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

IN RE: ACCOUNT OF GARY D. KOCH, PH.D.
DOCKET NO. 2020-03
CLAIM OF BLACKHAWK SCHOOL DISTRICT

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the record of this proceeding, including the Proposed Opinion and Recommendation of the Hearing Examiner ("HEO"), the exceptions filed by the Blackhawk School District (the "District"), and the Public School Employees' Retirement System's ("PSERS") response to the District's exceptions. Accordingly, the Board hereby issues the following Opinion and Order.

HISTORY

By letter dated January 7, 2020, PSERS' Executive Staff Review Committee ("ESRC") granted Gary D. Koch, Ph.D.'s ("Dr. Koch") request to have the service that he rendered with the District as a "school psychologist" during the 2010-2011 through 2016-2017 school years be considered that of a "school employee" under the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101, et seq., and, therefore, find him eligible for service credit with PSERS. On February 4, 2020, the District appealed the ESRC's determination to the Board, contending that Dr. Koch was an independent contractor for the 2010-2011 through 2016-2017 school years and not eligible for PSERS' membership or service credit.

On February 24, 2020, PSERS filed the *Public School Employees' Retirement System's Preliminary Objections* ("POs"), along with the *Public School Employees' Retirement System's Brief in Support of Preliminary Objections*. The bases for PSERS'

POs are: (1) the Board does not have jurisdiction under the Retirement Code to afford the District the relief it seeks; and (2) the District's pleading was legally insufficient, inasmuch as the Board is bound to follow the Retirement Code and the Public School Code of 1949, 24 P.S. § 1-101, *et seq.* ("School Code"), both of which dictate that Dr. Koch be considered a "school employee."

On March 17, 2020, the District filed its *Response to Public School Employees' Retirement System's Preliminary Objections* ("*Response to POs*"). The District's position is that the Board has the authority and, thus, the jurisdiction to deem Dr. Koch an independent contractor based upon the factors set forth in *Zimmerman v. Pub. Sch. Employees' Ret. Bd.*, 522 A.2d 43 (Pa. 1987).¹

By *Order* dated May 19, 2020, the Board delegated PSERS' POs to a hearing examiner for purposes of issuing a proposed opinion and recommendation. By letter from Secretary Glen Grell, dated June 15, 2020, Jason C. Giurintano, Esquire, was appointed as Hearing Examiner. On August 13, 2020, the Hearing Examiner submitted his HEO to the Board, recommending that the Board sustain PSERS' first PO, deny the District's request to classify Dr. Koch as an independent contractor for the 2010-2011 through 2016-2017 school years, dismiss the District's administrative appeal, and dismiss PSERS second PO as moot. The District filed exceptions to the HEO on September 11, 2020, and PSERS filed its response thereto on October 1, 2020. This matter is now before the Board for final determination.

FINDINGS OF FACT

1. Dr. Koch provided services to the District as a school psychologist from 2010 through 2017. (*Response to POs* at ¶ 4).

¹ The factors utilized in the *Zimmerman* case are: control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer; and also the right to terminate the employment at any time. 522 A.2d at 45.

2. Dr. Koch requested that PSERS credit him, as a “school employee” and member of PSERS, with the service he rendered as a school psychologist with the District during the 2010-2011 through 2016-2017 school years. (*Response to POs at ¶¶ 1-2; Official Notice of Board Records*).²

3. By letter dated January 7, 2020, the ESRC granted Dr. Koch’s request. (*Response to POs at ¶¶ 1-2*).

4. On February 4, 2020, through counsel, the District appealed the ESRC’s determination and requested that Dr. Koch be classified as an independent contractor of the District during the 2010-2011 through 2016-2017 school years and, therefore, that the Board conclude that Dr. Koch was not eligible for credit with PSERS. (*Response to POs at ¶¶ 1-2; Official Notice of Board Records*).³

5. On February 24, 2020, PSERS filed POs, along with the *Public School Employees’ Retirement System’s Brief in Support of Preliminary Objections*, on the bases that: (a) the Board did not have subject matter jurisdiction, and was the improper venue, to determine whether a school psychologist can be an independent contractor under the School Code and, thus, was not authorized to grant the relief requested; and (b) the District’s appeal was legally insufficient because the School Code dictates that Dr. Koch was a District employee. (*Official Notice of Board Records*).

6. On March 11, 2020, Dr. Koch filed a *Petition to Intervene*. (*Official Notice of Board Records*).

² This matter is before the Board on PSERS’ POs and, thus, no fact-finding hearing has been held. In its Response to PSERS’ POs, the District admitted PSERS’ paragraphs 1, 2, 4, and 5 in their entirety and, accordingly, the averments contained therein, including the authenticity of Exhibit 1 (District’s appeal letter). In any event, this was a document filed with the Board, which may take Official Notice of such matters as might be judicially noticed by courts under the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.173.

