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

IN RE: ACCOUNT OF K.S.
 DOCKET NO. 2019-08
 CLAIM OF K.S.

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 pleadings, transcript, exhibits, post-hearing briefs, the proposed Opinion and Recommendation of the Hearing Examiner ("HEO"), the Public School Employees' Retirement System's ("PSERS") Brief on Exceptions ("Exceptions"), and K.S.'s ("Claimant") brief opposing PSERS' Exceptions. Claimant did not file exceptions, thereby waiving all objections to the HEO. See 1 Pa. Code § 35.213.

Claimant requests that her *Application for Disability Retirement* be deemed as timely filed with PSERS. The Hearing Examiner recommends that the Board deny Claimant's request. Specifically, he concludes that Claimant is ineligible for a disability retirement from PSERS because she did not file her *Application for Disability Retirement* within the two-school-year statutory window, and equitable relief is not available under the law. (See HEO, Conclusion of Law 10 and Discussion at *18).

Although the Hearing Examiner agrees with PSERS that Claimant is ineligible for a disability retirement, PSERS filed Exceptions raising five issues or points of clarification with the language and reasoning in the HEO. Claimant did not file exceptions and did not challenge the ultimate opinion that she is ineligible for a disability retirement; however, through her reply brief to PSERS' Exceptions, Claimant challenges PSERS' position on three of the five exceptions raised. Claimant footnotes that she

takes no position on the remaining two exceptions. (Claimant's brief opposing PSERS' Exceptions, p. 8 n.1).

As to the first four exceptions PSERS raises, if accepted, the exceptions would have served as beneficial clarification for future cases, especially regarding employer reporting to PSERS and adjustments to member accounts. Nevertheless, noting Claimant's opposition to three of the exceptions, the fact that clarification would not affect the holding of the case, and the fact that neither party filed exceptions to challenge the Hearing Examiner's ultimate recommendation, the Board rejects these first four exceptions and substantially adopts the HEO without modification.

The Board, however, accepts PSERS' final exception regarding Special Sick Leave, to which Claimant did not take a position. As articulated by PSERS, the Hearing Examiner erroneously determined that there is no legal support for the Board's longstanding Special Sick Leave policy, despite neither party disputing this leave. (See HEO, at * 18 n.3). The Board has previously explained Special Sick Leave as follows:

[S]ervice credit may be obtained for "Special Sick Leave" pursuant to PSERS Business Rule . . . such credit can only be obtained in the event all of the following criteria set forth in the Business Rule are satisfied: (1) The leave must be approved by the employer; (2) The member must receive at least half pay during the leave through salary, worker's compensation or other disability insurance paid by the employer; (3) The member and employer must pay contributions based upon the full contracted salary; and (4) The leave is limited to one year in duration.

In Re Account of Pearl I. MacKerchar, Docket No. 2013-13, at *12-13 (PSERB Jan. 22, 2015). This Board will not reverse its Special Sick Leave policy and strip Claimant of the year of service credit she earned while on such approved leave.¹

¹ The Board's Special Sick Leave policy is based upon: (1) the 1917 Retirement Code, Act of July 18, 1917, P.L. 1043, No. 343, then in effect, which allowed for service credit as long as contributions were made; and (2) the Public School Code of 1949, Act of March 10, 1949, P.L. 30, 24 P.S. § 11-101 et seq., which provides for a sabbatical leave for illness, provided the leave is limited to one year (24 P.S. § 11-1166), the person receives one-half salary during the leave (24 P.S. § 11-1169), contributions are made based upon full salary (24 P.S. § 11-1170), and the person returns to service after the leave (24 P.S. § 11-1170). The 1975 Retirement Code, 24 Pa.C.S. § 8102 et seq., while eliminating the ability of an individual to obtain service credit merely by making

Therefore, this 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, with the following modifications:

1. The Board modifies Finding of Fact 30 as follows: "The Board's Special Sick Leave policy allows an individual to continue to accrue service credit as an active member of PSERS for one year while on an approved leave from their employer. (N.T. 59, 68-69)."
2. The Board adds and modifies the following Conclusions of Law to the HEO:
 - Add after Conclusion of Law 7:
 - The Board maintains a Special Sick Leave policy that allows a member to receive up to one year of service credit while off work and receiving Workers' Compensation if it is approved by the employer, the member is receiving at least half pay, and full contributions are made to PSERS based on the member's full salary. *In Re Account of Pearl I. MacKerchar*, Docket No. 2013-13, at *12-13 (PSERB Jan. 22, 2015); *Trakes v. Pub. Sch. Employees' Ret. Sys.*, 768 A.2d 357, 360-62 (Pa.Cmwth. 2001).
 - A member may be considered an "active member" of PSERS if they are on an "approved leave of absence" or on a one-year Special Sick Leave. 24 Pa.C.S. §§ 8102 (def. "approved leave of absence"), 8302(b); 22 Pa. Code § 211.2 (def. "active member"); *Account of Pearl I. Mackerchar*, Docket No. 2013-12, at *12-13 (PSERB Jan. 22, 2015).
 - Modify Conclusion of Law 9 as follows: "Except in the case of an approved Special Sick Leave, an individual not working but receiving Workers' Compensation benefits is not an active member of PSERS. *Trakes v. Public Sch. Employees' Ret. Sys.*, 768 A.2d 357, 363 (Pa. Cmwth. 2001);

