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

IN RE: ACCOUNT OF JOSE E. LEBRON
DOCKET NO. 2016-17
CLAIM OF JOSE E. LEBRON

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the pleadings, transcript, exhibits, post-hearing briefs, the proposed Opinion and Recommendation of the Hearing Examiner, Claimant's Brief on Exceptions ("Claimant's Exceptions"), and the Public School Employees' Retirement System's ("PSERS") letter brief opposing Claimant's Exceptions.

Claimant, Jose E. Lebron, requests that his post-retirement employment at Olney Charter High School ("Olney") be deemed a permissible return to service under one of the exceptions set forth in Section 8346(b) of the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8346(b). In the alternative, Claimant requests that this Board waive the overpaid annuity debt that he accrued while working for Olney during retirement pursuant to the waiver of adjustments provision set forth in Section 8303.1(a) of the Retirement Code, 24 Pa.C.S. § 8303.1(a).

The Hearing Examiner, in a 44-page opinion (hereinafter referred to as the "HEO"), recommended that the Board deny Claimant's requests. Claimant excepted to the HEO on several grounds. After review and consideration of the parties' arguments, the exceptions, and the HEO, the Board generally finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Conclusion. In light of the number of modifications the Board is making to the HEO, rather than issue an order adopting the HEO subject to the modifications set forth in that order, as the Board often does, we believe it is more appropriate

to issue our own History, Findings of Fact, Conclusions of Law, Discussion, and Conclusion, much of which are adopted or adapted from the HEO.

Claimant also has requested oral argument before the Board. Section 201.12 of the Board's regulations, 22 Pa. Code § 201.2, provides:

(a) The right to oral argument is discretionary with the Board and will be granted to the extent the Board believes it will be helpful in enabling the Board to acquire an understanding of and to resolve the issues. When oral argument is granted, the Secretary of the Board will schedule the argument for the next available Board meeting.

The Board does not believe that oral argument is necessary in helping the Board understand and resolve the issues and, therefore, denies Claimant's request.

HISTORY

This matter is before the Board on an appeal filed by Claimant on September 14, 2016, from a decision of the Executive Staff Review Committee ("ESRC") dated August 16, 2016 ("ESRC denial letter"), denying Claimant's request that PSERS not consider Claimant to have returned to active public school service. On October 4, 2016, PSERS filed its Answer to Claimant's appeal.

By letter dated October 12, 2016, the Appeal Docket Clerk notified ASPIRA, Inc. of Pennsylvania ("ASPIRA") of Claimant's appeal and explained that ASPIRA may elect to participate as an intervenor because as Claimant's former employer, ASPIRA may have a financial interest in the appeal. The Appeal Docket Clerk's letter directed ASPIRA to file a petition to intervene no later than October 24, 2016. ASPIRA did not file a petition to intervene.

By letter dated April 10, 2018, Ruth D. Dunnewold was appointed by the Board's Secretary, Glen R. Grell, to act as Hearing Examiner for Claimant's administrative hearing. By letter of April 10, 2018, the Appeal Docket Clerk notified Claimant that the administrative hearing on his appeal was scheduled for July 11, 2018, in Harrisburg, PA. The hearing was held as scheduled at PSERS in Harrisburg. Claimant attended the hearing and was represented by Elliot A. Strokoff, Esquire, while Kathrin V. Smith, Esquire, Deputy Chief Counsel, represented PSERS. At the close of the hearing, the parties elected to file post-hearing briefs.

Thereafter, the hearing transcript was filed on July 26, 2018, and an Order Establishing Briefing Schedule, dated July 31, 2018, was issued. The dates set forth in the briefing schedule were amended by Order dated September 20, 2018, which established November 13, 2018, as the date by which Claimant shall file his reply brief, the last brief to be filed in the matter. However, November 13, 2018 passed without Claimant's filing any reply brief. Accordingly, the record was closed as of that date.

On November 29, 2018, the Hearing Examiner issued the HEO. On December 31, 2018, Claimant filed his brief on exceptions with a request for oral argument. On January 18, 2019, PSERS filed its letter brief opposing Claimant's Exceptions. The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant began employment with the School District of Philadelphia ("SDP") as a teacher in 1970, and in 1973, he became a member of PSERS. Notes of Testimony ("NT") at 85, 86, 93.
2. From October 1983 on, the SDP employed Claimant as a principal. NT at 86.
3. By virtue of the fact that he was a PSERS member, Claimant is familiar with the Retirement Code and, at all relevant times, he understood that there are consequences to working in a public school after retirement, limited exceptions to such work, and a one-school-year time limit to such work. NT at 87, 88.
4. On June 28, 2007, Claimant attended a PSERS Retirement Exit Counseling session ("counseling session"). Exhibit PSERS-1; NT at 89 – 90.
5. During the counseling session, the PSERS counselor reviewed subject matter on an exit counseling checklist, including information about working after retirement. Exhibit PSERS-1; NT at 90 – 91.
6. The PSERS counselor reviewed the fact that there are only limited circumstances in which an annuitant can work in the public schools, the exceptions include an emergency and shortage, and that a return to school under those circumstances is limited to one school year, with a school year being July 1 through June 30 of the following year. NT at 90 – 91.

7. Claimant understood that a school year is July 1 through June 30 of the following year. NT at 91.

8. At the June 28, 2007 counseling session, Claimant signed an Exit Counseling Checklist, which included a checkmark indicating that a review of work after retirement had occurred, and Claimant submitted his Application for Retirement to PSERS. Exhibit PSERS-1; Exhibit PSERS-2; NT at 89, 91.

9. Claimant's Application for Retirement identified Claimant's effective date of resignation as June 30, 2007. Exhibit PSERS-2, pp. 1 and 8; NT at 57, 59, 92 – 93.

10. In his Application for Retirement, Claimant certified to PSERS that he understood, as a retiree, he was "not permitted to work in a PA public school except under the emergency personnel shortage and/or extracurricular employment provisions of Act 63 of 2004." PSERS-2, p. 8.

11. On June 30, 2007, Claimant terminated service with the SDP. NT at 93, 144; Exhibit PSERS-2, p. 1; Exhibit PSERS-4, p. 2; Exhibit Claimant 14, p. 1.

12. In a letter dated September 6, 2007 ("initial benefit letter"), PSERS informed Claimant that beginning October 31, 2007, based on an effective retirement date of July 1, 2007, his monthly gross benefit would be \$6,925.08. Exhibit Claimant 14; NT at 94.

13. The initial benefit letter included the following information at page 3:

EMPLOYMENT AFTER RETIREMENT

Passed on July 4, 2004, **Act 2004-63** permits a PSERS retiree to be employed by a Pennsylvania public school in emergency, shortage of personnel, and extracurricular situations without loss of the retiree's monthly benefit.

The law defines an **emergency/shortage of personnel situation** as "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." It defines an **extracurricular position** as "performed primarily outside regular instructional hours and not part of mandated curriculum."

Both emergency and shortage of personnel situations are restricted to a period not to extend beyond the school year during which the emergency or shortage occurs. There is no time restriction on an extracurricular position; however, a

separate written contract must exist between the employer and retiree. The contract must contain a waiver that waives any potential retirement benefits that could arise from the contract and releases the employer and the board from any liability for such benefit.

In all situations, a member may not contribute, earn any credited service, nor have the Commonwealth or employer contribute on account of such employment.

If a retiree returns to service that **does not** qualify under Act 2004-63, he or she must advise their employer of the prior service and should also send a letter to PSERS. This letter should include the retiree's return to service date so that the member's pension may be stopped before an overpayment occurs.

Exhibit Claimant 14, p. 3 (all emphasis in original).

14. Claimant read the initial benefit letter from PSERS, including page 3, and Claimant understood the last paragraph's statement that "[i]f a retiree returns to service that **does not** qualify under Act 2004-63, he or she must advise their employer of the prior service and should also send a letter to PSERS." Exhibit Claimant 14 (emphasis in original); NT at 95.

15. Claimant received a letter from PSERS, dated April 15, 2009 ("finalized benefit letter"), which informed Claimant of his finalized retirement benefit of \$7,703.08 (gross), based on 37 total year of school service, a final average salary of \$119,174.77, and an effective date of retirement of July 1, 2007. Exhibit PSERS-4; NT at 95 – 96.

16. The finalized benefit letter included, on its third page, the following paragraphs:

EMPLOYMENT AFTER RETIREMENT

If you return to work, it is your responsibility to notify the employer that you are a PSERS retiree.

Act 2004-63 permits a PSERS retiree to be employed by a Pennsylvania public school (including charter schools) in an emergency or shortage of personnel and extracurricular situations (certain conditions apply) without loss of the retiree/s monthly benefit.

Employers must determine that an emergency or shortage exists and make a "good faith" effort to hire non-retirees first. Please refer to your *Retired Member Handbook* or PSERS' Web for detailed information.

If a retiree's return to service **does not** qualify under Act 2004-63, the retiree should immediately send a letter to PSERS. This letter should include the retiree's return to service date so that the retiree's monthly benefit may be stopped before an overpayment occurs.

Exhibit PSERS-4, p. 3 (all emphasis in original); NT at 96.

17. Claimant saw and understood the statement on the third page of the finalized benefit letter, which stated, "Employers must determine that an emergency or shortage exists and make a "good faith" effort to hire non-retirees first." NT at 96.

18. Claimant received a PSERS Retired Member Handbook at retirement ("Member Handbook"), which he read and reviewed. NT at 97, 145.

19. Claimant read the portions of the Member Handbook about returning to service after retirement, the relevant parts of which stated as follows:

Returning to School Service After Retirement

Act 2004-63 expanded the period of time and conditions under which PSERS retirees may return to Pennsylvania public school employment without loss of their monthly retirement benefit. This law specifically defines the ability of a PSERS retiree to be employed by a Pennsylvania public school in an emergency, shortage of personnel, and extracurricular situations. Public schools include charter schools, community colleges, Penn State University and state-owned universities in addition to local school districts, vocational technical schools, and intermediate units.

