

Mail Date: MAR 11 2008

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

IN RE: ACCOUNT OF FRANK J. STAVISH
DOCKET NO. 2007-04
CLAIM OF FRANK J. STAVISH

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Prehearing Orders; and the Proposed Adjudication and Order of the Hearing Examiner. We note that neither party filed Exceptions to the Proposed Adjudication and Order of the Hearing Examiner. The Board finds appropriate the History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation in the Proposed Adjudication. Accordingly, we hereby adopt the Hearing Examiner's Proposed Adjudication and Order as our own.

IT IS HEREBY ORDERED that the Board grants the Public School Employees' Retirement System's Motion to Dismiss and that the appeal of Claimant, Frank J. Stavish, is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: MAR 11 2008

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

COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System

In re :
Account of Frank J. Stavish : Docket No. 2007-04
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PROPOSED ADJUDICATION AND ORDER

Date of Hearing: November 14, 2007

Linda C. Barrett
Hearing Officer

I. HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Frank Stavish (Claimant) seeking multiple service credit from the Public School Employees' Retirement System (PSERS).

A hearing in this matter was held on November 14, 2007 in Harrisburg, Pennsylvania, before Hearing Examiner Linda C. Barrett, Esquire.

Claimant did not appear at the hearing. David W. Speck, Esquire, represented PSERS. After presenting evidence in connection with the notice of hearing provided to Claimant, PSERS made a motion to dismiss the appeal.

II. FINDINGS OF FACT

1. Claimant is Frank J. Stavish ("Stavish"). (Agency Record; N.T. *passim*).¹

2. Claimant requested a hearing on or about March 10, 2007. (Agency Record, 10 March 2007 facsimile from Frank Stavish to Jeffrey Clay, Appeal and Request for Hearing form).

3. Claimant resides at Redacted Redacted
Redacted . *Id.*

4. On May 25, 2007, PSERS sent a Notice of Hearing by certified first class mail to Claimant at his Redacted Redacted Redacted (N.T. pp. 8-9; PSERS 2).

5. The Notice of Hearing advised Stavish that a hearing had been

¹ N.T. refers to Notes of Testimony taken at the November 14, 2007 hearing.

scheduled for July 25, 2007 at 1 p.m. at PSERS, 5 North Fifth Street, Harrisburg, Pennsylvania 17101. (N.T. p. 9; PSERS 2).

6. The Notice of Hearing was published in the *Pennsylvania Bulletin* on May 12, 2007. (N.T. p. 10; PSERS 3).

7. Claimant received the May 25, 2007 Notice of Hearing and acknowledged receipt of the Notice of Hearing by executing the Certified Mail Receipt. (N.T. p. 10; PSERS 2, p. 3).

8. The Notice of Hearing provided instructions on how to request a continuance of the hearing. (N.T. p. 9; PSERS 2, p. 2).

9. The Notice of Hearing advised Stavish of his right to be represented by counsel. *Id.*

10. On or about July 2, 2007, Claimant made a written request by facsimile for a continuance of the July 25, 2007 hearing to subpoena postal records. (N.T. p. 11; PSERS 1 and 4, p. 2).

11. Claimant asked that the hearing be rescheduled to early fall. (PSERS 4, p. 2).

12. By order dated July 13, 2007, the hearing officer granted Claimant's request for a continuance. (Agency Record; PSERS 1).

13. The July 13, 2007 Order was mailed to Claimant at his Redacted Redacted " " Redacted. (Agency Record).

14. The July 13, 2007 Order was not returned. (Agency Record; PSERS 1).

15. The July 13, 2007 Order directed the parties to confer on suitable

dates for a hearing. (Agency Record).

16. On July 20, 2007, Mary Myers, PSERS legal assistant, contacted Claimant and offered several possible dates for hearing. (N.T. p. 12).

17. On July 25, 2007, Claimant spoke to Ms. Myers and selected November 14, 2007 as the date for his hearing. (N.T. pp. 12-13; 26; PSERS 1 and 5).

18. On August 1, 2007, PSERS mailed a Notice of Hearing by certified first class mail to Claimant at his Redacted Redacted Redacted Redacted (PSERS 6).

19. The Notice of Hearing was published in the *Pennsylvania Bulletin* on August 11, 2007. (N.T. p. 13; PSERS 7).

20. The Notice of Hearing advised Claimant that a hearing had been scheduled for November 14, 2007 at 1 p.m. at PSERS, 5 North Fifth Street, Harrisburg, Pennsylvania 17101. (N.T. p. 13; PSERS 6).

21. Claimant received the August 1, 2007 Notice of Hearing on August 3, 2007. (N.T. p. 15; PSERS 6, p. 3).

22. Claimant acknowledged receipt of the Notice of Hearing by signing the Certified Mail Receipt on August 3, 2007. *Id.*

23. The Notice of Hearing provided instructions on how to request a continuance of the hearing. (N.T. p. 14; PSERS 6, p. 2).

24. The Notice of Hearing advised Claimant of his right to be represented by counsel. (PSERS 6, p. 2).

25. On August 28, 2007, Claimant filed another application for a

subpoena. (PSERS 1).

26. On September 4, 2007, PSERS responded to the subpoena. (PSERS 1).

27. On September 10, 2007, the hearing officer issued a Pre-Hearing Order denying Claimant's request for subpoenas.² (PSERS 1 and 8; Agency Record).

