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Mail Date: _____

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

IN RE: ACCOUNT OF DONALD E. THOMAS
DOCKET NO. 2015-09
CLAIM OF DONALD E. THOMAS

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with the following modifications:

1. Paragraph 2 on page 16, the date of January 7, 2007 in the first sentence should be January 8, 2007.
2. Paragraph 41 on page 7 is amended to read: "During their July, 2012 telephone conversation, Dr. Farester informed Claimant of the criteria needed for him to return to service under the emergency and shortage provisions of the Retirement Code, and Dr. Farester suggested that Claimant send a letter to PSERS for a predetermination on whether his return to service would be authorized. (N.T. 101-102, 108, 113-114)."
3. Paragraph 46 is amended to read: "Claimant also contacted Ms. Buchwach on December 11, 2012 to discuss his more recent return to service with United in light of the Auditor General's findings. (PSERS 12; N.T. 103-104)."

4. Paragraph 48, on page 8 is amended to read: "Claimant never sought a determination from PSERS regarding his post-retirement work with United, but PSERS did review the return through its normal course of business and made a determination that no action was needed. (N.T. 151-152)."

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

IT IS HEREBY ORDERED that Claimant Donald E. Thomas's request to have the school service he rendered between January 1, 2010 and June 30, 2010 deemed to have been rendered as an annuitant in an approved emergency capacity is DENIED

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: June 16, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

PSEPB
EXECUTIVE OFFICE

In Re:

Account of Donald E. Thomas

Claim of Donald E. Thomas

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Docket No. 2015-09

OPINION AND RECOMMENDATION

Date of Hearing: June 22, 2016
Hearing Officer: Marc A. Moyer, Esquire
For Claimant: Ronald N. Repak, Esquire
For PSERS: Kathrin V. Smith, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board on an appeal filed by Donald E. Thomas ("Claimant") from an April 23, 2015 determination by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request that his employment with the Blacklick Valley School District (the "District") from January 1, 2010 through June 30, 2010 be considered emergency service. Prior to the ESRC's April 23, 2015 determination, PSERS had made an actuarial reduction of Claimant's monthly benefits in the amount of \$237.81, effective December 31, 2014, to recoup an overpayment of \$38,845.09 in monthly annuity payments after having corrected Claimant's retirement date from January 1, 2010 to July 1, 2010. The correction of Claimant's retirement date was based upon PSERS' determination that Claimant had continued to render active service to the District until July 1, 2010, rather than having retired effective December 31, 2009, as originally reported.

Claimant filed a timely appeal to the ESRC from the adjustment to his retirement account. By letter dated May 27, 2015, PSERS notified Claimant of the ESRC's decision to deny Claimant's appeal on the ground that he had failed to demonstrate that the District had made a *bona fide* effort to recruit and employ a non-retiree due to a shortage of appropriate replacement candidates prior to having hired Claimant as Acting Superintendent. The correspondence further cited to the District having accepted Claimant's retirement, effective December 31, 2009, at the same October 21, 2009 school board meeting it had appointed Claimant as Acting Superintendent, effective January 1, 2010. For those reasons, PSERS did not consider Claimant to have actually retired due to the absence of a break in service. Because of the aforementioned prearrangement, PSERS considered Claimant to be subject to the return-to-service provisions of the retirement code, including reimbursement to PSERS for the annuity Claimant received from January 1, 2010 through June 30, 2010.

Claimant timely appealed from the ESRC's April 23, 2015 determination on or about June 19, 2015. PSERS filed an Answer with New Matter on July 9, 2015. A formal administrative hearing was held before Hearing Officer Marc A. Moyer, Esquire on June 22, 2016.

Claimant participated in the hearing, was represented by legal counsel, and testified on his own behalf. By way of exhibits, Claimant presented his Superintendent's Contract with the District and the District's October 21, 2009 School Board meeting minutes. Kathrin V. Smith, Esquire represented PSERS at the hearing. PSERS presented its case through the testimony of PSERS Retirement System Regional Representative, Dominic Corso, PSERS Regional Office Administrator, Brian Farester, Ph.D., and PSERS Retirement Administrator, Troy W. Peechatka. PSERS additionally presented its case through its admission into the record of twelve (12) exhibits.