contributions, nevertheless allows credit for an "approved leave of absence," which includes sabbatical leaves. 24 Pa.C.S. § 8102. Sabbatical leaves, under the Public School Code, include a leave for "restoration of health." 24 P.S. § 11-1166. The Board is allowed to carry forward interpretive rules that have not been repealed by the 1975 Retirement Code. See *Homer v. Pub. Sch. Employees' Ret. Bd.*, 692 A.2d 632 (Pa.Cmwth. 1997). Accordingly, the Board still maintains this policy.

Hoerner v. Public Sch. Employees' Ret. Bd., 684 A.2d 112, 118 (Pa. 1996);
Rowan v. State Employees' Ret. Bd., 685 A.2d 238 (Pa. 1996).”

- Add after Conclusion of Law 9:
 - Claimant was last an active member of PSERS on February 5, 2016, and Claimant was last an inactive member of PSERS on June 30, 2018.
- 3. Modify the paragraph spanning between pages 17-18 to delete footnote 3 and read as follows:

PSERS acknowledges that a member may continue as an active member while on a one-year Special Sick Leave or while on an “approved leave of absence.” 24 Pa.C.S. §§ 8102 (def. “approved leave of absence”), 8302(b) (in computing credited school service, an active member shall received credit for an approved leave of absence); *Account of Pearl I. Mackerchar*, Docket No. 2013-12, at *12-13. After Claimant’s one year of Special Sick Leave, however, Claimant’s Workers’ Compensation was not an “approved leave of absence” and did not qualify her for active member status. See *Trakes*, 768 A.2d at 365 (participants who are off work due to Workers’ Compensation disability do not qualify for an approved leave of absence under 24 Pa.C.S. § 8302(b)(1) and (2)). In its regulations, PSERS provides that credited service will be granted to an active member for an approved leave of absence as authorized under sections 8102 and 8302 of the Retirement Code and that members may be granted other types of leaves of absence not authorized by the Retirement Code, but such leave will not entitle the member to any credited service. 22 Pa. Code § 213.2(b). Because credited service is not available and contributions are not appropriately made for this other leave, it does not extend the time period for Claimant to be considered as an inactive member. As her last day of credited Special Sick Leave was in February 2016, Claimant was required to apply for disability retirement by the end of the second school year – June 30, 2018. Claimant did not submit her *Application for Disability Retirement* until September 2018, after this window had closed.

IT IS HEREBY ORDERED, that Claimant's appeal from the denial of her request for a disability retirement as untimely, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 12/17/21

By: 
Christopher SantaMaria, Chairman

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

IN RE:

**ACCOUNT OF K [REDACTED] S [REDACTED]
CLAIM OF K [REDACTED] S [REDACTED]**

DOCKET NO. 2019-08

PROPOSED OPINION AND RECOMMENDATION

**Thomas A. Blackburn
Hearing Officer**

**Date of Hearing: October 14, 2020
Hearing Officer: Thomas A. Blackburn
For Claimant: Joseph F. Canamucio, Esquire
For PSERS: Cayla B. Jakubowitz, Esquire**

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal, filed by K [REDACTED] S [REDACTED] ("Claimant") on June 20, 2019. Claimant appealed from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's application for disability retirement as untimely. On July 10, 2019, PSERS filed its Answer to Claimant's appeal.

By letter dated August 28, 2020, Board Secretary Glen R. Grell appointed the undersigned hearing examiner to act as hearing officer for Claimant's administrative appeal hearing. By letter dated August 28, 2020, the Board's Appeal Docket Clerk notified Claimant through counsel that the administrative hearing had been scheduled for October 14, 2020 at the offices of PSERS in Harrisburg. The hearing was held as scheduled. Claimant attended the hearing and was represented by Joseph F. Canamucio, Esquire. Assistant counsel Cayla B. Jakubowitz represented PSERS. Claimant testified and presented documentary evidence. With two sponsoring witnesses, PSERS presented its case through documentary evidence. At the close of the hearing, the parties elected to file post-hearing briefs. The hearing transcript was filed on October 29, 2020, and the hearing officer issued an Order Establishing Briefing Schedule on November 4, 2020. Claimant filed her post-hearing brief on December 8, 2020. After receiving an extension, PSERS filed its brief on January 27, 2021. The record closed February 12, 2021, when Claimant filed a reply brief. Accordingly, the matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Upon graduating from college in 1985 with a degree in elementary education, Claimant began working for the [REDACTED] School District (“District”) and spent her entire career there as a first or second grade teacher. (N.T. 11)