³ The District acknowledged that Dr. Koch was an employee of the District as of January 3, 2017 and, thus, eligible for credit with PSERS. (*Response to POs at ¶ 5*).

7. On April 9, 2020, the Board granted Dr. Koch's *Petition to Intervene*. (Official Notice of Board Records).

8. On March 17, 2020, the District filed its *Response to POs*. (Official Notice of Board Records).

9. By *Order* dated May 19, 2020, the Board delegated PSERS' POs to a hearing examiner for purposes of issuing a proposed opinion and recommendation. (Official Notice of Board Records).

10. By letter from Secretary Glen Grell, dated June 15, 2020, Jason C. Giurintano, Esquire, was appointed the Hearing Examiner in this matter. (Official Notice of Board Records).

11. On August 13, 2020, the Hearing Examiner issued the HEO, recommending that the Board sustain PSERS' first PO, deny the District's request to have PSERS classify Dr. Koch as an independent contractor of the District for the 2010-2011 through 2016-2017 school years, dismiss the District's administrative appeal, and dismiss PSERS second PO as moot.

CONCLUSIONS OF LAW

1. The District has been afforded notice and an opportunity to be heard in connection with PSERS' POs. See Findings of Fact 1 – 11.

2. Pursuant to Section 201.6(a) of the Board's regulations, before filing an answer to an appeal, PSERS may file preliminary objections to an appeal; the preliminary objections must conform to Pennsylvania Rule of Civil Procedure No. 1028. See 22 Pa Code § 201.6(a).

3. Pennsylvania Rule of Civil Procedure No. 1028(a)(1) permits a party to raise an objection for lack of jurisdiction over the subject matter of the action and improper venue. See Pa.R.C.P.1028(a)(1).

4. Subject matter jurisdiction is the competency of a tribunal to hear and determine controversies of the nature of the matter involved, and venue is the right of

a party to have an action brought in a particular location. See *McGinley v. Scott*, 164 A.2d 424, 427-28 (Pa. 1960).

5. Pennsylvania Rule of Civil Procedure No. 1028(a)(4) permits a party to challenge a pleading, in the nature of a demurrer, for legal insufficiency. See Pa.R.C.P. 1028(a)(4).

6. "As a general matter, preliminary objections in the nature of a demurrer allege that a pleading is, quite simply, legally insufficient." *Nationwide Mut. Ins. Co. v. Wickett*, 763 A.2d 813, 817 (Pa. 2000).

7. The Board may rule directly on preliminary objections or delegate the matter to a hearing examiner to prepare a proposed opinion and recommendation. See 22 Pa. Code § 201.6(c).

8. The Board has exclusive and primary jurisdiction regarding the interpretation and application of the Retirement Code and the administration of member accounts, subject to appellate judicial review. See 24 Pa.C.S. § 8501(a); see also 22 Pa. Code § 201.4a.

9. The Board is a creature of statute that derives its authority from the provisions of the Retirement Code and, thus, it is limited to applying and enforcing the Retirement Code. See *Krill v. Pub. Sch. Employees' Ret. Bd.*, 713 A.2d 132, 134 (Pa. Cmwlth. 1998) (citing *Estate of Rosenstein v. Pub. Sch. Employees' Ret. Sys.*, 685 A.2d 624 (Pa. Cmwlth. 1996) and *Cosgrove v. State Employees' Ret. Bd.*, 665 A.2d 870 (Pa. Cmwlth. 1995)).

10. The Board has no authority (equitable or otherwise) to provide a right that the Retirement Code does not bestow. See, e.g., *Marinucci v. State Employees' Ret. Sys.*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004).⁴

⁴ 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*, 713 A.2d at 134 n.3.

11. Statutes must be construed according to their plain meaning and in such a manner as to give effect to all provisions. 1 Pa.C.S. § 1921(a).

12. Pursuant to the Retirement Code, membership in PSERS is mandatory for all “school employees” with a few, narrow exceptions. See 24 Pa.C.S. §§ 8102 (def. “school employee”), 8301.

13. A “school employee” is a person “engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as ... employee excluding, however, any independent contractor[.]” 24 Pa.C.S. § 8102.

14. School districts are employers, school entities, and public schools under the Retirement Code. See 24 Pa.C.S. § 8102.

15. PSERS credits a member with service credit for periods when the member is a “school employee” and making contributions to PSERS. 24 Pa.C.S. §§ 8102 (“credited service,” “school employee,” and “school service”), 8302.