By Amended Order dated July 29, 2016, the Hearing Officer directed that Claimant file his Post-Hearing Brief no later than September 20, 2016. PSERS was directed to file its Post-Hearing Brief no later than November 21, 2016. The record closed with the filing of Notes of Testimony ("N.T.") on July 15, 2016, Claimant's filing of his Post-Hearing Brief with the Hearing Officer on September 22, 2016, and PSERS' filing of its Post-Hearing Brief on November 21, 2016. This matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant first became a member of PSERS upon beginning his employment with the District in 1974. (N.T. 28).
2. Claimant became the District's Superintendent in 1983. (N.T. 9, 28-29).
3. Claimant had entered into a contract with the District to serve as the District's Superintendent from July 1, 2006 through June 30, 2010. (Claimant Exhibit 1; N.T. 12-15, 21).
4. Claimant decided to retire from the District, effective December 31, 2009, prior to the expiration of the full term of his contract with the District, due to his wife experiencing health issues. (N.T. 15-16).
5. In August, 2009, Claimant verbally informed the District that he intended to retire, effective December 31, 2009. (N.T. 10-11, 18, 29-31).
6. Between August, 2009 and October 21, 2009, the District inquired into Claimant's willingness to serve as its Superintendent beyond December 31, 2009, in the event it could not identify his successor by that date. (N.T. 18, 30-31).
7. Claimant met with Dominic Corso during an unscheduled meeting in or about August, 2009, after Claimant had informed the District of his intention to retire, effective December 31, 2009. (N.T. 18, 35, 57, 73).
8. Dominic Corso is employed by PSERS as a Retirement System Regional Representative. (N.T. 67).
9. Dominic Corso has held his position as a PSERS Retirement System Regional Representative for approximately fifteen (15) years, since approximately 2001. (N.T. 67).
10. Dominic Corso had served as a PSERS Retirement System Regional Representative for approximately eight (8) years at the time he met with Claimant in August, 2009. (N.T. 18, 35, 67).

11. Brian Farester, Ph.D. ("Dr. Farester") serves as PSERS Regional Office Administrator, and has been Dominic Corso's supervisor since 2001. (N.T. 68, 72, 96, 99-101)

12. Dr. Farester trained Mr. Corso on his duties and responsibilities related to exit counseling. (N.T. 68, 72, 99-101).

13. Dominic Corso's routine practice in August, 2009 was to counsel prospective retirees in accordance with his training. (N.T. 73-74, 99-101).

14. Dominic Corso was not authorized to provide prospective retirees with his opinion regarding whether PSERS would approve specific instances of a retiree's return to service. (N.T. 74-75, 90, 99-101, 145-146).

15. Dominic Corso was not authorized to approve a retiree's return to service. (N.T. 75, 99-101).

16. Claimant did not memorialize his August, 2009 conversation with Dominic Corso in writing. (N.T. 18-19, 50-51, 57).

17. Neither Claimant, nor the District, sought a written determination from PSERS regarding whether Claimant's post-retirement work with the District in an emergency capacity would be permissible under the Retirement Code. (N.T. 50, 161).

18. Claimant agreed to continue to work for the District after December 31, 2009, sometime prior to October 21, 2009. (Exhibit A; N.T. 29-31).

19. Claimant identified two individuals within the District who had the credentials to serve as the District's Superintendent, and who were interested in the Superintendent position prior to October 21, 2009. (N.T. 16).

20. The Blacklick Valley School Board did not hire either of the two qualified Superintendent candidates prior to Claimant beginning his duties as Acting Superintendent on January 1, 2010. (N.T. 16-17, 33, 55).

21. The Blacklick Valley School Board accepted Claimant's resignation as Superintendent, effective December 31, 2009, at its October 21, 2009 meeting. The School Board also approved Claimant as the District's Acting Superintendent, effective January 1, 2010, at the same meeting. (Exhibit A; N.T. 29-31).

22. Claimant attended a PSERS retirement exit counseling session with Dominic Corso on December 29, 2009. (PSERS 3; N.T. 34-35, 69).

23. Dominic Corso has conducted approximately 25 exit counseling sessions per year since 2001. (N.T. 68).

24. Dominic Corso's retirement counseling sessions with prospective retirees as of December, 2009 routinely addressed the criteria needed for them to return to service after retirement, including their need to experience a break in service, the need for an existing vacancy for the intended position and the need for the prospective employer to have made a *bona fide* effort to fill the vacant position with a non-retiree in order to return to service on an emergency basis, or based upon a shortage of candidates, and their need to obtain any desired pre-approval for their return to service from PSERS in writing. Mr. Corso additionally informed prospective retirees of the prohibition against prearranging their return to service prior to their effective date of retirement. (N.T. 68, 70-74, 99-101).

25. During his meeting with Claimant in August, 2009, Dominic Corso did not inform Claimant that he was permitted to return to service as the District's Acting Superintendent under the circumstances by which Claimant assumed that position on January 1, 2010. (N.T. 74-75, 99-125).

26. Dominic Corso discussed the topics on the PSERS Retirement Exit Counseling Checklist with Claimant at his December 29, 2009 meeting with Claimant, including the topics addressed under the heading "After Retirement" within the Checklist. (PSERS 3; N.T. 69-70).

27. Dominic Corso provided Claimant the information he routinely provided to prospective retirees during his August, 2009 meeting with Claimant, and during Claimant's December 29, 2009 exit counseling session, including an explanation of the criteria required to return to school service on an emergency basis or based upon a shortage of personnel. (PSERS 3; N.T. 70-72, 75-77).

28. Claimant's testimony regarding the substance of his August, 2009 conversation with Dominic Corso is not credible as it related to his purported ability to return to post-retirement service without experiencing a break in service. (PSERS 12; PSERS 13; N.T. 18-19, 35-36, 72-80, 101-125).

