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

IN RE: ACCOUNT OF JAMES BRISKI, JR.  
DOCKET NO.: 2014-13  
CLAIM OF JAMES BRISKI, JR.

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board has carefully and independently reviewed the entire record of this proceeding, including the Opinion and Recommendation of the Hearing Examiner. Neither the Claimant nor the Public School Employees' Retirement System ("PSERS") filed exceptions in this matter.

The Board generally finds appropriate the History, Findings of Fact, Conclusions of Law, Discussion, Analysis, and Recommendation in the Hearing Examiner's Opinion attached hereto with the following modifications:

1. On Page 1, the first paragraph is amended, in part, to read ". . . and for the purchase of previous noncreditable school service under Section 8303."
2. On page 6, the following Finding of Fact should be added between Finding of

Fact No. 21 and 22:

"With respect to Claimant's New Jersey service, by letter dated October 1, 2012, PSERS informed Claimant that he had already 'received service credit for the school year(s) that you indicated on your purchase of service application. Therefore, you are not eligible to purchase this service credit.'

PSERS-19; N.T. 70, 130."

3. On page 8, Conclusion of Law No. 1: "PSERS has jurisdiction in this matter" is amended to read "PSERB has jurisdiction in this matter."
4. On page 8, Conclusion of Law No. 7 is amended to read "Claimant is not entitled to purchase credit with PSERS under Sections 8102 and 8303(d) of the Retirement Code, 24 Pa.C.S. §§ 8102, 8303(d), for his student employment at Kutztown."
5. On page 10, first full paragraph, "Executive Committee" is replaced with "Executive Staff Review Committee."
6. On page 10, third full paragraph, and on page 11, first full paragraph, "Council Rocks" is amended to read "Council Rock."
7. On page 15, the first citation "24 Pa.C.S. §§ 8102 and 8303(a)" is amended to read "24 Pa.C.S. §§ 8102 and 8304(b)(3)."

With the above modifications, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own, and accordingly:

IT IS HEREBY ORDERED that the Claimant's requests to purchase credit with PSERS for (a) the service that he rendered as an adjunct professor in New Jersey during the 2005-2006 through 2010-2011 school years, and (b) the service that he rendered as a student tutor at Kutztown University during 1997, 1998, 1999, and 2000 are DENIED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: March 11, 2016

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

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EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In re:

Account of James Brisk, Jr.  
Claim of James Briski, Jr.,

Claimant

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} Docket Number 2014-13  
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OPINION AND RECOMMENDATION

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Christopher K. McNally  
Hearing Examiner

Commonwealth of Pennsylvania  
Governor's Office of General Counsel  
Department of State  
Office of Hearing Examiners  
P.O. Box 2649  
Harrisburg, PA 17105-2649  
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## HISTORY

This case comes before the Hearing Examiner assigned by Glen R. Grell, Secretary to the Public School Employees' Retirement Board (PSERB) to determine whether to grant or deny the claim of James Briski, Jr., (Claimant), under the Public School Employees' Retirement Code<sup>1</sup> (Retirement Code), for purchase of creditable nonschool service under Section 8304, 24 Pa.C.S. § 8304, and for purchase of previous creditable school service under Section 8303. 24 Pa.C.S. § 8303.

Claimant filed a series of Applications to Purchase Out-of-State Service<sup>2</sup> and an Application for Purchase of Former Part-Time Uncredited Service.<sup>3</sup> On October 1, 2012, PSERS denied Claimant's Applications for Purchase of Out-of-State Service related to his service as an adjunct faculty member at Gloucester County College and Camden County College. On October 18, 2012, Applicant filed an Appeal to the Executive Staff Review Committee.

On November 13, 2012, PSERS denied Claimant's Application for Purchase of Former Part-Time Uncredited Service. On December 7, 2012, Claimant filed an Appeal to the Executive Staff Review Committee. On August 11, 2014, the Executive Staff Review Committee issued its Determination in which it denied both of Claimant's requests for purchase of out-of-state service and part-time uncredited service. On August 29, 2014, Claimant filed an Appeal and Request for an Administrative Hearing.

