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

IN RE: ACCOUNT OF VLACIA Z. CAMPBELL
DOCKET NO.: 2011-24
CLAIM OF VLACIA Z. CAMPBELL

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Proposed Decision and Order of the Hearing Officer. We note that neither party filed exceptions to the Proposed Decision and Order of the Hearing Officer. The Board finds appropriate the Hearing Officer's Procedural History, Proposed Findings of Fact, Proposed Conclusions of Law, Discussion, and Recommendation and, we hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to purchase service credit for the period of time from October 1985 through August 1987 is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 4, 2013

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF VLACIA Z. CAMPBELL
DOCKET NO. 2011-24
CLAIM OF VLACIA Z. CAMPBELL

PROPOSED DECISION AND ORDER

HEARING DATE: December 19, 2012

APPEARANCES: For Public School Employees' Retirement System:
Kathrin V. Smith, Esquire
Assistant Deputy Chief Counsel

For Vlacia Z. Campbell:
Jack A. Linton, Esquire
Linton, Distasio & Edwards P.C.

BEFORE: Lynne M. Mountz, Esquire
Hearing Officer

PROCEDURAL HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") pursuant to an appeal filed by Vlacía Z. Campbell ("Claimant") from a decision by the Public School Employees' Retirement System ("PSERS") denying her request to purchase service credit for the period of time from October 1985 through August 1987.

An administrative hearing regarding Claimant's appeal was conducted on December 19, 2012 before Hearing Officer Lynne Mountz. Claimant appeared at the hearing and was represented by Attorney Jack A. Linton. PSERS was represented by Attorney Kathrin V. Smith.

The parties entered into a *Stipulation of Documents* which was entered into the record as Joint Exhibit 1. Pursuant to the *Stipulation*, the parties: (1) stipulated to the authenticity of Exhibits 1 through 11; (2) waived any hearsay objection to Exhibits 1 through 11; and (3) reserved the right to raise any other objection to the admission of the exhibits at the hearing, including but not limited to, relevancy. (Joint Exhibit 1).

The parties were provided full opportunity to examine and cross-examine witnesses and submit documentary evidence in support of their respective positions.

The parties elected to file post-hearing briefs in this matter. The post-hearing briefs were timely filed and received.

Based upon the testimony and evidence presented at the hearing and all matters of record, the Hearing Officer enters the following:

PROPOSED FINDINGS OF FACT

1. Claimant first enrolled in PSERS in April 1976 by virtue of her employment with the Schuylkill Intermediate Unit. (N.T. 44, 101).
2. Claimant became employed as a full-time speech therapist with the Berks County Intermediate Unit ("BCIU") on August 29, 1979. (N.T. 9-10, 45; Exhibit 1, pp. 2-3; Exhibit 8, p. 1).
3. On September 6, 1979, PSERS received an *Enrollment Application* for Claimant which reflected that she had begun employment with the BCIU on August 29, 1979. (N.T. 102-103; Exhibit 1, pp. 2-3).
4. On October 18, 1979, Claimant and the Board of Directors for the BCIU entered into a *Professional Employee Contract*. The terms of the contract provided, in part, that Claimant was to work as a professional employee for a term of ten (10) months; that she was to receive an annual salary as compensation; that deductions would be made for contributions to PSERS¹; that the contract would continue in effect year after year unless Claimant resigned or the Board of Directors terminated the contract for cause; and that the Board of Directors could raise the compensation in accordance with the operation of an established salary schedule. (N.T. 26, 45-46; Exhibit 2, p. 16).
5. Claimant's position with the BCIU in 1979 was as a full-time speech therapist. Claimant was assigned to various school buildings, classrooms and programs within several school districts, working with children in kindergarten through twelfth grade. Claimant was

¹ The contract refers to the "Teachers' Retirement Fund". (Exhibit 2, p. 16).

responsible for determining whether students had speech and language needs and, if so, developing a program for them. (N.T. 10, 49-50, 67).

6. At the time, Claimant maintained an office at a building used by BCIU staff. (N.T. 50-51).
7. Claimant worked full-time for the BCIU from the beginning of her employment in 1979 through August of 1981. She was paid a salary and received W-2 forms. (N.T. 10-12, 52).
8. Claimant was on maternity leave from September 1981 through August 1982. When Claimant returned to work she began to work part-time. She had the same supervisors, essentially the same duties and was compensated in the same manner with the exception that she worked only two days per week instead of five. (N.T. 11-16).
9. Claimant began a second maternity leave in September 1984. She was required to provide the BCIU with written notice that she would be returning sixty (60) days prior to her return. (N.T. 16, 19).
10. Claimant timely notified the BCIU of her intent to return from maternity leave in September 1985. In response, Donovan Cobb, Claimant's supervisor, advised Claimant that her position would no longer be part-time. Claimant was given the option of accepting full-time employment or resigning. (N.T. 19-20).
11. Because Claimant had two small children, she elected not to work full-time. By letter dated July 8, 1985, Claimant notified the BCIU that because of the change in her position from part time to full time, she must resign from her position as a speech and language pathologist with the IU. (N.T. 20-21, 47-48; Exhibit 11).

