

Mail Date: MAR 15 2012

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

IN RE: ACCOUNT OF STANLEY L. DRAPER
DOCKET NO. 2010-17
CLAIM OF STANLEY L. DRAPER

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the transcript, exhibits, the Opinion and Recommendation of the Hearing Officer, Claimant's Brief on Exceptions to the Opinion and Recommendation of the Hearing Officer and PSERS' Brief Opposing Claimant's Exceptions. We note that Claimant's Exceptions merely argue the merits of his case, and, therefore, do not attempt to establish good cause for his failure to appear at the hearing after receiving timely notice, which he does not dispute receiving.

This Board finds appropriate the Hearing Officer's Findings of Fact, Conclusions of Law, Discussion, and Recommendation and, we hereby adopt them as our own, and accordingly:

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

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 3/9/2012

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

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD
HARRISBURG, PA.

In Re:
Account of Stanley L. Draper
Claim of Stanley L. Draper

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Docket No. 2010-17

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EXECUTIVE OFFICE

OPINION AND RECOMMENDATION

Date of Hearing: November 2, 2011

Linda C. Barrett
Hearing Officer

I. HISTORY:

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Stanley L. Draper (Claimant) relating to an emergency return to service with the Public School Employees' Retirement System (PSERS).

A hearing in this matter was held on November 2, 2011 in Harrisburg, Pennsylvania, before Hearing Examiner Linda C. Barrett, Esquire.

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

II. FINDINGS OF FACT:

1. Claimant is Stanley L. Draper. (Agency Record; N.T. *passim*).¹
2. Claimant requested a hearing on or about December 8, 2010. (Agency Record, December 8, 2010 facsimile from Stanley L. Draper to Mary Myers, Appeal and Request for Hearing form).
3. Claimant resides at Redacted Redacted Redacted
4. On June 21, 2011, PSERS sent a Notice of Hearing by certified first class mail to Claimant at his Redacted Redacted address. (Official Notice, Agency Record).
5. Claimant sought a continuance on August 15, 2011 in order to retain counsel. The request for continuance was granted by Order dated August

¹ N.T. refers to Notes of Testimony taken at the November 2, 2011 hearing.

16, 2011. (Official Notice, Agency Record).

6. The August 16, 2011 Order scheduled an August 24, 2011 pre-hearing telephonic conference call to address the issue of counsel and other pre-hearing matters. (Official Notice, Agency Record).

7. The pre-hearing conference call was held on August 24, 2011. Claimant participated as did counsel for PSERS. (Official Notice, Agency Record).

8. After the call, a new hearing date of November 2, 2011 was established by Order dated August 26, 2011 and PSERS was directed to issue an Amended Hearing Notice. (Official Notice, Agency Record).

9. On August 29, 2011, PSERS sent an Amended Notice of Hearing by certified mail and first class mail to Claimant at his [Redacted]

[Redacted]

[Redacted]

[Redacted] *passim*; PSERS 1).

10. The Amended Notice of Hearing advised Claimant that a hearing had been scheduled for November 2, 2011 at 12:30 p.m. at PSERS, 5 North Fifth Street, Harrisburg, Pennsylvania 17101. (N.T. *passim*; PSERS 1).

11. Claimant received the August 29, 2011 Amended Notice of Hearing and acknowledged receipt on September 1, 2011 of the Amended Notice of Hearing by executing the Certified Mail Receipt. (PSERS 1, p. 4). The Amended Notice of Hearing provided instructions on how to request a continuance of the hearing. (PSERS 1, p. 1).

12. The August 29, 2011 Amended Hearing Notice explained, [i]f you do not appear at the hearing on the date and the time scheduled without good

cause, the Hearing Officer, upon motion will recommend to the Board that [the] appeal be dismissed with prejudice." (PSERS 1).

13. The August 26, 2011 Order directed Claimant to obtain counsel to represent him by no later than October 15, 2011 and ensure that his attorney promptly filed a Notice of Appearance conforming to the requirements of the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 31.24. In the event, Claimant did not retain an attorney to represent him by October 15, 2011, he was ordered to file a detailed statement with the Docket Clerk on that date outlining the precise steps he had taken to retain counsel. (Official Notice, Agency Records).