29. Claimant submitted his Application for Retirement to PSERS which identified his effective date of retirement as December 31, 2009. (PSERS 4; N.T. 36).

30. Claimant began receiving retirement benefits, effective January 1, 2010. (PSERS 5; N.T. 37-38, 142).

31. Claimant began working for the District as Acting Superintendent on Monday, January 4, 2010, pursuant to the same terms and conditions set forth within his original Superintendent's Contract. (N.T. 40).

32. Claimant continued to receive the same salary and health insurance he received prior to December 31, 2009, upon assuming the position of Acting Superintendent on January 1, 2010. (N.T. 40-42).

33. The Blacklick Valley School Board selected John Mastillo, Ph.D. as the District's Superintendent, effective July 1, 2010, at its February 17, 2010 meeting. At the same meeting, the

School Board also created the position of Associate Superintendent and appointed Dr. Mastillo to that position upon his release from his prior employer in Texas. (PSERS 6; 42-45).

34. Dr. Mastillo began serving as the District's Associate Superintendent on April 6, 2010, during the same period Claimant continued to work as the District's Acting Superintendent. (N.T. 40, 45).

35. Claimant continued to work as the District's Acting Superintendent from January 1, 2010 through June 30, 2010, during which time he also assisted with Dr. Mastillo's transition to the Superintendent position. (N.T. 42, 45-46, 59).

36. Dr. Mastillo did not perform any duties as the District's Superintendent during the period Claimant served as Acting Superintendent. (N.T. 46).

37. Claimant's service with the District terminated on June 30, 2010. (PSERS 6; N.T. 42).

38. Claimant first contacted Dr. Farester by telephone in July, 2012 for the purpose of inquiring into his ability to work as Acting Superintendent for the United Area School District ("United") on an emergency basis. (PSERS 10; N.T. 51, 61-62, 101-102).

39. Claimant had already accepted the position of Acting Superintendent with United prior to having contacted Dr. Farester. (N.T. 52, 61).

40. Claimant contacted Dr. Farester in July, 2012 after being informed by legal counsel for United that he had failed to go through the formal process of returning to service on an emergency basis under the Retirement Code before he had accepted the position of Acting Superintendent. (PSERS 10; N.T. 61).

41. During their telephone conversation, Dr. Farester informed Claimant of the criteria needed for him to return to service under the emergency and shortage provisions of the Retirement Code, and he suggested that Claimant contact Jayne Buchwach at PSERS and/or write to PSERS for

additional information or for a predetermination on whether his return to service would be authorized. (PSERS 10; N.T. 61-62, 108).

42. Claimant informed Dr. Farester during their July, 2012 conversation that he was hesitant to seek a predetermination from PSERS due to the need for him to inform United about his ability to accept the position of Acting Superintendent within a few days of their telephone conversation. (PSERS 10; N.T. 102).

43. Dr. Farester was not authorized to approve Claimant's return to service, and he did not approve Claimant's return to service with United during his July, 2012 telephone conversation with Claimant. (N.T. 102).

44. Neither Claimant, nor United, sought a predetermination from PSERS regarding Claimant's ability to return to service prior to Claimant returning to service with United. (N.T. 151-152).

45. Claimant contacted Jayne Buchwach by telephone on December 11, 2012 for the purpose discussing the results of an investigation by the Pennsylvania Office of Auditor General which found that Claimant had improperly returned to school service with the District in January, 2010. Dr. Farester participated in the telephone conversation. (PSERS 12; N.T. 103-104).

46. Claimant also contacted Ms. Buchwach to discuss his more recent return to service with United in light of the Auditor General's findings. (PSERS 12; N.T. 103-104).

47. During the December 11, 2012 telephone conversation, Claimant incorrectly informed Ms. Buchwach that Dr. Forester had previously authorized his return to service with United. (PSERS 12; N.T. 103-104).

48. Claimant sought a determination from PSERS regarding his ability to return to service with United following his initial telephone conversation with Ms. Buchwach. (N.T. 62-64).

49. Claimant contacted Dr. Farester by telephone once again on July 11, 2013 to discuss the Auditor General's report regarding his return to service with the District. Claimant once again incorrectly stated that Dr. Farester had authorized his return to service with United during their telephone conversation in July, 2012. (PSERS 10; N.T. 113-114, 122).

50. By letter dated December 11, 2014, PSERS informed Claimant that it had adjusted his account to reflect a correction to his retirement date, from January 1, 2010 to July 1, 2010, based upon PSERS' determination that he had continued to render active service with the District until July 1, 2010. (PSERS 7; PSERS 9; N.T. 144, 155-156).

51. Claimant received additional service credit as a result of the adjustment, and his monthly benefit increased from \$6,588.22 to \$6,601.13. However, Claimant's net monthly benefit was reduced from \$5,270.22 to \$5,090.32 pursuant to an actuarial reduction for annuity overpayments. (PSERS 8; N.T. 147-149).