12. Claimant also informed the BCIU that she would be interested in working part time and would appreciate their consideration of her when a part-time position in speech and language became available. (*Id.*).
13. On or about June 30, 1985, Claimant's service with the BCIU terminated and her membership with PSERS terminated. (N.T. 105-106; Exhibit 1, p. 4).
14. From the time that Claimant was employed by the BCIU in 1979 through her resignation in 1985, she was a salaried employee and received W-2 forms. (N.T. 11-12, 16, 27-29, 52; Exhibit 2, pp. 16-18).
15. Claimant received annual raises during her employment with the BCIU in accordance with the salary schedule from 1979 until her resignation in 1985. (N.T. 54-55).
16. Claimant received evaluations, some written, during her employment with the BCIU from 1979 until her resignation in 1985. (N.T. 14, 54).
17. Claimant had monthly staff meetings and was required to report to her supervisors when asked to during her employment with the BCIU from 1979 until her resignation in 1985. (N.T. 55-56).
18. The BCIU provided materials that Claimant needed to use in her work as a speech therapist from 1979 through her resignation in 1985. (N.T. 14-15).
19. Prior to her resignation in 1985, the BCIU provided Claimant with health insurance, dental insurance, paid sick leave, paid personal leave, tuition reimbursement, and probably life insurance. (N.T. 48).

20. On or about September 30, 1985, Claimant filed a *Refund Application* with PSERS, seeking to withdraw all of her contributions and interest. (N.T. 57-58, 104; Exhibit 1, p. 4).
21. In October 1985, Claimant was notified that PSERS had approved her request for a refund of her contributions. Claimant's contributions from April 1976 through June 1985 and interest were refunded. (N.T. 59, 107; Exhibit 1, pp. 6-7).
22. In October 1985, Claimant was offered and accepted part-time work with the BCIU. (N.T. 21).
23. In her new position, Claimant provided speech therapy services to children aged three to five in the federally funded Head Start program. She had different supervisors than when previously employed by the BCIU and worked in different locations, with one exception – a school building that housed a Head Start location. Claimant identified her new supervisors as Roxanne Hassler and Jeffrey. (N.T. 21-23, 62-64, 66-67).
24. Claimant was instructed that she "needed to service programs and children and do all the things that were involved in servicing those children." Claimant was required to set goals for children and work towards those goals. (N.T. 43).
25. October 1985 was the first time that Claimant provided services to the Head Start program. (N.T. 64, 67).
26. Prior to beginning her work with Head Start, Claimant met with the speech therapist whom she would be replacing. Claimant did not know whether that individual was an independent contractor or an employee. (N.T. 21, 65-66).

27. In January 1987, Claimant began to provide speech therapy services to the BCIU's Act 89 program at the John Paul II Center in addition to her Head Start work. She had not provided services to this program when she was employed by the BCIU from 1979 through June 1985. (N.T. 67-68).
28. From October 1985 until September 1987, Claimant was paid as what she called a "contracted person". No taxes were withheld from her pay. (N.T. 23-25).
29. Claimant did not have a written contract with the BCIU for the services that she provided to the Head Start and Act 89 programs from October 1985 through August 1987. (N.T. 24, 60-61).
30. Claimant was not salaried from October 1985 through August 1987. She was paid on an hourly basis, receiving \$14.00 per hour for her services to Head Start and \$15.00 per hour for her services to the Act 89 program. (N.T. 33, 83).
31. In order to be paid during the period from October 1985 through August 1987, Claimant was required to fill out and submit *Contracted Service* forms and *Consultant Services* forms to BCIU. (N.T. 25, 33-34, 75-76, 80; Exhibit 2, pp. 30-33, 40-43; Exhibit 7, pp. 34-36, 44-47, 63-72, 74-80, 82-83).
32. The BCIU assigned Claimant a vendor number and completed *Multiline Payment Vouchers* and *Expense Vouchers* in order to pay her during the period of time from October 1985 through August 1987. (N.T. 32, 78-79; Exhibit 2, pp. 32-39; Exhibit 7, pp. 37-43, 48-62, 73).

