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

IN RE: ACCOUNT OF CECELIA H. YAUGER  
DOCKET NO. 2015-12  
CLAIM OF CECELIA H. YAUGER

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Cecelia H. Yauger's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact and PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on November 5, 2018 and served a copy by First-Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated November 5, 2018, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. On December 4, 2018, Claimant requested an extension of time until January 17, 2019 to file her response. On December 5, 2018, the Board granted Claimant's request and extended the deadline. Claimant did not file a response.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. See *Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment

has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. *See Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984). "Summary judgment may be entered against a party who does not respond." Pa.R.C.P. 1035.3(d).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying "(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.C.P. No. 1035.3(a). "An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence." Pa.R.C.P. No. 1035.3(b).

Claimant did not respond to PSERS' motion and, therefore, she has not disputed any of the facts set forth therein. Nor has Claimant identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter. Consequently, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve whether Claimant's retirement benefit with PSERS was forfeited pursuant to the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315.

### **FINDINGS OF FACT**

Based on the record, the Board finds the following relevant facts not in dispute:

1. Cecelia H. Yauger ("Claimant") was first enrolled in PSERS in July 1979, by virtue of her full-time, salaried employment with Midwestern Intermediate Unit IV ("IU4"), a reporting unit of PSERS.

2. On April 24, 2013, Claimant terminated her employment at IU4.
3. On July 7, 2014, Claimant was charged with one count of theft or bribery concerning programs receiving Federal funds, 18 U.S.C. § 666(a)(1)(A), relating to “steal[ing] property worth at least \$5,000 which was owned by and under the custody and control of the IU4” while serving as Executive Director of IU4. (PSERS-2).
4. On July 30, 2014, Claimant waived her right to an Indictment by Grand Jury and pleaded guilty to one count of 18 U.S.C. § 666(a)(1)(A) in the United States District Court for the Western District of Pennsylvania. (PSERS-4 and PSERS-5).
5. By letter dated September 9, 2014, PSERS informed Claimant that, due to her guilty plea, her pension benefits were forfeited under the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315, and the retirement benefits she was receiving would be terminated. (PSERS-6).
6. On December 10, 2014, Claimant appealed PSERS’ determination. (PSERS-7).
7. The Executive Staff Review Committee (“ESRC”), by letter dated August 24, 2015, denied Claimant’s appeal on the basis that 18 U.S.C. § 666(a)(1)(A) is substantially the same as 18 Pa.C.S. § 3927 and 18 Pa.C.S. § 4113. (PSERS-8).
8. On September 22, 2015, Claimant filed an *Appeal and Request for Administrative Hearing*. (PSERS-9).
9. On October 13, 2015, PSERS filed an Answer. (PSERS-10).
10. On November 5, 2018, PSERS filed a Motion for Summary Judgment.
11. On December 4, 2018, Claimant requested an extension of time until January 17, 2019 to file her response to PSERS’ motion.
12. On December 5, 2018, the Board granted Claimant’s request for an extension.
13. Claimant did not file a response to PSERS’ motion.

14. The matter is ripe for Board Adjudication.

## DISCUSSION

The Public Employee Pension Forfeiture Act ("Forfeiture Act"), 43 P.S. §§ 1311-1315, disqualifies public officials and public employees from receiving retirement benefits if they have been convicted of or pleaded guilty or no contest to any of the "crimes related to public office or public employment" enumerated in 43 P.S. § 1312. The Forfeiture Act mandates forfeiture once a triggering conviction or guilty plea to a covered offense occurs; it leaves no discretion to an administrative agency. See *Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29 (Pa. Cmwlth. 1999).

The Forfeiture Act defines the terms "public official" and "public employee" as "any person who is elected or appointed to any public office or employment ... including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits. . . ." 43 P.S. § 1312. The term includes "all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision." *Id.* Claimant does not dispute that, at the time she committed the Federal crime to which she pleaded guilty, i.e., "theft or bribery concerning programs receiving federal funds," 18 U.S.C. § 666(a)(1)(A), she was the Executive Director of IU4 and was, by virtue of her position, a member of PSERS. Claimant also does not dispute that her public employment placed her in a position to commit the offense. Rather, Claimant disputes that the Federal crime of "theft or bribery concerning programs receiving federal funds" is a forfeitable offense.

The Forfeiture Act's definition of "crimes related to public office or public employment" identifies the Pennsylvania crimes that constitute forfeitable offenses and it includes "theft by failure to make a required disposition of funds received," 18 Pa.C.S. § 3927, and "misapplication of property," 18 Pa.C.S. § 4113. The definition also includes, as forfeitable, "all criminal offenses as set forth in Federal law substantially the same as" the enumerated Pennsylvania crimes. 43 P.S. § 1312. To determine whether a Federal crime and a forfeitable State crime are "substantially the same," Pennsylvania courts compare the elements of the crimes, the burden of proof, and the *mens rea*. See

*Roche v State Employees' Ret. Bd.*, 731 A.2d 640 (Pa. Cmwlth. 1999); *Merlino v. Philadelphia Bd. of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlth. 2007); *In re Terlecki*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 434 (C.P. Allegheny 2006), *aff'd without op.*, 935 A.2d 936 (Pa. Cmwlth. 2007). The elements need not be identical, and the particular facts and specific conduct underlying the guilty plea or conviction as well as any third-party statement regarding such are irrelevant. 43 Pa.C.S. § 1312; *Scarantino v. Pub. Sch. Employees' Ret. Bd.*, 68 A.3d 375, 379-80, 82 (Pa. Cmwlth. 2013) (where the court properly ignored statements made by the United States Attorney, the Judge, and claimant's own counsel in favor of an analysis of the crimes' elements to determine whether the crimes were substantially the same); *DiLacqua v. City of Phila.*, 83 A.3d 302, 310 (Pa. Cmwlth. 2014); *Roche*, 731 A.2d 640; *Brace v. County of Luzerne*, 873 F. Supp. 2d 616 (M.D. Pa. 2012).