2. Claimant was enrolled in PSERS in September 1985. (Claimant-E attachment A)

3. In late 2014, Claimant was injured while walking a disruptive student to lunch when the student pulled her down on the steps and she grabbed the railing to keep from falling down a large amount of steps. (N.T. 11-12)

4. Claimant was a member of PSEA. (N.T. 12)

5. PSEA’s collective bargaining agreement with the District for 2012-13 through 2014-15 at Article 46 Section A paragraph 7.a(2) provided that a bargaining unit member injured on the job will be paid for sick leave, but if the injury is compensable under Workers’ Compensation the employee will give the WC check to the district and the district will deduct 1/3 sick time and pay the employee regular wages; under paragraph 8 a member will not lose any sick leave days or salary because of injury resulting from assault by a student. (N.T. 12-13, Claimant-A at 35-36)

6. PSEA’s collective bargaining agreement with the District for 2015-16 through 2018-19 at Article 46 Section A paragraph 7.a(2) provided that a bargaining unit member injured on the job will be paid for sick leave, but if the injury is compensable under Workers’ Compensation the employee will give the WC check to the district and the district will deduct 1/3 sick time and pay the employee regular wages; under paragraph 8 a member will not lose any sick leave days or salary because of injury resulting from assault by a student. (N.T. 16-17, Claimant-B at 34)

7. Claimant received Workers' Compensation benefits through the District beginning up the date of her surgery on February 6, 2015, then signed it over to the District. (N.T. 12, 14)

8. Through August 1, 2018, Claimant received paychecks from the District, noting that it made contributions to PSERS for Claimant's pension. (N.T. 18-19, Claimant-C)

9. Claimant did not use any sick or vacation leave time while she was receiving the Workers' Compensation checks and turning them over to the District. (N.T. 53)

10. Claimant's Workers' Compensation case was resolved through a compromise and release in August 2018 and she no longer receives compensation payments, but the insurer still pays for medical expenses. (N.T. 46-47)

11. Because she could not return to work due to her disability, Claimant retired from the District on September 27, 2018. (N.T. 24-25)

12. Claimant has not physically worked for the District since February 5, 2015. (N.T. 49)

13. In summer 2008, winter 2009, winter 2010, and winter 2011, PSERS produced active members newsletters to provide general information to its active membership and mailed them to active members including Claimant. (N.T. 92-95)

14. The summer 2008, newsletter each instructed members to "Apply for disability benefits within two school years of your last day of service or paid leave, whichever is later." (N.T. 94, PSERS-18 at 2)

15. The winter 2009, winter 2010 and winter 2011 newsletters each instructed members "To be eligible, you must: ... apply for a disability benefit within two school years from the day you last earned service credit and had contributions withheld." (N.T. 94-96,

PSERS-19 at 5, PSERS-20 at 5, PSERS-21 at 12)

16. In June 2007, PSERS updated its member handbook and sent a copy to all active members including Claimant. (N.T. 96)

17. The June 2007 member handbook directed members “You must apply to PSERS for disability benefits within two school years from the last day of service or paid leave,” and noted “Under specific guidelines, you may receive service credit for the following approved leaves of absence: special sick leave, sabbatical leave, professional study leave, activated military leave, exchange teacher leave and collective bargaining leave.” (N.T. 96-97, PSERS-22 at 6, 16)

18. In September 2012, PSERS updated its member handbook and made it available to members to view on the member website and by mail upon request. (N.T. 98)

19. The June 2007 member handbook directed members “To apply for a disability benefit, you must: ... apply for disability retirement benefits within two school years of your last day of service or paid leave, whichever is later” and noted “If you do not apply within two school years, you will forfeit all rights to apply for a disability retirement benefit;” it further noted the following as types of approved leave: special sick leave, sabbatical leave, professional study leave, activated military leave, exchange teacher leave, and collective bargaining leave. (N.T. 98-99, PSERS-23 at 7, 17)

20. From April 2012 through 2016, PSERS produced a pamphlet entitled “Let’s Talk About Disability Retirement Benefits” and made that available to view on its member website and by mail upon request. (N.T. 99-100)

21. The pamphlet notified members “To apply for a disability retirement benefit, you must: ... Apply for disability retirement benefits within two school years of your last day of

service or paid leave, whichever is later” and cautioned “If you do not apply within the two years, you will forfeit all rights to apply for a disability retirement benefit.” (N.T. 100, PSERS-24 at 2)