33. Claimant was responsible for paying her own federal, state and local taxes from October 1985 through August 1987. She received 1099 forms to reflect her earnings during this period of time. (N.T. 28-29, 68-69; Exhibit 2, pp. 19-20, 29).
34. An *Itemized Statement of Earnings* from the Social Security Administration reflects that Claimant was self-employed in 1986 and 1987. (Exhibit 2, p. 29).
35. Claimant did not contribute to and was not a member of PSERS during the period of time from July 1985 through August 1987. (N.T. 61, 107-108; Exhibit 7, p. 10).
36. Claimant was not provided with health insurance, paid sick leave or paid personal leave during the period of time from October 1985 through August 1987. (N.T. 70-71).
37. Claimant ceased working for the Head Start program in May 1987. (N.T. 65, 67).
38. In September 1987, Claimant accepted a part-time position with the BCIU in its Act 89 program. Her work days were increased and she began to receive a salary. Claimant was no longer paid by the hour. (N.T. 68, 84-85).
39. In September 1987, Claimant enrolled in and began making contributions to PSERS. (N.T. 84-85, 107; Exhibit 1, p. 8).
40. On or about October 18, 1990, Claimant submitted an *Application to Return Withdrawn Contributions* to PSERS, seeking to return the contributions she had previously withdrawn when she resigned employment with the BCIU in June 1985. (N.T. 85-87; Exhibit 1, p. 14).
41. Claimant received a *Statement of Amount Due* from PSERS and returned the contributions and interest. As a result, Claimant was credited with 6.82 years of service

- for the period of time from April 1976 through June 1985. (N.T. 59, 87; 109-110; Exhibit 1, p. 12; Exhibit 7, p. 10).
42. Claimant accepted a position with the BCIU as a learning resource consultant in 1994. (N.T. 29-30, 41-42).
43. From September 1987 through the end of her employment with the BCIU, the BCIU withheld taxes from Claimant's pay. Claimant received W-2 forms, made contributions to PSERS, received paid sick leave, and received or was offered health insurance. (N.T. 87-89; Exhibit 2, pp. 20-28).
44. By letter dated February 28, 2005, Claimant was notified by PSERS that it had received an *Application to Purchase Credit for Part-Time Service* from her for her non-qualifying part-time service ("NQPT") with the BCIU. (Exhibit C-2).
45. By letter dated April 13, 2009, PSERS sent Claimant a statement of her credited service as of that date. The credited service did not include her service with the BCIU from October 1985 through August 1987. (Exhibit 2, pp. 5-6).
46. By letter dated April 24, 2009 to the Executive Director of the BCIU, Claimant requested assistance in obtaining retirement service credit for the time that she was a contracted employee. (Exhibit 2, p. 7).
47. By letter dated June 18, 2009, Karen Gokay, Director of Human Resources and Public Relations for the BCIU, advised Claimant that they had no documentation that could support her claim that she was in an employer-employee relationship during the time in question. (Exhibit 2, p. 8).

48. On December 19, 2009, Claimant sent Ms. Gokay a PSERS' *Purchase of Part-Time Uncredited Service* form. (Exhibit 2, p.12).
49. On February 3, 2010, PSERS received a letter from Counsel for Claimant which appealed the determination of the BCIU that Claimant was not entitled to service credit from October 1985 through August 1987. (N.T. 110-111; Exhibit 2).
50. By letter dated February 22, 2010, PSERS provided Claimant with a *Purchase of Former Part-Time Uncredited Service* form. Claimant was advised that "[t]he application must be completed and approved by the employer where the service was performed and returned to the above address." (N.T. 111-112; Exhibit 3).
51. By letter dated March 16, 2010, PSERS sent a letter to Ms. Gokay and requested that the BCIU complete a *Questionnaire To Determine PSERS Eligibility* form regarding Claimant's employment at the BCIU from October 1985 through August 1987. (N.T. 112-113; Exhibit 4).
52. By letter to PSERS dated March 22, 2010, Ms. Gokay enclosed the completed *Questionnaire*. Ms. Gokay, wrote, in part:
- Please note that, consistent with information already shared with [Claimant], the Berks County Intermediate Unit no longer possesses documentation for any individual, including [Claimant], who may have provided services as an independent contractor from 1985 through 1987. ... such documentation is retained for only seven (7) years. ... therefore, we are unable to answer many of the questions in the enclosed *Questionnaire*.
- (N.T. 113-114; Exhibit 5).
53. By letter dated March 31, 2010, PSERS advised Claimant that it was unable to process her request to purchase part-time service from the BCIU because the BCIU no longer

possessed the documentation for any individual who may have provided services as an independent contractor from 1985 through 1987. (N.T. 115-116; Exhibit 6).

