

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF PAULA HARTE-BIELECKI
DOCKET NO. 2007-02
CLAIM OF PAULA HARTE-BIELECKI

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Proposed Decision and Order of the Hearing Examiner. We note that neither party filed Exceptions to the Proposed Decision and Order of the Hearing Examiner. The Board finds appropriate the Introduction, Findings of Fact, Discussion, Conclusions of Law, and Recommendation in the Proposed Decision of the Hearing Examiner, with one non-consequential error. In 1981, when Claimant enrolled, she was required to elect Multiple Service membership within 30 days under 24 Pa. C.S. § 8507 (c). The words "within 365 days" on page 12, third full paragraph, second line, are therefore amended to read "within 30 days." Accordingly, with that correction, we hereby adopt the Hearing Examiner's Proposed Decision 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, Paula Harte-Bielecki, is DISMISSED WITH PREJUDICE.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: DEC 17 2008

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

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

IN RE: Account of Paula Harte-Bielecki
Docket No. 2007-02
Claim of Paula Harte-Bielecki

BEFORE: Lynne M. Mountz, Esquire
Hearing Examiner

HEARING DATE: July 30, 2008

APPEARANCES: For the Public School Employees' Retirement System:
David W. Speck, Esquire

For the Claimant:
Paula Harte-Bielecki, Pro Se

PROPOSED DECISION AND ORDER

Introduction

Paula Harte-Bielecki¹ (Claimant) appealed the decision of the Public School Employees' Retirement System (PSERS) to deny her request for Multiple Service Membership. An administrative hearing regarding this matter was scheduled and conducted on July 30, 2008. Claimant was given the opportunity to fully participate in the hearing via telephone, but declined to do so. PSERS made a Motion to Dismiss the Claim at the hearing. PSERS also presented testimony and evidence and made oral argument in support of its position at the hearing.

No post-hearing briefs were submitted in this matter.

¹ Claimant stated that her name is now Paula Harte.

7. By letter to Claimant dated July 20, 2001, PSERS sent Claimant an *Application for Multiple Service Membership*. The letter was sent to the Dunmore address listed for Claimant in PSERS' records. (N.T. 22-23; PSERS Ex. 4).

8. The July 20, 2001 letter to Claimant specifically stated, in relevant part:

. . . You must return the completed application in the enclosed envelope to the Public School Employees' Retirement System (PSERS).

If the completed application is not received **by December 31, 2003, or prior to your termination from school employment, whichever is earlier**, your request for Multiple Service membership will be voided and you will not be eligible to request Multiple Service membership unless you have a break in school service.

(PSERS Ex. 4). (Emphasis in original).

9. Between the summer of 2001 and the fall of 2003, PSERS sent Claimant the following six (6) newsletters:

a. Summer 2001 – Containing specific information concerning Multiple Service membership including the window for the election of Multiple Service membership. This newsletter was sent to Claimant at her Clark Summit address. (N.T. 25-27; PSERS Ex. 8).

b. Fall 2001 – Containing specific information regarding the window of time in which Multiple Service membership could be elected. (N.T. 27; PSERS Ex. 9).

c. Spring 2002 – Containing specific information regarding the window of time in which Multiple Service membership could be elected. This newsletter was sent to Claimant at her Dunmore address. (N.T. 27-29; PSERS Ex. 10).

- d. Fall 2002 – Containing specific information regarding the window of time in which Multiple Service membership could be elected. This newsletter was sent to Claimant at her Dunmore address. (N.T. 29; PSERS Ex. 11).
 - e. Summer 2003 – Containing specific information regarding the window of time in which Multiple Service membership could be elected. This newsletter was sent to Claimant at her Dunmore address. (N.T. 29; PSERS Ex. 12).
 - f. Fall 2003 – Containing headline “Deadline Approaching for Multiple Service Election” and underlining “December 31, 2003” as the date when Multiple Service must be elected under the window provided.² This newsletter was sent to Claimant at her Dunmore address. (N.T. 29-30; PSERS Ex. 13).
10. All newsletters were mailed to Claimant at the address contained in PSERS’ records for her at the time of the mailings. (N.T. 31).
11. Claimant received notice that the window of time for the election of Multiple Service membership was from July 1, 2001 through December 31, 2003.
12. PSERS never received a completed *Application for Multiple Service Membership* from Claimant. (N.T. 23).
13. Claimant filed an *Application for Retirement* with PSERS which was received by the agency on March 31, 2006. (N.T. 23-23; PSERS Ex. 5).