This Board has held previously, as a matter of law, that the Federal crime of "theft or bribery concerning programs receiving federal funds," 18 U.S.C. § 666(a)(1)(A), is "substantially the same" as both Section 3927 and Section 4113, and thus a forfeitable offense. See *Account of Dennis L. Bruno*, Docket No. 2011-15 (PSERB May 1, 2013). In *Bruno*, after comparing the elements, burdens of proof, and *mens rea* of Section 666(a)(1)(A) and Section 3927, the Board concluded that the crimes are substantially the same because they both criminalize a public official's intentional "misapplication of funds when he or she acts as a public official." *Bruno* at \*14. Likewise, the Board concluded that Section 666(a)(1)(A) is substantially the same as Section 4113 because both statutes criminalize the misapplication of property that was entrusted to a public official. *Id.* at \*15-16; see also *Harper v. Policemen's Relief and Pension Fund of the City of Pittsburgh*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 705 (Pa. County Ct. 2010) (concluding that Section 666(a)(1)(A) is substantially the same as Section 4113).

On appeal, Claimant argues that she is not subject to the Forfeiture Act because she pleaded guilty only to "theft" of funds under Section 666(a)(1)(A), not to the embezzlement of funds or to the procurement of funds by fraud or to anything else. Theft, however, is not a severable piece of Section 666(a)(1)(A). Section 666(a)(1)(A) makes it

a crime when an agent of an organization, state or local government, or agency thereof embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts, or intentionally misapplies property that is (i) valued at \$5,000 or more; and (ii) is under the care, custody, or control of such organization, government, or agency thereof. 18 U.S.C. § 666(a)(1)(A). Similarly, Section 3927 provides that a “person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition . . . is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition.” 18 Pa.C.S. § 3927(a). For purposes of Section 3927, a government employee or officer is presumed:

(1) to know any legal obligation relevant to his criminal liability under this section; and

(2) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

*Id.* Both offenses thus criminalize an employee’s theft of government property or, in other words, an employee’s intentional use of such property in an unauthorized manner, and are therefore substantially the same.

Section 4113 makes it a crime when someone “applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.” 18 Pa.C.S. § 4113. Section 4113 targets a defendant’s unauthorized use of government property. Both Section 666(A)(1)(A) and Section 4113, therefore, criminalize the intentional misapplication or disposition of property that was entrusted to a defendant and are substantially the same. See *Bruno*; Model Jury Instruction 6.18.666A1A-3 at <http://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions>.

Claimant also maintains that her pension is not forfeitable because Section 666(a)(1)(A) is more similar to the non-forfeitable, Pennsylvania crime of “theft by unlawful taking or disposition,” 18 Pa.C.S. § 3921. She cites to the fact that the charge

against her for “theft by unlawful taking or disposition,” 18 Pa.C.S. § 3921, was withdrawn on “double jeopardy” grounds. Whether Section 666(a)(1)(A) is also substantially the same as a non-forfeitable offense is not determinative, however, because a federal offense may be substantially the same as more than one Pennsylvania crime. *Bruno*, Docket No. 2011-15, at \*15; *Merlino*, 916 A.2d 1231, 1235. In *Merlino*, the Commonwealth Court affirmed the Philadelphia Board of Pensions and Retirement’s forfeiture of the claimant’s pension on the grounds that the federal crime of making false statements as a police officer to federal authorities during an investigation is substantially similar to *two* state crimes that are enumerated in the Forfeiture Act, namely the crimes of unsworn falsification to authorities and false reports to law enforcement authorities. *Merlino* at 1233, 1235; 18 Pa.C.S. § 4904(a)(2); 18 Pa.C.S. § 4906(b)(1). Moreover, the analysis for whether double jeopardy applies is distinct from the analysis used for purposes of the Forfeiture Act. Double jeopardy is applicable where charges arise from a “common and continuing scheme.” 18 Pa.C.S. § 109; 18 Pa.C.S. § 111; *Commonwealth v. Mascaro*, 394 A.2d 998 (Pa. Super. 1978). The focus, therefore, is on the defendant’s underlying facts and conduct. See *id.* In contrast, the analysis for purposes of pension forfeiture is focused solely on the elements set forth in criminal statute, the *mens rea*, and the burden of proof. The underlying, criminal actions of a defendant do not dictate whether the crime constitutes a forfeitable offense. See *DiLacqua*, 83 A.3d at 310; see also *Scarantino*, 68 A.3d at 375; *Roche*, 731 A.2d 640; *Brace*, 873 F. Supp. 2d 616.

Therefore, Section 666(a)(1)(A) is substantially the same as the Pennsylvania crimes of “theft by failure to make a required disposition of funds received,” 18 Pa.C.S. § 3927, and “misapplication of property,” 18 Pa.C.S. § 4113. There is no dispute that Claimant’s public employment placed her in a position to commit the offense. Consequently, Claimant’s PSERS pension should be forfeited under the Forfeiture Act.

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PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request that PSERS reinstate Claimant's benefits that have been forfeited by operation of law under the Public Employee Pension Forfeiture Act.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: March 8, 2019

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