54. By letter dated April 6, 2010, Counsel for Claimant appealed the March 31, 2010 determination to the PSERS' Executive Staff Review Committee ("ESRC"). (N.T. 117; Exhibit 7).

55. By letter dated April 27, 2010 to the ESRC, Ms. Gokay reiterated that the BCIU had no records to support Claimant's assertion that she was entitled to purchase service credit as an employee from July 1, 1985 through August 31, 1987. (Exhibit 8).

56. By letter dated May 24, 2011, Claimant sent PSERS a *Questionnaire to Determine PSERS Eligibility* form which she had completed. (N.T. 118-120; Exhibit 9).

57. By letter dated November 2, 2011, the ESRC denied Claimant's request to purchase service, stating, in part: " ... Based on the evidence that you provided, [Claimant] was self-employed and performed the service from October 1985 through August 1987 as an independent contractor. Therefore, her service does not qualify to be credited as school service. ..." (N.T. 125; Exhibit 10, p. 1).

58. Claimant timely appealed the ESRC's denial of her request to purchase service credit.

59. An administrative hearing regarding Claimant's appeal was held on December 19, 2012.

60. Claimant is the Assistant Superintendent of Muhlenberg School District and an active member of PSERS. (N.T. 6, 101).

PROPOSED CONCLUSIONS OF LAW

1. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code. 24 Pa.C.S. § 8101, *et seq.*
2. Claimant has only those rights recognized by statute and none beyond. *Burriss v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa.Cmwlt. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403, 405 (Pa.Cmwlt. 1992).
3. An active member of PSERS may purchase credit and receive eligibility points for previous school service that was rendered as a "school employee". 24 Pa.C.S. § 8303.
4. Claimant is an active member of PSERS.
5. A "school employee" is "any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis." 24 Pa.C.S. § 8102.
6. Claimant has the burden of proving that she was a "school employee" during the period of time for which she seeks to purchase credit. *Giershick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa.Cmwlt. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa.Cmwlt. 1991).
7. The Board will determine whether a person is a "school employee" or an "independent contractor " upon review of all the circumstances surrounding the employment of the person seeking membership. 22 Pa.Code § 215.5 (d) (3).
8. The ten-part test to be used as a guide in determining whether an individual is an employee or an independent contractor consists of the following factors: (1) control of

the manner in which the work is to be done; (2) responsibility for result only; (3) terms of the agreement between the parties; (4) the nature of the work or occupation; (5) the skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is by time or by the job; (9) whether the work is part of the regular business of the employer; and (10) whether there exists the right to terminate the employment at any time. *Zimmerman v. Public School Employes' Retirement Board*, 522 A.2d 43, 45 (Pa. 1987).

9. Another factor in determining an employer-employee relationship is to consider how the alleged employer treats other employees with respect to working conditions and fringe benefits. *Zimmerman*, 522 A.2d at 45; *Shafer v. State Employes' Retirement Board*, 696 A.2d 1186, 1193 (Pa. 1997).
10. Although all of the factors set forth in *Zimmerman* are to be examined and analyzed, no single factor is dispositive of a person's status as an independent contractor or an employee and each case must be decided according to its facts. *Zimmerman*, 522 A.2d at 45; *Shafer*, 696 A.2d at 1192.
11. Claimant has not met her burden of proving that she was a "school employee" during her service with the BCIU for the period of time from October 1985 through August 1987.
12. Claimant is not entitled to purchase service credit for the period of time from October 1985 through August 1987.

DISCUSSION

Through this appeal, Claimant is seeking to purchase service credit for services she provided with the BCIU from October 1985 through August 1987.

Claimant began working for the BCIU in August 1979. She entered into a *Professional Employee Contract* with the BCIU in October 1979. From August 1979 until August 1981, Claimant was employed full-time as a speech therapist, servicing students in kindergarten through twelfth grade in several school districts within the BCIU. From September 1981 until August 1982, Claimant was on maternity leave. When she returned to work in September 1982, Claimant performed the same duties that she had previously performed as a full-time employee, but on a part-time basis, working two instead of five days per week.

Claimant began a second maternity leave in September 1984. When she provided the BCIU with notice of her intent to return to work in September 1985, Claimant was informed that her position would no longer be part-time. Claimant was given the option of returning to the position on a full-time basis or resigning. Claimant chose not to work full-time because she had two small children at home. Accordingly, Claimant resigned from her position as a speech therapist with the BCIU in June 1985.