On April 14, 2015, PSERS issued notice to Kutztown University of Pennsylvania of Claimant's appeal with copies of relevant documents on file and provided notice to the State

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<sup>1</sup> The act of October 2, 1975, P.L. 298, No. 96. 24 Pa.C.S. §§ 8101 – 8536.

<sup>2</sup> The Applications for Purchase of Out-of-State Service were filed on (1) July 5, 2011, *Exhibit PSERS-6*; (2) July 15, 2011, *Exhibit PSERS-8*; (3) May 29, 2012, *Exhibit PSERS-11*; (4) June 20, 2012, *Exhibit PSERS-13*; and two (5) and (6) on September 13, 2012, *Exhibits PSERS-17, 18*. The second application in this series, *Exhibit PSERS-8*, related to purchase of credit for service as a teacher in the Caesar Rodney School District in the State of Delaware. PSERS granted that application and it is not at issue. The remaining applications relate to purchase of credit for service as a part-time faculty member at Gloucester County College and Camden County College in New Jersey.

<sup>3</sup> Filed on November 5, 2012. *Exhibit PSERS-21*.

System of Higher Education of its right to intervene. On May 5, 2015, the Secretary to the Board designated Christopher K. McNally, Esq. as the Hearing Examiner in this matter. The Secretary's appointment directed that the appeal and hearing be conducted in accord with the Administrative Agency Law<sup>4</sup> and the General Rules of Administrative Practice and Procedure (GRAPP),<sup>5</sup> and directed the Hearing Examiner to issued a proposed opinion and recommendation. On June 4, 2015, the Appeal Docket Clerk issued a Notice of Hearing, including a succinct statement of Claimant's procedural rights, including, *inter alia*, the right to offer evidence and to compel attendance of witnesses. Claimant requested a continuance due to his teaching schedule, which was granted.

At the hearing on July 15, 2015, Claimant appeared *pro se* before the Hearing Examiner. PSERS was represented by Kathrin V. Smith, Esq. Following a colloquy by which Claimant was advised of his due process rights, both parties offered testimonial evidence and documentary evidence. At the conclusion of the hearing, the Hearing Examiner held open the record to permit Claimant to search for, and if discovered, offer additional documentary evidence in support of his claim, and to file a post-hearing brief. On August 26, 2015, Claimant filed a letter advising that he had conducted an inquiry for additional documentation and had discovered nothing further. He indicated that he would rest upon the materials that were already submitted. On September 1, 2015, the Hearing Examiner issued an Order Admitting Exhibits. On October 9, 2015, the Commonwealth filed its post-hearing brief.

The Office of Hearing Examiners now issues this opinion and recommendation as directed by PSERS. The matter is now before PSERB for final disposition.

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<sup>4</sup> The act of April 28, 1978, P.L. 202, No. 53, § 5, *as amended*. 2 Pa.C.S. §§ 501 – 508.

<sup>5</sup> 1 Pa. Code §§ 31.1 – 35.251.

## FINDINGS OF FACT

1. James Briski, Jr. (Claimant) is a TD Class member of the Public School Employees' Retirement System (PSERS). (*Hearing Transcript, pages Exhibit PSERS-1.*)

2. Claimant became a member of PSERS in the school year commencing on July 1, 2005 and ending on June 30, 2006, and has been an active member of PSERS in each consecutive school year thereafter. (*Hearing Transcript, Exhibit PSERS-1.*)

3. From 1997 to 2000, Claimant was a full-time, undergraduate student at Kutztown University ("Kutztown") studying secondary education with a focus on social studies and history. (*Hearing Transcript, pages 159-160.*)

