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

IN RE: ACCOUNT OF RONALD M. MIHALKO  
DOCKET NO. 2014-06  
CLAIM OF RONALD M. MIHALKO

**OPINION AND ORDER OF THE BOARD**

The Board has carefully and independently reviewed the entire record of this proceeding, including the Hearing Examiner's proposed Opinion and Recommendation, Claimant's Brief on Exceptions to the Opinion of the Hearing Examiner, and PSERS' Brief Opposing Exceptions.

Claimant excepts to the Hearing Examiner's proposed Opinion and Recommendation on the basis that: (1) PSERS is prohibited by the statute of limitations and the statute of repose in recouping the amount of overpayment; and (2) he should not be responsible for mistakes made by others. Section 8534 of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8534(b), mandates that all errors and mistakes made in the record must be corrected upon discovery. Consequently, Claimant's argument that PSERS is subject to statutes of limitations or repose must be rejected. Moreover, Section 8534(b) states that errors must be corrected regardless of the intentional or unintentional nature of the error. Claimant's only relief from such correction is under the waiver provision of 24 Pa.C.S. § 8303.1. As discussed by the Hearing Examiner, Claimant does not meet the requirements for a waiver and specifically agreed in the premium assistance election forms to return all premium assistance payments made to him in error, and authorized PSERS to withhold payments from his monthly retirement

benefit in absence of his lump sum payment. Accordingly, Claimant's exceptions must be denied.

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation attached hereto, and we hereby adopt them as our own. Accordingly:

IT IS HEREBY ORDERED that Claimant's request that PSERS waive the premium assistance overpayment debt accumulated during the time periods when he had no out-of-pocket expenses is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: December 8, 2015

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

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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EXECUTIVE OFFICE

In Re: :  
Account of Ronald M. Mihalko :  
Claim of Ronald M. Mihalko :           Docket No. 2014-06  
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OPINION AND RECOMMENDATION

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Dates of Hearing:   November 12, 2014 and April 16, 2015  
Hearing Examiner: Jackie Wiest Lutz, Esquire  
For the Claimant:  Ronald M. Mihalko, *pro se*  
For PSERS:         Jennifer Mills, Esquire

## HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Ronald M. Mihalko ("Claimant") from a decision of the Executive Staff Review Committee ("Committee") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request that PSERS waive his premium assistance overpayment debt during time periods when he had no out-of-pocket expenses.

Claimant was notified of the Committee's decision by letter dated April 4, 2014. Claimant was notified that if he wished to appeal the Committee's decision to the Board he must file an appeal and request a formal administrative hearing within 30 days of the date of the letter.

Claimant filed a timely request for an administrative hearing on April 28, 2014. On May 19, 2014, Jennifer A. Mills, Assistant Counsel, filed an Answer on behalf of PSERS.

On August 21, 2014, Secretary Jeffrey B. Clay appointed Jackie Wiest Lutz, Esquire to act as hearing examiner for Claimant's administrative hearing and to file an applicable report, in the nature of an opinion and recommendation, with Secretary Clay, in accordance with 1 Pa. Code §35.202. On the same date, a hearing notice was issued by PSERS, which scheduled the administrative hearing on Claimant's appeal for November 12, 2014.

On November 12, 2014, the hearing was held as scheduled at 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing, *pro se*. Jennifer Mills, Esquire, represented PSERS.

Following the close of testimony, Claimant made a closing statement for the record. PSERS requested an opportunity to file a post-hearing brief. Claimant reserved his right to file a reply brief.

Upon receipt of the hearing transcript, the hearing examiner notified the parties of the briefing schedule. Pursuant to the briefing schedule, PSERS was directed to file its responsive brief

on or before January 2, 2015; and, Claimant was afforded the right to file a reply brief no later than January 17, 2015.

By letter dated December 11, 2014, Claimant requested a modification of the briefing schedule to allow him additional time to file a reply to PSERS' brief owing to anticipated mail delays.

On December 17, 2014, the Hearing Officer issued an *Order Granting Extension of Time to File Reply Brief*, which granted the Claimant an extension of time until January 31, 2015 to file his reply brief.

PSERS' brief was timely filed on December 23, 2014. Claimant filed his reply to PSERS' brief by letter dated January 9, 2015, which was received for filing on January 13, 2015.

On March 3, 2015, an *Order Re-Opening Record* was issued by the Hearing Officer pursuant to 1 Pa. Code §35.232 to receive evidence to clarify, *inter alia*, the exact premium assistance overpayment that is alleged to be due by Claimant; the specific information and/or calculations upon which PSERS based the premium assistance overpayment; the *McCleary, Swanson & Woods* ruling and what effect, if any, that ruling has or had in the calculation of Claimant's premium assistance overpayment; and, the position held by Joanne Lichtenwalner of the Palmerton Area School District and how she is familiar with Claimant's premium assistance account.

On March 5, 2015, a hearing notice was issued by PSERS, which scheduled the second administrative hearing on Claimant's appeal for April 15, 2015.

By letter dated April 8, 2015, PSERS requested that the hearing be re-scheduled to April 16, 2015 owing to a scheduling conflict of Ms. Lichtenwalner, and that Ms. Lichtenwalner and Lisa Zurn from the Business Office at Carbon Career & Technical Institute be permitted to testify telephonically. Claimant opposed this request via an e-mail dated April 8, 2015 because he does not

have a landline and had made previous arrangements to have a landline for the April 15, 2015 hearing.