14. Claimant did not comply with either directive. (Official Notice, Agency Records).

15. No attorney representing Claimant has entered an appearance in this case. (Official Notice, Agency Records).

16. By Order dated November 1, 2011, Claimant was reminded of his obligation to attend the hearing.² (Official Notice, Agency Records).

17. Prior to the hearing, Claimant did not file a request for continuance or communicate in any way with the Hearing Officer, the Docket Clerk or counsel for PSERS. (N.T. *passim*; Official Notice, Agency Record).

18. The August 26, 2011 and November 1, 2011 Orders were mailed to Claimant at his Redacted Redacted address.

² It should be noted that the November 1, 2011 Order contained a typographical error indicating that the hearing was scheduled for 12:30 a.m. rather than 12:30 p.m. (Agency Record, November 1, 2011 Order). However, this typographical error is not material. Additionally, there is no evidence that Claimant appeared for a hearing at this time or took steps to clarify this clerical error especially in the face of two prior notices containing the correct date and time.

(Official Notice, Agency Record).

19. The August 26, 2011 and November 1, 2011 Orders were also emailed or faxed to the parties. (Official Notice, Agency Record).

20. The Orders were not returned. (Official Notice, Agency Record; PSERS 1).

21. An administrative hearing was held on November 2, 2011. (N.T. *passim*).

22. Claimant did not attend the November 2, 2011 hearing. (N.T. *passim*).

III. CONCLUSIONS OF LAW:

1. Claimant was provided with timely notice of the November 2, 2011 hearing. (Findings of Fact Nos. 9-12).

2. Claimant has not demonstrated just cause for a continuance. (Findings of Fact Nos. 1-22).

3. Whenever a claimant fails to appear, either in person or through counsel without good cause, for a scheduled hearing, the hearing examiner will issue a recommendation to dismiss the case, without considering the merits of the case. 22 Pa. Code § 201.4.

IV. DISCUSSION:

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

The record clearly establishes that Claimant received notice of the November 2, 2011 hearing. The essential question to be resolved at this point is whether Claimant has established just cause for failure to appear at a hearing about which he was aware. The record does not establish just cause. Indeed, Claimant took no steps to proceed with this matter despite explicit directives from the Hearing Officer to retain counsel prior to the hearing; or in the event, he was unable to do so, file a detailed statement explaining his inability to retain counsel. He did neither.

Subsequent to the November 2, 2011 hearing, on November 15, 2011, Draper submitted a request for continuance which is opposed by PSERS.³ In support of this request, Draper offers two reasons. First he maintains that he did not have information regarding his retirement account being "overdrawn" at

³ PSERS opposes the request for continuance for three reasons: (1) it is untimely; (2) it should not be construed as a request to re-open the record; and (3) it would be an untimely response to the motion to dismiss. It is clear that Claimant has filed a request for continuance having styled it as such. Consequently, there is no reason to consider it to be a request for rehearing or reconsideration. In so far as PSERS argues that the Claimant's motion for continuance could serve as a response to the motion to dismiss and would be untimely, the response would be untimely if the Claimant was aware that such a motion had been made. Although Claimant could presume that such a motion might be made based on the contents of the Amended Hearing Notice, no order or other notice had been issued directing Claimant to reply at the time Claimant filed his motion. As such, Claimant's response will be considered as a response to the motion on the issue of just cause. For reasons, contained in this opinion, the representations offered by Claimant do not establish just cause.

Corestate Bank after being frozen or after funds were "unlawfully" deposited into an IRA account at a branch he did not patronize. He represents that this information came to his attention during the weekend of October 28, 2011. Draper next asserts that Clinton Johnson, Sr. is his attorney of record and has been unresponsive.