4. While at Kutztown, Claimant was a student tutor. (*Hearing Transcript, pages 158, 160, 166; Exhibit PSERS-21.*)

5. Claimant's employment as a student tutor was principally for the purpose of defraying incidental costs of education. (*Hearing Transcript, pages 164-165.*)

6. Claimant's employment as a student tutor was advertised and offered only to Kutztown students; qualifications of employment included a minimum grade point average, good standing with professors, and minimum credits; job responsibilities included tutoring of only Kutztown students in Claimant's field of study, and hours were scheduled only when the university was in session and when Claimant was not scheduled for class or wrestling practice. (*Hearing Transcript, pages 156, 160-161, 163-168; PSERS-21, Section E.*)

7. Claimant did not receive health insurance, life insurance, dental insurance, vision insurance, paid vacation days, paid sick leave, or paid personal leave from Kutztown in connection with his position as a tutor. (*Hearing Transcript, pages 166-167.*)

8. Claimant was not enrolled in a retirement system in connection with his work as a

tutor at Kutztown. (*Hearing Transcript, pages 167, 187, 190.*)

9. After Claimant graduated from Kutztown, he took a job as a teacher in the Caesar Rodney School District in the State of Delaware beginning in the 2000-2001 school year. (*Hearing Transcript, page 162.*)

10. From January 2006 through December 2010, which includes the school years 2005-2006 through 2010-2011, Claimant was employed as an adjunct, part-time member of the faculty of two community colleges in the State of New Jersey, including one semester at Camden County College and the remainder at Gloucester County College, and was a member of the New Jersey Public Employees' Retirement System (the "New Jersey system"). (*Hearing Transcript, pages 20, 44-45, 65-66.*)

11. As of June 30, 2011, Claimant was not vested in the New Jersey system, and he had not withdrawn his contributions and interest from it. (*Hearing Transcript, pages 66-67; Exhibit PSERS-6, Section E, Numbers 2-4.*)

12. During the 2005-2006 school year, Claimant began working for Council Rock School District ("Council Rock") in Pennsylvania and, in September 2005 he enrolled with PSERS through his employment with Council Rock. (*Hearing Transcript, pages 43, 46, 107.*)

13. During each school year from 2005-2006 through 2010-2011, Claimant earned a full year of service credit with the PSERS. (*Hearing Transcript, pages 43, 48; Exhibits PSERS-1 through PSERS-5; PSERS-10.*)

14. By a series of letters issued each year from 2006 to 2011, PSERS notified Claimant that he had accrued one year of service credit with PSERS for his work in the preceding school year, and notified him that "You may not earn more than one year of service credit in each school year regardless of the total number of days and/or hours you worked."

*(Hearing Transcript, pages 38, 53, 108-109, Exhibits PSERS-1, PSERS-2, PSERS-3 PSERS-4 PSERS-5 PSERS-10, pages 1 and 4 of each exhibit.)*

15. On July 5, 2011, Claimant filed an application to purchase out-of-state service credit with PSERS for the service he rendered at the Gloucester County College during the 2005-2006 through 2010-2011 school years. *(Hearing Transcript, pages 43-45, Exhibit PSERS-6.)*

16. On July 15, 2011, Claimant filed an application to purchase out-of-state service credit with PSERS for the service he rendered with the Caesar Rodney School District in Delaware during the 2000-2001 school year. *(Hearing Transcript, pages 49-50; PSERS-8.)*

17. On May 29, 2012, Claimant resubmitted his application to purchase out-of-state service credit with PSERS for the service he rendered at Gloucester County College. *(Hearing Transcript, pages 54, Exhibit PSERS-11.)*

18. On June 20, 2012, Claimant filed an application to purchase out-of-state service credit with PSERS for the service he rendered at the Camden County College during the 2005-2006 school year. *(Hearing Transcript, pages 61; Exhibit PSERS-13.)*

19. On September 13, 2012, Claimant resubmitted his application to purchase out-of-state service credit with PSERS for the service he rendered at the Camden County College in New Jersey, indicating that he had no pension account for his position with Camden. *(Hearing Transcript, page 68; PSERS-17, Section E.)*