If you retired under a regular retirement benefit, you may return to Pennsylvania public school employment under the following conditions.

Employment Due to Emergency or Shortage of Personnel –

- Whenever a school employer determines there has been an increase in workload that creates a serious impairment [sic] of service to the public or there is a shortage of personnel, a retiree may return to Pennsylvania school service for a period not to extend beyond the school year during which the emergency or shortage occurs.

The employer makes the determination that these elements have been satisfied. **Employers are expected to first make a "good faith" effort to secure non-retired school personnel.** PSERS, however, reserves the right to review an employer's determination that a qualifying emergency or shortage exists.

* * *

It is your responsibility to notify the employer that you are a PSERS retiree.

If you return to service under the emergency, shortage, or extracurricular provisions, you must have had a bona fide termination and retirement. Your retirement may come into question if you “retire” and immediately begin working under an “emergency,” “shortage,” or “extracurricular” exception. It may be considered that you truly did not retire and your employment may be treated as continuing part-time or full-time employment.

If you do return to service under any circumstances other than the provisions covered by Act 2004-63, you must advise your employer that you are a PSERS retiree. You should also send a letter to PSERS including the return to service date so your pension may be stopped before an overpayment occurs.

Members interested in returning to service in the capacity of a consultant should submit their request in writing to PSERS for review before doing so.

* * *

Exhibit PSERS-5, pp. 31, 32 (all emphasis in original); NT at 97 – 98.

20. Claimant read and understood the statement on page 31 of the Member Handbook that “PSERS, however, reserves the right to review an employer’s determination that a qualifying emergency or shortage exists.” NT at 97 – 98.

21. When Claimant retired, he began receiving PSERS’ retired member newsletters two to three times a year, which PSERS, in the regular course of business, sent to members at their addresses on file with PSERS, and Claimant read most of them when he received them. NT at 99 – 100, 184 – 185, 189; Exhibits PSERS-19, 20, 21, 22, 23, 24, 25, 26, 28.

22. In September 2007, the principal at Microsoft High School of the Future in the SDP suddenly left and Claimant was asked to return to work there as principal on a special assignment, on an interim basis, and he did so with the understanding that it had been cleared through PSERS, but without notifying PSERS himself, and when a new principal was assigned, in December 2007, Claimant stopped working there. Exhibit PSERS-35; NT at 105 – 106, 107, 131.

23. From January 2008 to June 2008, Claimant served as principal on a special assignment at Middle Years Alternative School for the Humanities in the SDP when the principal retired midyear, and Claimant ceased working there at the end of the year because another principal had been hired; he did not notify PSERS that he was working there. Exhibit PSERS-35; NT at 108 – 110, 131.

24. PSERS' Summer 2008 Retiree Newsletter contained an article entitled "Returning to School Service After Retirement" that was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, and the Member Handbook. Exhibits PSERS-3, 4, 5, and Exhibit PSERS-19, pp. 6 – 7.

25. As of July 2008, PSERS had available to members on the PSERS website, at PSERS' Harrisburg and regional offices, and to be sent to members upon request, a publication entitled "Let's Talk About Returning to School Service After Retirement," which was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, and the Member Handbook. Exhibit PSERS-7; NT at 146 – 147.

26. In September 2008, Claimant was asked to be the interim principal on a special assignment at Germantown High School in the SDP, a position which concluded in June 2009; he did not notify PSERS about the special assignment. Exhibit PSERS-35; NT at 110 – 111, 131.

27. As of April 2009, PSERS' website included information about Act 2004-63 and its effect on retirees working after retirement, which information was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, and PSERS' Summer 2008 Retiree Newsletter. Exhibits PSERS-3, 4, 5, 6 and 19; NT at 145 – 146.

28. PSERS' Summer 2009 Retired Member Newsletter contained an article entitled "Returning to PA School Service After Retirement" that was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, and the PSERS' Summer 2008 Retiree Newsletter. Exhibits PSERS-3, 4, 5, 19, and Exhibit PSERS-20, pp. 5 – 7.

29. In October 2009, Claimant was principal on special assignment at Kensington Creative & Performing Arts High School in the SDP because its principal was going on

maternity leave, and he stayed until her return in February 2010; he did not notify PSERS about the special assignment. Exhibit PSERS-35; NT at 111 – 112, 131.

30. PSERS' Fall 2009 Retired Member Newsletter contained an article entitled "Returning to School Service After Retirement" that was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, and PSERS' Summer 2009 Retired Member Newsletter. Exhibits PSERS-3, 4, 5, 19, 20, and Exhibit PSERS-21, pp. 1 – 3.

31. From February 2010 until June 2010, Claimant was principal on special assignment at Lawton Elementary School in SDP because that school's principal retired mid-year; he did not notify PSERS about the special assignment. Exhibit PSERS-35; NT at 112 – 113, 131.

32. PSERS' Fall 2010 Retired Member Newsletter contained an article entitled "Returning to School Service After Retirement" that was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, PSERS' Summer 2009 Retired Member Newsletter, and PSERS' Fall 2009 Retired Member Newsletter. Exhibits PSERS-3, 4, 5, 19, 20, 21, and Exhibit PSERS-22, pp. 5 – 7.

33. From August 2010 until June 2011, Claimant was principal on special assignment at Randolph Career Academy in the SDP because that school's principal died right before the school year was to begin; he did not notify PSERS about that special assignment. Exhibit PSERS-35; NT at 114 – 115, 131.

34. During Claimant's post-retirement employment at Microsoft High School of the Future, Middle Years Alternative School for the Humanities, Germantown High School, Kensington Creative & Performing Arts High School, Lawton Elementary, and Randolph Career & Technical High School, Claimant received a salary, no health, vision or dental benefits, and no performance evaluations, and he collected his pension from PSERS. NT at 115 – 116.

35. ASPIRA is a private, non-profit organization that contracts with charter schools to provide non-academic services such as operations and human resources, including hiring. NT at 31, 32.

36. Olney High School (“Olney”), located in North Philadelphia in the SDP, is a school that, prior to 2011, the Commonwealth of Pennsylvania had identified as a particularly dangerous school that was continuously underperforming. NT at 12, 13, 15.

37. In April 2011, the SDP awarded ASPIRA a contract to operate Olney as a charter school. NT at 12, 13.

38. At that time, ASPIRA’s Chief Academic Officer was Evelyn Nuñez (“Dr. Nuñez”), who had two years of experience in the SDP as a principal, 13 years of experience as a superintendent or chief academic officer in the charter school sector, and 11 years of experience as a teacher in the SDP. NT at 11.

39. Dr. Nuñez also had a principal certificate, was bilingual, and during her tenure with ASPIRA, had started four other charter schools in North Philadelphia and was the founding principal of the second charter school. NT at 12, 31, 33, 50 – 51.

40. After being awarded the contract to operate Olney as a charter school, ASPIRA began to recruit for a bilingual minority principal with some experience in an urban setting in Philadelphia, primarily in the area in which Olney was located; ASPIRA was open to hiring someone who was not bilingual. NT at 15, 40 – 41.

41. In connection with opening up the charter school, ASPIRA needed a principal who could interview and hire nearly 200 employees, including teachers, lunchroom aides, basic team members; work with facilities to ensure the adequacy of the building and ensure that construction was happening; and interview different publishing companies to identify resources to be used for every content area, basically building a school so it would be ready for opening in September. NT at 26, 27.

42. ASPIRA first recruited the African-American woman who had been the principal at Olney under the SDP, but she had taken a position elsewhere and was not available. NT at 15 – 16.

43. ASPIRA then recruited another candidate who was a principal in the SDP at the time, but she declined the position. NT at 16.

44. Dr. Nuñez testified that ASPIRA began to interview anyone who submitted a résumé, but the candidates had never been principals or did not otherwise meet the criteria they were seeking.¹ NT at 16 – 17.

45. In May 2011, ASPIRA reached out to Claimant and asked him to come in for an interview to talk about the possibility of his becoming the principal at Olney. NT at 17, 60, 61, 116.

46. In May 2011, Claimant interviewed with ASPIRA's hiring team, which included the CEO, Alfredo Calderon; the Chief Financial Officer, Murray Roseman; the Chief of Operations, Orlando Rendon; the Director of Human Resources, Marisol Morales; the Director of Curriculum Instruction, Susan Ostrich; and Dr. Nuñez. NT at 12, 17, 60 – 61.

47. After the ASPIRA hiring team explained their vision for Olney and the characteristics of the candidate they were looking for, Claimant informed them that he was retired, and indicated that he would accept the position on the condition that ASPIRA notified PSERS that he was retired and obtained approval and clearance from PSERS for him to take the position as an emergency hire for the 2011 – 2012 school year. NT at 17 – 18, 61 – 62, 102, 118 – 119, 120, 121, 131 – 132.

48. Dr. Nuñez testified that ASPIRA's sense of urgency in May 2011 was that it now had just two months to build and staff the school for opening in September, everyone who had some high school leadership experience had declined, and Dr. Nuñez's primary background was in K – 8 schools, so they needed someone with high school experience. NT at 30.

49. After discussion about what ASPIRA would have to do to get permission from PSERS for Claimant to work at Olney, Claimant believed that ASPIRA accepted that condition. NT 24, 62-63, 117, 120.

50. ASPIRA offered Claimant the position at Olney at the interview. NT at 120.

¹ No documentary evidence is in the record to corroborate Dr. Nuñez's testimony.

51. After the interview with ASPIRA and ASPIRA's offering him the position of principal at Olney, ASPIRA required Claimant to fill out an application and submit a résumé. Exhibits PSERS-34, 25; NT at 117, 118.

52. Approximately one week after the interview, on May 23, 2011, Claimant signed an Employment Agreement with ASPIRA, accepting the position of Principal at Olney, under the following terms, among others:

- a. a contract term period beginning June 27, 2011 and ending August 17, 2012;
- b. an annualized salary of \$135,500.00 with an increase, to \$139,565.00, scheduled for January 1, 2012;
- c. the requirement that he maintain a satisfactory rating through the 90-day orientation period and annual evaluation;
- d. eligibility to participate in the health and dental plan;
- e. eligibility to participate in PSERS; and
- f. eligibility to participate in short-term and long-term disability.