Even if the facts as Draper represents them to be are accepted as explanation for his failure to appear at the hearing, they do not change the result here. The purpose of the hearing in this matter was to address the issue of Draper's emergency return to service. Draper's banking issues uncovered on or about October 28, 2011 regarding the handling of deposits to his retirement account are not relevant to the material issue in this case and his failure to resolve those issues prior to his hearing would have no bearing on the evidence to be introduced at the hearing in support of his appeal which involve his emergency return to service and perhaps Draper's request to rollover monthly periodic payments to an IRA. Since that request was not honored by PSERS, the status of Draper's bank account is not material to this matter. Additionally, to the extent that Draper believed that resolving this issue was necessary prior to the hearing, he could have sought a further continuance. He did nothing until November 15, 2011.

Draper also maintains that his attorney has been non-responsive. This issue is not new. Indeed, Draper raised the issue of the non-responsiveness of his desired counsel during the pre-hearing conference held on August 24, 2011. Draper was provided with additional time to resolve this matter and advised to

seek other representation if his desired counsel remained unresponsive. (Official Notice, August 26, 2011 Order, Agency Record). Based on the November 15, 2011 filing, Draper did not take any action to obtain new counsel and certainly did not comply with the August 26, 2011 Order directing him to explain his steps to secure alternate counsel. Rather, Draper apparently wishes to delay resolution of this matter while he tries to pursue a separate action against an attorney who has not entered an appearance in this case.

While PSERS regulations govern in this instance, there is also other support for a dismissal for a failure to comply with pre-hearing directives. The rules of administrative procedure are not mere suggestions, and compliance with them is necessary for the orderly administration of state government.” *Snyder Memorial Health Center v. Department of Public Welfare*, 898 A.2d 1227, 1229-30 (Pa. Cmwlth. 2006) (internal citations omitted). The administrative appeal at issue is subject to PSERS regulations governing administrative hearings, 22 Pa. Code §§ 201-1-201.12 and where those rules contain no guidance, the General Rules of Administrative Practice and Procedure (GRAPP) will govern (found in Title I, Part II of the Pennsylvania Code, 1 Pa. Code §§ 31.1-35.251). While GRAPP does not specifically address the dismissal of appeals based upon *non pros* or failure to comply with an order or rule; they do authorize parties to file motions without regard to limitation, see 1 Pa. Code §§ 35.177- 35.180, and authorize the presiding officer to dispose of motions to dismiss if such disposition is part of a recommendation for a final agency determination, see 1 Pa. Code § 35.187. Moreover, while agencies do not have the full breadth of inherent

powers exercised by Pennsylvania courts, those courts have recognized the inherent power of agencies to control their own dockets through the dismissal of appeals where parties have failed to comply with a rule or order. See *Burch v. Department of Public Welfare*, 815 A.2d 1143 (Pa. Cmwlth. 2002) (Court affirmed a dismissal of an appeal where applicant failed to prosecute the matter and failed to respond to notice for pre-hearing conference and to rule to show cause and to motion to dismiss); *Greensburg Nursing and Convalescent Center v. Department of Public Welfare*, 159 Pa. Cmwlth. 391, 633 A.2d 249 (1993) (Court affirmed dismissal of appeal for repeated failure to meet pre-hearing requirements and to respond to pre-hearing requests to specify issues involved in appeal); *Goetz v. Department of Environmental Resources*, 149 Pa. Cmwlth. 230, 613 A.2d 65 (1992), *petition for allowance of appeal denied*, 533 Pa. 663, 625 A.2d 1196 (1993) (Court affirmed the dismissal of an appeal after repeated failures by appellant to file pre-hearing memorandum); *Lee v. Department of Public Welfare*, 105 Pa. Cmwlth. 211, 523 A.2d 1188 (1987) (Court affirmed dismissal of appeal where party did not have good cause for failure to appear at hearing after a continuance was denied).” *Barr Street Corp. v. Dept. of Public Welfare*, 881 A.2d 1278, 1284-85 (Pa. Cmwlth. 2005) (some internal citations and footnotes omitted). The *Barr* court further espoused that, “[t]he key to determining whether dismissal of an administrative appeal on the basis of *non pros* is proper lies with whether the requirements for *non pros* were met and whether the parties were afforded due process-not whether the parties have failed to comply with a rule or order.” *Id.*