20. On September 13, 2012, Claimant resubmitted his application to purchase out-of-state service credit with PSERS for the service he rendered at Gloucester County College during the 2005-2006 through 2010-2011 school years. *(Hearing Transcript, pages 69-70; Exhibit PSERS-18.)*

21. Claimant received one full year of service credit with PSERS for his out-of-state



service in Delaware during the 2000-2001 school year. (*Hearing Transcript, pages 75-76; Exhibit PSERS-24.*)

22. On October 18, 2012, Claimant appealed PSERS' October 1, 2012 denial of his application to purchase out-of-state service credit for service rendered in New Jersey. (*Hearing Transcript, pages 70-71; Exhibit PSERS-20.*)

23. On November 5, 2012, Claimant submitted an application to Purchase Former Part-Time Uncredited Service to PSERS identifying part-time service as a "tutor" at Kutztown during 1997, 1998, 1999, and 2000. (*Hearing Transcript, pages 158; Exhibit PSERS-21.*)

24. Claimant had a series of telephone and written communications with employees of PSERS, who provided Claimant with correct information relating to requirements to qualify for purchase of out-of-state service and employment at Kutztown University. (*Hearing Transcript, pages 21, 23-24, 26, 70, 121, 130; Exhibits PSERS-7, PSERS-9, PSERS-15, PSERS-17, PSERS-19, A-29.*)

25. By letter dated November 13, 2012, PSERS denied Claimant's request to purchase service credit for his work at Kutztown on the basis that Section 8201 of the Retirement Code defines school service as service rendered as a school employee, and that work-study, graduate assistant, resident assistant, and any similar exclusionary programs do not meet the definition of an employer/employee relationship in which the employee accrues retirement, health and leave benefits. (*Hearing Transcript, pages 168; Exhibit PSERS-22.*)

26. On December 17, 2012, Claimant appealed PSERS' November 13, 2012 determination regarding his service as a tutor at Kutztown. (*Hearing Transcript, pages 168 Exhibit PSERS-23.*)

27. By letter dated August 11, 2014, the Executive Staff Review Committee denied

Claimant's appeals, concluding that Claimant: (1) could not receive more than one year of credited service for any 12 consecutive months; and (2) had not met his burden of proving that his service at Kutztown was rendered as a university employee. (*Hearing Transcript, Exhibit PSERS-26.*)

28. An administrative hearing was held on July 15, 2015 before Hearing Officer, Christopher K. McNally, Esq., and Claimant appeared *pro se*, and he had the opportunity to testify, examine witnesses, and offer evidence. (*Hearing Transcript, passim.*)

## CONCLUSIONS OF LAW

1. PSERS has jurisdiction in this matter. (Finding of Fact Numbers 1, 2, 12 – 28.)
2. Claimant had adequate notice of the basis for denial of his claim and was given an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa.C.S. § 504. (Findings of Fact Numbers 15 - 28.)
3. A claimant bears the burden of establishing the facts necessary to sustain his claim. *See, e. g., Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa.Cmwlth. 1999).
4. The burden of proof applied in an administrative action is the preponderance of the evidence standard and is “such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600,612(Pa.Cmwlth. 1990); *Sigafoos v. Pa. Bd. of Probation and Parole*, 503 A.2d 1076, 1079 (Pa.Cmwlth. 1986).
5. Claimant is not eligible to purchase and receive credit for the out-of-state service that he rendered in New Jersey during the 2005-2006 through 2010-2011 school years, because he already received one full year of service credit with PSERS for each of those years, and he is precluded from earning more than one credit per school year. 24 Pa.C.S. § 8302(a). (Findings of Fact Numbers 1, 2, 10 – 15, 17 – 20, 22, 24, 27.)
6. Claimant was not a “school employee” of Kutztown in 1997, 1998, 1999, or 2000, and he did not render “school service” while he was working as a part-time, student tutor. 24 Pa.C.S. § 8102; *Simmonds v. State Employees' Ret. Sys.*, 696 A.2d 801, 803 (Pa. 1997) (Findings of Fact Numbers 1 – 9, 16, 21, 23, 25 - 27.)
7. Claimant is not entitled to purchase credit with PSERS under Sections 8102 and 8303(c) of the Retirement Code, 24 Pa.C.S. §§ 8102, 8303(c), for his student employment at