Exhibit Claimant 1; NT at 61, 122 – 123, 124.

53. Claimant's May 23, 2011 Employment Agreement with ASPIRA did not mention any emergency or shortage of personnel. Exhibit Claimant 1; NT at 124.

54. Claimant understood that he was contracting with ASPIRA to work for a period that extended beyond one school year. NT 123.

55. After hiring Claimant, ASPIRA sent out rejection letters to the other candidates who had applied for the position, advising those candidates that "although their skills and qualifications were excellent," ASPIRA had "chosen to hire another candidate for the position." NT at 170 – 171.

56. Claimant began working for ASPIRA as principal at Olney on June 27, 2011. NT at 26, 63 – 64.

57. Effective July 1, 2011, Olney became a PSERS participating employer with its employees becoming PSERS members as of that date. NT at 183 – 184, 186 – 187.

58. After July 2011, PSERS had available to members on the PSERS website, at PSERS' Harrisburg and regional offices, and to be sent to members upon request, a publication entitled "PSERS Return to Service Guidelines and Clarifications," which was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, PSERS' Summer 2009 Retired Member Newsletter, and PSERS' Fall 2009 Retired Member Newsletter. Exhibits PSERS-3, 4, 5, 8, 19, 20, 21 and 22; NT at 147 – 148.

59. PSERS' Summer 2011 Retired Member Newsletter contained an article entitled "Returning to School Service Guidelines" that referred retirees to PSERS' publication entitled "PSERS Return to Service Guidelines and Clarifications" for answers to retirees' questions about how returning to work in a Pennsylvania public school would affect their PSERS pension. Exhibits PSERS-23, p. 5.

60. PSERS' Fall 2011 Retired Member Newsletter contained an article entitled "Returning to School Service After Retirement" that was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, PSERS' Summer 2009 Retired Member Newsletter, PSERS' Fall 2009 Retired Member Newsletter, and PSERS' Fall 2010 Retired Member Newsletter. Exhibits PSERS-3, 4, 5, 19, 20, 21, 22, and Exhibit PSERS-24, pp. 8 – 10.

61. During the 2011 – 2012 school year, Claimant mentored and trained two assistant principals at Olney, Hye-Won Gehring and Keith Miles, who had principal certifications, with the goal that one or the other would take over as principal at the end of that school year, in June 2012. NT at 25 – 26, 48, 66.

62. At the end of the 2011 – 2012 school year, ASPIRA decided Gehring and Miles were not to be ready to take over as principal. NT at 26, 27, 48, 67 – 68.

63. At the end of the 2011 – 2012 school year, Dr. Nuñez contacted Claimant on behalf of ASPIRA and asked if he was willing to reapply to continue as principal for the 2012

– 2013 school year, and Claimant agreed to do so with the condition that PSERS approved it. NT at 27 – 28, 68, 128.

64. On June 26, 2012, Claimant signed an Employment Agreement with Olney, accepting the position of School Principal, under the following terms, among others:

- a. a contract term period beginning July 1, 2012 and ending June 30, 2013;
- b. an annualized salary of \$139,565.00;
- c. the requirement that he maintain a satisfactory rating through the 90-day orientation period, midyear evaluation, and annual evaluation;
- d. eligibility to participate in the health and dental plan;
- e. eligibility to participate in PSERS; and
- f. eligibility to participate in short-term and long-term disability.

Exhibit Claimant 2; NT at 28, 125.

65. Claimant's June 26, 2012 Employment Agreement with Olney did not mention any emergency or shortage of personnel. Exhibit Claimant 2; NT at 125.

66. Dr. Nuñez left ASPIRA's employ in June 2013 and had no further involvement with Claimant's employment after that. NT at 29, 30.

67. During the two years in which Dr. Nuñez was ASPIRA's Chief Academic Officer, the criteria for serving as Olney's principal never changed. NT at 30.

68. After Claimant's June 26, 2012 Employment Agreement with Olney expired on June 30, 2013, Claimant continued as principal at Olney after Dr. Lucilla Paramo, who replaced Dr. Nuñez as Chief Academic Officer, contacted him about reapplying to continue as principal. NT at 68, 69, 70, 128.

69. On August 2, 2013, Claimant signed an Employment Agreement with Olney, accepting the position of Principal, under the following terms, among others:

- a. a contract term period beginning August 1, 2013 and ending July 31, 2014;
- b. an annualized salary of \$139,565.00;
- c. the requirement that he maintain a satisfactory rating through the 90-day orientation period, midyear evaluation, and annual evaluation;
- d. eligibility to participate in the health and dental plan;
- e. eligibility to participate in PSERS; and
- f. eligibility to participate in short-term and long-term disability.

Exhibit Claimant 3; NT at 69, 70, 125 – 126.

70. Claimant's August 2, 2013 Employment Agreement with Olney did not mention any emergency or shortage of personnel. Exhibit Claimant 3.

71. PSERS' Retired Member Newsletter, Vol. 2 – 2013, contained an article entitled "Return to Service Exceptions It's Your Pension in Jeopardy," that was consistent with information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, PSERS' Summer 2009 Retired Member Newsletter, PSERS' Fall 2009 Retired Member Newsletter, PSERS' Fall 2010 Retired Member Newsletter, and PSERS' Fall 2011 Retired Member Newsletter, and it also referred retirees to the PSERS publication entitled "PSERS Return to Service Guidelines." Exhibits PSERS-3, 4, 5, 19, 20, 21, 22, 24, and Exhibit PSERS-25, p. 2.

72. PSERS' Active and Retired Member Update newsletter, Vol. 1 – 2014, contained an article entitled "Return to Service After Retirement and Substitute Services," that was consistent with information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS' Summer 2008 Retiree Newsletter, PSERS' Summer 2009 Retired Member Newsletter, PSERS' Fall 2009 Retired Member Newsletter, PSERS' Fall 2010 Retired Member Newsletter, PSERS' Fall 2011 Retired Member Newsletter, and PSERS' Retired Member Newsletter, Vol. 2 – 2013, and it also referred retirees to the PSERS publication entitled "PSERS Return to Service

Guidelines and Clarifications.” Exhibits PSERS-3, 4, 5, 19, 20, 21, 22, 24, 25 and Exhibit PSERS-26, pp. 1 – 2.

73. PSERS’ Retired Member Newsletter, Vol. 3 – 2014, contained an article entitled “Return to Service,” that was consistent with information on that topic set forth in Claimant’s initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS’ Summer 2008 Retiree Newsletter, PSERS’ Summer 2009 Retired Member Newsletter, PSERS’ Fall 2009 Retired Member Newsletter, PSERS’ Fall 2010 Retired Member Newsletter, PSERS’ Fall 2011 Retired Member Newsletter, PSERS’ Retired Member Newsletter, Vol. 2 – 2013, and PSERS Active and Retired Member Update newsletter, Vol. 1 – 2014, and it also referred retirees to the PSERS publication entitled “PSERS Return to Service Guidelines.” Exhibits PSERS-3, 4, 5, 19, 20, 21, 22, 24, 25, 26, and Exhibit PSERS-27, p. 4.

74. After being contacted by Dr. Paramo again about reapplying to continue as principal for the 2014 – 2015 school year, Claimant agreed to do so, and returned to work as principal at Olney for the 2014 – 2015 school year under a written contract with terms similar to the prior written contracts. NT at 72, 127 – 128.

75. PSERS’ Active and Retired Member Update newsletter, Vol. 1 – 2015, contained an article entitled “Returning to PA Public School Service After Retirement,” that was consistent with information on that topic set forth in Claimant’s initial benefit letter, the finalized benefit letter, the Member Handbook, PSERS’ Summer 2008 Retiree Newsletter, PSERS’ Summer 2009 Retired Member Newsletter, PSERS’ Fall 2009 Retired Member Newsletter, PSERS’ Fall 2010 Retired Member Newsletter, PSERS’ Fall 2011 Retired Member Newsletter, PSERS’ Retired Member Newsletter, Vol. 2 – 2013, PSERS Active and Retired Member Update newsletter, Vol. 1 – 2014, and PSERS’ Retired Member Newsletter, Vol. 3 – 2014, and it also referred retirees to the PSERS publication entitled “PSERS Return to Service Guidelines.” Exhibits PSERS-3, 4, 5, 19, 20, 21, 22, 24, 25, 26, 27, and Exhibit PSERS-28, p. 7.

76. All of PSERS’ newsletters and publications are also available on PSERS’ website. NT at 185.

77. Claimant's last day as principal with Olney was June 25, 2015, after he was terminated by letter of that date; Claimant understood that Olney had hired a principal after him. NT at 74, 128, 129.

78. Claimant never requested or received verbal or written confirmation from ASPIRA about obtaining approval and clearance from PSERS for him to take the position at Olney, nor did he ever do anything, himself, to clear it with PSERS; he just assumed that ASPIRA did so and that it was ASPIRA's responsibility. NT at 101 – 102, 121 – 122, 131 – 132.

79. Neither Olney nor ASPIRA ever sought pre-approval from PSERS to have Claimant return to work as the principal at Olney. NT at 184.

80. No deductions for PSERS retirement were taken out of Claimant's pay during the entire period he worked for ASPIRA/Olney. NT at 132 – 133.

81. Claimant fulfilled all of his contracts with ASPIRA/Olney for the time periods set forth in each Employment Agreement. NT at 134.

82. In April 2015, based on information provided by ASPIRA about PSERS annuitants who had been employed in charter schools managed by ASPIRA, PSERS learned that Claimant had been working at Olney. NT at 150, 168.

83. At that point, PSERS, through PSERS' employee Troy Peechatka, began looking into whether Claimant had returned to service in an approved capacity when he took the principal position at Olney. NT at 136, 138, 142, 149, 150.