22. Each year from 2002 through 2004 and 2009 through 2012 PSERS prepared for Claimant a Statement of Account for School Year Ending June 30 of that year and mailed the statement to Claimant at her address on file with PSERS; none were returned as undeliverable. (N.T. 89-91, PSERS-11 through PSERS-17)

23. Each year’s statement of account recited “You must ... apply for PSERS disability benefits within two school years of the last day paid by the school employer.” (N.T. 89-91, PSERS-11 through PSERS-17 at 3)

24. Claimant’s Statement of Account for School Year Ending June 30, 2014 showed contributions of \$6,059.99 for 190 days worked for the District during the 2013-14 school year and total service credits of 29.00 years and 1.00 years of service was credited for this school year. (N.T. 20, Claimant-D at 1, 2)

25. Each month a school district is required to report to PSERS each employee with job and status as well as salary and service earned. (N.T. 55-56)

26. Although Claimant’s last day of active work for the District was in February 2015, during the rest of 2015 and early 2016 the District reported her as active, which means that she was actively working or performing duties at the school. (N.T. 56)

27. In December 2015 after receiving her statement of account Claimant telephoned PSERS and reported that she was on leave and no longer actively teaching, and during the conversation the PSERS representative advised Claimant that there is a two-year window in which to apply for a disability retirement; Claimant believed this would not start to run until the

District reports that she is not teaching. (N.T. 41-42)

28. In December 2015, Claimant notified PSERS that she was no longer actively working for the District, which was contrary to the District's reports to PSERS. (N.T. 56-57)

29. Upon being notified by Claimant that she was not actively working, PSERS reached out to the District and updated its records to show that Claimant was on special sick leave as a result of Workers' Compensation. (N.T. 58)

30. Special sick leave allows an individual not actively working to continue to receive service credit with PSERS for up to one year. (N.T. 59)

31. Claimant's Statement of Account for School Year Ending June 30, 2015 showed contributions of \$6,139.39 for 190 days worked for the District during the 2014-15 school year and total service credits of 30.00 years and 1.00 years of service was credited for this school year. (Claimant-D at 5, 6)

32. Because her special sick leave began no later than February 2015, this approved leave would have had to have ended by February 2016. (N.T. 59)

33. After February 2016 through August 2018, the District reported Claimant as on unpaid leave that is not approved as contributing leave for PSERS. (N.T. 59-60)

34. From February 2016 through August 2018, the District continued to report Claimant's salary and made contributions to PSERS, and in September 2018 PSERS removed that additional service, wages and contributions from Claimant's account because that was not retirement covered compensation. (N.T. 60-61)

35. In February 2016, Claimant telephoned PSERS, and during the conversation the PSERS representative advised Claimant that there is a two-year window in which to apply for a disability retirement; Claimant believed that the clock would not start to run until the District

reported she was no longer teaching. (N.T. 42-43)

36. During this phone call on February 6, 2016, Claimant told the PSERS representative that she had been on Workers' Compensation since February 6, 2015 yet the District was reporting her as teaching and a prior PSERS representative had told her that she had only two years to take a disability retirement. (N.T. 102, 103-04)

37. During this phone conversation on February 6, 2016, the PSERS representative told Claimant that, hypothetically, if she was last paid in February 2015 during the 2014-15 school year, she would have to apply for a disability pension by June 2017. (N.T. 122-23)

38. During this phone conversation on February 6, 2016, the PSERS representative told Claimant that if the District's reporting was not accurate the account would be modified. (N.T. 120)

39. On March 1, 2016, PSERS prepared a disability retirement estimate for Claimant with a date of retirement of June 30, 2016. (N.T. 73, PSERS-1)

40. PSERS mailed this disability retirement estimate to Claimant at her address on file with PSERS, and it was not returned to PSERS as undeliverable. (N.T. 73-74)

41. The disability retirement estimate recited "For a disability retirement, you must file an *Application for Disability Retirement* within the two school years following your last day of qualified service or paid leave, whichever is later, and you must be disabled at the time of application." (N.T. 74-75, PSERS-1 at 4)

42. On March 1, 2016, PSERS prepared an early retirement estimate for Claimant with a date of retirement of June 30, 2016. (N.T. 75, PSERS-2)

43. PSERS mailed this early retirement estimate to Claimant at her address on file with PSERS, and it was not returned to PSERS as undeliverable. (N.T. 75-76)

44. The early retirement estimate recited “For a disability retirement, you must file an *Application for Disability Retirement* within the two school years following your last day of qualified service or paid leave, whichever is later, and you must be disabled at the time of application.” (N.T. 76, PSERS-2 at 4)