Kutztown. *Simmonds v. State Employees' Ret. Sys.*, 696 A.2d 801, 803 (Pa. 1997) (Findings of Fact Numbers 1 – 9, 16, 21, 23, 25 - 27.)

## DISCUSSION

### Procedural Due Process

Claimant was provided with a written notice of both the legal and factual grounds on which the PSERS denied his claims for purchase of credit. The notice also advised him of the procedures for appealing and seeking a review of the determination of the Executive Committee and to request a hearing. The notice further explained his procedural rights under the Administrative Agency Law and GRAPP. Following his appeal, PSERS issued a scheduling order which reiterated his rights. Claimant appeared at the hearing as scheduled and received an oral explanation that he had the burden of proof in this proceeding and that he had the right to be represented by an attorney. Claimant expressly waived his right to counsel and proceeded to represent himself. He expressed a clear understanding of his burden of proof and his rights and the issues raised regarding his applications. At the conclusion of the hearing he was again advised of his right to file a post-hearing brief and to supplement the record. After the hearing, Claimant notified the Hearing Examiner that he would not supplement the record and would rest upon the record previously established.

Claimant had adequate notice of his rights and the factual and legal grounds for the denial of his applications for purchase of credit. The Hearing Examiner is satisfied from this procedural history that Claimant has been afforded adequate notice of the basis for denial of his applications, as well as an opportunity to be heard regarding the denial and to address the merits of the issues in this matter.

### Facts

Claimant has been a teacher for the Council Rocks School District since the 2005-2006 school year. When he began employment with Council Rocks Claimant enrolled in PSERS and

has remained a PSERS member until the present. As a PSERS member Claimant has received one year of credit under the Retirement Code for each school year that he has been employed by Council Rocks.

Before employment with Council Rocks Claimant attended Kutztown University of Pennsylvania from 1997 to 2000. As a Kutztown student Claimant worked part-time as a student tutor. Kutztown paid Claimant an hourly wage, which he used to defray the incidental costs of his education, such as clothing, food, entertainment, and similar expenses. Claimant's position was advertised in the student union and limited to students. Qualifications included minimum grade point average and credits, and work assignments and schedules were based upon Claimant's course of study and class and wrestling schedule. Claimant was not enrolled in PSERS while employed at Kutztown, and he received no other benefits in addition to wages.

Upon graduation from Kutztown, Claimant was employed by the Caesar Rodney School District in the State of Delaware. Later, from January 2006 through December 2010, Claimant was employed as a part-time adjunct faculty member at two community colleges in the State of New Jersey, Gloucester County College and Camden County College. As a teacher in Delaware, Claimant was a member of the Delaware retirement system. As an adjunct faculty member at Gloucester County College and Camden County College, Claimant was enrolled in the New Jersey State Retirement System. Claimant did not vest in the New Jersey system.

In 2011, Claimant began the process of applying to purchase credit for his service in Delaware and New Jersey, as well as credit for his employment as a student tutor at Kutztown. He exchanged correspondence and telephone calls with PSERS staff while his applications were pending and subject to review.

Claimant contends that during this period of time PSERS staff instructed him to withdraw

his funds from the New Jersey system. According to Claimant, he was advised that he could not purchase credit in PSERS if he held funds in the retirement system of another state. Based upon those purported instructions, Claimant testified that he withdrew his contributions from the New Jersey system.

