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

IN RE: ACCOUNT OF: KATHERINE BARHAM
PATRICE BOVE
EDWARD FRESCOLN
ALEXANDRIA GARRITY
GARY KERSCHNER
MARY LOU LYN
MARGARET MARGHERITA
NANCY MCMULLEN
FLORENCE MOYER
MARY ELLEN POULSON
DIANA PERELLA
ANTHONY RUSSO
SUSAN SAWYER
GWENDOLYN SETTLE
MICHAEL SWEENEY
ELIZABETH YOUNG

DOCKET NO.: 2013-06
CLAIM OF: BARHAM, ET AL.

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") and a Cross-Motion for Summary Judgment filed by the above listed claimants (collectively referred to as "Claimants"). The issue in this appeal is whether certain monies Claimants received in the 2011-2012 school year should be included in the calculation of Claimants' "final average salary" or if such payments are severance payments.

PSERS filed its Motion for Summary Judgment on May 28, 2013, and served a copy on Claimants as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. On June 26, 2013, Claimants, through counsel, filed a response to PSERS' motion and a Cross-Motion for Summary

Judgment. On July 24, 2013, PSERS timely filed a response to Claimant's Cross-Motion.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. In the absence of disputed material facts, this Board has the authority to decide the legal issues in dispute without an evidentiary hearing. *United Healthcare Benefits v. Insurance Commission of Pennsylvania*, 620 A.2d 81 (Pa.Cmwlth. 1993); *Mellinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa.Cmwlth. 1987).

In Claimants' Response and Cross-Motion for Summary Judgment, Claimants concede that this matter is appropriately before this Board for summary judgment because no issues of material facts exist. PSERS, however, believes that Claimants asserted additional facts in their Cross-Motion regarding the intent and purpose of the Tredyffrin-Easttown School District ("School District") and the Tredyffrin-Easttown Education Association ("Association") in entering into the *Memorandum of Understanding Clarifying and Supplementing Section 1.04, 2.02 "Salary" and Section 2.03 "Advanced Studies Assistance" of the Collective Bargaining Agreement Effective from July 1, 2008 through June 30, 2012 Between the Tredyffrin/Easttown Education Association and the Tredyffrin/Easttown School District* dated May 20, 2011 ("MOU"), specifically that the parties intended to freeze the salary schedules of only those employees who were subject to furloughs or demotion, i.e. those with lesser seniority. PSERS objects to such statements on the basis that such facts are not supported by the record and, even if true, the intent and interpretation of the School District and the Association (who are not parties to this proceeding) regarding the MOU is immaterial to determining whether Claimants' received a severance payment in their last year of employment.

Based on the filings, the Board finds that there are no additional material facts remaining in dispute. As an independent, administrative board governed by statute, the Board is not bound by characterizations of money payments made to a PSERS member pursuant to a private contractual arrangement to which it is not a party. See *Watrel v. Commonwealth, Dep't. of Education*, 488 A.2d 378, 380 (Pa.Cmwlth. 1985), *aff'd*, 518 A.2d 1158 (Pa. 1986) (State Employees' Retirement Board not obligated to accept contributions on behalf of a member where contributions were made in accordance with a settlement agreement to which Board was not a party). Although changing Claimants'

salary is within the power of the School District and the Association, the determination of what qualifies as "compensation" under the Public School Employees' Retirement Code, ("Retirement Code"), 24 Pa.C.S. § 8101 et seq., is solely within the authority of the Board. This Board has previously held that the intent of the parties to a contract to which the Board is not a party is immaterial to whether a payment constitutes retirement-covered compensation under the Retirement Code. In re *Account of Ronald J. Mento*, Docket No.: 2011-19 (Opinion issued October 1, 2012), *aff'd*, *Mento v. Public School Employees' Retirement System*, No. 2025 C.D. 2012 (Pa.Cmwth. July 10, 2013).

Accordingly, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimants received a severance payment in their last year of employment.

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

FINDINGS OF FACT

1. Claimants filed an appeal and request for an administrative hearing on February 15, 2013 requesting that the lump sum Claimants received in their last year of employment be included in the calculation of Claimants' "final average salary." (PSERS-1)
2. On March 6, 2013, PSERS filed its Answer and New Matter to Claimants' appeal and request for an administrative hearing. (PSERS-2)
3. On March 22, 2013, Claimants filed a Response to New Matter. (PSERS-3)
4. An administrative hearing is not scheduled in this matter.
5. At all relevant times, Claimants were employed by the School District. (PSERS' Memorandum of Facts at p. 2, ¶5)
6. At all relevant times, Claimants were members of the bargaining unit represented by the Association prior to their retirements. (PSERS-1 at p. 2)

7. The Association and the School District entered into the CBA, which set forth a salary schedule and progression for all employees of the School District through to the end of June 30, 2012, the end date of the CBA. (PSERS-4 at pp. 8-10)

8. On May 20, 2011, the Association and the School District executed the MOU. (PSERS-5)

9. The MOU (PSERS-5) states in pertinent part:

1. **Scope of Agreement:** This agreement clarifies and supplements Sections 1.04, 2.02 and 2.03 of the Collective Bargaining Agreement effective from July 1, 2008 through June 30, 2012 (the "CBA") between the [Association] and the [School District]. All capitalized terms used herein shall have the same definition as set forth in the CBA.