On April 9, 2015, upon agreement of the parties, the Hearing Officer issued an *Order Re-Scheduling Hearing* for April 16, 2015, commencing at 1:00 p.m., with the proviso that Claimant may testify using a landline phone or his cell phone, and that Ms. Lichtenwalner and Ms. Zurn may both testify telephonically.

The re-scheduled hearing proceeded on April 16, 2015 as scheduled. Claimant participated telephonically during this re-scheduled hearing. Jennifer Mills, Esquire, represented PSERS.

At the close of evidence on April 16, 2015, the parties were granted the opportunity to supplement their post-hearing briefs. A briefing schedule was issued by the Hearing Officer on May 1, 2015, and modified on July 10, 2015, to grant Claimant an extension of time until July 27, 2015 to file his supplemental brief. Supplemental post-hearing briefs were timely filed by both parties.

The matter is now before the Board for final disposition.

## FINDINGS OF FACT

1. In 1991, the Legislature passed Act 23 of 1991, which provides health insurance premium assistance to eligible retirees of PSERS for their basic health insurance coverage. (PSERS' Exhibit 9)
2. On or about July 1, 1992, PSERS implemented a Premium Assistance Program to help eligible annuitants pay for health insurance by providing eligible annuitants with supplemental monthly payments to be used toward the purchase of basic health insurance. (N.T.<sup>1</sup> 9, PSERS' Exhibits 2, 3, 6 and 7 – Official Notice,<sup>2</sup> 24 Pa. C.S. §8509)
3. In order to be eligible for premium assistance, annuitants must meet age and service requirements; participate in either the PSERS' Health Options Program or a school sponsored group plan; and, have an actual out-of-pocket expense. (N.T. 9, 170)

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<sup>1</sup> "N.T." refers to "notes of testimony" from the November 12, 2014 and April 16, 2015 administrative hearings.

<sup>2</sup> 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 §31.1 *et. seq.*, at §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.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the 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.

4. The requirement that annuitants have an out-of-pocket expense is an IRS requirement based upon the principle that a tax-free reimbursement cannot be used to pay a nontaxable expense. (N.T. 9-10, 170)
5. Premium Assistance Information Sheets and Election Forms are available through PSERS to eligible annuitants who wish to apply for premium assistance benefits. (N.T. 15-16; PSERS' Exhibits 2, 3 and 6)
6. The Premium Assistance Information Sheet notifies annuitants that if they are receiving a tax free benefit from another source, they may not be eligible to receive premium assistance. (PSERS' Exhibit 3)
7. When PSERS receives a Premium Assistance Election Form from an annuitant, PSERS accepts at face value the annuitant's representation that they have incurred an out-of-pocket monthly premium expense. (N.T. 166-172)
8. Once annually, beginning in January, PSERS conducts an audit by contacting school districts who have members receiving premium assistance benefits to confirm that the member had an out-of-pocket expense during the previous 12 months. (N.T. 8, 171-172)
9. If the school district verifies that the member had an out-of-pocket expense during the previous 12 months, no further documentation is required. (N.T. 171-172)
10. If the school district provides PSERS with evidence that the out-of-pocket monthly premium expense claimed by the member was not taxed, staff is directed to stop the premium assistance reimbursement and to request repayment of any payments made that were not taxable events for the individual. (N.T. 170-171)
11. Based on information received during annual audits, if PSERS receives information from the School District that differs from that initially reported, it is duty-bound to make adjustments to the member's account. (N.T. 155)



12. Claimant retired from the Palmerton Area School District ("School District") in June of 1999. (N.T. 55, 69, 71; Claimant's Exhibit D)

13. When Claimant retired from the School District, he delayed his health care benefits for 5 years, i.e., from June 30, 1999 through July 1, 2004, and was not on any health care coverage with the School District until July 2004. (N.T. 69-71, 115-116; Claimant's Exhibit D)

14. When Claimant retired, the School District had agreements with teachers, support staff and administrators that if they had 100 accumulated sick days, they would receive one year of health care benefits at no charge in lieu of payment for accumulated sick days; if they had 150 accumulated sick days, they would receive two years of health care benefits at no charge in lieu of payment for accumulated sick days; and, if they had 200 or more accumulated sick days, they would receive three years of health care benefits at no charge in lieu of payment for accumulated sick days. (N.T. 118-119; PSERS' Exhibit 10)

15. As part of Claimant's retirement package, the Board of Directors of the School District approved Claimant's request for medical (including prescription), dental and life insurance coverage after his retirement, and notified Claimant by letter dated June 29, 1999, as follows:

In accordance with the agreement, your current benefits will cease on June 30, 1999. Your retirement benefits will begin on July 1, 2004, and will be in effect for thirteen (13) years. The benefits for you and your eligible family will be medical (including prescription), dental, and life insurance that are provided by the District during that time. You will receive three (3) years of these benefits at no cost to you, and for the remaining ten (10) years of coverage you and your family must pay any additional costs above the 1998-99 annual premium (see attached) for the particular coverage you desire to maintain. If you choose to cancel a particular coverage, you will not be permitted to rejoin the District's plan.