84. PSERS made several written requests for information from ASPIRA about the nature of its emergency employment and the recruitment efforts they had made to secure a non-annuitant for the Olney principal position; Claimant was copied on at least one of those letters requesting information from ASPIRA. NT at 149 – 150.

85. After Claimant left Olney, the SDP superintendent of schools called Claimant, and Claimant went back to work for the SDP as a full-time, salaried principal, and SDP reenrolled Claimant in PSERS, identifying Claimant's start date with SDP as August 19, 2015; at the time of the hearing, Claimant was still employed by the SDP and accruing service and salary credit with PSERS. Exhibit PSERS-16; NT at 129, 159 – 161.

86. By September 1, 2015, PSERS had not received satisfactory documentation from ASPIRA, although ASPIRA had provided some information, including copies of the rejection letters ASPIRA had to the other candidates who had applied for the position, advising those candidates that “although their skills and qualifications were excellent,” ASPIRA had “chosen to hire another candidate for the position.” NT at 76, 148 – 149, 156, 169, 170 – 171.

87. Mr. Peechatka reviewed all of the information ASPIRA provided to PSERS and, by letter dated September 1, 2015, notified Claimant of the following:

a. PSERS had determined that Claimant had returned to active employment on July 1, 2011;

b. ASPIRA’s information about hiring Claimant indicated that ASPIRA had chosen to hire him over other candidates whose skills and qualifications were excellent;

c. PSERS had determined that ASPIRA had failed to establish a shortage of personnel that would exempt Claimant from the return to service provisions in the Retirement Code;

d. PSERS was required by law to discontinue payment of Claimant’s retirement, effective with the September 30, 2015 benefit payment and return Claimant to active service effective July 1, 2011;

e. based on the annuity Claimant had received since his return to service date and the new salary and service information provided by ASPIRA for the period since July 1, 2011, PSERS would calculate the appropriate debits and credits to be placed on Claimant’s account as a result of his return to active employment, and would notify Claimant of those changes under separate cover.

f. once Claimant’s public school employment has ended, if Claimant desired to receive a retirement benefit from PSERS again, Claimant must submit an Application for Retirement, and his retirement benefit will be recalculated appropriately using the updated information; and

g. Claimant had a right to appeal to PSERS' Executive Staff Review Committee ("ESRC").

Exhibit Claimant 6; NT at 157, 158, 171, 172.

88. By letter dated October 1, 2015, Claimant filed a timely appeal to the ESRC of PSERS' determination. Exhibit Claimant 7; NT at 77, 157.

89. By letter dated November 5, 2015, PSERS notified Claimant that his name had been removed from PSERS' annuitant payroll, he had been re-enrolled as an active, contributing member of PSERS, and he would need to repay his retirement benefit, from July 1, 2011 through August 31, 2015, in the amount of \$378,686.00. Exhibit Claimant 8; NT at 159.

90. ASPIRA will incur debt with PSERS due to PSERS' determination because ASPIRA will owe its employer share of contributions for each year of Claimant's employment, plus interest for each year that the employer's contribution has not been received. NT at 159.

91. As of the date of the hearing, PSERS had not yet credited Claimant with the service for the period he worked at Olney because ASPIRA had not responded to PSERS' request for Claimant's salary and service information; once ASPIRA provides it, PSERS will credit Claimant with the salary and service earned. NT at 159.

92. By letter dated November 24, 2015, Claimant appealed the repayment notice set forth in PSERS' letter dated November 5, 2015. Exhibit Claimant 9.

93. By letter dated August 16, 2016, the ESRC notified Claimant that it had denied his request that PSERS not consider Claimant to have returned to active public school service; the letter also notified Claimant of his right to appeal to the Board. Exhibit Claimant 10; NT at 162.

94. On September 14, 2016, Claimant filed an Appeal and Request for Administrative Hearing. Exhibit Claimant 11.

95. On October 4, 2016, PSERS filed its Answer to Claimant's Appeal. Exhibit Claimant 12.

96. A hearing on the appeal was held on July 11, 2018, before Hearing Examiner Ruth D. Dunnewold. NT, *passim*.

97. Claimant was present and represented by counsel at the hearing, and had the opportunity to be heard, cross-examine witnesses, make a closing statement for the record, and file a post-hearing brief in support of his appeal. NT at 6 and *passim*.

CONCLUSIONS OF LAW

1. Claimant was afforded notice and an opportunity to be heard in connection with his appeal. Finding of Fact 98.

2. Claimant failed to demonstrate by a preponderance of the evidence that his return to school service during the 2011 – 2012, 2012 – 2013, 2013 – 2014, and 2014 – 2015 school years was the result of an emergency or a shortage of other appropriate personnel so that he was exempt from loss of annuity under the Retirement Code at 24 Pa.C.S. § 8346. Findings of Fact 1 – 98.

3. Claimant failed to demonstrate by a preponderance of the evidence that he satisfies all four prongs of the Retirement Code's waiver-of-adjustment provision, 24 Pa.C.S. § 8303.1(a), so he does not qualify for a waiver based on "undue hardship." Findings of Fact 1 – 98.

DISCUSSION

The basic facts in this matter are that, after retiring in 2007, Claimant returned to full time employment in 2011 as principal of Olney in Philadelphia. He was employed at the charter school by ASPIRA pursuant to a May 2011 contract that extended across parts of three school years. He entered into similar contracts with Olney for the same position in three subsequent school years. His August 2013 contract with Olney similarly extended beyond one school year. While employed by ASPIRA/Olney, Claimant received both his PSERS monthly annuity in the amount of \$7,703.08 and an "annualized" salary that started at \$135,500 and, effective January 1, 2012, increased to \$139,565.

Claimant asserts that his return to work for ASPIRA at Olney was justified because an emergency or a shortage of appropriate other personnel existed, as defined in Section 8346(b) of the Retirement Code, 24 Pa.C.S. § 8346(b). PSERS, on the other hand, asserts that Claimant's return to work was not in a capacity permissible under the Retirement Code, mandating that his annuity cease immediately and that Claimant return the overpaid annuity amounts received to PSERS, plus statutory interest, in accordance with Section 8346(a) and (a.1) of the Retirement Code, 24 Pa.C.S. § 8346(a) and (a.1).

Claimant bears the burden of establishing those facts upon which he relies to prevail. *Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269 (Pa. Cmwlth. 1991). Claimant must prove that he had a right to continue to receive a retirement benefit from PSERS during the period he was working for Olney. See 24 Pa. C.S. § 8346(a). To do so, he must prove he returned to service, each school year, in a capacity permissible pursuant to Section 8346(b) of the Retirement Code. See 24 Pa. C.S. § 8346(b). The degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence, *Lansberry v. Pennsylvania Pub. Utility Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), which is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the proponent's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). With that burden in mind, we examine Claimant's arguments.

Lack of Regulations

In support of his position, Claimant first asserts that the issues in this case are “a predictable result of PSERS’ failure and/or refusal to promulgate regulations” that address annuitants’ emergency or shortage of appropriate other personnel returns to employment. Claimant’s Brief at p. 7; see Claimant’s Exceptions at p. 1. As part of this argument, Claimant argues that PSERS’ review of school districts’ determinations as to whether an emergency or shortage of appropriate other personnel exists is “contrary to [PSERS’] statutory obligation to promulgate rules and regulations.” Claimant’s Brief at p. 8. However, he cites no legal support for that assertion and completely ignores the existence of a definitive ruling to the contrary by the Commonwealth Court in *Baillie v. Pub. Sch. Employees’ Ret. Bd.*, 993 A.2d 944 (Pa. Cmwlth. 2010) (discussed in detail below in the context of another of Claimant’s arguments), which unequivocally affirmed PSERS’ authority to review school districts’ determinations as to whether an emergency or shortage of appropriate other personnel exists. Moreover, he blatantly ignores the Commonwealth Court’s statement in *Volpe v. Public School Employees’ Retirement Board*, 2107 Pa. Commw. Unpub. LEXIS 798, 20 (October 24, 2017), that *Baillie* is “dispositive” on this issue. Further, the record in this matter is replete with evidence showing that PSERS, on numerous occasions and over multiple years, provided guidance directly to Claimant on post-retirement employment and made such guidance available to Claimant via PSERS’ website. Exhibit Claimant 14; Exhibits PSERS-4, 5, 6, 7, 8, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28. Accordingly, this argument provides no support for Claimant’s appeal.

Due Process

In a footnote, Claimant also articulates a due process argument, see Claimant’s Brief at p. 13 n.5, asserting that PSERS violated his due process because PSERS did not provide Claimant with any information in response to Claimant’s requests, prior to the hearing, for all the information that ASPIRA provided to PSERS concerning Claimant’s employment with Olney. In making that argument, Claimant characterizes PSERS’ refusal to provide the requested information as “PSERS [sic] standard stonewalling position that no discovery is available in these proceedings.” *Id.* To begin with, this argument is based on an incorrect representation by Claimant. As PSERS noted in its post-hearing brief in response to this

allegation and as Claimant later admitted in his exceptions, PSERS did provide Claimant's counsel with the information Claimant requested "about 4 weeks before the hearing" in this matter. PSERS' Brief to the Hearing Examiner at p. 35; Claimant's Exceptions at p. 6. Therefore, Claimant's argument is without factual support and fails to elucidate any prejudice.

Moreover, Claimant's due process argument has no support in the law. Pennsylvania's Commonwealth Court has long recognized that, as a general rule, discovery as provided by the rules of civil procedure is not available in administrative proceedings. *C.f. Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 981 A.2d 975, 997 (Pa. Cmwlth. 2009); *D.E.L.T.A. Rescue v. Bureau of Charitable Orgs.*, 979 A.2d 415, 428 (Pa. Cmwlth. 2009); *Vaders v. Pa. State Horse Racing Comm'n*, 964 A.2d 56, 58 – 59 (Pa. Cmwlth. 2009); and *UGI Utils., Inc. v. Unemployment Comp. Bd. of Rev.*, 851 A.2d 240, 251 – 252 (Pa. Cmwlth. 2004), all citing *Weinberg v. Ins. Dep't*, 398 A.2d 1120, 1121 (Pa. Cmwlth. 1979). In the face of this longstanding case law, Claimant unjustifiably characterized PSERS' position as "stonewalling." Rather, if PSERS had taken that position, it would have been a position is legitimately supported by the law.