52. By letter dated December 15, 2014, PSERS informed Claimant of his ability to appeal from the adjustment of his service credit. (PSERS 9; PSERS 10; N.T. 114-115).

53. Claimant filed a timely appeal to the ESRC from the adjustment to his retirement account. By letter dated May 27, 2015, PSERS notified Claimant of the ESRC's decision to deny his appeal on the ground that he had failed to demonstrate that the District had made a *bona fide* effort to recruit and employ a non-retiree before hiring him due to a shortage of appropriate replacement candidates. (PSERS 11; N.T. 49).

54. PSERS' May 27, 2014 correspondence further cited to the District having accepted Claimant's retirement, effective December 31, 2009, at the same October 21, 2009 School Board meeting at which it appointed Claimant as Acting Superintendent, effective January 1, 2010. For that

reason, PSERS did not consider Claimant to have actually retired due to the absence of a break in service. (PSERS 11).

55. Claimant timely appealed from the ESRC's April 23, 2015 determination, on or about June 19, 2015. (Official Notice-Agency records).¹

56. PSERS filed an Answer with New Matter on July 9, 2015. (Official Notice-Agency records).

57. A formal administrative hearing was held before Hearing Officer Marc A. Moyer, Esquire on June 22, 2016.

58. Claimant was properly served with all pleadings, notices and orders filed in this matter, and he participated in the formal administrative hearing with the assistance of legal counsel, on June 22, 2016. (Official Notice-Board records; N.T. 50-58).

¹ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . . 1 Pa.Code §35.173.

Official notice is also permitted under case law. *See, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained: "Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A.2d at 994 n. 6.

CONCLUSIONS OF LAW

1. Claimant has failed in his burden of showing that he experienced a *bona fide* break in service with the Blacklick School District prior to January 1, 2010. (24 Pa.C.S.A. §§8307, 8346; Findings of Fact, Nos. 3-7, 20, 23, 31-32, 34-37).
2. Claimant has failed in his burden of showing that he returned to school service during an emergency pursuant to Retirement Code at 24 Pa.C.S.A. §8346. (Findings of Fact, Nos. 3, 6, 20-23, 29-37).
3. The PSERS properly corrected the error regarding Claimant's original date of retirement and adjusted Claimant's retirement benefits to reflect his termination date of June 30, 2010. 24 Pa.C.S.A. §8534(b); (Findings of Fact, Nos. 3-7, 20-23, 29-37).
4. PSERS is not estopped from either correcting or adjusting Claimant's retirement benefits to reflect his termination date with the District, effective June 30, 2010. (Findings of Fact, Nos. 7-9, 24-28, 38-49; *Tyson v. Pennsylvania Public School Employees' Retirement System*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999); *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848, 852 (Pa. Cmwlth. 1989); *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995)).
5. Claimant was served with all pleadings, orders and notices filed of record in this matter, and he participated in the hearing with the assistance of legal counsel. (Official Notice-Board records; N.T. 50-58).
6. Claimant was provided appropriate due process in this matter. (Findings of Fact, Nos. 50-58).

DISCUSSION

This matter involves an appeal from an April 23, 2015 decision by the PSERS' Executive Staff Review Committee to deny Claimant's request that his school service with the Blacklick Valley School District from January 1, 2010 through June 30, 2010 be considered emergency service. Claimant does not dispute that he continued to serve as the District's Acting Superintendent after his December 31, 2009 resignation. Rather, Claimant asserts that the continuation of his duties and responsibilities as Acting Superintendent were rendered to the District on an emergency basis, after he had purportedly received verbal assurances by a PSERS Retirement System Regional Representative that his return to service was permissible under the Retirement Code. By contrast, PSERS contends that Claimant did not receive the oral assurances upon which he allegedly relied, that he did not experience a *bona fide* break in service from the District and, therefore, did not legitimately become an annuitant under the Retirement Code, effective January 1, 2010. PSERS similarly asserts that Claimant did not assume his duties as Acting Superintendent under emergency circumstances pursuant to the Retirement Code at 24 Pa.C.S.A. §8346. Claimant asks the Board to enter an order which reinstates his December 31, 2009 retirement date and fully restores his PSERS retirement benefits based upon having returned to service with the District on an emergency basis from January 1, 2010 through June 30, 2010.

As the party appealing from the determination of the PSERS' Executive Review Committee, Claimant bears the burden of establishing that he is entitled to the service credit he seeks under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. §8101 *et. seq.* See, *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). The degree of proof required by Claimant to establish his case is a preponderance of the evidence. *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A.2d 678, 681-83 (Pa. Cmwlth.

2005); *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *app. den.*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is “such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence” through evidence which is substantial and legally credible. *A.B. v. Slippery Rock Area School District*, 906 A.2d 674 (Pa. Cmwlth. 2006); *Lansberry*, 578 A.2d at 601-602; *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986).