(N.T. 59; Claimant's Exhibit D)

16. Claimant's healthcare package was based upon an amount credited to Claimant by the School District for unused sick days available at the effective date of Claimant's retirement. (N.T. 55-56)
17. The School District maintained an account in which an amount equal to the cash value of Claimant's unused sick leave was held to pay toward the continuation of medical benefits for Claimant. (N.T. 64, 74-75)
18. Claimant did not pay taxes on the cash value of his unused sick leave that was used by the School District to pay toward the continuation of medical benefits for him. (N.T. 75)
19. Between July 1, 2003 and July 1, 2004, Claimant was covered on his wife's insurance plan through Carbon County Area Vo-Tech, in which his wife had an \$18.50 per month pre-tax deduction for both of them as a family. (N.T. 72-73, 103-105, 112)
20. Consistent with Claimant's agreement with the School District upon his retirement, from July 1, 2004 through June 30, 2007 Claimant did not pay any premiums for health insurance. (N.T. 31, 70-77, 117-118; Claimant's Exhibit D; PSERS' Exhibits 9 and 10, 11 and 13)
21. On January 22, 2004, Claimant completed a *Premium Assistance Election Form*, which PSERS received for filing on January 27, 2004. (N.T. 15; PSERS' Exhibit 2)
22. The *Premium Assistance Election Form* that Claimant completed contained the following pertinent information:

Premium assistance is not payable for premium expenses for optional dental, vision or prescription drug plans or for premium expenses to cover your spouse or dependents.

PSERS is required to verify that you have an actual out-of-pocket expense from an approved plan. Any premium assistance benefit paid for a period for which you did not have an actual out-of-pocket expense must be returned to PSERS. PSERS reserves the right to withhold payments from your monthly retirement benefit to collect Premium Assistance benefits paid to you in error.

(N.T. 19; PSERS' Exhibit 2)

23. By signing the *Premium Assistance Election Form* Claimant agreed to return all premium assistance payments made to him in error and authorized PSERS to withhold payments from his monthly retirement benefit in absence of his lump sum payment. (PSERS' Exhibit 2)

24. When Claimant completed his *Premium Assistance Election Form*, Claimant reported that he was covered under his wife's insurance through the Carbon County Area Vo-Tech, with an effective date of coverage of 7/1/2003, and a monthly premium of \$18.50. (N.T. 15, 17-18; PSERS' Exhibit 2)

25. Claimant's wife actually paid this premium for Claimant's medical insurance through pre-tax dollars from her gross pay. (N.T. 12, 22, 73)

26. Upon PSERS' receipt and review of Claimant's *Premium Assistance Election Form*, PSERS accepted at face value Claimant's representation that he incurred an out-of-pocket monthly premium expense and granted Claimant's request for premium assistance for \$18.50 per month. (N.T. 19)

27. When PSERS granted Claimant premium assistance for \$18.50/month, PSERS was not aware that the premium amount was a pre-tax deduction taken from Claimant's wife's pay with the Carbon County Vo-Tech School. (N.T. 12, 22)

28. PSERS began adding a premium assistance benefit to Claimant's retirement benefit on February 13, 2004, with benefits retroactive to June 2003. (PSERS' Exhibits 1 and 14)

29. Rather than providing premium assistance to Claimant in the amount of \$18.50/month as requested by Claimant, owing to a processing error of a new employee, PSERS mistakenly provided premium assistance to Claimant in the amount of \$100/month for the period covering June 2003 through February 2004, in the total amount of \$900.00. (N.T. 11, 18, 133-134; PSERS' Exhibits 4 and 15)

30. Anytime there is an alteration in the monthly amount of premium assistance payments, a check change letter is automatically processed by PSERS. (N.T. 135)

31. In March 2004, PSERS sent a check change letter to Claimant to notify Claimant that effective March 31, 2004, he would begin receiving \$18.50 in monthly premium assistance payments as opposed to \$100.00. (N.T. 136; PSERS' Exhibit 16)

32. From March 2004 through August 2005, PSERS reduced Claimant's amount of premium assistance to \$18.50/month, but did not collect the \$733.50 overpaid ( $\$900.00 - \$166.50$ ) ( $\$18.50 \times 9$ ) from June 2003 through February 2004. (N.T. 11, 136)

33. At all relevant and material times, Valerie Sponseller ("Sponseller") was employed by PSERS as an Administrative Officer 1 within PSERS' Health Insurance Division. (N.T. 7-8)

34. Sponseller is responsible for administration of the premium assistance program, and for conducting annual audits beginning in January of each year to ensure that premium assistance payments are made in accordance with Commonwealth statutes. (N.T. 8)

35. As part of the annual audit, Sponseller's division contacts school employers who have members receiving premium assistance benefits to request confirmation that each member continues to meet the eligibility criteria to receive premium assistance. (N.T. 8)

36. Following an audit in 2005, Sponseller's division discovered that Claimant received an overpayment of \$259.00 in premium assistance benefits from July 2004 through August 2005 ( $14 \text{ months} \times \$18.50 = \$259.00$ ) for expenses that were incurred in other than an approved plan. (N.T. 21-22)