28. On September 24, 2007, Claimant filed a letter referencing the September 10, 2007 Pre-Hearing Order and stating that his efforts to establish witness identities for subpoenas was continuing. (Agency Record).

29. On November 6, 2007, Mary Myers mailed a follow up Notice of Hearing to Claimant. (N.T. pp. 23, 25-26; PSERS 5).

30. On Saturday, November 10, 2007, Claimant left a voice mail message for Ms. Myers asserting that the November 6, 2007 letter was the first time he knew that his hearing was scheduled for November 14, 2007. (N.T. p. 18; PSERS 9).

31. Claimant also asserted that he had not received the August 1, 2007 letter. (N.T. p. 23; PSERS 9).

32. Claimant advised Ms. Myers that he had a medical appointment on November 14, 2007 that he could not cancel. (N.T. p. 23; PSERS 9).

33. Claimant did not provide any details regarding the nature of the

² It should be noted that the September 10, 2007 Pre-Hearing Order contained a typographical error indicating that the hearing was November 1, 2007 based on a September 4, 2007 PSERS letter referencing that date. (Agency Record). Claimant received that letter. (Agency Record, September 24, 2007 letter from Claimant to Hearing Officer). However, this typographical error is not material since there is no claim that Claimant appeared for a hearing on this date rather than November 14, 2007.

appointment and why it could not be rescheduled. (N.T. pp. 23-24; PSERS 9).

34. Claimant did not make his request for continuance in writing. (Agency Record; PSERS 9).

35. Claimant advised that he also wanted to reschedule his hearing so that he could assemble his evidence from the United States Post Office which was critical to the case he intended to present at his hearing. (N.T. p. 24; PSERS 9).

36. Claimant asked Ms. Myers to return the call. (N.T. p. 24).

37. Ms. Myers did not return the call. (N.T. p. 25).

38. Claimant also contacted Ms. Myers' supervisor who did speak to Claimant. (N.T. p. 25).

39. An administrative hearing was held on November 14, 2007. (N.T. *passim*).

40. Claimant did not attend the November 14, 2007 hearing. (N.T. *passim*).

III. CONCLUSIONS OF LAW

1. Claimant was provided with timely notice of the November 14, 2007 hearing. (Findings of Fact Nos. 15-24).

2. Claimant's assertion in the November 10, 2007 voice mail message is not credible. (Findings of Fact Nos. 15-35).

3. Claimant has not demonstrated just cause for a further continuance. (Findings of Fact Nos. 1-35).

4. Whenever a claimant fails to appear, either in person or through

counsel without good cause, for a scheduled hearing, the hearing examiner will issue a recommendation to dismiss the case, without considering the merits of the case. 22 Pa. Code § 201.4.

IV. DISCUSSION

PSERS' motion to dismiss Claimant's appeal is governed by the Board's regulation, specifically 22 Pa. Code § 201.4, which states in pertinent part, "[w]henever a claimant fails to appear, either in person or through counsel without good cause, for a scheduled hearing, the hearing examiner will issue a recommendation to dismiss the case, without considering the merits of the case."

The record clearly establishes that Claimant received notice of the November 14, 2007 hearing. His assertion by way of the voicemail message he left for Ms. Myers that he did not have notice of the November 14, 2007 hearing is not believable based on Claimant's August 3, 2007 acknowledgement showing his signature. (Findings of Fact Nos. 21-22). Claimant actually selected the date of November 14, 2007 and cannot now claim that he did not know the date of the hearing. (Findings of Fact No. 17).

The essential question to be resolved at this point is whether Claimant has established just cause for failure to appear at a hearing about which he was aware. The record does not establish just cause.

Claimant's voice mail offers several reasons why he cannot appear at his hearing. First, he was unaware of the hearing date. The record establishes that this statement is not true. Next, he states he has a conflict with the date because of a medical appointment. The voice mail message directed to Ms. Myers does

not explain why the appointment was critical or why he scheduled it on the date he previously selected for the hearing. Finally, Claimant states he is not prepared to go forward because he had not assembled the evidence from the Postal Service needed for his hearing. Claimant was provided with over four (4) months to obtain this evidence. He was also provided with explicit directions on two (2) occasions on how to subpoena the appropriate records. His voice mail does not indicate why additional time would be necessary to identify the appropriate records custodian from the Post Office.

While it is true that Claimant is a *pro se* litigant, he has demonstrated sufficient understanding of what he needed to do to file for a continuance and what steps he needed to take to obtain the documents he needed for his hearing.

Under the circumstances as they appear in the record, there is no good cause to deny PSERS' motion.

V. RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, I recommend that the attached Order granting PSERS' motion to dismiss with prejudice be issued.



LINDA C. BARRETT

Hearing Officer

December 6, 2007

COMMONWEALTH OF PENNSYLVANIA
Public School Employees' Retirement System

In re :
Account of Frank Stavish : Docket No. 2007-04
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ORDER

AND NOW, this ____ day of _____, 2007 based upon the foregoing Findings of Fact, Conclusions of Law and Discussion and the recommendation of the Hearing Officer dated December 6, 2007, the Board adopts the Proposed Report of the Hearing Officer and hereby **GRANTS** the Public School Employees Retirement System's Motion to Dismiss. The appeal of Claimant Frank Stavish is dismissed with prejudice.

BY ORDER:

For the Public School Employees'
Retirement Board