Statutory/Regulatory Framework

It is well established that a retiree’s right to benefits under the Retirement Code is strictly limited to those specifically set forth by the Code. *See, Forman v. Public School Employes’ Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burriss v. State Employes’ Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees’ Retirement Board*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992). Moreover, PSERS is required to construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa.C.S.A. §1921(a),(b). The Retirement Code addresses the need for the termination of service by an annuitant as follows:

§8307. Eligibility for annuities

(a) Superannuation annuity.- An active or an inactive member who attains superannuation age shall be entitled to receive a superannuation annuity upon **termination of service** and filing of a proper application....

24 Pa.C.S.A. §8307(a)(emphasis added).

The Retirement Code defines an “Annuitant” as “[a]ny member on or after the effective date of retirement until his annuity is terminated.” 24 Pa. C.S.A. §8102. Pertinent to Claimant’s return to service in this case, the phrase “Date of termination of service” is defined by the Retirement Code at 24 Pa.C.S.A. §8102, as follows:

The last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his

employer or two years following the last day of service for which contributions were made, whichever is earliest.

24 Pa.C.S.A. §8102. To the extent Claimant contends that his return to service was in response to an “emergency” experienced by the District, the Retirement Code at 24 Pa.C.S.A. §8346 provide as follows:

§8346. Termination of annuities

(a) **General rule.**--If an annuitant returns to school service or enters or has entered State service and elects multiple service membership, any annuity payable to him under this part shall cease effective upon the date of his return to school service or entering State service and in the case of an annuity other than a disability annuity the present value of such annuity, adjusted for full coverage in the case of a joint coverage member who makes the appropriate back contributions for full coverage, shall be frozen as of the date such annuity ceases...

(b) **Return to school service during emergency.**--When, in the judgment of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers or other personnel, an annuitant may be returned to school service for a period not to extend beyond the school year during which the emergency or shortage occurs, without loss of his annuity, provided that the annuitant meets the conditions set forth in subsection (b.2). The annuitant shall not be entitled to earn any credited service, and no contributions may be made by the annuitant, the employer or the Commonwealth on account of such employment.

(b.2) Limitation on return to school service by an annuitant during emergency or in an extracurricular position.--

(1) An annuitant may return to school service under subsection (b) or (b.1), provided the annuitant otherwise meets the requirements of subsection (b) or (b.1) and has attained the age set forth in IRC § 401(a)(36) or the applicable “normal retirement age” in 26 C.F.R. § 1.401(a)-1(b)(2) (relating to post-ERISA qualified plans and qualified trusts; in general).

(2) An annuitant who has not reached the age as set forth in IRC § 401(a)(36), or the applicable “normal retirement age” under 26 C.F.R. § 1.401(a)-1(b)(2), may return to service under subsection (b) or (b.1) provided the annuitant otherwise meets the requirements of subsection (b) or (b.1) and has had a break in service, as set forth in paragraph (3).

(3) For purposes of this subsection, a break in service occurs when a member has a bona fide termination of service. The following factors will be considered in determining whether there had been a bona fide termination of service:

(i) whether the change in the employment relationship is more than a formal or technical change, requiring the severing of the employment connection with the employer;

(ii) whether there has been a reasonable anticipation or prearranged agreement between the member and the employer that a return to school service under this section shall take place;

(iii) the amount of time that has elapsed from the date the member becomes an annuitant and the return to school service;

(iv) whether the services are a continuation of the annuitant's previous service with the same employer; and

(v) such other factors as the board may deem appropriate.

24 Pa.C.S.A. §8346.

The Retirement Code defines “school service” as “service rendered as a school employee.” 24 Pa.C.S.A §8102. The term “school employee” is further defined under the Retirement Code 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, excluding, however, any independent contractor or a person compensated on a fee basis.” 24 Pa.C.S.A. §8102. The Board’s regulations provide, in pertinent part, “in cases of doubt, the Board will determine whether any person is a school employee within the meaning of the Retirement Code.” 22 Pa.Code §215.5(d)(3).

Break in Service Analysis

In order to qualify for an annuity under the Retirement Code, an annuitant must first experience a *bona fide* break, or termination of service. See, e.g., *Baillie v. Public School Employees' Retirement Board*, 993 A.2d 944, 951 (Pa. Cmwlth. 2009); 24 Pa.C.S.A §8307(a), 8346(b.2). In *Baillie*, the Pennsylvania Commonwealth court affirmed PSERS' order which directed the claimant to return \$79,083.39 in retirement annuity payments he had received. *Id.* at 945. Claimant had served as the Executive Director of a county intermediate unit prior to his claimed date of retirement, Friday, January 5, 2007. However, Claimant agreed to work under an emergency contract until the end of the school year, after having informed the intermediate unit of his pending retirement. *Baillie*, 993 A.2d at 945. The board of the intermediate unit, thereafter, voted at its November, 2006 meeting to employ the claimant under an emergency contract following his announced date of retirement based upon its perceived shortage of qualified candidates to replace the claimant. *Id.*