37. By letter dated June 20, 2005, PSERS notified Claimant of the \$259.00 overpayment and of Claimant's responsibility to return the overpayment amount to PSERS. (N.T. 21; PSERS' Exhibit 5)

38. PSERS collected Claimant's \$259.00 overpayment by withholding \$100.00 from Claimant's monthly retirement benefits in September and October 2005, and by withholding \$59.00 from Claimant's monthly retirement benefits in November 2005. (N.T. 13; PSERS' Exhibit 1)

39. In August 2005 it was also determined through PSERS' annual audit that Claimant had an overpayment of \$733.50 for the time period between June 2003 through February of 2004, representing the difference between the \$100.00 monthly premium assistance actually paid to Claimant and the \$18.50 that Claimant claimed for this time period. (N.T. 136)

40. In September 2005, PSERS sent a check change letter to Claimant to notify Claimant that as of September 2005, PSERS was going to begin collecting \$100.00/month out of his pension check to pay his overpayment debt. (N.T. 138; PSERS' Exhibit 18)

41. On June 22, 2007, Claimant completed a *Premium Assistance Election Form*, which PSERS received for filing on June 27, 2007, listing the Palmerton Area School District as the School Employer, an effective date of coverage of 7/01/07, and a monthly premium of \$389.11. (N.T. 23-24; PSERS' Exhibit 6)

42. At the time PSERS processed Claimant's June 22, 2007 *Premium Assistance Election Form*, the monthly premium of \$389.11 was certified by the School District. (N.T. 162-163)

43. PSERS started Claimant's \$100/month premium assistance payment in September 2007, with a retroactive payment of \$200 to cover him for *June* and July 2007. (N.T. 143, 162-163; PSERS' Exhibits 15 and 22)

44. On October 22, 2007, PSERS received a *Premium Assistance Election Form*, from Claimant, listing the Palmerton Area School District as the School Employer, an effective date of coverage of 7/01/2004, and a monthly premium of \$389.11; Claimant listed on this form that the "amount forfeited [by him] to obtain health insurance coverage was \$125, 027." (N.T. 23-24; PSERS' Exhibit 7)

45. The October 22, 2007 *Premium Assistance Election Form* was accompanied by a letter from Claimant in which Claimant reported:

Previously, I was denied this benefit by the Business Administrator saying that taxes were not paid by my sick days accumulated (371 days @ \$337/day). In accordance with the *McCleary, Swanson & Wood* case, I am requesting my monies to be reversed by premium assistance for the period of July 1, 2004 thru 7/1/2007. I was recently added to premium assistance beginning 7/1/2007 because I now reimburse the district monthly through check payment.

If you have any questions, please feel free to contact me. . . .

Sincerely,  
/s/  
Ronald M. Mihalko

(N.T. 23-24; PSERS' Exhibit 7)

46. Under the *McCleary, Swanson and Woods* ruling, if a participating eligible annuitant has the choice upon retirement to take an early retirement incentive payment in cash or to apply it to the purchase of medical insurance, and chooses to apply the cash payment to the purchase of medical insurance, the arrangement is the economic equivalent of the eligible annuitant prepaying health insurance premiums through taxable income equal to the amount of cash he chose to give up. As such, the amount applied to purchase medical insurance constitutes a medical expense under section 213 of the Internal Revenue Code, and the annuitant is entitled to receive premium assistance payments as reimbursement for health insurance premiums that the annuitant prepaid pursuant to the "give-up" arrangement. (N.T. 24; PSERS' Exhibits 31 and 32)

47. The *McCleary, Swanson and Woods* ruling covered the period July 2004 – July 2007. (N.T. 26, 141; PSERS' Exhibit 15)

48. In October 2007, PSERS sent a check change letter to Claimant to notify Claimant that as of October 31, 2007, he would begin receiving \$100.00 in monthly premium assistance payments. (N.T. 143; PSERS' Exhibit 23)

49. In December 2007, PSERS paid Claimant a regular monthly payment of \$100.00, and a \$3,600.00 retroactive payment for the period July 1, 2004 through July 1, 2007 based on the *McCleary, Swanson and Woods* ruling. (N.T. 25, 141, 162-163; PSERS' Exhibits 1 and 15)

50. PSERS sent a check change letter to Claimant in December 2007 to notify Claimant that his December 31, 2007 premium assistance benefit amount would be \$3,700.00, which was the \$3,600 retroactive payment based on the *McCleary, Swanson and Woods* ruling plus his regular December payment. (N.T. 144; PSERS' Exhibit 24)

51. PSERS sent a check change letter to Claimant in January 2008 to notify Claimant that as of January 31, 2008, his premium assistance payment will revert back to \$100.00. (N.T. 144; PSERS' Exhibit 25)

52. Between January 2008 and April 2012, Claimant received \$100.00 in premium assistance payments each month. (N.T. 144-145; PSERS' Exhibit 15)

53. In April 2012, PSERS learned from the School District that Claimant's out-of-pocket expense should have been paid at \$11.22 per month, effective June 2009, as opposed to \$100.00/month. (N.T. 145; PSERS' Exhibits 10 and 15)

54. In June 2010, Claimant's out-of-pocket expense increased to \$22.41. (N.T. 145; PSERS' Exhibit 10)

55. PSERS sent a check change letter to Claimant in May 2012 to notify Claimant that as of May 31, 2012 his premium assistance payment will be reduced to \$22.41 (N.T. 146; PSERS' Exhibit 27)