² Members can also elect Multiple Service membership within 365 days of employment. Claimant’s initial enrollment was in 1981. *See*, PSERS Ex. 7.

14. On her *Application for Retirement*, Claimant indicated that she had multiple service citing previous employment with the Scranton State School for the Deaf. (N.T. 24; PSERS Ex. 5).
15. Claimant's *Application for Retirement* was the first written documentation received by PSERS which indicated the type of state service she wanted to be considered for multiple service membership. (N.T. 24).
16. PSERS indicated on Claimant's *Application for Retirement* that she did not have multiple service membership as of December 2005. (N.T. 24; PSERS Ex. 5).
17. By letter dated July 24, 2006, Claimant appealed the initial decision of PSERS to deny her multiple service membership. (N.T. 24-25; PSERS Ex. 6).
18. In her appeal letter, Claimant stated in part: "The Reason for my appeal is that I do not ever recall receiving a notification in the mail regarding the abovementioned opportunity [multiple service membership]. ... If a notification was sent to me, I was not aware of it, or was made aware of it by anyone. ..." (PSERS Ex. 6).
19. By letter dated February 15, 2007 from PSERS Executive Director, Claimant was advised that the Executive Staff Review Committee of PSERS had denied her request for multiple service membership. The basis for the denial was that she had not filed her *Application for Multiple Service Membership* within the required time frame. The letter also informed Claimant of her right to request an administrative hearing and appeal the decision to the Public School Employees' Retirement Board (Board) and request an administrative hearing. (N.T. 25; PSERS Ex. 7).

20. An administrative hearing was scheduled regarding Claimant's appeal on June 20, 2007. (Hearing Examiner Ex. 1-2).
21. By letter dated June 13, 2007, Claimant requested a continuance of her hearing for reasons of health and asked that the hearing be held in Scranton, Pennsylvania when it was rescheduled. (Hearing Examiner 3).
22. By letter dated June 18, 2007, the Hearing Examiner granted Claimant's request for a continuance³. (Hearing Examiner 4).
23. By letter dated August 1, 2007, PSERS advised Claimant that her hearing had been rescheduled for October 31, 2007. (Hearing Examiner 5).
24. By letter dated October 31, 2007, the Hearing Examiner notified the Parties that she was granting Claimant's second request for a continuance over the objection of PSERS. The letter stated in relevant part:

This is the second continuance requested by and granted to Claimant for unspecified health reasons. **Please be advised that absent specific, compelling and documented reasons no additional continuances will be granted to Claimant.**

Claimant is hereby notified that should she seek another continuance that request must be sent in writing to the Hearing Examiner prior to the hearing setting forth specific reasons for the continuance. If the request is for health reasons, it must be supported by a letter from a health care provider attesting to the fact that Claimant is medically unable to attend the hearing. A copy of the continuance request and supporting documentation must be sent to PSERS which may oppose the continuance.

(Hearing Examiner Ex. 6). (Emphasis in original).

25. Claimant received notice that her administrative hearing was rescheduled for July 30, 2008 at 1:00 p.m. at PSERS, 5 North Fifth Street, Harrisburg, PA. (Hearing Examiner Ex. 7; *also* Hearing Examiner Ex. 8).

³ Claimant's request for a change of venue was denied by the Board in an Order dated July 17, 2007.

26. Claimant requested a third continuance of her hearing.
27. By Order dated July 18, 2008, the Hearing Examiner denied Claimant's request for a continuance. (Hearing Examiner Ex. 9).
28. In her July 18, 2008 Order, the Hearing Examiner granted Claimant's request to participate in the hearing via a telephonic conference call and directed Claimant to provide a telephone number where she could be reached for the hearing. (Hearing Examiner Ex. 9).
29. The Parties were directed to exchange documents that they were going to submit as exhibits at the hearing on or before July 25, 2008. (Hearing Examiner Ex. 9).
30. PSERS complied with the Hearing Examiner's Order and provided Claimant with the exhibits it intended to use at the hearing, by cover letter dated July 23, 2008 and delivery date of July 24, 2008. (Hearing Examiner Ex. 10-11).
31. The only document provided by Claimant in response to the Order was a note from a physician who stated that Claimant was unable to travel long distances. (Hearing Examiner 12).
32. Claimant's administrative hearing was convened on July 30, 2008 at 1:00 p.m.
33. The Hearing Examiner placed a call to Claimant at the telephone number she provided.
34. Claimant answered the telephone and stated:
 - a. That she didn't realize that her hearing was that day and she was getting ready to leave for a medical appointment (N.T. 4);
 - b. That she thought the hearing was Friday [August 1] and she had planned to call and say "just go ahead with it without me Friday" (N.T. 5);