Claimant returned to work as Executive Director of the intermediate unit the work day following his stated date of retirement, Monday, January 7, 2007, and began collecting a retirement annuity, effective January, 2007. *Baillie*, 993 A.2d at 945-46. He also simultaneously collected his salary from the intermediate unit for his work as Executive Director until his last day with the Intermediate Unit on June 30, 2007. *Id.* Although the Intermediate Unit cited to exigent circumstances for rehiring claimant, PSERS concluded that the claimant's employment from January 8, 2007 through June 30, 2007 was not prompted by a genuine emergency pursuant to its investigation into the matter. *Baillie*, 993 A.2d at 946. Accordingly, PSERS recalculated claimant's final average salary based upon a retirement date of June 30, 2007, and ordered claimant to repay \$79,083.39. *Id.*

Claimant appealed from PSERS' decision and an administrative hearing ensued. As in this case, claimant asserted that a PSERS representative had informed him that he could return to service with the

Intermediate Unit on an emergency basis while he collected his retirement annuity. Claimant also testified that the Intermediate Unit's solicitor informed him that his return to service under the circumstances complied with the Retirement Code. *Id.* at 946. A representative of the Intermediate Unit also testified that while claimant's original contract required to him to work until June 30, 2007, the board decided that it would not be in the Intermediate Unit's best interest to force claimant to continue his employment after he decided to retire. *Baillie*, 993 A.2d at 946-47.

The hearing examiner in *Baillie* found in favor of claimant, but recommended that PSERS' calculation be modified based upon PSERS having properly excluded payments for unused vacation time. The hearing examiner reasoned that the power to enter into an emergency contract rested exclusively with the public school employer and, therefore, that the emergency hire was beyond the permissible review of PSERS. *Baillie*, 993 A.2d at 948. The PSERS' Board, thereafter, granted PSERS' exceptions to the hearing examiner's decision and concluded, in part, that the Claimant had not been recalled from retirement for an emergency. *Id.* On appeal to the Commonwealth Court, claimant asserted, in part, that PSERS had abused its discretion in concluding that there was not an emergency. *Baillie*, 993 A.2d at 948.

The Commonwealth Court affirmed the decision by the PSERS Board upon finding, as a threshold matter, that claimant never separated from service and, therefore, was not an annuitant when he was hired on an emergency basis. The Commonwealth Court noted that "The dispositive issue is not whether the challenges facing the Intermediate Unit constituted a true emergency but, rather, whether a public school employee can effect a phony retirement in the middle of a contract period to achieve an increase in payouts by PSERS. Such retirement pre-planning has implications for all public school employers and the solvency of PSERS." *Baillie*, 993 A.2d at 951-952. The Commonwealth Court additionally concluded that claimant was not rehired on an emergency basis in that the purported

“emergency” was of his own making in the form of having retired in the middle of his contract.

Accordingly, the Commonwealth Court found that claimant’s decision to “retire” on a Friday, and return to work the following Monday under an emergency contract, violated the statutory prohibitions set forth in the Retirement Code. *Id.* at 951.

In this case, like in *Baillie*, the threshold issue is whether Claimant experienced a termination, or a *bona fide* break in service, prior to providing services to the District as its Acting Superintendent after December 31, 2009. Upon considering the factors enunciated in 24 Pa.C.S.A. §8346(b), including whether there was a prearrangement to return to employment prior to Claimant’s effective date of retirement, whether sufficient time had passed between Claimant’s date of retirement and his return to service, and whether Claimant had continued to provide the same or related services he had provided prior to the date of his “retirement”, this Hearing Officer finds that Claimant did not experience a *bona fide* termination in service prior to becoming the District’s Acting Superintendent.

The material facts of this case are nearly identical to those of *Baillie*. The record unequivocally shows that Claimant agreed to remain employed by the District without interruption, prior to having filed his retirement Application, and that he continued to remain employed with the District after the effective date of his “retirement”. Claimant first agreed to serve as Acting Superintendent prior to the expiration of his contract, in the middle of the 2009-2010 school year. Far from experiencing a break in service of any kind, the District’s School Board went so far as to pre-arrange Claimant’s subsequent employment even prior to the expiration of his existing contract when it approved his retirement at the same meeting it had agreed to retain him as the District’s Acting Superintendent, effective the first school day following his purported retirement. In that regard, Claimant did not experience a lapse of a single school day prior to assuming the position of Acting Superintendent. Further, Claimant’s job

responsibilities as Acting Superintendent were essentially identical to those for which he was responsible prior to December 31, 2009, including searching for his replacement.

Based upon the totality of circumstances set forth above, this Hearing Officer finds that Claimant did not experience a *bona fide* termination of school service, effective December 31, 2009. Having failed to separate from school service, Claimant was not eligible for retirement as an annuitant until he ultimately concluded his employment relationship with the District on June 30, 2010.

Emergency Return to Service Analysis

Having found that Claimant did not experience an actual termination of service from the District, Claimant's status as having returned to service on an emergency basis is moot to the extent the Retirement Code requires an annuitant to experience a *bona fide* termination of service in order to be eligible for an annuity under the Retirement Code. See, Baillie, 993 A.2d at 952. Because this Opinion is of an advisory nature however, an analysis of whether Claimant had returned to service as Acting Superintendent on an emergency basis becomes necessary in the event the PSERS Board ultimately determines that Claimant did, in fact, experience an actual termination of service.