56. Subsequently, the School District reported to PSERS that Claimant's monthly out-of-pocket for basic health incurrence had increased from \$22.41 to \$56.55 per month. (N.T. 146)

57. PSERS sent a check change letter to Claimant in June 2012 to notify Claimant that as of June 30, 2012, his premium assistance payment will increase to \$56.66. (N.T. 144; PSERS' Exhibit 25)

58. In October 2012, PSERS began to recoup the premium assistance overpayments made to Claimant. (N.T. 147)

59. PSERS sent a check change letter to Claimant in October 2012 to notify Claimant that as of October 31, 2012 his premium assistance payment of \$56.66 will be applied toward his debt. (N.T. 147-148; PSERS' Exhibit 28)

60. In 2013, PSERS learned that Claimant's out-of-pocket expense of \$56.66 per month should have been paid at \$92.97, which resulted in a retroactive payment of \$145.24, which PSERS applied towards Claimant's premium assistance overpayment. (N.T. 147)

61. Sponseller prepared a spreadsheet (Spreadsheet No. 1) of Claimant's account to show all premium assistance payments that had been made by PSERS to Claimant between June 2003 and October 2013. (N.T. 11; PSERS' Exhibit 1)

62. Spreadsheet No. 1 shows that between June 2003 and October 2013, the amount of premium assistance payments that were made by PSERS to Claimant totaled \$11,754.94. (PSERS' Exhibit 1)

63. Spreadsheet No. 1 shows that between June 2003 and October 2013, the amount of premium assistance payments that Claimant was entitled to receive was only \$5,417.25. (N.T. 149; PSERS' Exhibit 1)

64. Spreadsheet No. 1 shows that as of October 31, 2013, Claimant's overpayment debt totaled \$5,160.56. (PSERS' Exhibit 1)

65. By letter dated August 16, 2012, PSERS sent notification to Claimant, in pertinent part, as follows:

. . . According to the information provided by your former school employer, your monthly Premium Assistance benefit exceeded your out-of-pocket premium expenses from an approved plan. As a consequence, PSERS has suspended Premium Assistance from your monthly retirement benefit until such time as you return all Premium Assistance payments made to you in excess of your actual out-of-



pocket expense and establish or continue to have an out-of-pocket premium expense from an approved plan.

Considering the Premium Assistance payments added to your monthly retirement benefit from the date you terminated your coverage or your Premium Assistance benefit exceeded your out-of-pocket expense with an approved plan, the amount owed is \$5,149.93. **We are not requiring that you pay the debt in a lump sum.** Instead, PSERS will accept repayments over time deducted from your monthly retirement benefit. Beginning with your October 31, 2012 retirement benefit, PSERS will deduct \$100.00 each month until your Premium Assistance debt is repaid. No interest will be charged on the outstanding balance. . . .

(N.T. 32-33; PSERS' Exhibit 11)

66. By letter dated April 11, 2013, Claimant appealed PSERS' determination to the Executive Staff Review Committee ("ESRC"). (N.T. 33; PSERS' Exhibit 12)

67. After Claimant appealed PSERS' determination to the ESRC, Sponseller confirmed with the Palmerton Area School District that Claimant's premiums for health care coverage from July 1, 2004 through June 30, 2007 were paid from non-taxed monies. (N.T. 37; PSERS' Exhibit 13)

68. During its review of Claimant's account following receipt of Claimant's appeal, PSERS' discovered an additional \$752.00 of overpayment that PSERS is required to collect from Claimant for the period between June 2003 through February 2004, and June 2004, when Claimant received premium assistance for \$18.50/month for medical benefits provided through pre-tax dollars from his wife's gross pay. (N.T. 52-53)

69. By correspondence dated April 4, 2014, PSERS' Executive Director notified Claimant that the ESRC denied Claimant's request to waive Claimant's premium assistance overpayment debt accumulated during the periods that he had no out-of-pocket expense. (N.T. 38; PSERS' Exhibit 14)

70. Claimant was notified of his right to appeal the Committee's decision to the Board. (PSERS' Exhibit 14)

71. Claimant filed a timely appeal; administrative hearings were held on November 12, 2014 and April 16, 2015. (Transcripts, *passim*)
72. Claimant was present for his November 12, 2014 hearing; participated telephonically during the April 16, 2015 hearing; and had an opportunity to file post-hearing briefs following each hearing. (Transcripts, *passim*; Official notice – PSERS docket)
73. In preparation for the April 16, 2015 administrative hearing, Sponseller prepared an updated spreadsheet (Spreadsheet No. 2) after reviewing all of Claimant’s payroll records from June 2003 through April 2015. (PSERS’ Exhibit 15)
74. Between June 2003 and April 2015, the amount of premium assistance payments that were actually received from PSERS by Claimant totaled \$12,690.52. (N.T. 149; PSERS’ Exhibit 15)
75. Between June 2003 and April 2015, the amount of premium assistance payments that Claimant was entitled to receive was \$6,352.83. (N.T. 149; PSERS’ Exhibit 15)
76. Between June 2003 and April 2015, Claimant received \$6337.69 in premium assistance payments that Claimant was not entitled to receive. (N.T. 149; PSERS’ Exhibit 15)
77. As of April 16, 2015, Claimant paid \$2,783.51 of his overpayment debt, with a current balance of \$3,554.18. (N.T. 149; PSERS’ Exhibit 15)