Although it appears that Claimant did, in fact, withdraw his contributions from the New Jersey system, Claimant did not prove that he did so in reliance upon faulty advice or information from PSERS staff. PSERS contends, persuasively, that Claimant received these instructions when he contacted PSERS to discuss the purchase of credit for his service as a teacher in Delaware. Furthermore, there is no evidence that during any of these discussions Claimant informed PSERS staff that he sought to purchase credit for the school years 2005-2006 through 2010-2011, for which he already received credit by virtue of his employment with Council Rocks.

PSERS staff reviewed Claimant's applications after they were complete. As a result of that review, Claimant's application to purchase credit for his service as a teacher in the State of Delaware was granted. The staff denied his application to purchase credit for his service as an adjunct faculty member in the State of New Jersey on the grounds that he had already received credit for the school years of 2005-2006 through 2010-2011, which included the years that he worked in New Jersey. The staff denied his application for credit as a student tutor on the grounds that his employment at Kutztown did not satisfy the requirements for "school service." Claimant appealed the staff's denials and after review the Executive Staff Review Committee likewise denied his applications. Claimant appealed, and the hearing in this matter followed.

### **Governing Law**

PSERS is a creature of the legislature and its members have only those rights created by

the Retirement Code and none beyond. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778,780 (Pa. Cmwlth. 2001). An active member of PSERS may purchase credit and receive eligibility points toward retirement for previous creditable or noncreditable "school service." 24 Pa.C.S. § 8303(c), (d).<sup>6</sup> An active member of PSERS may also purchase credit and receive eligibility points toward retirement for previous creditable "nonschool service." 24 Pa.C.S. § 8304(a).<sup>7</sup>

<sup>6</sup> The Retirement Code provides in pertinent part:

**§ 8303. Eligibility points for retention and reinstatement of service credits**

(a) Accrued credited service.--Eligibility points shall be computed in accordance with section 8306 (relating to eligibility points) with respect to all credited service accrued as of the effective date of this part.

\* \* \* \* \*

(c) Purchase of previous creditable service.--Every active member of the system or a multiple service member who is an active member of the State Employees' Retirement System on or after the effective date of this part may purchase credit and receive eligibility points:

\* \* \* \* \*

(2) as a member of Class T-D for previous creditable school service, provided the member elects to become a Class T-D member pursuant to section 8305.1 (relating to election to become a Class T-D member);

upon written agreement by the member and the board as to the manner of payment of the amount due for credit for such service; except, that any purchase for reinstatement of service credit shall be for all service previously credited.

(d) Purchase of previous noncreditable service.--Class T-C and Class T-D members who are active members on the effective date of this subsection [July 1, 2011] shall have three years from the effective date of this subsection to file a written application with the board to purchase any previous noncreditable school service. ....

24 Pa.C.S. § 8303

<sup>7</sup> The pertinent portion of the Retirement Code provides:

**§ 8304. Creditable nonschool service**

(a) Eligibility.--An active member or a multiple service member who is an active member of the State Employees' Retirement System shall be eligible to receive ... Class T-D ... service ... as set forth in subsection (b) provided that he is not entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits for such service under a retirement system administered and wholly or partially paid for by any other governmental agency or by any private employer, or a retirement program approved by the employer in accordance with section 8301(a)(1) (relating to mandatory and optional membership), and further provided that such service is certified by the previous employer and the manner of payment of the amount due is agreed upon by the member, the employer, and the board.

(b) Limitations on nonschool service.--Creditable nonschool service credit shall be limited to:



The Retirement Code defines “school service” as service rendered as a “school employee.” “School employee” is defined as 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[.]” 24 Pa.C.S. § 8102. The Board determines who is a “school employee.” 22 Pa. Code § 215.5(d)(3); *see generally Perry v. State Employees’ Ret Sys.*, 872 A.2d 273,278 (Pa.Cmwlth. 2005).