2. It is agreed that for all Employees, there shall be no increase in compensation of any nature for the first thirteen pay periods of the 2011-2012 Contract Year. The compensation for all Employees shall be frozen at the level of compensation in effect for their final paycheck of the 2010-2011 Contract Year.

3. Commencing the 14th pay period of the 2011-12 Contract Year, Employees will move one (1) vertical step on the 2011-12 Salary Schedule set forth in Appendix A of the CBA. . .

4. . . . any salary level column advancement which had not gone into effect and therefore had not been reflected in the Employee's final paycheck of the 2010-2011 Contract Year will not go into effect for salary pay adjustment until the 14th pay of the 2011-2012 Contract Year. Such salary adjustment will not be retroactive . . .

5. Any Employee who resigns for purposes of retirement under the provisions of the Public School Employees' Retirement System effective on or before June 30, 2012 shall not be subject to compensation increase waiver so long as the employee provides 90 calendar days notice of retirement. This notice provision will not apply if the retirement is a disability retirement. Such employees will be reimbursed for any differential between what they would have received in compensation under the CBA prior to the execution of this Memorandum of Understanding and what they actually received in their final pay for the 2011-12 Contract Year.

10. The effective dates of retirement of the Claimants are as follows:

Katherine Barham	June 16, 2012
Patrice Bove	June 16, 2012
Edward Frescoln	June 16, 2012
Alexandria Garrity	June 16, 2012
Gary Kerschner	June 16, 2012
Mary Lou Lyn	May 11, 2012
Margaret Margherita	June 16, 2012
Nancy McMullen	June 16, 2012
Florence Moyer	June 16, 2012
Mary Ellen Poulson	June 30, 2012
Diana Perella	June 16, 2012
Anthony Russo	June 17, 2012
Susan Sawyer	June 16, 2012
Gwendolyn Settle	June 25, 2012
Michael Sweeney	June 16, 2012
Elizabeth Young	June 16, 2012

(PSERS' Memorandum of Facts at p. 3, ¶11)

11. Each of the Claimants provided ninety (90) calendar days' notice to the School District of their retirements that were effective on or before June 30, 2012.

(PSERS-1 at p. 1; PSERS-2 at p. 11; PSERS-3 at p. 2)

12. No Claimant retired from PSERS on a disability retirement. (PSERS-2 at p. 11; PSERS-3 at p. 2)

13. After providing ninety (90) calendar days' notice to the School District that each Claimant would retire on or before June 30, 2012, each Claimant received in the last pay in June 2012 a lump sum payment that represented the difference between what they would have received in compensation under the CBA prior to the execution of the MOU and what they actually received in their final pay for the 2011-2012 school year. (See PSERS-1, *passim*; PSERS-5 at ¶5)

14. Claimants would not have received the lump sum payment in the last pay in June 2012 had they not notified the School District within ninety (90) calendar days that they were retiring at the end of the 2011-2012 school year. (PSERS-5 at ¶5)

15. On March 29, 2012, PSERS received a copy of the MOU by email and advised the School District on the same date that the monies paid under paragraph 5 of the MOU are not "compensation" as defined by the Retirement Code and would not be

used in the Claimants' "final average salary." (PSERS' Memorandum of Facts at p. 4, ¶15)

16. By letter date June 13, 2012, Michelle F. Duggan, counsel for Claimants, filed an appeal with PSERS Executive Staff Review Committee ("ESRC") claiming that the lump sum payment Claimants received in their last year of employment were not severance payments because: (1) the Claimants were receiving their "regularly-scheduled salary increases in accord with the customary salary schedule;" and (2) the MOU was "merely a means by which the [School] District could identify who was retiring and thus, a means by which the [School] District could identify who would receive the 2011-12 salary increase in accord with the 2011-12 salary schedule." (PSERS-6 at pp. 6-7)

17. By letter dated January 18, 2013, the ESRC denied Claimants' request stating:

that "the 'retroactive portion' of this salary increase paid to these 16 members during the 2011-2012 school year is a severance payment, because it was contingent on their retiring by June 30, 2012 and providing 90 calendar days' notice of retirement, and it was not received by other personnel who did not retire by that date. (PSERS-7)

18. This matter is ripe for Board adjudication.

DISCUSSION

Claimants appeal the ESRC's determination that the lump sum payments Claimants received in their last year of employment were severance payments. Claimants argue that they are entitled to include the lump sum payment in the calculation of their "final average salary" as retirement-covered compensations because: (1) the lump sum payment was part of the Claimants' standard salary schedule; (2) the School District had a continuing contractual obligation to make such payments to the Claimants; and (3) Claimants have rebutted the presumption that the lump sum payments were severance payments.