## CONCLUSIONS OF LAW

1. Claimant was afforded due process. (Findings of Fact Nos. 65-72; Transcripts, *passim*)
2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
3. A preponderance of the evidence is the correct burden of proof to be applied in this administrative action. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 529 Pa. 654, 602 A.2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A.2d 678 (Pa. Cmwlth. 2005).
4. 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). The Claimant therefore has the burden of proving the facts upon which he relies with evidence that is substantial and legally credible, not by mere "suspicion" or by only a "scintilla" of evidence. *Lansberry*, 578 A.2d at 602.
5. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code ("Retirement Code"). 24 Pa.C.S. §§8101 *et. seq.*
6. The authority of the Board to grant or deny Claimant's request is limited to the provisions of the Retirement Code; the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

7. Claimant is a “participating eligible annuitant” within the meaning of the health insurance premium assistance program of the Retirement Code. 24 Pa. C.S. §8509(b).

8. Under section 8509(b) of the Retirement Code, premium assistance is available only for actual premium payments made by annuitants for health care. 24 Pa. C.S. §8509(b).

9. Under section 401(a) of the Internal Revenue Code (“IRC”), a trust created or organized in the United States and forming part of a pension or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust. 26 U.S.C. §401.

10. PSERS is a qualified trust under section 401(a) of the IRC.

11. Pursuant to section 401(h) of the IRC, PSERS can operate a pension or annuity plan to reimburse eligible annuitants for medical care expenses they have paid with taxable income or after tax funds. 26 USCS §401(h).

12. Under section 213 of the IRC, medical care is defined to include amounts paid for insurance. 26 USCS §213(d)(1)(D).

13. Claimant’s premium payments for medical care insurance from June 2003 through February 2004 were paid through pre-taxed deductions from his wife’s gross pay. (Findings of Fact Nos. 19, 24-25, 39)

14. The premium assistance payments paid by PSERS to Claimant from June 2003 through February 2004 were paid in error. (Findings of Fact Nos. 1-11, 19, 21-29, 39, 149; PSERS’ Exhibit 15)

15. Claimant made no out-of-pocket premium payments for medical care insurance from July 1, 2004 through June 30, 2007. (Findings of Fact Nos. 12-18)

16. The premium assistance payments paid by PSERS to Claimant from July 2004 through June 30, 2007 were paid in error. (Findings of Fact Nos. 3-18, 149; PSERS’ Exhibit 15)

17. The \$3600.00 retroactive premium assistance payment that was paid by PSERS to Claimant in December 2007 for period July 1, 2004 through July 1, 2007 based on the *McCleary, Swanson and Wood* ruling was paid in error. (Findings of Fact Nos. 44-49, 149; PSERS' Exhibit 15)

18. Claimant was not entitled to receive \$6,337.69 in premium assistance benefits during the period of June 2003 and April 2015. (Findings of Fact Nos. 1 – 77)

19. Whenever any change or mistake in records results in any member receiving from the system more or less than he would have been entitled to receive had the records been correct, then regardless of the intentional or unintentional nature of the error, and upon the discovery of such error, the board shall correct the error, and so far as practicable shall adjust the payments which may be made for and to such person in such a manner that the actuarial equivalent of the benefit to which the member was correctly entitled shall be paid. 24 Pa. C.S. §8534(b).

20. Claimant has failed in his burden to show that he is entitled to be exonerated from the balance of the amount owed by him for premium assistance payments erroneously paid to him and to be credited with the amount which has been deducted from his monthly retirement check. (Findings of Fact Nos. 1-77)

## DISCUSSION

Claimant filed this appeal to challenge the Executive Staff Review Committee's denial of his request that PSERS waive the premium assistance overpayment debt accumulated on his account during time periods when he had no out-of-pocket expense.

Under section 8534(b) of the Retirement Code,

(b) Should any change or mistake in records result in any member . . . receiving from the system more or less than he would have been entitled to receive had the records been correct, then regardless of the intentional or unintentional nature of the error and upon the discovery of such error, the board shall correct the error and so far as practicable shall adjust the payments which may be made for and to such person in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

24 Pa. C. S. §8534(b).

The circumstances under which the Board may waive an adjustment are set forth in section 8303.1 of the Retirement Code. Under section 8303.1, the Board may waive an adjustment if, in the opinion of the Board, the following conditions are met:

- (1) The adjustment or portion of the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant;
- (2) The adjustment was not the result of erroneous information supplied by the member, beneficiary or survivor annuitant;
- (3) The member had no knowledge or notice of the error before adjustment was made and the member, beneficiary, or survivor annuitant took action with respect to their benefits based on erroneous information provided by the system; *and*
- (4) The member, beneficiary, or survivor annuitant had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made.

24 Pa. C.S. §8303.1.

The adjustments to Claimant's account do not qualify for a waiver.