- c. That she knew the hearing was scheduled for July 30th (N.T. 5);
 - d. That she knew sometime Monday [July 28] or Tuesday [July 29] that she had a medical appointment for July 30th and had planned to call PSERS prior to the appointment to inform them to go ahead at the hearing on Friday [August 1] without her (N.T. 8);
 - e. That she was not requesting a continuance (N.T. 9-10, 12); and,
 - f. That the hearing should proceed without her. (N.T. 5, 8-10, 12-13).
35. Claimant was specifically informed that if she did not proceed with the hearing or request a continuance, she would not have another opportunity to present evidence in this matter at an administrative hearing. (N.T. 6, 10).
36. In un-sworn statements, Claimant indicated that she did not receive the letters from PSERS [regarding Multiple Service membership election] during the years when she was sick (N.T. 6, 10, 12); that her sister had been getting her mail and told her to sign and check a letter because it was important (N.T. 6-7); and, that she didn't know what she was signing. (N.T. 11).
37. Claimant terminated the telephone call without requesting a continuance, without offering sworn testimony on her behalf, without submitting exhibits into the record and without being subjected to cross-examination.
38. Claimant declined to fully participate in the administrative hearing.
39. The Hearing Examiner proceeded with the hearing, during which time:
- a. The Hearing Examiner submitted documents into the record (N.T. 14-17; Hearing Examiner Ex. 1-12);

- b. PSERS made a Motion to Dismiss Claimant's appeal with prejudice for failure to prosecute her claim and made an oral argument in support of the Motion (N.T. 17-19); and,
- c. PSERS was permitted to and elected to present its case on the merits *ex parte* (N.T. 20-31; PSERS Ex. 1-13);
- d. PSERS waived its right to file a written post-hearing brief and made an oral closing argument (N.T. 33).
- e. The Hearing Examiner closed the record at the conclusion of the administrative hearing. (N.T. 33).

Discussion

Motion to Dismiss

PSERS has made a Motion to Dismiss Claimant's Claim for Multiple Service benefits with prejudice for lack of prosecution. For the following reasons, it will be recommended that the Board grant the Motion to Dismiss with prejudice.

The administrative hearing regarding Claimant's appeal was initially scheduled for June 20, 2007. Claimant requested and was granted a continuance of this hearing for unspecified health reasons. PSERS did not object to the continuance.

Claimant's administrative hearing was rescheduled for October 31, 2007. Claimant again requested a continuance of the hearing. The continuance was granted over the objection of PSERS and despite the fact that Claimant failed to submit her request in writing, failed to specify her health concerns and failed to provide medical documentation for her request. In her Notice of Continuance, the Hearing Examiner

warned Claimant that “absent specific, compelling and documented reasons no additional continuances would be granted to her.” The Hearing Examiner further advised that a continuance request for medical reasons must be supported by a letter from a health care provider. (Hearing Ex. 6).

A third hearing was scheduled for Claimant on Wednesday, July 30, 2008, over one year from the date of the first scheduled hearing. Claimant requested a continuance a third time. Although that continuance request was denied, the Hearing Examiner issued an Order granting Claimant’s request to participate in the hearing via telephone. This Order was issued without any medical documentation from Claimant establishing that she could not travel to the hearing location in Harrisburg, Pennsylvania.

Notwithstanding all of these accommodations, Claimant did not actively participate in the hearing on July 30, 2008. When Claimant was telephoned to commence the hearing, she answered and indicated that she did not know that her hearing was to be held that day. Claimant does not deny that she received notice of the hearing and admitted that she knew the date of the hearing to be July 30, 2008. Claimant stated that she had been confused because of her health problems and thought the hearing was later in the week on Friday.

Claimant stated that she could not participate in the hearing on July 30th because she had to leave for a medical appointment. Claimant indicated that the appointment had been scheduled in response to medical tests she had undergone the week before. By her own statement, she knew a day or two before the hearing date that the medical appointment had been scheduled. Claimant, however, had not contacted PSERS or the Hearing Examiner to alert them to that fact.