In addition, the Commonwealth Court has explicitly stated that, in an administrative proceeding, where the General Rules of Administrative Practice and Procedure ("General Rules"), 1 Pa. Code § 31.1 *et seq.*, do not expressly permit discovery other than requests for admission, "[a] refusal to answer some discovery requests does not violate due process when there is no authority to conduct formal discovery." *KC Equities d/b/a Little Steps Day Care v. Dep't of Public Welfare*, 95 A.3d 918, 933 (Pa. Cmwlth. 2014), citing *Cooper v. State Bd. of Med.*, 623 A.2d 433 (Pa. Cmwlth. 1993).

To the extent Claimant claims, in his exceptions, that there was a lack of discovery at the ESRC level of review or that the ESRC did not have substantial evidence to support the determination set forth in the ESRC denial letter, the arguments are similarly unavailing. Claimant's Exceptions at pp. 4-6. A proceeding before the ESRC is, by regulation, a non-adjudicatory proceeding that is subject to appeal. 22 Pa. Code §§ 201.3a and 201.4a. A "non-adjudicatory appeal" is an appeal "which is resolved without conducting a hearing or issuing an adjudication." 22 Pa. Code § 201.21. The ESRC determination is a staff

determination. It is an internal agency process that provides a second level of review of an initial staff determination. The record before the ESRC is not the record before the Board, and the ESRC's decision is not binding on this Board. This Board's review is de novo and involves full consideration of the matter anew. See, e.g., *Wingert v. State Employees' Retirement Bd.*, 589 A.2d 269 (Pa. Cmwlth. 1991); see also 22 Pa. Code § 201.4a. The Board is both fact finder and decision maker. *Tyson v. Pub. Sch. Employees' Ret. Sys.*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999). This Board makes both "credibility determinations and conclusions of law," and we are not bound to the evidence before the ESRC or the issues as framed by PSERS or the ESRC. *Account of Joan Chalker*, Docket No. 2014-17 (PSERB December 13, 2018) (citations omitted; emphasis in original). This Board, therefore, may consider and address the terms of Claimant's contracts with Olney, which Claimant introduced as evidence at the hearing. Claimant's Exceptions at p. 5 n. 3. Accordingly, there is no legal support for Claimant's due process arguments.

PSERS' Ability to Review the Judgment of the Employer as to the Existence of an Exception under Section 8346(b) of the Retirement Code

As touched on earlier, Claimant also asserts that PSERS acted without authority and ignored a legislative mandate when it reviewed ASPIRA's decision that an emergency or shortage of appropriate other personnel existed which justified Claimant's post-retirement return to employment with ASPIRA. In making that argument, Claimant disregards the fact that the issue of PSERS' authority in this context is settled law, having been decided by the Commonwealth Court in *Baillie*.

The claimant in *Baillie* retired on a Friday and then returned to school service the following Monday under a new employment contract, based on his employer's determination that his retirement created an emergency within the meaning of section 8346(b). The Board determined that Baillie had not been recalled from retirement for an emergency, and Baillie appealed. On appeal to the Commonwealth Court, Baillie contended, among other things, that PSERS did not have the authority to review the employer's decision that an emergency warranted his temporary return to service. *Baillie*, 993 A.2d at 948. However, the Commonwealth Court ruled that, while the employer may make the initial determination that an emergency exists, the final decision for matters affecting disbursements to annuitants must rest with PSERS, because PSERS has a fiduciary duty under the Retirement Code that

would be breached if PSERS were to allow a member to continue to receive an annuity after returning to school service under circumstances that do not fall within the exceptions defined in Section 8346(b) of the Retirement Code. *Id.* at 950.

Claimant did not even address *Baillie* and its implications for this particular case. But that is of no moment, because the issue of PSERS' authority under the Retirement Code is an issue of *law* that is not fact-dependent. Determining PSERS' authority under the law is a matter of statutory construction – a question of law, see *Com. v. Diego*, 119 A.3d 370, 373 (Pa. Super. 2015) – with the object being to construe the language of the Retirement Code and discern its meaning. See *Tritt v. Cortes*, 851 A.2d 903 (Pa. 2004). The Commonwealth Court's conclusion of law on that question is not dependent on the facts, because the interpretation holds true regardless of the facts in any given case. Therefore, the Commonwealth Court's holding in *Baillie* applies here, and it unquestionably establishes that PSERS has the authority to review ASPIRA's judgment about whether an emergency or a shortage of appropriate other personnel existed, as defined in section 8346(b) of the Retirement Code, that justified the hiring of Claimant, an annuitant, for multiple periods that exceeded one school year.

Emergency/Shortage of Appropriate Other Personnel

Claimant's next argument is that he permissibly returned to school service with ASPIRA in 2011 as an annuitant in the face of an emergency or a shortage of appropriate other personnel, under section 8346(b) of the Retirement Code, 24 Pa.C.S. § 8346(b). He argues that the Retirement Code's general rule, which prohibits an annuitant's return to school service after retirement without cessation of the annuity, does not apply to him because he returned to school service with ASPIRA under a statutory exception to that general rule.

At the time of Claimant's return to school service with ASPIRA in 2011, section 8346(b) of the Retirement Code provided the following exceptions to the general rule that an annuitant may not return to work without losing his annuity:

* * *

(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 or participant receiving distributions 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 or distributions, provided that the annuitant meets the conditions set forth in subsection (b.2).

* * *

24 Pa.C.S. § 8346(b) (emphasis added). Under the terms of this provision, the statutorily-defined exceptions in which an annuitant may return to service without the loss of his annuity are these: (1) where an emergency creates an increase in work load such that there is a serious impairment of service to the public (“emergency increase in work load exception”); (2) in the event of a shortage of appropriate subject certified teachers (“teacher shortage exception”); or (3) in the event of a shortage of appropriate other personnel (“other personnel shortage exception”). Additionally, for any of these exceptions to apply, the return to school service cannot extend beyond the school year during which the shortage occurs. This “period not to extend beyond the school year” requirement is an essential element; it must be present for any of these exceptions to apply. 24 Pa.C.S. § 8346(b).

Claimant makes no assertions about an increase in work load seriously impairing service to the public, so the emergency increase in work load exception is not at issue. Moreover, he did not work for ASPIRA as a teacher, so the teacher shortage exception to the general rule is inapplicable. Accordingly, the focus here must be on the other personnel shortage exception.

The essential elements of the other personnel shortage exception under Section 8346(b) are (1) there is a shortage of (2) other appropriate personnel and (3) the return to school service does not extend beyond the school year in which the shortage occurs. PSERS’ regulations define a “school year” as “[t]he 12-month period which the governmental entity uses for purposes of administration, regardless of the actual time during which a member renders service.” 22 Pa. Code § 211.2(b). Therefore, a school year lasts no more than 12 months. Additionally, PSERS’ regulations provide that, in construing the Retirement Code, “the school year commences on July 1 and ends on June 30 of the following year.”

Pa. Code § 211.3(g). From these provisions, it is clear that Claimant's return to school service in any given school year could not, under the "period not to extend beyond the school year" requirement of section 8346(b), permissibly extend beyond the twelve-month period that commences on July 1 and ends on June 30 of the following year.

The evidence in this matter demonstrates that Claimant's first contract with ASPIRA for the principalship at Olney commenced on June 27, 2011 and ended on August 17, 2012. See Exhibit Claimant 1. Therefore, it included:

- (1) a portion of the 2010 – 2011 school year (June 27, 2011 through June 30, 2011);
- (2) the entire 2011 – 2012 school year (July 1, 2011 through June 30, 2012); and
- (3) a portion of the 2012 – 2013 school year (July 1, 2012 through August 17, 2012).

However, Olney did not begin participating with PSERS until July 1, 2011, NT at 187, so the portion of Claimant's first contract prior to that date may be discounted. Nonetheless, Claimant's first contract with ASPIRA extended beyond the 2011 – 2012 school year and into the 2012 – 2013 school year, so the third element required for the exception to apply – the period of the shortage is not to extend beyond the school year – is not supported by the record, and Claimant does not, accordingly, meet the other personnel shortage exception for the 2011 – 2012 school year. Because his initial return for the 2011-2012 school year was not within a permissible exception for post-retirement employment, Claimant became an active member of PSERS as of July 1, 2011 and, by law, he was no longer eligible for an annuity until he terminated school service again and reapplied for retirement. See 24 Pa.C.S. §§ 8102 (def. annuitant), 8307, and 8342(a); see also 24 Pa.C.S. § 8346(c), (d).

Although this Board need not consider the school years after the 2011-2012 period, because we have found that Claimant had returned to service that year, the same is true of Claimant's third contract with ASPIRA, which ran from August 1, 2013 to July 31, 2014. See Exhibit Claimant 3. It extended from the 2013 – 2014 school year into the 2014 – 2015 school year. Again, in that case, the record does not support the presence of the third element required for the exception to apply, so Claimant does not meet the other personnel shortage exception for the 2013 – 2014 school year.

In his post-hearing brief, Claimant does not in any way address the "period not to extend beyond the school year" requirement of section 8346(b), but he focuses primarily on

the argument that ASPIRA made bona fide efforts to replace him but never found an appropriate replacement. However, this argument must be rejected, because it is contrary to prior case law, as embodied in *Account of Dr. John K. Baillie*, the PSERB decision that the Commonwealth Court upheld in *Baillie, supra*, 993 A.2d 944. In *Account of Dr. John K. Baillie*, the claimant, Baillie, similarly focused on the alleged shortage of available candidates to fill his position after his retirement and the many challenges facing the employer in searching for an appropriate replacement candidate. The PSERB in *Account of Dr. John K. Baillie*, however, determined that the factors on which Baillie focused were irrelevant to the way the PSERB approached such a case. Instead, the PSERB's approach focused on how the employer would have behaved if the annuitant had retired and been unable to return to work. In such a situation, the PSERB believed, the employer would have found a timely replacement, either temporary or permanent, because it would not have been able to rely on the annuitant's return. *Account of Dr. John K. Baillie* at 57 – 58. As Baillie did in that case, ASPIRA, in this case, did not behave as if Claimant, the annuitant, had retired and been unable to return to work. Instead of making the effort it would have made if a shortage of other personnel had existed, ASPIRA simply chose to secure Claimant's return to employment as Olney's principal because that suited ASPIRA. See *Account of Dr. John K. Baillie* at 50.