**(A) PREMIUM ASSISTANCE PROGRAM**

The premium assistance program was established by the legislature in 1991 through Act 23 of 1991<sup>1</sup> (Act 23). Act 23 added section 8509 to the Retirement Code to establish a health insurance premium assistance program to provide a supplemental monthly payment to help eligible annuitants purchase basic health insurance.<sup>2</sup> Section 8509 provides, in pertinent part, as follows:

§8509. Health insurance premium assistance program.

(b) Amount of premium assistance. - -

Participating eligible annuitants<sup>3</sup> shall receive premium assistance payments as provided in paragraphs (1) and (2). Such payments shall be made by the board to the participating eligible annuitants for their payment directly to their approved insurance carriers.

Such payments may also be paid by the board. . . directly to the participating eligible annuitants' approved insurance carriers. The board shall have the right to verify the application and receipt of the payments by the participating eligible annuitants and their approved insurance carriers. The premium payments are as follows:

(1) Effective July 1, 1992, \$55 per month or the actual monthly premium, whichever is less.

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<sup>1</sup> Act of August 5, 1991, P.L. 183, No. 23.

<sup>2</sup> Under section 401(a) of the Internal Revenue Code (IRC), a trust created or organized in the United States and forming part of a pension or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust. 26 U.S.C. §401. PSERS is a qualified plan and can operate a pension or annuity plan to reimburse eligible annuitants for medical care expenses, including amounts paid for insurance, that have been paid with taxable income or after tax funds. 26 U.S.C. §401(h).

<sup>3</sup> The phrase "participating eligible annuitant" is defined in section 8102 of the Retirement Code as follows:

§8102. Definitions

The following words and phrases when used in this part shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Participating eligible annuitants." All eligible annuitants who are enrolled or elect to enroll in a health insurance program approved by the Public School Employees' Retirement Board.

- (2) Effective January 1, 2002, \$100 per month or the actual monthly premium, whichever is less.

**(B) CLAIMANTS PREMIUM ASSISTANCE PAYMENTS**

Claimant retired from the Palmerton Area School District in 1999. When Claimant retired in 1999, he was offered a retirement package comparable to what was being offered by various other school districts at the time, which offered incentives for unused sick days in payment for health care. The retirement package that Claimant received was communicated to Claimant by the School Board Secretary by letter dated June 29, 1999, which provided, as follows:

In accordance with the agreement, your current benefits will cease on June 30, 1999. Your retirement benefits will begin on July 1, 2004, and will be in effect for thirteen (13) years. The benefits for you and your eligible family will be medical (including prescription), dental, and life insurance that are provided by the District during that time. You will receive three (3) years of these benefits at no cost to you, and for the remaining ten (10) years of coverage you and your family must pay any additional costs above the 1998-99 annual premium (see attached) for the particular coverage you desire to maintain. If you choose to cancel a particular coverage, you will not be permitted to rejoin the District's plan.

(Claimant's Exhibit D)

Under Claimant's agreement with the School District, Claimant delayed all health benefits until 2004. The health care package that he received from the School District was based upon an amount credited to Claimant for unused sick days available at the effective date of his retirement. However, Claimant did not pay taxes on the cash value of his unused sick leave that was used by the School District to pay



toward the continuation of his medical benefits. Claimant concedes: "No lump sum was offered; therefore, no taxes had to be paid." (Letter brief of Claimant, p. 2)

Claimant first filed a *Premium Assistance Election Form* with PSERS in January 2004. Based upon the information provided by Claimant and the School District, PSERS began adding a premium assistance benefit to Claimant's monthly retirement benefit in February 13, 2004, retroactive to June 2003. Unknown to PSERS, Claimant had no out-of-pocket expense for medical insurance premiums because Claimant's wife actually paid this premium for Claimant's medical insurance through pre-tax dollars from her gross pay.

Following annual audits of Claimant's premium assistance account that were conducted by PSERS staff beginning in 2005, PSERS made several adjustments to Claimant's account owing to errors that were discovered, which resulted in overpayments to Claimant's account. Subsequently, in 2007 and 2011 PSERS received additional *Premium Assistance Election Forms* from Claimant requesting a continuation of his premium assistance benefits. The *Premium Assistance Election Forms* completed by Claimant contained the following forewarning:

PSERS is required to verify that you have an actual out-of-pocket expense from an approved plan. Any Premium Assistance benefit paid for a period for which you did not have an actual out-of-pocket expense must be returned to PSERS. PSERS reserves the right to withhold Premium Assistance benefits paid to you in error. (PSERS' Exhibits 2 and 7)

Claimant's October 22, 2007 *Premium Assistance Election Form* was accompanied by a letter from Claimant in which Claimant reported:

Previously, I was denied this benefit by the Business Administrator saying that taxes were not paid by my sick days accumulated (371 days @ \$337/day). In accordance with the *McCleary, Swanson & Wood* case, I am requesting my monies to be reversed by premium assistance for the period of July 1, 2004 thru 7/1/2007. I was recently added to premium assistance beginning 7/1/2007 because I now reimburse the district monthly through check payment.