From the time of her initial employment with the BCIU through her resignation in June 1985, Claimant was a salaried employee who received annual raises commensurate with the BCIU's salary schedule. Additionally, Claimant was provided with fringe benefits, including health insurance, dental insurance, paid sick leave, paid personal leave, tuition reimbursement and possibly life insurance. At the end of each year, Claimant's income with the BCIU was reported on a W-2 form.

Claimant was a member of and made the required contributions to PSERS during her employment with the BCIU from August 1979 through June 1985. In September 1985, Claimant filed a *Refund Application* with PSERS, seeking to withdraw all of her contributions and interest. As a result, Claimant received a refund of contributions she had made to PSERS from April 1976 through June 1985.²

In October 1985, Claimant was offered and accepted work with the BCIU to provide speech therapy services to the federally funded Head Start program. Claimant worked with children ages three to five. She was paid \$14.00 per hour for these services and received no fringe benefits. In January 1987, Claimant also began to provide speech therapy services in the BCIU's Act 89 program. She was paid \$15.00 per hour for these services and received no fringe benefits. Claimant was required to submit *Contracted Service* and *Consultant Service* forms in order to be paid for her work in the Head Start and Act 89 programs. At the end of each year in which Claimant provided these services, she received a 1099 form from the BCIU.

In September 1987, Claimant no longer worked for the Head Start program. Instead, the BCIU offered and Claimant accepted a part-time position in the Act 89 program which required her to increase the number of days that she worked. Claimant became salaried, began to receive fringe benefits and again became a member of PSERS.

In April 2009, Claimant received a statement from PSERS which listed her credited service time. The statement did not contain any credit for the work that Claimant performed for the BCIU in the Head Start and Act 89 programs from October 1985 through August 1987. Claimant contacted the BCIU for information regarding that period of time. The BCIU notified

² The contributions for April 1976 through July 1979 were from Claimant's membership in PSERS by virtue of her employment with the Schuylkill Intermediate Unit. (N.T. 44, 101; Exhibit 1, p.14; Exhibit 2, p. 6).

Claimant that they had no record of her employment during that period of time. Additionally, the BCIU advised that they kept records of independent contractors for only seven years and Claimant's request for information was beyond that period of time.

Claimant filed a request to purchase service credit with PSERS for the period of time from October 25, 1985 through August 1987. After reviewing the information submitted both by Claimant and the BCIU, the ESRC denied the request on the basis that Claimant was an independent contractor during the relevant period of time. The instant appeal ensued.

As an active member of PSERS, Claimant may purchase credit for previous school service which she rendered as a "school employee". 24 Pa.C.S. § 8303. A "school employee" is defined in relevant part as "any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an ... employee excluding, however, any independent contractor or a person compensated on a fee basis." 24 Pa.C.S. § 8102. Thus, Claimant bears the burden of proving that she was a "school employee" during the period of time for which she seeks to purchase credit. *Giershick*, 733 A.2d at 32; *Wingert*, 589 A.2d at 271.

Regulations duly promulgated under the Public School Employees' Retirement Code³ specifically provide:

In cases of doubt, the Board will determine whether any person is a school employee within the meaning of the Retirement Code. The Board will also determine whether a person is an independent contractor or a person compensated on a fee basis upon review of all the circumstances surrounding the employment of the person seeking membership in the program.

22 Pa. Code § 215.5 (d) (3).

³ The Retirement Code grants the Board the authority to adopt and promulgate regulations for the uniform administration of the system. 24 Pa.C.S. § 8502 (h).

The Board's obligation to make its decision "upon a review of all the circumstances surrounding the employment of the person seeking membership" must be viewed in accordance with the analysis set forth by the Pennsylvania Supreme Court in *Zimmerman, supra*.

In *Zimmerman*, the Court established a ten-part test to be used as a guide in determining whether an individual was an independent contractor or an employee. The test involves these factors: (1) control of manner of work to be done; (2) responsibility for work only; (3) terms of the agreement between the parties; (4) the nature of the work or occupation; (5) the skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is by the time or by the job; (9) whether work is part of the regular business of the employer; and (10) whether there exists a right to terminate the employment at any time. *Zimmerman*, 522 A.2d at 45. "None of these factors is absolutely dispositive of a person's status as an employee and each case must be determined on its own facts." *Shafer*, 696 A.2d at 1192.