During her brief comments on the record, Claimant said no less than six (6) times that the hearing should proceed without her⁴. She expressly denied wanting another continuance⁵. Although Claimant may have been surprised by the telephone call and/or confused about the hearing date, these factors do not appear to be the basis for those statements. Significantly, Claimant stated that she had planned to contact PSERS and tell them to proceed without her on Friday, the day she thought was the hearing date. Claimant clearly intended to waive her right to participate in the hearing **prior** to what she believed to be the hearing date. She did not intend to seek another continuance.

Claimant provided no competent evidence in support of her appeal during the hearing on July 30, 2008. She made brief and vague un-sworn statements regarding her claim and offered no documentary evidence. Claimant terminated the telephone call without subjecting herself to cross-examination regarding any of her statements.

Over the course of a year, Claimant was provided with three (3) opportunities for a hearing in which to provide a record on the merits of her claim. She failed to do so. PSERS appropriately moved to dismiss Claimant's claim with prejudice. *See, Clayton v. Workers' Compensation Appeal Board*, 881 A.2d 51 (Pa.Cmwlt. 2005).

On the basis of the record produced and Claimant's failure to prosecute her claim, it will be recommended that the Board grant the Motion to Dismiss with prejudice.

⁴ See, N.T. 5, 8-10, 12-13.

⁵ See, N.T. 9-10, 12-13.

*Merits*⁶

Should the Board determine that any of Claimant's statements during the telephonic hearing constituted a presentation of her case on the merits, it would be necessary to determine if she met her burden of proof in this matter. *See, Wingert v. State Employees' Retirement Board*. 589 A.2d 269 (Pa.Cmwlth. 1991).

In her claim, Claimant is seeking Multiple Service membership benefits. Multiple Service membership results when a member of PSERS elects to combine PSERS retirement credit with any credit previously earned as a member of the State Employees' Retirement System. Claimant had two opportunities to elect Multiple Service membership.

The first opportunity Claimant had to elect Multiple Service membership was within 365 days of her initial enrollment in PSERS in March 1981.⁷ There is no evidence on the record that Claimant elected Multiple Service membership within this time frame. In fact, Claimant stated that she did not know anything about it when she began work in 1981. (N.T. 11).

Claimant had a second opportunity to elect Multiple Service membership when Act 9 was signed into law in May 2001. Under the relevant provisions of that law, members who were active on or after July 1, 2001 were given a window of time from

⁶ The Hearing Examiner recommends that this claim be dismissed with prejudice for the reasons set forth in this Report. The analysis of the merits is offered, and need be considered, only in the event that the Board determines that Claimant provided a record on the merits of her claim.

⁷ Section 8507 (c) of the Public School Employees' Retirement Code provides as follows:

§ 8507 – Rights and duties of school employees and members.

(c) Multiple service membership. – Any active member who was formerly an active member in the State Employees' Retirement System may elect to become a multiple service member. Such election shall occur no later than 365 days after becoming an active member in this system. 24 Pa. C.S. §8507 (c).

July 1, 2001 through December 31, 2003 to elect Multiple Service membership. Claimant received and responded to a letter from PSERS in June 2001 which explained, among other changes provided for under Act 9, the new window of opportunity to elect Multiple Service membership. Claimant returned the *PSERS Membership Class Election Form* enclosed with the letter to PSERS and checked the box requesting information regarding Multiple Service membership.

Claimant acknowledged sending this form to PSERS, but denied understanding what she was signing. During the hearing, Claimant stated that she was undergoing treatment for a serious medical condition at the time she signed the form and that her sister had been getting the mail for her. According to Claimant, her sister gave the form to her to sign and she did so without knowing what she was signing. Prior to the hearing, Claimant apparently confirmed with her sister that she (Claimant) had in fact signed the document.

During the hearing, Claimant stated generally that she “did not receive the letters when I was sick all those – the couple years”⁸ and “I did not receive anything like that because apparently I guess I wasn’t in the right mind, or whatever. And I certainly would have sent something back.”⁹

Prior to the hearing, Claimant was provided with the documents which PSERS intended to submit as exhibits. She referred to none of those documents. It is not at all clear what “letters” she was referring to in her statement. Nor is it clear that Claimant is even refuting that the “letters” were sent to her. Her comments suggest that she does not remember receiving them due to her understandable preoccupation with her

⁸ N.T. 6.

⁹ N.T. 10.

illness. Claimant stated that her sister had been getting her mail, but did not offer the testimony of her sister regarding the receipt of any PSERS documents other than the one which actually bears Claimant's signature.