(PSERS' Exhibit 7)

Under *McCleary, Swanson and Wood* (Docket Nos. 1996-17, 1996-18 and 1996-19), it was determined that when a participating eligible annuitant has the choice, upon retirement, to take an early retirement incentive payment in cash, or to apply it to the purchase of medical insurance, and the eligible annuitant chooses the latter option, the arrangement is the economic equivalent of the eligible annuitant prepaying health insurance premiums through taxable income equal in amount to the cash he chose to give up. As such, the cash payment amount applied to purchase medical insurance constitutes a medical expense under section 213 of the Internal Revenue Code, and the annuitant is entitled to receive premium assistance payments as reimbursement for health insurance premiums that the annuitant prepaid pursuant to the "give-up" arrangement. *McCleary, Swanson and Wood*, at 7-8. (PSERS' Exhibit 32)

Upon receipt of Claimant's October 22, 2007 *Premium Assistance Election Form*, PSERS processed Claimant's premium assistance benefit payments based upon the information provided by Claimant and the School District. It was not until a later annual audit that PSERS learned through the School District that the cash value of the medical benefits that were paid to Claimant from July 2004 through June 2007 under Claimant's agreement with the School District for unused sick leave was not taxed.

Because Claimant was never taxed on the cash equivalent of his unused sick leave, Claimant's arrangement with the School District was not the economic equivalent of the Claimant prepaying health insurance premiums through taxable income equal to the amount of cash he chose to give up. Hence, Claimant should not have received premium assistance at all between July 1, 2004 and June 30, 2007. In like vein, PSERS should not have paid Claimant any premium assistance for the periods between June 2003 and February 2004 and March 2004 through August 2005 because the Carbon County Technical Institute reported to PSERS in April 2012 that Claimant's health care premiums during these periods were paid through pre-tax dollars through his wife's gross pay.

Claimant argues that he had no reasonable grounds to believe that erroneous information was being provided to PSERS by the Palmerton Area and Carbon County School Districts. He maintains that retirees are not current on federal tax laws or the criteria for premium assistance payments and place their trust and confidence in the accountability of PSERS and school district professionals. Claimant further argues that PSERS and the Palmerton Area School District should be held accountable and responsible for their actions, adding that it was PSERS who mistakenly paid him the payments that he received. For these reasons, Claimant requests that he be exonerated for the balance of the amount claimed to be due by him. Claimant also requests that he be credited with the previous amounts deducted from his monthly retirement checks.

Claimant's frustrations are understandable. However, by signing the *Premium Assistance Election Forms* Claimant agreed to return all premium assistance payments made to him in error, and authorized PSERS to withhold payments from his monthly

retirement benefit in absence of his lump sum payment. When, as here, a change or mistake in records results in a member receiving from the system more or less than he would have been entitled to receive had the records been correct, the Retirement Code mandates that upon discovery of such error - regardless of the intentional or unintentional nature of the error -the board *shall* correct the error and adjust the error in such a manner that the actuarial equivalent of the benefit to which the member was correctly entitled shall be paid. 24 Pa. C.S. §8534(b). That is what occurred here.

By letter dated August 16, 2012, PSERS informed Claimant that he received premium assistance overpayments and explained how PSERS would recoup the debt.<sup>4</sup> Claimant simply did not qualify for premium assistance during the periods at issue in this appeal because he did not incur an out-of-pocket expense. He erroneously received a benefit from the system that he was not entitled to receive and PSERS is required by law to make appropriate adjustments to his account to correct the errors. Further, Claimant presented no evidence to establish that he is entitled to a waiver of this adjustment under section 8303.1. No evidence was introduced by Claimant to show that the adjustment will cause undue hardship to him; that the adjustment was not the result of erroneous information supplied by him; or, that he lacked reasonable grounds to believe that the erroneous information was incorrect before the adjustment was made. In fact, Claimant admits that he paid no taxes on the cash value of his unused sick leave that was used by the School District to pay toward the continuation of his medical benefits. It follows that Claimant had knowledge that he was not entitled to receive the premium assistance benefits that he was paid from July 2004 through June 2007.

Claimant bears the burden of proof in this proceeding. *Wingert v. State Employees*

*Retirement Board*, 589 A 2d 269 (Pa. Cmwlth. 1991). Claimant has failed in his burden to show that he is entitled to be exonerated from the balance of the amount owed by him for premium assistance payments erroneously paid to him. Claimant is not entitled to be credited with the amount which has been deducted from his monthly retirement check.

For these reasons, it is recommended as follows:

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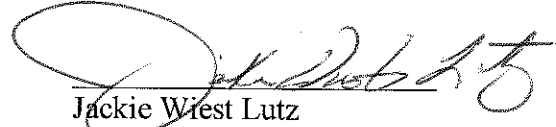
<sup>4</sup> Since then, PSERS has discovered additional overpayments that PSERS is required to collect from Claimant as reflected on PSERS' Exhibit 15.

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

|                                     |   |                           |
|-------------------------------------|---|---------------------------|
| <b>In Re:</b>                       | : |                           |
| <b>Account of Ronald M. Mihalko</b> | : |                           |
| <b>Claim of Ronald M. Mihalko</b>   | : | <b>Docket No. 2014-06</b> |
|                                     | : |                           |

**RECOMMENDATION**

**AND NOW**, this 28<sup>th</sup> day of September 2015, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, it is recommended that Claimant's request that PSERS waive his premium assistance overpayment debt during time periods when he had no out-of-pocket expenses should be **DENIED**.

  
Jackie Wiest Lutz  
Chief Hearing Examiner

Date of Mailing:      September 28, 2015