In reviewing the record in this case, it is apparent that as in many cases, *all* of the factors cannot be found to favor either Claimant's position or PSERS' position. Overall, however, the facts presented support a finding that Claimant was an independent contractor and not a "school employee" during the time for which she seeks to purchase service credit. Based upon the following analysis, it is determined that Claimant has failed to meet her burden of proof in this matter.

Control of the Manner of the Work

Claimant asserts that BCIU maintained the same control over the manner in which she provided services as a speech therapist when she was working with Head Start as it did when she was providing services to the school districts within the BCIU prior to her resignation. In support of this position, Claimant contends that when she returned to work in October 1985, she was told the locations where she would be going, told when to report to work and was given assignments by her supervisor. Additionally, Claimant asserts that she was doing the same work as she had always done with the BCIU, but with younger children.

At the outset, it is clear that when Claimant began to service the Head Start program in October 1985, she no longer reported to the same supervisor that she previously had reported to in the BCIU. (N.T. 21-22, 66-67). Claimant testified that her new supervisors were Roxanne Hassler, an individual that Claimant described as the "supervisor of the program" and another individual whom Claimant could only identify as "Jeff". (*Id.*). Significantly, Claimant *never* identified Ms. Hassler or Jeff as BCIU employees. There is no evidence to indicate where the supervisors were located or to whom they reported. A reasonable inference can be made that "the supervisor of the program" was in fact an employee of the federally funded Head Start program and not the BCIU.

More importantly, it is not at all clear that Claimant's supervisor closely monitored her work. Claimant testified that she did not recall if she received written evaluations during the period of time in question, although she does remember receiving some written evaluations when she was employed by the BCIU prior to June 1985. (N.T. 54, 84). The fact that Claimant periodically met with her supervisor to discuss her work is not in and of itself indicative of an

employer-employee relationship. (See, N.T. 84). There is no evidence to indicate how many times Claimant was required to report to a supervisor or what specifically, if anything, she was expected to report. Nor is there anything in the record to support a finding that Claimant's supervisor and/or the BCIU provided Claimant with directives on how to perform her job.

Claimant also argues that she was expected to work prescribed hours and did not have flexibility to work hours chosen by her. Claimant testified, however, that the hours she was expected to work were in fact the hours when the children she was servicing were participating in the Head Start program. (N.T. 82). Similarly, the locations to which Claimant was assigned, including churches, were those locations in which the Head Start program was operating. (See, N.T. 62-63). When Claimant began to service children in the Act 89 program, she reported to the John Paul II Center where the children requiring services under that program were located. (See, N.T.67). Claimant's services as a speech therapist for the children in Head Start, and subsequently in the Act 89 program, were of necessity required to be performed when and where the children were present.

Claimant has been able to establish only that she had *some* reporting responsibility to a supervisor regarding her work as a speech therapist in the Head Start program and that she was required to provide those services at specific locations during certain hours of the day. This evidence is insufficient to establish that the BCIU had exclusive control over the manner in which Claimant performed her work.

In *Disston v. Public School Employees' Retirement Board*, No. 25 C.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 546 (Pa.Cmwlt. Jan. 8, 2009)⁴, in facts similar to those presented

⁴ *Disston* is cited for persuasive purposes only.

herein, a guidance counselor who had been contracted to provide counseling services and subsequently was employed to provide counseling services sought to purchase retirement credit for the time when she was under contract. With respect to the first factor under the *Zimmerman* analysis, Commonwealth Court opined:

Petitioner did not produce sufficient evidence of either IU 26 or the school's "control" to establish that she was an employee rather than an independent contractor. She herself testified that she did not "really recall" any evaluation processes or documents and that she did not recall the exact names of any supervisors. (citations omitted). Petitioner relied mostly on contractual language which indicated that she was required to perform such "duties as prescribed by the school Principal" as establishing the necessary control. **We conclude that the contractual language providing that the school principal was to prescribe Petitioner's duties, the size of the group, the location and the time is insufficient to establish that Petitioner was under the control of the school district or the IU 26 such that she was a school employee.**

Disston, 2009 Pa. Commw. Unpub. LEXIS 546, at *10 -11. (Emphasis added).

It must likewise be concluded that Claimant failed to present facts sufficient to find that she was under the control of the BCIU in the manner of a school employee. *See, also*, *Zimmerman*, 522 A.2d at 45; *Shafer*, 696 A.2d at 1192.

Responsibility for Results Only

Claimant asserts that it was the BCIU which was ultimately responsible for the results and "answerable to the schools and the parents"⁵. PSERS correctly contends, however, that there is nothing in the record to support that assertion. Specifically, there is no evidence in the record to address the relationship between the BCIU and the Head Start and Act 89 programs which Claimant serviced. As noted above, there is a lack of probative evidence to even find that Claimant's supervisors were BCIU employees.