Indeed, Claimant's argument that ASPIRA made bona fide efforts to replace him but never found an appropriate replacement is not supported by the facts of record. For one thing, there is no evidence that when ASPIRA hired Claimant in 2011, ASPIRA had determined the principal position at Olney to be unfillable due to a shortage of other personnel. This is apparent from Dr. Nuñez' testimony that, based on the persistent and insistent recommendations of Olney's School Advisory Council, ASPIRA began to recruit for a minority principal who had some experience in Philadelphia. She added that, when interviewing Claimant, the ASPIRA hiring team explained to Claimant its visions for Olney, along with what the hiring team was looking for in a candidate. In none of her testimony did Dr. Nuñez indicate that the ASPIRA hiring team had determined that there was a shortage of other personnel or that they passed that along to Claimant as one of their motives for approaching him about the position.

And significantly, after hearing their vision and what they wanted in a principal from the ASPIRA hiring team, Claimant told them that he was retired and the only way he would accept the position was if ASPIRA notified PSERS that he was retired and had returned to work. Claimant, in his prior returns to work under the other personnel shortage exception since he had retired in 2007, all of which lasted less than a school year, had *never* sought PSERS' approval. Indeed, in the case of his first return, in 2007, he understood that to be an emergency situation and that his taking the position had been cleared through PSERS. NT at 106. But in all of his subsequent short-term returns, he neither notified PSERS that he was going to be working for the schools in question, nor sought PSERS' approval of his return. NT at 109, 111, 112, 115. The fact that, in the case of Olney, he discussed with ASPIRA the need to do so, is a strong indicator that Claimant understood his return to work at Olney to be *different* from all of his prior returns, further supporting the finding that ASPIRA initially offered him the position without ASPIRA's referring to the shortage of other personnel exception.

Nor did Claimant succeed in proving that there was a shortage of other personnel that required retention of Claimant in May 2011. For one thing, Dr. Nuñez had two years of experience in the SDP as a principal, 13 years of experience as a superintendent or chief academic officer in the charter school sector, and 11 years of experience as a teacher in the SDP. During her tenure with ASPIRA, she had started four other charter schools and was the founding principal of ASPIRA's second charter school. She had both the experience and the ability to interview and hire the needed employees, work with facilities to ensure the adequacy of the building, and ensure that construction was happening, interview different publishing companies to identify resources to be used for every content area, and basically get the school up and running *while ASPIRA continued its search for a non-retiree principal prior to the start of school.*² In addition, both Claimant and Dr. Nuñez testified that there

² This Board does not conclude, as Claimant argues in his exceptions, that a shortage of other personnel exists only if there is no other employee in the organization who could potentially fill the role. Claimant's Exceptions at p. 7. If the evidence establishes, however, that a school employer has a back-up plan to fill the vacancy with another existing employee, even if only temporarily, that fact does support a finding that a shortage did not exist that would support hiring a PSERS retiree. It contradicts an argument that the employer had no choice but to stop recruiting efforts for the vacancy and hire a retiree. In this case, Dr. Nuñez testified that she believed she would have been the back-up plan. NT 50-51. This testimony is not the

(footnote continued on next page)

were five other ASPIRA employees involved in the hiring process for Claimant and that Olney hired two assistant principals for the 2011-2012 school year. The record, therefore, does not support the existence of a shortage of other personnel in May 2011, when ASPIRA approached Claimant about taking the principal position at Olney, offered him the position, and stopped all recruitment efforts to find a non-retiree principal who could begin on June 27, 2011 or before school started in August 2011. Rather, the evidence establishes that ASPIRA recruited and hired Claimant due to his experience and ability, not because of an established shortage of non-annuitant personnel. Nor is there a preponderance of the evidence that there was any shortage of other personnel in any subsequent school year in which Claimant returned to work as principal for Olney.

In addition, there is no documentary evidence in the record to indicate that ASPIRA ever advertised the Olney principal position and, therefore, undertook a bona fide search for a non-annuitant. While Dr. Nuñez testified that ASPIRA did so, it is impossible, for several reasons, to credit that testimony. For one thing, ASPIRA has a financial interest in the outcome in light of the fact that ASPIRA will incur debt with PSERS due to PSERS' determination, because ASPIRA will owe its employer share of contributions for each year of Claimant's employment, plus interest for each year that the employer's contribution has not been received. NT at 159. While Dr. Nuñez is no longer employed by ASPIRA, she may bear some responsibility for ASPIRA's hiring of Claimant without clearing it with PSERS, so she has a motive to be other than frank on this point.

It is also impossible to credit that testimony so long after the fact, when ASPIRA could have produced representative job descriptions and advertising of the position to PSERS at any point, and in particular, after PSERS began requesting such documentation, but ASPIRA never did. And finally, Dr. Nuñez testified that in school years 2011 – 2012 and 2012 – 2013, ASPIRA hired principals for all of the other ASPIRA charter schools. NT at 51 –

basis for this Board's conclusion that Claimant failed to meet his burden of proving that a shortage of other personnel existed in May 2011, but it does lend support to that conclusion because it shows that ASPIRA had not exhausted its perceived options prior to hiring Claimant.

52. All of this information casts doubt on Claimant's position that ASPIRA hired him due to an emergency or shortage of other appropriate personnel.

Dr. Nuñez's testimony that the ASPIRA hiring committee relied on Claimant to tell them what the practice was for return to work after retirement, NT at 24, is also not credible. Even Claimant did not believe that; he testified that he did not believe that ASPIRA relied on him to tell them about the process for employment after retirement. NT at 88. In other words, he did not find the testimony of his own witness credible on that point. All of this supports the general unreliability of Dr. Nuñez's testimony.

Furthermore, because Claimant continually returned to perform the same duties with Olney from the 2011 – 2012 school year through the 2014 – 2015 school year, ASPIRA had even more time to find an appropriate replacement, and yet there is no documentary evidence to support Claimant's assertion that ASPIRA made any such effort. Dr. Nuñez left ASPIRA's employ in June 2013, so she is not competent to testify about what efforts ASPIRA made after June 2013 to recruit someone other than Claimant to take the position for the 2013 – 2014 and 2014 – 2015 school years, which means there is no evidence whatsoever of any efforts to recruit a non-annuitant for those years. On top of that, Claimant actually applied for the position in the school years subsequent to the 2011 – 2012 school year, he entered into contracts (as discussed above) that extended his work beyond a discrete school year, those contracts did not mention any emergency or shortage of other personnel, and those contracts stated that he was eligible to participate in PSERS, which is a strong indicator of a return to service that does not fall under any of the statutory exceptions.

These circumstances certainly evidence ASPIRA's *preference* for having Claimant continue in the same role, but ASPIRA's preference does not signify that there is an emergency or shortage of other personnel, as contemplated by 24 Pa.C.S. § 8346(b). Nor is PSERS required to recognize ASPIRA's preference as evidence of a shortage of other personnel. *Account of Dr. John K. Baillie* at 57. To summarize, the elements of the other personnel shortage exception are not met for the school year 2011 – 2012 because Claimant's contract with ASPIRA extended beyond one school year and there is insufficient creditable evidence available to demonstrate by a preponderance that a true shortage of

other personnel existed. The elements of the other personnel shortage exception are not met for the 2012 – 2013 school year because there is insufficient creditable evidence available to demonstrate by a preponderance that a true shortage of other personnel existed. And the elements of the other personnel shortage exception for the 2013 – 2014 and 2014 – 2015 school years are not met because Claimant's contract for the 2013 – 2014 school year extended beyond one school year, and because there is no evidence in the record whatsoever about what efforts, if any, ASPIRA/Olney made to locate a non-annuitant for the Olney principalship for those two school years. This record simply does not support the existence of a shortage of other personnel in any of the school years during which Claimant worked for ASPIRA/Olney after he retired.

Waiver of Adjustments

Claimant next argues that this case is an appropriate one in which to apply a waiver of adjustments under the Retirement Code. Upon a return to service, the Retirement Code mandates that an annuitant's retirement benefits cease and that the present value of the annuity is frozen as of the date the benefits ceased:

If an annuitant returns to school service ... any annuity payable to him under this part shall cease effective upon the date of his return to school 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.

* * *

24 Pa.C.S. § 8346(a) (emphasis added). The Retirement Code also requires an annuitant, whose annuity ceases pursuant to Section 8346 (a.1), to return any annuity payments received after the return to school service, plus statutory interest. 24 Pa.C.S. § 8346(a.1). And, under the Retirement Code, the Board is duty-bound to correct errors in a member's record upon discovering them, and to adjust payments accordingly. 24 Pa.C.S. § 8534(b). Based on these provisions, PSERS sent Claimant the letter of November 5, 2015, notifying him that his name had been removed from PSERS' annuitant payroll, he had been re-enrolled as an active, contributing member of PSERS, and he would need to repay his retirement benefit, from July 1, 2011 through August 31, 2015, in the amount of \$378,686.00.

However, the Board may waive such an adjustment if: (1) the adjustment or portion of the adjustment will cause undue hardship to the member; (2) the adjustment was not the result of erroneous information supplied by the member; (3) the member had no knowledge or notice of the error before adjustment was made, and the member took action with respect to their benefits based on erroneous information provided by the system; and (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a). The use of the term “may” in Section 8303.1(a) indicates that the waiver is discretionary with the Board. But Claimant must satisfy all four prongs of this waiver-of-adjustment provision to qualify for a waiver, and it is his burden to prove that he satisfies them. *White v. Pub. Sch. Employees’ Ret. Bd.*, 11 A.3d 1, 6 – 7 (Pa. Cmwlth. 2010).