The Retirement Code provided Claimant with the opportunity to return to service with the District in response to an emergency which created an increase in the work load such that there would have been a serious impairment of services to the public, or in the event there existed a shortage of appropriate candidates to replace him. 24 Pa.C.S.A. §8346(b). As the party claiming his entitlement to retirement benefits, Claimant bears the burden of proving the existence of an emergency at the time he was hired by the District as its Acting Superintendent. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999). See also, Wingert v. State Employees' Retirement Board, 589 A.2d 269 (Pa. Cmwlth. 1991).

Claimant contends that the District was placed in an emergent situation by virtue of his impending early retirement on December 31, 2009. As an initial matter however, Claimant failed to provide any evidence that the District specifically hired him in response to an existing emergency.² On the contrary, the record unequivocally establishes that a Superintendent vacancy never existed. Instead, Claimant was hired to actually prevent such a vacancy for the purpose of avoiding the emergency upon which he now relies.

The record is similarly devoid of any evidence the District would have experienced an increased work load pending its search for a replacement superintendent, or that the absence of an acting superintendent would have resulted in a serious impairment of service to the public, as required to justify an emergency return to service under the Retirement Code. Instead, the record shows that the District had interviewed two replacement candidates within the District who were qualified to assume the position of Superintendent or Acting Superintendent. Rather than retaining either candidate to fill the anticipated void created by Claimant's departure, the District voluntarily elected to retain Claimant as its Acting Superintendent after the date of his "retirement", until it was able to hire a more preferable candidate.

Claimant's contention that he served the District in an emergency capacity after December 31, 2009 is further undermined by the fact that the District continued to retain Claimant as its Acting Superintendent even after it had hired Dr. Mastillo to serve as his replacement. Instead of immediately releasing Claimant from his duties as Acting Superintendent upon resolving the purported "emergency" through Dr. Mastillo's arrival to the District on April 6, 2010, the District created a new position as Associate Superintendent for Dr. Mastillo, while it continued to retain Claimant as its Acting Superintendent until June 30, 2010.

² The totality of Claimant's evidence as it relates to the existence of an emergency consisted of his own testimony through which he characterized the circumstances surrounding his hiring as an emergency. However, the minutes from the School Board's October 21, 2009 meeting fail to identify the School District's rationale for hiring Claimant on that basis.

A review of the plain language of the Retirement Code also demonstrates Claimant's failure to demonstrate the existence of an emergency under the Code. Although the Retirement Code does not define "emergency", it is well settled that all words and phrases used in a statute are to be construed in accordance with their common meaning and accepted usage. 1 Pa.C.S. §1903. *Allstate Insurance Company v. Heffner*, 421 A.2d 629 (Pa. 1980). Where a statute does not define a term, it is acceptable to resort to a dictionary definition for the purpose of ascertaining the term's common meaning and usage. See, *Commonwealth v. Cahill*, 95 A.3d 298, 301-02 (Pa. Super. 2014); *Hankin v. Upper Moreland Township*, 502 A.2d 109, 111 (Pa. Cmwlth. 1986). In turn, dictionaries define an "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action...an urgent need for assistance or relief"³, "[a] serious, unexpected, and often dangerous situation requiring immediate action"⁴, or "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action."⁵ Consistent with the Commonwealth Court's findings in *Baillie*, and the common meaning of the term "emergency", the PSERB Board in the *Account of Louis Volpe*, Docket No. 2013-22 (PSERB Oct. 17, 2016), previously found that "[T]he term 'emergency' does not, therefore, refer to a voluntary act of retirement, with significant advance notice, where the retiree is able to work and, in fact, continues to work in the same job." *Id.* at *27.

As recognized by the Commonwealth Court in *Baillie*, a claimant cannot claim retirement benefits under the emergency provisions of the Retirement Code where he has created his own emergency. Like the claimant in *Baillie*, Claimant in this case created the so-called "emergency" for which he claims eligibility under the Retirement Code by having retired in the middle of his contract, after having provided the District with only four months prior notice. For the reasons articulated by the Commonwealth Court in *Baillie* under similar circumstances, permitting Claimant in this case to "retire"

³ *Merriam-Webster* (Oct. 7, 2015), <http://www.merriam-webster.com/dictionary/emergency>.

⁴ *Oxford Dictionaries*(October 7, 2015), http://www.oxforddictionaries.com/us/definition/american_english/emergency.

⁵ *Webster's New World Dictionary* 444 (3d coll. Ed. 1994).

on a Friday and return to work the next Monday would inherently violate the statutory prohibitions against receiving retirement benefits while simultaneously continuing to work in nearly an identical capacity. *See, Baillie*, 993 A.2d at 951.