45. Claimant did not again contact PSERS until after June 30, 2018. (N.T. 77)

46. Claimant’s Statement of Account for School Year Ending June 30, 2016 showed contributions of \$6,183.41 for 190 days worked for the District during the 2015-16 school year and total service credits of 31.00 years and 1.00 years of service was credited for this school year; this was mailed to Claimant on November 15, 2016 at her address on file with PSERS. (N.T. 77-78, Claimant-D at 9, PSERS-3 at 1, 2)

47. Claimant’s Statement of Account for School Year Ending June 30, 2017 showed contributions of \$6,338.00 for 190 days worked for the District during the 2016-17 school year and total service credits of 31.00 years and 0.00 years of service was credited for this school year; this was mailed to Claimant on February 11, 2018 at her address on file with PSERS. (N.T. 20, 33, 79-80, Claimant-D at 13, 14, PSERS-4 at 1, 2)

48. On July 31, 2018, Claimant requested a retirement estimate. (N.T. 80, PSERS-5)

49. On August 27, 2018, PSERS prepared a disability retirement estimate for Claimant with a date of retirement of February 6, 2016; PSERS mailed this estimate to Claimant and it was not returned as undeliverable. (N.T. 81-82, PSERS-6)

50. The disability retirement estimate recited “For a disability retirement, you must file an *Application for Disability Retirement* with the two school years following your last day of qualified service or paid leave, whichever is later, and you must be disabled at the time of application.” (N.T. 82, PSERS-6 at 4)

51. The disability retirement estimate recited “Estimate request was not submitted within two school years of leave/termination date; therefore, you are not eligible to apply for a disability retirement.” (N.T. 82-83, PSERS-6 at 4)

52. On August 27, 2018, PSERS prepared an early retirement estimate for Claimant with a date of retirement of September 29, 2018; PSERS mailed this estimate to Claimant and it was not returned as undeliverable. (N.T. 83-84, PSERS-7)

53. The early retirement estimate recited “For a disability retirement, you must file an *Application for Disability Retirement* with the two school years following your last day of qualified service or paid leave, whichever is later, and you must be disabled at the time of application.” (N.T. 84, PSERS-7 at 4)

54. The application for disability form notifies an applicant that the applicant must “Submit your disability retirement application no later than two (2) years from the end of the school year in which you last had active, qualifying paid service or paid leave.” (PSERS-8)

55. Claimant signed her *Application for Disability Retirement* on September 25, 2018 and submitted it to PSERS on that date. (N.T. 85, PSERS-8 at 1, 6)

56. By letter dated November 5, 2018, PSERS notified Claimant that it had received her *Application for Disability Retirement* and determined that she was not eligible for a disability benefit because she did not file her application timely, as it had not been filed by June 30, 2018; PSERS mailed the letter on that date and it was not returned as undeliverable. (N.T. 85-86, PSERS-9)

57. Claimant appealed PSERS’ November 5, 2018, determination to the ESRC. (N.T. 35, 86-87)

58. By letter dated May 22, 2019, the ESRC notified Claimant that it had denied

Claimant's request to apply for disability benefits, because PSERS did not receive her *Application for Disability Retirement* until September 25, 2018, which was after June 30, 2018 – the end of the two-year eligibility period following Claimant's last day of public school service (the last day of her Special Sick Leave) on February 5, 2018. (N.T. 87, PSERS-10, Claimant-E)

59. On June 20, 2019, Claimant filed an Appeal and Request for Administrative Hearing. (N.T. 87, PSERS Records¹)

60. On July 10, 2019, PSERS filed its Answer to Claimant's Appeal and Request for Administrative Hearing. (PSERS Records)

61. A hearing on the appeal was held on October 14, 2020, before the undersigned hearing officer. (N.T. *passim*; Dkt. No. 2019-08)

62. Claimant was present for her hearing, was represented by legal counsel, and had the opportunity to be heard, present evidence on her own behalf, cross-examine witnesses, make a closing statement for the record, and file a post-hearing brief in support of her appeal. (N.T. *passim*; Dkt. No. 2019-08)

¹Under 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 56 – 62)

2. Claimant has the burden of proving the facts she alleges in support of her 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. An active or inactive member who has credit for at least five years of service shall, upon filing of a proper application, be entitled to a disability annuity if he becomes mentally or physically incapable of continuing to perform the duties for which he is employed and qualifies for an annuity in accordance with the provisions of section 8505(c)(1) of the Retirement Code.

24 Pa.C.S. § 8307(c).

7. The Retirement Code defines “active member” as a school employee for whom pickup contributions are being made and defines “inactive member” as a member for whom no pickup contributions are being made to the fund but who has accumulated deductions standing to his credit in the fund and for whom contributions have been made within the last two school years. 24 Pa.C.S. § 8102 (relating to definitions).