For service to count as “school service,” it must be rendered with a reporting unit of PSERS and it must be rendered as an employee who has the true bargained-for exchange with their employer that exists in the typical employment relationship. *Account of Donald G. Bailey*, Docket No. 2012-49, at pages 14, 15 (PSERB January 22, 2015); *see also Account of Bernard J. Ridgeley*, Docket No. 2014-05, at pages 16, 21-22 (PSERB October 7, 2015); *Simmonds v. State Employees’ Ret. Sys.*, 696 A.2d 801, 803 (Pa. 1997); PSERS-26; N.T. 181-184. “School service” excludes service “performed as a student.” *Bailey*, Docket No. 2012-49, at page 15; *see generally Ridgeley*, Docket No. 2014-05; *Simmonds*, 696 A.2d 801.

“Creditable nonschool service” is defined as “[s]ervice other than service as a school employee for which an active member may obtain credit” and includes “[s]ervice in any public school or public educational institution in any state other than this Commonwealth or in any

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(3) Service in any public school or public educational institution in any state other than this Commonwealth or in any territory or area under the jurisdiction of the United States. This paragraph includes service, prior to July 1, 1965, at a community college established under the act of August 24, 1963 (P.L. 1132, No. 484), known as the Community College Act of 1963.

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(c) Limitations on years of credit.--Service listed in subsection (b)(3) and (4) must have been for a period of at least one school year and credit for such service shall be limited to the lesser of 12 years or the number of years of school service credited in the system. In no case shall the total credit for nonschool service other than that listed in subsection (b)(5) exceed the number of years of school service credited in the system, plus, in the case of a multiple service member, any additional years of State service credited in the State Employees’ Retirement System.

territory or area under the jurisdiction of the United States[.]” 24 Pa.C.S. §§ 8102 and 8303(a). However, the Retirement Code also provides that “[i]n no case shall a member receive more than one year of credited service for any 12 consecutive months[.]” 24 Pa.C.S. § 8302(a); see also 24 Pa.C.S. § 8306; *Account of Craig M. Houliston*, Docket No. 2011-20 (PSERB June 26, 2012); *Account of Murray A. Neeper*, Docket No. 2011-14 (PSERB October 11, 2011).

Claimant also presented an argument that he relied upon representations of PSERS staff in withdrawing his contributions from the New Jersey system. He contends that this withdrawal of contributions has prejudiced him. He argues, in effect, that the doctrine of equitable estoppel applies and that PSERS should be bound by the position taken by its staff. “It is well established that when<sup>8</sup> the Commonwealth is acting in a governmental capacity, it cannot be estopped by actions of its officials, employees or agents.” *Pennsylvania Ass’n of State Mental Hospital Physicians v. State Employees Retirement Bd.*, 31 Pa.Cmwlth. 151, 156, 375 A.2d 863, 865, (1977), *aff’d* 484 Pa. 313, 399 A.2d 93 (1979), *quoted by Finnegan v. Com., Public School Employees’ Retirement Bd.*, 560 A.2d 848, 851, 126 Pa.Cmwlth. 584, 590 (Pa.Cmwlth. 1989), *aff’d* 591 A.2d 1053 (Pa. 1991). “It is a fundamental legal principle that a State or sovereignty cannot be estopped by any acts or conduct of its officers or agents in the performance of a governmental as distinguished from a proprietary function.” *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 320, 105 A.2d 336, 340-341, *cert. den.*, 348 U.S. 857, 75 S.Ct. 82, 99 L.Ed. 675 (1954).

“When a statute is interpreted by an agency, such interpretation shall be accorded great weight and shall be overturned or disregarded only if such construction is clearly erroneous.” *Hawkins v. Pa. Housing Finance Agency*, 595 A.2d 712, 714 (Pa.Cmwlth. 1991); *see Laurito vs. Pub. Sch. Employees’ Ret. Bd.*, 606 A.2d 609, 611 (Pa.Cmwlth. 1992).