⁵ Claimant's brief, p. 6.

Both Claimant and PSERS cite to the following portion of Claimant's testimony in support of their respective positions regarding this factor:

Q: Okay. I think the example I gave you, if I told you to cut down a tree and that's all I wanted, that would be a specific result.

Were you told by your supervisor or anybody that you had to get a specific result while you were a speech therapist?

A: No. I was told I needed to service programs and children and do all the things that were involved in servicing those children. I was not told I had to have -- I had to make sure I improved the speech of this many children to this percentage or to this level. I just worked in the programs like I did before, setting goals for children and working towards them.

(N.T. 43, Lines 8-21).

While this testimony is clearly not dispositive of the employment status of Claimant, it does indicate that Claimant had discretion in and responsibility for both setting and achieving the desired goals.

Term of the Agreement

Claimant contends that when she returned to work after her first and second maternity leaves, she performed the exact same duties. Claimant argues that when she returned to work after her second maternity leave, the "BCIU treated her the same way [as after the first maternity leave] except she received a 1099."⁶ This argument is not supported by the record. To the contrary, the evidence reveals a distinct difference between Claimant's return to work following her two periods of maternity leave.

Claimant began her employment with the BCIU in 1979 by virtue of a *Professional Employee Contract* that she had entered into with the BCIU. (Exhibit 2, p. 16). When Claimant took her first maternity leave, she was still under the terms of that employee contract. Upon

⁶ Claimant's brief, p. 6.

return from that maternity leave, Claimant remained an employee under the contract. She performed the exact same duties as prior to the leave, the only difference being that she worked two days per week instead of five. (N.T. 11-16).

When Claimant was on her second maternity leave, she was specifically advised that her position would return to a full-time position. Claimant had the option of returning to that position or resigning. Claimant elected *not* to return to her prior position. She resigned, severing the employer-employee relationship. Claimant cannot now argue that she went back to the same position with the same duties as she had done following her first maternity leave. Claimant instead was specifically advised that she would be working for the Head Start program. Claimant was told to report to different supervisors, work in different locations and service a different population than she had when she was employed with the BCIU prior to her second maternity leave. (N.T. 21-23, 62-64, 66-67).

Claimant testified that she did not fully understand the distinction between being an employee and an independent contractor when she accepted part-time work with the Head Start program. (N.T. 24-25). While that may be, it was clearly apparent that she was being paid as a "contracted" individual. (N.T. 24).

Unlike her previous employment with the BCIU, Claimant did not receive a salary or a pro-rated salary. Claimant instead was paid \$14.00 per hour for her services to Head Start and \$15.00 per hour for her services to the Act 89 program. Moreover, Claimant was required to complete *Consultant Services* reports and *Contracted Services Forms* in order to be paid. (N.T. 25, 33-34, 75-76, 80; Exhibit 2, pp. 30-33, 40-43; Exhibit 7, pp. 34-36, 44-47, 63-72, 74-80, 82-83). The BCIU, in turn, assigned Claimant a vendor number and completed *Multiline Payment*

Vouchers and Expense Vouchers as part of the process for paying Claimant between October 1985 through August 1987. (N.T. 32, 78-79; Exhibit 2, pp. 32-39; Exhibit 7, pp. 37-43, 48-62, 73).

Unlike her previous employment with the BCIU, Claimant was not entitled to fringe benefits when she accepted the part-time position servicing the Head Start program. She received no fringe benefits throughout the period of time from October 1985 through August 1987.

Finally, the BCIU did not withhold taxes from Claimant's pay during the period of time in question. Claimant produced 1099 forms for years 1986 and 1987, forms which are issued for "nonemployee compensation." (Exhibit 2, pp. 19-20). Consistently, an *Itemized Statement* from the Social Security Administration reflects that Claimant was self-employed those same years. (Exhibit 2, p. 29). By contrast, Claimant received W-2 forms for her employment with the BCIU and had taxes, including Social Security taxes, withheld from her pay prior to October 1985 and subsequent to August 1987. (Exhibit 2, pp. 16-18, 20-28).

This factor decidedly supports a finding that Claimant was an independent contractor during the time for which she seeks to purchase service credit.

Nature of the Work or Occupation; Skill Required for Performance

There is no question that Claimant is an extremely talented and skilled professional. Her value as a speech therapist to the BCIU, while apparent, is not dispositive of the issue in this matter. Certainly, it is possible for a speech therapist to offer services either as an employee or as an independent contractor.