Claimant terminated the telephone call, essentially leaving the hearing, before she could elaborate on or clarify her statements. She offered no exhibits into the record. As noted above, she also failed to request a continuance for another opportunity to provide a record on the merits. Claimant was not subjected to cross-examination.

In its case, PSERS presented the testimony of Elizabeth Eichelberger, a Retirement Technician Supervisor, and submitted numerous exhibits.

Ms. Eichelberger credibly testified that: Claimant was sent an *Application for Multiple Service Membership* in July 2001; Claimant was sent newsletters in Summer 2001, Fall 2001, Spring 2002, Fall 2002, Summer 2003 and Fall 2003; and, each of the mailings was sent to Claimant at the address on file for her in PSERS' records at the time of the mailing. Each of these documents sent to Claimant specifically set forth the time frame in which the *Application for Multiple Service Membership* must be returned to PSERS.

By terminating the telephone call and leaving the hearing, Claimant waived her right to cross-examine Ms. Eichelberger or object to the admission into the record of the exhibits Ms. Eichelberger had identified. By her own volition Claimant was unavailable to specifically deny receipt of any of the documents testified to by Ms. Eichelberger or otherwise provide rebuttal testimony. Accordingly, based upon the unrefuted testimony and evidence submitted by PSERS, it must be concluded that

Claimant received the mailings containing notice of the requirements for electing multiple service membership.

The record is clear that Claimant never returned the *Application for Multiple Service Membership* to PSERS. Claimant was provided with the opportunity to file the Application and received adequate notice that the Application had to be filed on or before the December 31, 2003 deadline. Claimant failed to do so.

While it is easy to sympathize with Claimant's concern for her medical problems, the provisions of the Public School Employees' Retirement Code, including statutorily imposed deadlines, can not be waived. *See, Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848 (Pa.Cmwlth. 1989), aff'd, 527 Pa. 362, 591 A.2d 1053 (1991).

For this reason, and on the record produced, it must be concluded that Claimant failed to meet her burden of proof in this matter and her claim should be denied.

Proposed Conclusions of Law

1. Claimant was provided with notice of the date, time and location of the administrative hearing scheduled regarding her claim.
2. Claimant made an appearance at the hearing via telephonic conference.
3. Witnesses whose testimony is to be taken in an administrative hearing shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding. 1 Pa. Code § 35.137.
4. Claimant terminated her participation in the hearing without providing sworn testimony herself or by anyone on her behalf thereby waiving her right to do so.

5. Claimant terminated her participation in the hearing without submitting exhibits into the record thereby waiving her right to do so.
6. Claimant terminated her participation in the hearing without requesting a continuance of the hearing thereby waiving her right to do so.
7. Claimant requested that the hearing proceed without her thereby waiving her right to cross-examination, to object to PSERS' exhibits, to make oral argument on her own behalf, or to file a post-hearing brief.
8. Claimant had the burden of establishing facts upon which she relied in order to be granted the relief requested. *See, Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa.Cmwlt. 1991).
9. Claimant provided no competent evidence at the hearing.
10. Claimant failed to meet her burden of proof.
11. PSERS' appropriately moved to dismiss Claimant's appeal with prejudice for failure to prosecute her claim. *See, Clayton v. Workers' Compensation Appeal Board*, 881 A.2d 51 (Pa.Cmwlt. 2005).
12. Claimant's appeal should be dismissed with prejudice for failure to prosecute her claim.
13. Insofar as the merits are considered, Claimant forfeited her right to multiple service membership when she failed to comply with the statutory requirements for filing an Application for Multiple Service membership.

14. Insofar as the merits are considered, the Board can not waive a statutory requirement of the Public School Employees' Retirement Code. *See, Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848 (Pa.Cmwlth. 1989), aff'd, 527 Pa. 362, 591 A.2d 1053 (1991).
15. Insofar as the merits are considered, Claimant's appeal should be denied.

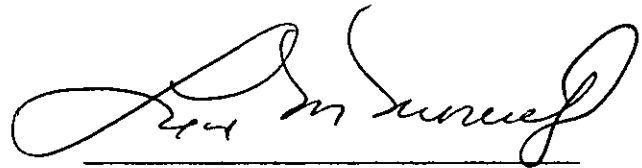
RECOMMENDATION

It is recommended that the Public School Employees' Retirement Board DISMISS WITH PREJUDICE the Claim of Paula Harte-Bielecki for multiple service membership.

Respectfully submitted,

Dated:

September 12, 2008



Lynne M. Mountz, Esquire
Hearing Examiner