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<sup>8</sup> *Finnegan* omits the word “when” in quoting the opinion in *State Mental Hospital Physicians*.

## Analysis

The Retirement Code has very clear provisions governing this matter. A member of PSERS may not accrue more than one year of credit in a school year. Claimant does not dispute that he has already received one credit for each school year from 2005-2006 through 2010-2011. Claimant also admits that his service as an adjunct faculty member in the State of New Jersey for Gloucester County College and Camden County College were these same school years. Therefore, under the Retirement Code, he may not purchase credits for his service in New Jersey.

Claimant also argues that he withdrew his contributions from the New Jersey system in reliance upon advice or instructions from PSERS staff. The holding in *Finnegan, supra*, is clear that PSERS acts in a governmental capacity and not in a proprietary capacity when it makes a determination of an individual's eligibility for retirement credit. Therefore, equitable estoppel may not be applied to PSERS.

Even if the doctrine of equitable estoppel could be applied to PSERS in this case, Claimant's argument would not prevail. The evidence was very persuasive that the information that Claimant relied upon was, in fact, accurate for the issues that he presented to staff. It is apparent that Claimant concluded incorrectly that the advice that he received relating to his application to purchase nonschool service in Delaware would apply to his nonschool service in New Jersey. He overlooked the critical fact that, unlike his nonschool service in Delaware, his New Jersey teaching position overlapped with his membership in PSERS. This critical fact was not presented to PSERS staff and therefore, Claimant's conclusion was erroneous.

Furthermore, there is no evidence that Claimant has, in fact, suffered prejudice as a result of his misunderstanding. Although he withdrew his contributions from the New Jersey system, Claimant was not vested in that system. Therefore, he did not lose benefits. He still retains

those funds in a traditional Individual Retirement Account, which he testified has earned 2% interest. There is no credible evidence that he did, in fact, earn a higher rate of return in the New Jersey system. Nor is there any evidence that he would not be permitted to purchase his prior service if, in the future, he returned to the New Jersey system. Therefore, Claimant would not be able to satisfy his burden of proof of justifiable reliance and prejudice to invoke the doctrine of equitable estoppel.<sup>9</sup>

As it relates to Claimant's application to purchase credit for school service as a student at Kutztown University, it is likewise clear that Claimant does not qualify. There is no evidence that Kutztown University enrolled Claimant as a member of PSERS during his employment. Furthermore, the nature of his employment responsibilities make it clear that his work as a student tutor were a form of financial assistance for his education, and not bargained for employment that entitles an individual to membership and credit in PSERS.

Accordingly, based upon the foregoing findings of fact, conclusions of law, and discussion, the following proposed order shall issue:

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<sup>9</sup> Unlike the remainder of his case, Claimant must prove the elements of estoppel by clear and convincing evidence. *Carpenter and Carpenter v. City of Johnstown*, 146 Pa.Cmwlth. 274, 281, 605 A.2d 456, 459 (1992). The weight of evidence relating to the accuracy of representations and alleged prejudice falls far short of the clear and convincing standard and weighs by a healthy preponderance of evidence in favor of PSERS.

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

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In re:

Account of James Briski, Jr.  
Claim of James Briski, Jr.

Docket No. 2014-13

Claimant

RECOMMENDATION

AND NOW, this 2<sup>nd</sup> day of November, 2015, having duly reviewed and considered the entire record, and based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Claimant's appeal from the August 11, 2014 determination of the PSERS' Executive Staff Review Committee be **DENIED**.

BY ORDER:



Christopher K. McNally  
Hearing Examiner

Claimant:

James Briski, Jr.  


PSERS Counsel:

Kathryn V. Smith, Esq.  
Assistant Deputy Chief Counsel  
Public School Employees' Retirement  
System  
5 North 5<sup>th</sup> Street  
Harrisburg, PA 17101

Docket Clerk:

Laura Vitale

Date of Mailing:

November 2, 2015