8. Because the Retirement Code authorizes only an active member or inactive member to apply for a disability annuity and defines active member to be currently having contributions made and inactive member to have had contributions made within the last two school years, the window in which to apply for a disability retirement is within two school years after one’s last date of paid service or approved leave. *See*, 24 Pa.C.S. §§ 8102, 8307(c).

9. An individual not working but receiving Workers’ Compensation benefits is not an active member of PSERS. *Trakes v. Public Sch. Employees’ Ret. Sys.*, 768 A.2d 357, 363 (Pa. Cmwlth. 2001); *Hoerner v. Public Sch. Employees’ Ret. Bd.*, 684 A.2d 112, 118 (Pa. 1996); *Rowan v. State Employees’ Ret. Bd.*, 685 A.2d 238 (Pa. 1996).

10. Claimant has failed in her burden to establish that she applied for a disability annuity within two school years of her last date of paid service or approved leave, because her last date of approved leaved was February 5, 2016 and she never returned but submitted her *Application for Disability Retirement* on September 25, 2018. (Findings of Fact 1 - 55)

DISCUSSION

In this matter, Claimant was injured by a student and was on Workers' Compensation before submitting an *Application for Disability Retirement* on September 25, 2018. PSERS denied the application as untimely. Claimant appealed, and PSERS' ERSC affirmed the denial, because Claimant filed the application more than two school years after she her last day of service or approved leave. Claimant appeals to the Board.

It is well established that Claimant bears the burden of establishing the facts necessary to sustain her claim. *See, Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlt. 1999); *Wingert v. State Employes' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlt. 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 Employes' Ret. Bd.*, 745 A.2d 704, 706 (Pa. Cmwlt. 2000); *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlt. 1992); *Hughes v. Public Sch. Employees' Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlt. 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. Cmwlt. 2011). Equitable relief is not an available remedy under the Retirement Code. *Finnegan v. Public School Employes' Ret. Bd.*, 560 A.2d 848, 851 (Pa. Cmwlt. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991).

Under the Retirement Code, a PSERS member may apply for a disability retirement as follows:

§ 8307. Eligibility for annuities

* * *

(c) **Disability annuity.**—An active or inactive member who has credit for at least five years of service shall, upon filing of a proper application, be entitled to a disability annuity if he becomes mentally or physically incapable of continuing to perform the duties for which he is employed and qualifies for an annuity in accordance with the provisions of section 8505(c)(1) (relating to duties of board regarding applications and elections of members and participants).

24 Pa.C.S. § 8307(c). The Retirement Code further defines some of these terms as follows:

§ 8102. Definitions

* * *

“Active member.” A school employee for whom pickup contributions are being made to the fund or for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part relating to the limitations under section 401(a)(17) or 415 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 401(a)(17) or 415).

* * *

“Inactive member.” A member for whom no pickup contributions are being made to the fund, except in the case of an active member for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part relating to the limitations under section 401(a)(17) or 415 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 401(a)(17) or 415) or because the member is on USERRA leave, who has accumulated deductions standing to his credit in the fund and for whom contributions have been made within the last two school years or a multiple service member who is active in the State Employees’ Retirement System.

* * *

“School employee.” Any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis.

* * *

“Pickup contributions.” Regular or joint coverage member contributions and shared-risk member contributions which are made by the employer for active members for current service on and after January 1, 1983.

* * *

24 Pa.C.S. § 8102 (relating to definitions). Thus, in order to be eligible for disability benefits, a PSERS member must be either: (1) a school employee that is actively working for regular remuneration and for whom the employer is making regular or joint contributions to the fund for

current service, or (2) a member who is not actively working or receiving regular remuneration but for whom regular or joint contributions have been made to the fund within the last two school years. *Trakes v. Pub. Sch. Employees' Ret. Sys.*, 768 A.2d 357, 362 (Pa. Cmwlth. 2001), *appeal denied*, 792 A.2d 1256 (Pa.).

As established by the findings of fact,² Claimant's last date of actual service for the District was February 5, 2015. By the time Claimant submitted the *Application for Disability Retirement* on September 25, 2018, she was not engaged in work for a public school for which she was receiving remuneration and was not a school employee and thus no longer an active member.

Beginning February 6, 2015, Claimant was receiving Worker' Compensation as a result for being injured by a student at work. Under the collective bargaining agreement in effect, Claimant signed the Workers' Compensation payments over to the District and the District paid Claimant her full salary and made pickup contributions to PSERS. Claimant first argues that she was thus an active member through August 2018 while she was receiving a paycheck and contributions were being made. This argument is easily rejected. Under the statutory scheme set forth by the General Assembly at 24 Pa.C.S. §§ 8102 and 8307(c), Workers' Compensation recipients – who are not receiving compensation for actual work performance – cannot be classified as active members. *Trakes*, 768 A.2d at 363; *id.* at 365 (one cannot qualify as an active member during the period she was off work receiving Workers' Compensation disability even though her pickup contributions were fully paid).

