees' Retirement Board*, 985 A.2d 671, 676 (Pa. 2009). The Retirement Code expressly requires that a PSERS member who was on a non-contributing leave of absence for activated military service notify PSERS of the desire to purchase service credit within one year of his or her return to work. Here, claimant returned to work from his activated military service on September 30, 2009. Thus, he was statutorily required to make his request to purchase service credit no later than September 30, 2010. However, Claimant did not do so. Rather, Claimant did not submit the *Purchase of Intervening or Activated Military Service* form

to PSERS until March 19, 2019, or approximately 8 ½ years after the deadline.

Claimant acknowledges that he did not submit a request to purchase service credit within a year of his return to employment with the District. (N.T. 22). However, Claimant argues that “things going on for [him] personally in [his] life over that period of time might be considered mitigating circumstances.” (N.T. 23). Claimant cites to a history of alcohol abuse, his return from Iraq, and divorce as personal issues that he was dealing with around the time when he should have made the request to PSERS. (N.T. 23). With this assertion, Claimant is essentially requesting equitable relief; however, such relief is not an available remedy under the Retirement Code as PSERS may not waive the statutory deadline. *Finnegan v. Public School Employees' Ret. Bd.*, 560 A.2d 848, 850-51 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991).

The Retirement Code requires a request to purchase credits to leave of absence for activated military service to be made within one year of the members return to employment and there is no exception (equitable or otherwise) to this deadline. “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Here, the deadline is clear, and the Board must enforce the statutory deadline.

Based on all of the above, the facts of record support the conclusion that Claimant did not timely file a *Purchase of Intervening or Activated Military Service* form the following recommendation will be made to the Board:

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

IN RE:

ACCOUNT OF BRETT A. MUSSER
CLAIM OF BRETT A. MUSSER

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DOCKET NO. 2021-03

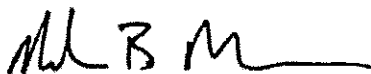
RECOMMENDATION

AND NOW, this 18th day of November 2022, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Hearing Officer for the Public School Employees' Retirement Board ("Board") recommends that the Board **DENY** Claimant's request to purchase service credit as untimely and **DISMISS** Claimant's appeal.

A party may file exceptions to this proposed opinion and recommendation in accordance with 1 Pa. Code §§ 35.211 and 35.212 (relating to procedure to except to proposed report; and content and form of briefs on exceptions). 22 Pa. Code § 201.11(d). **Exceptions shall be filed** with the below-noted Appeal Docket Administrator and must be received **no later than 30 days** after the mailing date of this proposed opinion and memorandum. *See*, 1 Pa. Code § 35.211 (participant desiring to appeal to the agency head shall, within 30 days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in brief on exceptions; brief opposing exceptions may be filed in response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the agency head). If exceptions are filed, the Board will rule upon the exceptions; the Board may adopt or reject, in whole or in part, or supplement the proposed opinion and recommendation or issue its own opinion and order,

whether or not exceptions to the proposed opinion and recommendation are filed by any party.
22 Pa. Code § 201.11(c).

A legal assistant for the Office of Hearing Examiners will distribute this proposed opinion and recommendation to the Appeal Docket Administrator and the parties.



Nolan B. Meeks
Hearing Officer

For Claimant:

Brett A. Musser

Redacted

For PSERS:

Cayla B. Jakubowitz, Esquire
Public School Employees' Retirement System
5 North 5th Street
Harrisburg, PA 17101

Docket Clerk:

Julie Vitale, Appeal Docket Administrator
Public School Employees' Retirement Board
5 N 5th Street
Harrisburg, PA 17101

Date of mailing:

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