Equitable Estoppel Analysis

Faced with the facts surrounding his lack of break in service from the District and the statutory mandates set forth above, Claimant asserts that PSERS is somehow precluded from adjusting his retirement date from December 31, 2009, and the service credit associated with that date of retirement. Claimant's contention is based upon what he contends was erroneous advice provided to him by PSERS Retirement System Regional Representative, Dominic Corso, during his conversation with Mr. Corso in August, 2009, during which Mr. Corso purportedly approved Claimant's continuing employment with the District, beginning January 1, 2010. Claimant's assertion in that regard is not found to be credible. Instead, the record demonstrates Claimant's propensity to misinterpret/misapply information orally provided to him by PSERS.

As to Claimant's assertion regarding his conversation with Mr. Corso in August, 2009, the record shows that Mr. Corso was trained and experienced with providing prospective retirees information in accordance with the Retirement Code, as outlined in the PSERS' Retirement Exit Counseling Checklist. Mr. Corso credibly testified that he would have provided information regarding Claimant's ability to return to service on an emergency basis in August, 2009, consistent with the information he provided to Claimant once again during Claimant's exit interview on December 29, 2009. Because Claimant did not memorialize his conversation with Mr. Corso in writing, the record fails to contain documentation capable of refuting Mr. Corso's testimony as it relates to his customary practices or to support Claimant's position to the contrary.

Dr. Farester provided additional evidence of Claimant's propensity to misunderstand information provided to him orally regarding his retirement options. In particular, Dr. Farester credibly recalled an instance where Claimant mischaracterized the substance of a discussion he had with Dr. Farester regarding Claimant's ability to return to service on an emergency basis with another school district in July, 2012. Despite not having provided Claimant with approval to return to service with the other school district during that conversation, Claimant later mischaracterized his July, 2012 conversation with Dr. Farester during a telephone conversation with Ms. Buchwach at PSERS on December 11, 2012. During that conversation, Claimant asserted that Dr. Farester had approved his return to service when he spoke with Dr. Farester in July, 2012, just as he presently asserts that Mr. Corso provided him with similar approval regarding his return to the District in this case. Based upon the testimony provided by Mr. Corso and Dr. Farester, who also corroborated Mr. Corso's training and experience, this Hearing Officer does not find sufficient evidence of record to conclude that Mr. Corso provided Claimant erroneous information on two occasions prior to his stated retirement date of December 31, 2009.

Assuming, *arguendo*, Mr. Corso provided Claimant with erroneous information, it is well settled that the statutory provisions of the Retirement Code strictly apply, even when a claimant may not have been provided adequate or correct information from PSERS. *Tyson v. Pennsylvania Public School Employees' Retirement System*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999); *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848, 852 (Pa. Cmwlth. 1989); *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870 (Pa. Cmwlth. 1995). In *Finnegan*, PSERS erroneously informed a member that she could purchase fifteen years of out-of-state service credit which would have provided the member with 30 years of active service. *Finnegan*, 560 A.2d at 849. The member relied on that information and made an irrevocable decision to retire. The Retirement Code, however, restricted such

purchases to twelve years. *Id.* As a result, the member received far smaller retirement benefits than she expected.

On appeal, the Commonwealth Court affirmed PSERS's determination that the member was not permitted to purchase additional service credit because doing so would be tantamount to impermissibly permitting PSERS's employees to amend the statute. *Finnegan*, 560 A.2d at 851. Citing to *Finnegan*, the Commonwealth Court reached the same conclusion in *Cosgrove*, where it found that the statutory language of the Retirement Code prevents retirees from changing their retirement benefit elections, even under circumstances where members may have been misled by inadequate counseling provided by the State Employees' Retirement System. *Cosgrove v. State Employees' Retirement Board*, 665 A.2d 870, 874 (Pa. Cmwlth. 1995).

In this case, Pennsylvania law makes clear that the substance of any discussions Claimant had with Mr. Corso cannot negate or otherwise usurp the provisions of the Retirement Code upon which PSERS relied when it denied Claimant's request to be deemed to have returned to service with the District on an emergency basis. Upholding the decision of the PSERS Executive Staff Review Committee is even more compelling than in *Finnegan* and *Cosgrove* in light of evidence that he was not provided erroneous or misleading information by PSERS regarding his ability to return to service. For the foregoing reasons, PSERS is not estopped from having established Claimant's effective date of retirement from the District as June 30, 2010. Accordingly, the following Recommendation shall be issued:

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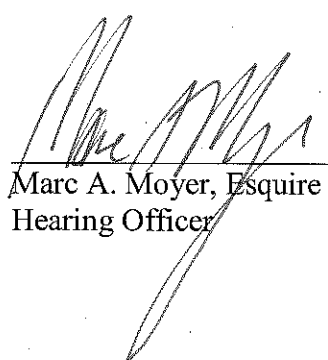
PSERS
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: :
Account of Donald E. Thomas : Docket No. 2015-09
Claim of Donald E. Thomas :

RECOMMENDATION

AND NOW, this 23rd day of January, 2017, upon consideration of 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 April 23, 2015 decision of the PSERS' Executive Staff Review Committee be **DENIED**.



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