² 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).

Alternatively, Claimant argues that, though she was not actively working, she was receiving regular remuneration and regular or joint contributions were being made on her behalf and thus she was at least an inactive member through August 2018 and the following two school years. This argument is also rejected.

Contributions are not appropriately made for periods for which the employee is not entitled to retirement service credit. *See*, 24 Pa.C.S. § 8404(a) (participant shall make mandatory pickup participant contributions through payroll deductions to the participant's individual investment account for school service required to be credited in the plan). Under the statutory scheme set forth by the General Assembly at 24 Pa.C.S. §§ 8102 and 8307(c), Workers' Compensation recipients cannot earn service credit because public school employees that are not receiving compensation for actual work performance cannot be classified as active members. *Trakes*, 768 A.2d at 363. Should any change or mistake in records result in any member or beneficiary receiving from PSERS 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, PSERS shall correct the error and so far as practicable shall adjust the payments which may be made 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). PSERS is bound to follow the intent of the General Assembly in administering the provisions of the Retirement Code; if a beneficiary of the PSERS is receiving mistaken benefits, the Board is duty bound, under the Retirement Code, to correct the mistake. *Hughes v. Public School Employes' Ret. Bd.*, 662 A. 701, 706 (Pa. Cmwlth. 1995), *appeal den'd*, 668 A.2d 1139 (Pa. 1995). This is so even where the error is not discovered until after a member's retirement; a member is never entitled to a benefit based upon an error in his retirement records. *Id.* PSERS is required to recalculate

benefits to correct errors despite the member relying upon the estimated benefits information received from the employing school district and PSERS in deciding whether and when to retire. *Cannonie v. Public School Employees' Ret. Sys.*, 952 A.2d 706, 709 (Pa. Cmwlth. 2008). Upon discovering that the District had improperly reported Claimant's service, earnings and contributions, PSERS was duty-bound to correct its records. PSERS properly corrected its records to exclude the contributions and service for Claimant while receiving Workers' Compensation.

PSERS acknowledges that a member may continue as an active member while on approved leave status under 24 Pa.C.S. §§ 8102 ("approved leave of absence" defined as a leave of absence for activated military service or which has been approved by the employer for sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study), 8302(b) (in computing credited school service, active member shall receive credit for an approved leave of absence). However, Claimant's Workers' Compensation or special sick leave is not of any of these types and she does not qualify for approved leave of absence. *See, Trakes*, 768 A.2d at 365 (participants who are off work due to Workers' Compensation disability do not qualify for an approved leave of absence under 24 Pa.C.S. § 8302(b)(1) and (2)). In its regulations, PSERS provides that credited service will be granted to an active member for an approved leave of absence as authorized under sections 8202 and 8302 of the Retirement Code and that members may be granted other types of leaves of absence not authorized by the Retirement Code, but such leave will not entitle the member to any credited service. 22 Pa. Code § 213.2(b). Because credited service is not available and contributions are not appropriately made for this other leave, it does not extend the time period

for Claimant to be considered as an inactive member.³ As her last day of credited service was in February 2015, Claimant was required to apply for disability retirement by the end of the second school year – June 30, 2017. Claimant did not submit her *Application for Disability Retirement* until September 2018, after this window had closed.

Claimant also argues that concluding that Claimant is time-barred from applying for a disability pension is unfair, elevates form over substance, and fails to follow the judicial directive to liberally construe the Retirement Code in favor of members. She notes that she was deprived of a disability retirement due to the District's misreporting and the delay of PSERS' correction until she was time-barred from applying. Moreover, Claimant repeatedly contacted PSERS and reported that she was receiving Workers' Compensation and not actually working (though signing over her checks in exchange for her regular salary), yet PSERS' agents never told her that the clock was running on applying for disability retirement.