Section 8102 of the Retirement Code provides the following pertinent definitions:

"Final Average Salary." The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months . . .

"Compensation." Pickup contributions plus any remuneration received as a school employee excluding reimbursements for expenses incidental to employment and excluding any bonus, severance payments, and any other remuneration or other emolument received by a school employee during his school service which is not based on the standard salary schedule under which he is rendering service, payments for unused sick leave or vacation leave, bonuses or other compensation for attending school seminars and conventions, payments under health and welfare plans based on hours of employment or any other payment or emolument which may be provided for in a collective bargaining agreement which may be determined by the Public School Employees' Retirement Board to be for the purpose of enhancing compensation as a factor in the determination of final average salary . . .

24 Pa.C.S. § 8102. The Retirement Code, therefore, specifically excludes severance payments from retirement-covered compensation. "Severance payments" are defined in the Retirement Code as follows:

Any payments for unused vacation or sick leave and any additional compensation contingent upon retirement including payments in excess of the scheduled or customary salaries provided for members within the same governmental entity with the same educational and experience qualifications who are not terminating service.

24 Pa.C.S. §8102. Pennsylvania courts have consistently held that a payment received as part of an agreement to terminate school service by a date certain is a "prima facie

severance payment” that can only be rebutted by evidence that the payment was in accord with the customary or scheduled salary scale in that particular school district for personnel with similar educational and experience backgrounds, who are *not terminating service*. *Christiana*, 669 A.2d at 945, citing *Dowler v. Public School Employees' Retirement Board*, 620 A.2d 639, 643 (Pa.Cmwlt. 1993); *Cannonie, et al. v. Public School Employees' Retirement System*, 952 A.2d 706 (Pa.Cmwlt. 2008); *Hoerner v. Public School Employees' Retirement Board*, 684 A.2d 112, 116 (Pa. 1996); *Wyland v. Public School Employees' Retirement Board*, 669 A.2d 1098 (Pa.Cmwlt. 1996); and *Laurito vs. Public School Employees' Retirement Board*, 606 A.2d 609 (Pa.Cmwlt. 1992).

Claimants attempt to distinguish themselves from this line of cases by arguing that this is a case of first impression. That argument is misplaced. Although the cases may contain differing factual circumstances, the cases relied upon by PSERS set forth this Board's application of the concepts of compensation and severance payments. As stated above, changing Claimants' salary is within the power of the School District and the Association and can be based on a variety of different factors. Under the Retirement Code, however, the Board has a right to question the propriety of those payments. *Finnegan v. Public School Employees' Retirement Board*, 560 A.2d 848 (Pa.Cmwlt. 1989) (PSERS cannot provide a benefit that would produce a result that is contrary to positive law). The evaluation of this type of payment is part of the obligation imposed under the Retirement Code and endorsed by the courts. As enunciated by our Supreme Court, “[t]he restrictive definitions of compensation under the Retirement Code and regulations reflect the Legislature’s intention to preserve the actuarial integrity of the retirement fund by exclud[ing] from the computation of employees’ final average salary all payments which may artificially inflate compensation for the purpose of enhancing retirement benefits.” *Christiana*, 669 A.2d at 944 (quotation marks omitted). Consequently, neither PSERS nor this Board can be swayed in the application of the restrictive definitions in the Retirement Code by the good intentions of the parties in assisting a school district to regain financial health. Rather, the Board is bound to follow the intent of the General Assembly in administering the provisions of the Retirement Code. 1 Pa.C.S. § 1921(a).” *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701, 706 (Pa.Cmwlt. 1995). Thus, while a member is

entitled to liberal administration of the PSERS, “a liberal administration of the retirement system does not permit the [B]oard to circumvent the express language of the Code, which does not permit inclusion of a severance payment in the computation of final average salary.” *Dowler*, 620 A.2d at 644. Following the mandate of the Retirement Code, and cognizant of the fact that the retirement benefit is based on the three highest years of compensation, this Board must disallow from the benefit computation amounts that are severance payments.