The first prong of the waiver-of-adjustments provision requires that the adjustment will cause an “undue hardship” to Claimant. 24 Pa.C.S. § 8303.1(a)(1). The waiver-of-adjustments provision provides for a very narrow exception to the mandates of the Retirement Code and is intended for situations in which a member has already retired or, potentially, has irrevocably resigned, left active employment, and filed a retirement application based on incorrect information that he received from PSERS and that he reasonably relied upon in making his retirement decision. See *White*, 11 A.3d at 6 (the “General Assembly amended the [Retirement] Code in 1998 to allow the Board to waive certain after retirement account adjustments.”). Thus, in its regulations at 22 Pa. Code § 213.3a(a), this Board has defined “undue hardship” as either an adjustment that causes a reduction in excess of 5% of the monthly annuity, or an adjustment that results in the member’s losing eligibility for a benefit other than an annuity. 22 Pa. Code § 213.3a(a)(1) and (2); NT at 163, 179 – 180. To satisfy the “undue hardship,” the monthly annuity being paid to an annuitant must be reduced by at least 5% as a result of a correction to the record, or, alternatively, a member must establish losing eligibility for a benefit other than an annuity. Here, Claimant has not made a claim that he lost eligibility for a benefit other than an annuity. Accordingly, we turn to the hardship calculation of Claimant’s adjusted benefit.

When determining whether an “undue hardship” exists, the adjusted benefit is determined by comparing the monthly benefit that the annuitant was receiving prior to the correction of the record, with the finalized adjusted benefit that the annuitant must receive as

a result of the correction of the record, and then determining if the change in the two monthly annuities is greater than 5%. 22 Pa. Code § 213.3a(a); NT 182; *Account of Nancy C. Bowers*, Docket No. 2012-45, p. 22 (PSERB June 16, 2014). Section 8303.1(b) provides that an affected member must request a waiver of a correction of an error within 30 days of notice of the correction. 24 Pa.C.S. § 8303.1(b). Consequently, the calculation of the “undue hardship” must be applied at the time a member seeks the waiver. The determination of whether the “undue hardship” prong is met is done at the time of the adjustment, not at a later retirement date.

Claimant was not receiving a monthly benefit or due any payments from PSERS at the time of PSERS’ determination that he returned to service in an unapproved capacity; rather, he had accepted a position with SDP, he was reenrolled with PSERS before he requested a waiver, and he had begun to accrue additional service and salary credit toward a future retirement benefit with PSERS. Thus, Claimant cannot meet his burden of proving that he suffered a 5% reduction in his monthly annuity as of September 2015, when he was notified of PSERS’ determination, or even in November 2015, when he was notified of the amount of the debt he owed PSERS for receiving retirement benefits while actively working as a school employee at Olney. Claimant speculates that he “will certainly” reach that threshold at some future and unknown retirement date that is within his control, but the unknown future is immaterial. Claimant’s Exceptions at p. 9. No authority exists for using an estimate of a future monthly annuity to calculate whether an “undue hardship” exists. Claimant is not without any recourse, however, as he has the ability to mitigate some of the hardship he predicts by paying back the amount he owes to PSERS for double-dipping in a lump sum and, therefore, avoiding any actuarial debt on his account (Exhibit Claimant 8) or by continuing to work and accrue additional salary and service that will increase his future retirement benefit.

To satisfy the second prong of the waiver-of-adjustment provision, Claimant must prove that the adjustment is not the result of erroneous information supplied by him. 24 Pa.C.S. § 8303.1(a)(2). The evidence relevant to this prong indicates that, by virtue of the fact that he was a PSERS member, Claimant is familiar with the Retirement Code and at all relevant times, he understood that there are consequences to working in a public school after retirement, limited exceptions to such work, and a one-school-year time limit to such

work. Moreover, on June 28, 2007, Claimant attended a PSERS Retirement Exit Counseling session (“counseling session”), during which the PSERS counselor reviewed information about working after retirement, including the fact that there are only limited circumstances in which an annuitant can work in the public schools, those exceptions were emergency, shortage or extracurricular activity, and a return to school under those circumstances is limited to one school year, with a school year being July 1 through June 30 of the following year, which Claimant understood.

Furthermore, after Claimant submitted his Application for Retirement in 2007, PSERS sent him an initial benefit letter, dated September 6, 2007, which included extensive information about employment after retirement that was consistent with what the counselor had explained at the counseling session. Claimant read the initial benefit letter and understood the information about returning to work after retirement. Similarly, Claimant received a finalized benefit letter from PSERS, dated April 15, 2009, which included similar information about employment after retirement; again, Claimant saw and understood that information.

Subsequent to retiring, Claimant received a PSERS Member Handbook, which he read and reviewed, including the portions about returning to service after retirement. Additionally, after retiring, Claimant began receiving PSERS’ retired member newsletters two to three times a year, which PSERS, in the regular course of business, sent to members at their addresses on file with PSERS, and Claimant read most of them when he received them. Of those, at a minimum, PSERS’ Summer 2008 Retiree Newsletter, PSERS’ Summer 2009 Retired Member Newsletter, PSERS’ Fall 2009 Retired Member Newsletter, PSERS’ Fall 2010 Retired Member Newsletter, PSERS’ Fall 2011 Retired Member Newsletter, PSERS’ Retired Member Newsletter, Vol. 2 – 2013, PSERS Active and Retired Member Update newsletter, Vol. 1 – 2014, PSERS’ Retired Member Newsletter, Vol. 3 – 2014, and PSERS’ Active and Retired Member Update newsletter, Vol. 1 – 2015, all contained information about employment after retirement that was consistent with the information on that topic set forth in Claimant’s initial benefit letter, the finalized benefit letter, and the Member Handbook.

Finally, as of July 2008, PSERS had available to members on the PSERS website, at PSERS' Harrisburg and regional offices, and to be sent to members upon request, a publication entitled "Let's Talk About Returning to School Service After Retirement." Also, as of April 2009, PSERS' website included information about Act 2004-63 and its effect on retirees working after retirement, which information was consistent with the information on that topic set forth in Claimant's initial benefit letter, the finalized benefit letter, the Member Handbook, and the retired member newsletters. Additionally, all of PSERS' newsletters and publications are available on PSERS' website. And after July 2011, PSERS had available to members on the PSERS website, at PSERS' Harrisburg and regional offices, and to be sent to members upon request, an updated publication entitled "PSERS Return to Service Guidelines and Clarifications." Supplementing that, many of PSERS' newsletters to active and retired members referred retirees to the PSERS publications about return to service that are available on PSERS' website.

All the information about returning to work after retirement that PSERS conveyed to Claimant from the date of his 2007 counseling session forward told him the same thing. Claimant admitted he read and understood that information. Besides that, he plainly was cognizant of the restrictions on returning to work after retirement, and he apparently suspected it would apply in the Olney situation, because he is the one who raised it with the ASPIRA hiring team and stipulated to them that PSERS' approval of his taking the position as principal was a condition of his employment in that capacity.

Nonetheless, when Claimant returned to employment with ASPIRA post-retirement, rather than proactively finding out for himself, by contacting PSERS – or simply by confirming with ASPIRA – that ASPIRA had done the right thing and cleared with PSERS his return to work as the principal of Olney, Claimant just assumed that ASPIRA did what he had asked. In fact, Claimant failed to contact either ASPIRA or PSERS to inquire in any way, shape or form about the permissibility of his return to employment. Nor did ASPIRA contact PSERS about the propriety of Claimant's post-retirement return to employment, even though, when the ASPIRA hiring committee interviewed Claimant, Claimant was "quite express" that he could not accept the position unless it would be deemed an emergency hire for the 2011 – 2012 school year, NT at 120, and the ASPIRA hiring committee asked *Claimant* how to go about obtaining PSERS' approval. NT at 24. Claimant knew he may

have returned to work under circumstances that did not fall within any of the exceptions to section 8346(b), he knew what the rules were, he knew the consequences of a return to work in an unapproved capacity, and he knew that he, himself, had never notified or contacted PSERS about his return to work. Under these circumstances, Claimant had no reasonable justification for returning to work with ASPIRA/Olney, and then continuing that employment for three more school years, without first making certain that PSERS had approved of his post-retirement return to employment with ASPIRA/Olney.

Because neither Claimant nor ASPIRA notified PSERS about Claimant's post-retirement return to employment with ASPIRA/Olney, PSERS did not find out about it until 2015, when ASPIRA brought to PSERS' attention the fact that six employees, including Claimant, were not having PSERS contributions withheld. Up to that point, PSERS had no way of finding out about it. So, while PSERS' ceasing payment of Claimant's retirement benefit in 2015 was not the result of erroneous information supplied by Claimant, it was the result of his failure to supply pertinent information to PSERS despite his knowing about the possible impact – in the form of the cessation of his retirement benefit payments – his return to service could have. The failure to supply pertinent information is not quite the same thing as supplying erroneous information to PSERS, so Claimant technically satisfies the second prong of the waiver-of-adjustment provision at section 8303.1(a)(2).

Even if Claimant had satisfied both the first and second prong, he does not satisfy the third. To satisfy the third prong, Claimant must prove that he had no knowledge or notice of the error before the adjustment was made and that he took action with respect to his benefits based on erroneous information provided by PSERS. 24 Pa.C.S. § 8303.1(a)(3). Claimant received a PSERS Retired Member Handbook at retirement ("Member Handbook"), which he read and reviewed. In particular, Claimant read the portions of the Member Handbook about returning to service after retirement, the statements that "PSERS, however, reserves the right to review an employer's determination that a qualifying emergency or shortage exists," "[i]t is your responsibility to notify the employer that you are a PSERS retiree," and "[i]f you do return to service under any circumstances other than the provisions covered by Act 2004-63, you must advise your employer that you are a PSERS retiree. *You should also send a letter to PSERS including the return to service date so your pension may be stopped before an overpayment occurs.*" Exhibit PSERS-5 (emphasis added).