Claimant is essentially requesting equitable relief, but such relief is not an available remedy under the Retirement Code. PSERS cannot be equitably estopped from asserting a statutory provision to deny a certain benefit even where its employees led a member to believe

³ PSERS presented testimony that a member may receive credit for special sick leave of up to one year for which contributions are made and that this is found in the Retirement Code. (N.T. 59, 68-69). The hearing officer is unable to find such a provision in the Retirement Code or in Board regulations. Other than this testimony, in its post-hearing brief PSERS cited only to *Trakes*, 768 A.2d at 363, for such a proposition. There, Commonwealth Court noted PSERS' construction of the Board's former regulation at 22 Pa. Code § 211.2 (defining "active member" to include those receiving workman's compensation) to provide service credit to workers' compensation recipients only through its special sick leave policy, which states that a member may obtain up to one year of service credit while off work, provided that the employer approves, the member receives at least half pay during the leave, and both the member and employer make PSERS contributions based on the member's full salary. The court rejected, as inconsistent with sections 8102 and 8307(c) of the Retirement Code, the argument that this provision permitted members receiving Workers' Compensation to be exempt from the statutory requirements for disability benefit eligibility. On October 17, 1998 (28 Pa.B. 5226), the Board amended § 211.2 to remove this portion of the definition of "active member." The hearing officer finds no statutory or regulatory support to conclude that paying salary and making contributions during Claimant's Workers' Compensation in any way extended the period during which she could be considered to be an active member. Had this extended the period for up to one year, that would have extended only to February 2016, making the window in which Claimant may apply for disability retirement close June 30, 2018. Claimant did not apply until September 25, 2018.

she was qualified for that benefit and that member prematurely retired under a full belief that her retirement benefits were protected and intact. *Finnegan v. Public School Employes' Ret. Bd.*, 560 A.2d 848, 850-51 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991). Upon discovering that the District improperly reported Claimant's salary and made contributions, PSERS properly corrected its records to reflect that Claimant was no longer an active employee. Claimant cannot apply for a retirement benefit based upon incorrectly submitted contributions even if she relied to her detriment on the belief that those contributions were properly made. *See, Trakes*, 768 A.2d at 366-67 (rejecting argument that Board should not be permitted to deny disability retirement annuity as untimely because she detrimentally relied on the statements of PSERS' representative purportedly informing member that she could obtain a larger retirement benefit if she delayed her application until age 62 or 65, because Board is required to apply positive provisions of the Retirement Code and cannot be required to honor the alleged misrepresentation of its agent following the lapse of the member's two-year inactive member status).

The Board does not have the authority under the Retirement Code to deem her *Application for Disability Retirement* as received within two school years of her last contribution properly made. The Retirement Code, as discussed above, mandates that a member who is not actively working or receiving regular remuneration may apply for disability retirement only if regular or joint contributions have been made to the fund within the last two school years. The Retirement Code is thus clear, and there is no exception (equitable or otherwise) to this time period. Although the Board must liberally administer the system, it does not have the authority to circumvent the express language of the Retirement Code. *See, Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780; *Marinucci v. State Employees' Ret. Sys.*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004). "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). It remains for the legislature, not the Board, to amend the Retirement Code to address Claimant’s circumstances. *Marinucci* at 47. The Board has no authority to reopen a legislatively crafted window of time to retroactively allow Claimant’s filing to be deemed filed timely. No liberal administration of PSERS permits the Board to circumvent the express language of the Retirement Code and grant Claimant the relief she requests. *See Dowler v. Public Sch. Employees’ Ret. Bd.*, 620 A.2d 639, 644 (Pa. Cmwlth. 1993); *Marinucci*.

The hearing officer is sympathetic to Claimant’s situation. After being injured by a student and undergoing surgery, she was unable to return to the classroom and began to receive Workers’ Compensation benefits. In accordance with the collective bargaining agreement, she signed over the benefit checks and received her regular paycheck. The District reported her to PSERS as working full-time and submitted contributions on her behalf. Claimant forthrightly told PSERS what was going on. Claimant was well aware that she was required to apply for a disability retirement within two school years of her last day of service or approved leave. She believed that this clock would not start to run while she was on this leave and the District was reporting her this way and making contributions. While PSERS’ representative indicated that Claimant’s records would be corrected once it was confirmed through the District, she did not correct this misconception about the running of this time limit. Not until after the window in which to apply had closed was Claimant notified that it had started. Unfortunately, the law is clear that Claimant’s time receiving salary in lieu of Workers’ Compensation does not extend the time in which she may apply for disability retirement and PSERS is required to enforce that notwithstanding the District’s incorrect reporting.

Based on all of the above, the facts of record support the conclusion that Claimant did

not timely file an *Application for Disability Retirement* such that she may receive disability retirement. Moreover, the Retirement Code does not authorize the Board to provide any remedy that would allow the Board to find that Claimant timely filed an *Application for Disability Retirement* timely when, in fact, she did not do so. Based upon all of the foregoing, the following recommendation will be made to the Board:

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

IN RE:

**ACCOUNT OF K [REDACTED] S [REDACTED]
CLAIM OF K [REDACTED] S [REDACTED]**

DOCKET NO. 2019-08

RECOMMENDATION

AND NOW, this 11th day of **March, 2021**, 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 application for disability retirement as untimely.

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 by **April 13, 2021**, 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.



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3/11/21