The BCIU initially offered a professional employment contract to Claimant under which she was able to provide services both on a full-time and a part-time basis. When the BCIU determined that the position needed to be full-time, it afforded Claimant the opportunity to remain in the position, an offer she declined.

After Claimant subsequently expressed her desire to work part-time, the BCIU provided her with that opportunity, albeit as an independent contractor. There is no evidence that in doing so, the BCIU did not value her work or her skills. To the contrary, the BCIU again offered her an opportunity to work as a part-time employee in a position that required more hours when that position became available.

Whether One is Engaged in a Distinct Occupation or Business

Claimant testified that she was a speech therapist for the BCIU from 1979 through 1993 (N.T. 29). Claimant contends that she was an employee of the BCIU because she worked only for the BCIU and had no other private jobs and did not operate a business.

That Claimant offered her speech therapy services only to the BCIU during the time for which she seeks to purchase service credit, however, does not necessarily lead to the conclusion that she was an employee of the BCIU. Claimant testified that she was happy to have the opportunity to work part-time because she had two small children at home. (N.T. 21). There is absolutely no evidence in the record to support a finding that Claimant was precluded from offering consulting services elsewhere while she was working for the Head Start and Act 89 programs had she elected to do so.

Which Party Supplied the Tools

Claimant testified that she did not have to supply her own materials as a speech therapist from October 1985 through August 1987. She indicated that the BCIU provided the materials that she used. (N.T. 25). This factor is favorable to Claimant's position.

Whether Payment is By Time or By the Job

Claimant contends that she was paid an hourly wage determined by the BCIU and there was no agreement that she would get paid per student or per job. The evidence establishes, however, that Claimant's hourly rate in fact differed between the two jobs that she had. Claimant was paid \$14.00 per hour for her services with Head Start and \$15.00 per hour for her services to the Act 89 program.

Whether Work is Part of the Regular Business of the Employer

Claimant asserts that providing speech therapy throughout the school districts of Berks County is part of the employer's regular business. Claimant offers no evidentiary or legal citations for that conclusion. Moreover, Claimant fails to specifically address the provision of these services to the Head Start and Act 89 programs.

The Right to Terminate Employment at Any Time

Claimant argues that the BCIU maintained the right to terminate her employment when she was a part-time employee. This argument, of course, presumes that Claimant was a part-time employee as opposed to an independent contractor from October 1985 through August 1987. There is no evidence regarding what, if any, rights the BCIU had to terminate Claimant from her position during that period of time.

Finally, the Pennsylvania Supreme Court has also determined that in addition to these ten tests, consideration may be given to how the alleged employer treats other employees with respect to working conditions and fringe benefits. *Zimmerman*, 522 A.2d at 45; *Shafer*, 696 A.2d at 1193. Claimant failed to offer any evidence in this regard that would support her position. Claimant testified that she talked with the individual who had provided speech therapy services to the Head Start program prior to beginning that work herself. Claimant, however, was unaware whether that person had been an employee of the BCIU or an independent contractor. (N.T. 21, 65-66) There is no evidence on the record regarding how other speech therapists in that program have been paid, whether they received fringe benefits or whether they were treated any differently than Claimant.

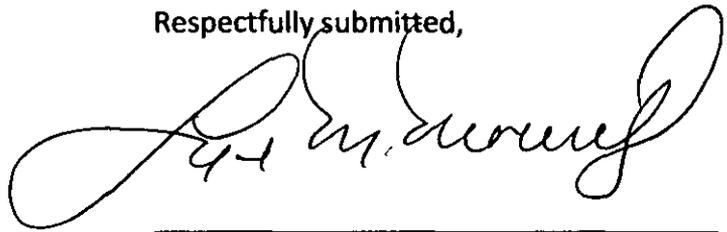
Based upon the record produced and in accordance with the *Zimmerman* analysis, it must be concluded that Claimant has unfortunately failed to meet her burden of proving that she was a "school employee" and not an independent contractor from October 1985 through August 1987. Accordingly, Claimant has failed to prove facts necessary to sustain her claim that she is entitled to purchase service credit for that period of time.

The following recommendation is entered:

RECOMMENDATION

It is recommended that the Public School Employees' Retirement Board issue an Order denying the appeal of Vacia Z. Campbell and her request to purchase service credit for the period of time from October 1985 through August 1987.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "Lynne M. Mountz".

Lynne M. Mountz, Esquire
Hearing Officer

Dated: *July 22, 2013*
Harrisburg, Pennsylvania