Claimant read and understood these statements, clearly gaining the knowledge that he may have returned to service in error, but he took no steps to inform PSERS to secure the cessation of his pension before an overpayment occurred. Additionally, despite this notice and this knowledge, Claimant made no inquiries to see if PSERS had reviewed ASPIRA's determination that Claimant's post-retirement return to employment had occurred in a bona fide emergency or shortage of other personnel. Based on these occurrences, he had knowledge or notice of a possible error before ever accepting the position at Olney in 2011. Therefore, he could have taken action to preserve his benefits long prior to PSERS' ever learning of his return to work in 2015 and then notifying Claimant of the need to make the adjustment to his annuity required by the Retirement Code.

Nor is there any evidence that Claimant took action with respect to his benefits based on "erroneous information provided by" PSERS. In fact, there is no evidence that PSERS provided any erroneous information to Claimant. Rather, the evidence unequivocally establishes that PSERS informed Claimant, on multiple occasions, and he understood that both a bona fide emergency and a shortage of personnel was prohibited from extending beyond one school year and, in the event he was not returning to employment that fit within the exceptions in the Retirement Code, he should contact PSERS. The evidence also shows that PSERS provided Claimant with guidelines to assist him in understanding what post-retirement employment was permissible and what post-retirement employment was not permissible. But besides that, the evidence indicates that at no time between his retirement in 2007 and his return to service with ASPIRA/Olney in 2011, 2012, 2013, and 2014 did Claimant check with PSERS about any impact that his post-retirement return to employment with ASPIRA/Olney might have on his benefits.

These facts set this case apart from the Commonwealth Court's decision in *Volpe*, 2017 Pa. Commw. Unpub. LEXIS 798. Here, Claimant told his employer that the position had to be deemed as a shortage of personnel position. In *Volpe*, the school district made the shortage of personnel determination. Here, Claimant contracted to work beyond the permissible time allowed for a return to service, understanding that he was doing so. In *Volpe*, the claimant did not agree to work beyond the statutory time limits allowed for post-retirement employment. In *Volpe*, the Commonwealth Court stated that a member does not have a clear statutory duty to notify PSERS if he is working in an emergency or shortage of

personnel capacity and found that PSERS never advised Volpe to notify it in the event of a return. The situation in this case is very different. In this case, PSERS informed Claimant that he should send a letter to PSERS directly if he was working in a capacity that did not fit a return to service exception, including the one-year limitation, to avoid any overpayment of annuity. See Claimant Exhibit 14; Exhibits PSERS-4, 5, 20, 21, 27, 28. The gap in communication that the Commonwealth Court found in *Volpe* does not exist in this case between PSERS and Claimant. Claimant has not, therefore, satisfied the third prong of section 8303.1(a).

To satisfy the fourth and final prong of the waiver-of-adjustment provision, Claimant must prove that he had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a)(4). He has not done so. As discussed above, the evidence indicates that Claimant was aware well before he returned to service with ASPIRA/Olney that his doing so might raise the specter of his erring by returning to work in an unapproved capacity. Claimant knew the Retirement Code's one school year limitation on an emergency return to service when he entered into the contract with ASPIRA in May 2011 that extended beyond a school year and the August 2013 contract that also extended beyond a school year. NT 123. Also, his claimed reliance on ASPIRA was not reasonable. Claimant testified that, at his interview, he was offered the job and he told ASPIRA that he would accept it if ASPIRA received clearance through PSERS, but then he never: (1) asked ASPIRA if it had cleared his employment with PSERS; (2) requested documentary proof of clearance from ASPIRA; or (3) contacted PSERS to confirm clearance. Rather, he signed a contract with ASPIRA, which stated he was eligible for PSERS, just one week after his interview and then continued to work at Olney for four school years. Therefore, Claimant did not prove that he satisfies 24 Pa.C.S. § 8303.1(a)(4) either. Because he must satisfy all four prongs of section 8303.1(a) to qualify for a waiver, *White*, 11 A.3d at 6, Claimant does not qualify for a waiver.

Even assuming, for the sake of argument, that Claimant had satisfied all four prongs of 24 Pa.C.S. § 8303.1(a), the facts do not, from the standpoint of exercising the discretion to grant a waiver under that provision, favor Claimant. While he had no positive duty under the Retirement Code to notify PSERS of his return to school service, nearly all of the materials he received – and by his own testimony, read and understood – from PSERS prior to his

return to service in 2011 contained statements indicating that an annuitant considering a return to service should contact PSERS first to make sure doing so would not endanger his pension. And the fact that Claimant knew about the possible impact on his PSERS annuity should have caused Claimant, reasonably, to question whether his post-retirement return to employment with ASPIRA had been properly vetted with PSERS, instead of his relying on the goodness of ASPIRA. This is analogous to the situation in *White, supra*, 11 A.3d at 9 – 10, where the Commonwealth Court determined that the fact that a claimant received disparate estimates of retirement benefit on several occasions was sufficient basis to cause the claimant reasonably to question all of the estimates, despite the fact that there is no statutory requirement that a claimant specifically question disparities in estimates prepared by PSERS. Claimant's failure to supply pertinent information to PSERS, despite the information and warnings provided to him, therefore, is a factor that militates against a discretionary waiver.

Finally, Claimant received his finalized monthly retirement benefit of \$7,703.08 in each of the years in question, in addition to a full year's salary, each of those years, that ranged from \$135,500.00 to \$139,565.00 during the four school years in question. This is exactly what the Retirement Code aims to prevent in section 24 Pa.C.S. § 8346. Based on all of these facts, then, there is no sound basis for the Board to exercise its discretion to grant a waiver in this case.

CONCLUSION

PSERS is a creature of statute which derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). Consequently, Claimant has only those rights created by the Retirement Code and none beyond that. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burriss v. State Employees' Ret. Bd.*,³ 745A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403 (Pa. Cmwlth. 1992).

Based on all of the above, the facts of record support the conclusion that Claimant did not fit any of the exemptions by which an annuitant is permitted to return to service under 24 Pa.C.S. § 8346(b) without loss of his annuity. The general rule enunciated in Section 8346 is this: if an annuitant returns to school service, any annuity payable to him under the Retirement Code shall cease and in the case of an annuity other than a disability annuity, the present value of such annuity shall be frozen as of the date such annuity ceases. This provision dictates that an annuitant may not continue to receive retirement benefits if the annuitant returns to service under any conditions other than those expressly stated in section 8346(b).

Therefore, at the time Claimant returned to school service in 2011, his annuity was to cease by operation of law, and its present value was to be frozen. 24 Pa.C.S. § 8346(a); see also *Account of Dr. John K. Baillie* at 82, n.23. It follows that Claimant's account should have been frozen as of the date of his return to service, established (for the purposes of PSERS participation) in the Discussion above as July 1, 2011. Also, pursuant to 24 Pa.C.S. § 8346(a.1), he must repay the annuity amounts he received, from that date until he ceased his employment with ASPIRA/Olney, by way of cash payment or actuarial debt. *Account of Dr. John K. Baillie* at 82, n.23.

In a prior case, the Board has held that the moment an annuitant returns to school service, his status as an annuitant for purposes of the Retirement Code ends "by operation of law" on the first day of his return, and that is true whether the return is in a full time or a

³ Cases interpreting provisions of the State Employees' Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions" of the Retirement Code. *Krill v. Pub. Sch. Employees' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

part time capacity. *C.f. Account of Douglas Goerlitz*, Docket No. 2010-16, at 20 (PSERB October 13, 2011) (emphasis in original). This is because a PSERS member cannot simultaneously be an active member *and* an annuitant. *Id.* Accordingly, Claimant's annuity should have ceased, effective upon the date of his return to school service in the 2011 – 2012 school year, July 1, 2011, and the present value of his annuity should have been frozen as of that date. Yet Claimant continued to collect his annuity until PSERS finally stopped it in September 2015.

Under section 8521(e) of the Retirement Code, 24 Pa.C.S. § 8521(e), PSERS and its Board “stand in a fiduciary relationship to the members of the system regarding the investments and disbursements of any of the moneys of the fund.” *Baillie*, 993 A.2d at 949. Additionally, under the Retirement Code, PSERS is responsible for the “uniform administration” of the public school employees’ retirement system. *Id.*, *citing* 24 Pa.C.S. § 8502(h). The Retirement Code also “requires PSERS to correct all intentional or unintentional errors in members’ accounts,” which means “PSERS has the duty to correct errors made by public school employers and to make actuarial adjustments to an individual member's benefit payments.” *Baillie*, 993 A.2d at 950, *citing* 24 Pa.C.S. § 8534(b). It follows that PSERS was correct in notifying Claimant of the need to make actuarial adjustments to Claimant’s account, in the form of requiring him to pay back the pension amounts he collected while employed as principal by ASPIRA/Olney.

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

IN RE: ACCOUNT OF JOSE E. LEBRON
 DOCKET NO. 2016-17
 CLAIM OF JOSE E. LEBRON

ORDER

The Board has carefully and independently reviewed the entire record of this proceeding, including the pleadings, transcript, exhibits, post-hearing briefs, the proposed Opinion and Recommendation of the Hearing Examiner, Claimant's Brief on Exceptions, and the Public School Employees' Retirement System's ("PSERS") letter brief in opposition.

IT IS HEREBY ORDERED:

- (1) Claimant's request for oral argument is DENIED;
- (2) Claimant's request that his post-retirement employment with ASPIRA/Olney for the 2011 – 2012, 2012 – 2013, 2013 – 2014, and 2014 – 2015 school years be deemed a permissible return to school service, without loss of annuity, under one of the exceptions set forth in 24 Pa.C.S. § 8346(b) of the Retirement Code is DENIED;
- (3) Claimant's request for a waiver of adjustments, under the Retirement Code at 24 Pa.C.S. § 8303.1, is DENIED; and
- (4) PSERS' determination that Claimant shall repay retirement benefits, as detailed in PSERS' letter to Claimant dated November 5, 2015, is AFFIRMED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 9, 2019

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