Instantly, Draper's failure to comply with the August 26, 2011 pre-hearing order reflects a blatant disregard of the administrative process. This failure frustrates the adjudication of Draper's matter and squanders agency resources. The record before the agency establishes that the Hearing Officer provided Draper with multiple opportunities to be heard, but he failed to take the necessary affirmative steps to seek a timely continuance despite instructions to do so.⁴ Such failures provide the agency head with "the inherent power ... to control [the] docket[] through the dismissal of appeals where the parties have failed to comply with a rule or order." See *Snyder Memorial Health Center*, 898 at 1229 (citing *Barr Street Corp.*, 881 A.2d 1278).

According to the Administrative Agency Law, any party *may* be represented by counsel at an administrative hearing. 2 Pa.C.S.A. § 502 (emphasis added). However, an individual may proceed in an administrative hearing without counsel, and the individual bears the responsibility to secure counsel if he desires to be represented. *Shenk v. State Real Estate Commission*, 527 A.2d 629, 631 (Pa. Cmwlth. 1987). In this case, Draper was afforded ample opportunity to obtain counsel. This is not a criminal proceeding and individuals may appear at an administrative hearing *pro se*. Draper was provided with additional time to obtain access to counsel. During that time, Draper represented himself in pre-hearing matters and demonstrated his

⁴ Absent specific direction from the agency or the presiding officer, requests for continuance must be timely filed. 1 Pa. Code § 31.15. This rule presumes that such a request is made in advance of the hearing or if events transpire during a hearing, at the hearing itself. The reasons that Claimant relies upon in support of a continuance of his hearing were known to him well in advance of the hearing date. He took no action despite a directive to inform the Hearing Officer of his attempts to retain counsel by no later than October 15, 2011 or the knowledge that he had not obtained what he thought he might need regarding his financial records. Claimant's lack of planning is not a justifiable reason for ignoring his obligations to timely pursue his appeal.

awareness of how to seek a continuance. When directed to explain his efforts to seek counsel, Draper ignored that clear directive.

While it is true that Claimant is a *pro se* litigant, he has demonstrated sufficient understanding of what he needed to do to file for a continuance and was provided with ample time and instructions on how to obtain counsel. Draper's insistence that he be allowed time to pursue a separate action against an attorney who has not even entered an appearance in this case is not reasonable. Indeed, Draper was instructed to obtain alternative counsel and provided with information regarding the Pennsylvania Lawyer Referral Service to aid him in his search for counsel. Draper has yet to explain why he failed to avail himself of this resource or explain why he could not retain another attorney during the additional time provided to him after the August 24, 2011 pre-hearing telephone conference held for this precise reason. Finally, Draper was advised of the consequences of a failure to appear at his hearing. The August 29, 2011 Amended Hearing Notice explained, "[i]f you do not appear at the hearing on the date and the time scheduled without good cause, the Hearing Officer, upon motion will recommend to the Board that [the] appeal be dismissed with prejudice." (PSERS 1).

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

V. RECOMMENDATION

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



LINDA C. BARRETT
Hearing Officer

Date Mailed: December 1, 2011

Stanley L. Draper

REDACTED

By Certified Mail and First Class Mail

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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD
HARRISBURG, PA.

In Re: :
Account of Stanley L. Draper :
Claim of Stanley L. Draper : Docket No. 2010-17
:

ORDER

AND NOW, this ____ day of _____, 2012 based upon the foregoing Findings of Fact, Conclusions of Law and Discussion and the recommendation of the Hearing Officer dated November 30, 2011, the Board adopts the Opinion and Recommendation of the Hearing Officer and hereby **GRANTS** the Public School Employees Retirement System's Motion to Dismiss. The appeal of Claimant Stanley L. Draper is dismissed with prejudice.

BY ORDER:

For the Public School Employees'
Retirement Board