Here, Claimants argue that they were simply receiving their regular pay under the CBA as previously promised and bargained by the parties. In support of this contention, Claimants attempt to distinguish themselves from those who were subject to involuntary furloughing or demotion, arguing that the salary freeze only applied to those individuals who had lesser seniority.¹ It is disingenuous for Claimants to make such an argument based on the plain language of the MOU. The MOU states that the pay for “**all Employees**” of the School District would stay at the level of compensation in effect for the final paycheck in the 2010-2011 school year and would not be increased for the first thirteen pay periods of the 2011-2012 school year. (PSERS-5 at p. 1, ¶2) As PSERS correctly points out, the term “Employees” in the MOU is capitalized, which means it is to “have the same definition as set forth in the CBA.” (PSERS-5 at p. 1, ¶1) Section 1.01 of the CBA defines “Employees” as “all full-time teachers, part-time teachers, long-term substitutes, guidance counselors, certified school nurses, health room nurses, media specialists, and home and school visitor(s), . . . and . . . Employees properly included . . . under the conditions of Pennsylvania Law Act 195 and Act 88 providing for collective bargaining for public employees (collectively hereinafter called the ‘Employees’)” represented by the Association. (PSERS-4 at p. 1) Claimants admit that they were members of the bargaining unit represented by the Association prior to

¹ This logic fails to account for the employee of the School District who may be eligible to retire with PSERS, but may not have seniority with the School District if the majority of the employee’s credited service with PSERS was rendered with another employer. (PSERS-4 at p. 3, Section 1.08) (stating: “seniority shall be the total number of years of continuous service with [the School District].”) Based on the plain language of the MOU, such an employee would be eligible to receive the lump sum payment.

their retirements and were subject to the CBA. (PSERS-1 at p. 2) The reference to "Employees" in the MOU, therefore, includes Claimants.

Claimants next argue that the School District had a continuing contractual obligation to make such payments to the Claimants under the CBA and, therefore, these payments should not be considered in excess of the standard salary schedule. This argument, however, is not supported by the record. The uncontroverted evidence establishes that neither Claimants nor any other "Employee" of the School District were subject to or had a right to receive the salary set forth in the 2011-2012 salary schedule in the CBA for the first thirteen pay periods of 2011-2012 *unless they submitted a 90 calendar day notice of retirement*. (PSERS-5) This exception to the salary freeze did not apply to those who just terminated. To be exempt from the salary freeze, an employee had to actually retire with PSERS. Had Claimants not given the requisite ninety (90) day notice of retirement with PSERS, their salary would have remained at the level of compensation that was paid at the end of the 2010-2011 school year. Receipt of these specific payments was contingent upon execution of a notice of intent to retire, which each Claimant submitted within the requisite time frame.

Inherent in the definition of "severance payment" is the notion that a payment is *only* payable upon the retirement of a member. Thus, a severance payment is a payment that is not in accord with the standard salary schedule. To rebut the presumption of a *prima facie* severance payment, Claimants must prove that the disputed payments were received by other employees with similar experience *who did not retire*. Claimants have offered no such evidence.

Claimants had a choice to either: (1) receive the lump sum payment by retiring; or (2) continue to work for the 2011-2012 school year and receive the salary under the 2010-2011 salary schedule. Merely because Claimants received what they would have received had the School District and the Association not entered into the MOU does not convert the monies to compensation for determining final average salary because such payments would not have been payable if Claimants had chosen to continue to work. *See Laurito*, 606 A.2d 609. The lump sum payment Claimants received in their last year

of employment were made strictly pursuant to the MOU, not the salary schedule in the CBA.

The law and record evidence supports PSERS' determination that the lump sum payment was not part of Claimants' standard salary schedule for the 2011-2012 school year, but rather was a severance payment that the Claimants would not have received had they not retired. The full salary and benefits that are paid must reflect any increases that would have naturally occurred due to longevity or changes in the pay scale *for all employees*. While the payments at issue may have been salary increases as far as the Claimants are concerned, they are not covered compensation under the Retirement Code. The record shows that the lump sum payments Claimants received were part of a retirement package designed to be triggered only for individuals who indicated an intent to retire. It is abundantly clear that these lump sum payments are severance payments.

Accordingly, the lump sum payment was properly excluded from Claimants' final average salary computation as a severance payment. For all of the above reasons, the Board grants PSERS' Motion for Summary Judgment and denies Claimants' Cross-Motion for Summary Judgment.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF BARHAM, ET AL.
DOCKET NO. 2013-06
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ORDER

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

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, Claimants' Cross-Motion for Summary Judgment is DENIED and Claimant's Request for Administrative Hearing is DISMISSED in compliance with 22 Pa.Code § 201.6(b), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimants' request to include as retirement-covered compensation the lump sum payments Claimants received in their last year of employment that represents the difference between what they would have received in compensation under the CBA prior to the execution of the MOU and what they actually received in their final pay for the 2011-12 school year because such payments constitute severance payments.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 7, 2013

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