16. The School Code mandates that school districts employ “professional employees.” See 24 P.S. § 11-1106.

17. A “school psychologist” is a “professional employe” under the School Code. See 24 P.S. §§ 11-1106, 11-1101(1), 11-1123(o)(6), 11-1142; 22 Pa. Code § 49.1; see *McCoy v. Lincoln Intermediate Unit No. 12*, 391 A.2d 1119, 1122 n.5 (Pa. Cmwlth. 1978) (citing *Charleroi Area Sch. Dist. v. Secretary of Education*, 334 A.2d 785, 786 (Pa. Cmwlth. 1975)); see generally *Cherry v. Pa. Higher Educ. Assistance Agency*, 642 A.2d 463, 466 (1994).

18. “Professional employes,” pursuant to the School Code, are “school employees” under the Retirement Code. See 24 P.S. §§ 11-1101, 11-1106; 24 Pa.C.S. § 8102 (“school employee”).

19. The Board does not have subject matter jurisdiction to determine whether Dr. Koch is an independent contractor, because the School Code mandates

that he be classified as an “professional employee.” See 24 Pa.C.S. §§ 8102, 8301; 24 P.S. § 11-1106, 11-1101(1), 11-1123(o)(6), 11-1142; 22 Pa. Code § 49.1; see also *McCoy*, 391 A.2d at 1122 n.5 (citing *Charleroi Area Sch. Dist.*, 334 A.2d at 786); see generally *Cherry*, 642 A.2d at 466.

DISCUSSION

PSERS asserts two POs: (1) the Board’s lack of subject matter jurisdiction or venue; and (2) the legal insufficiency of the District’s appeal. Because this Board concludes that PSERS’ first preliminary objection as to lack of jurisdiction should be sustained for the reasons set forth below, and the District’s appeal should thus be dismissed, this Board does not need to address PSERS’ second preliminary objection at this time.

Subject matter jurisdiction relates to the competency of a tribunal (in this instance, the Board) to hear and determine controversies of the nature of the matter involved, and venue is the right of a party to have an action brought and heard in a particular forum. See *McGinley v. Scott*, 164 A.2d 424, 427-28 (Pa. 1960). The Board is a creature of statute that derives its authority from the provisions of the Retirement Code. See, e.g., *Krill*, 713 A.2d at 134 (citing *Estate of Rosenstein*, 685 A.2d 624 and *Cosgrove*, 665 A.2d 870). The Board has exclusive and primary jurisdiction regarding the interpretation of the Retirement Code and the administration of member accounts, subject to appellate judicial review. See 24 Pa.C.S. § 8501(a); 2 Pa.C.S. § 702. The Board, however, has no authority (equitable or otherwise) to provide a right that the Retirement Code does not bestow. See, e.g., *Marinucci*, 863 A.2d at 47.

Preliminarily, membership in PSERS is mandatory for all school employees with a few, narrow exceptions. See 24 Pa.C.S. §§ 8102 (def. “school employee”), 8301.

The Retirement Code defines the term “school employee” as a person “engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as ... employee excluding, however, any

independent contractor[.]” 24 Pa.C.S. § 8102. School districts are employers, school entities, and public schools under the Retirement Code. See 24 Pa.C.S. § 8102. PSERS members receive credit for periods when the member is a “school employee” and making contributions to PSERS. See 24 Pa.C.S. §§ 8102 (“credited service,” “school employee,” and “school service”), 8302.

While it is well within the Board’s jurisdiction to determine whether an individual is a “school employee” for purposes of the Retirement Code, 24 Pa.C.S. § 8102 (def. “school employee”), the Board is not authorized to redefine the employment relationship between an individual and a school district when the School Code *statutorily* dictates that relationship. Indeed, Section 215.5(d)(3) of the Board’s regulations provides that, “*in cases of doubt*, the Board will determine whether any person is a school employee for the purposes of the Retirement Code.” 22 Pa. Code § 215.5(d)(3) (emphasis added).

Section 1106 of the School Code (“Duty to employ”) mandates that the District “*employ* the necessary professional employees ... to keep the public schools open in their respective district in compliance with the provisions of the [School Code].” 24 P.S. § 11-1106 (emphasis added); see *Wilksburg Educ. Ass’n v. Sch. Dist. of Wilksburg*, Civ. No. GD 95-05174 (Allegheny Ct. Com. Pls., Aug. 6, 1997) (Exhibit 2 to POs). The School Code further provides that the “term ‘professional employe,’ *shall include* those who are certificated as . . . school counselors,” 24 P.S. § 11-1101(1) (emphasis added); “a ‘school psychologist’ falls within the category of ‘school counselor,’” *McCoy*, 391 A.2d at 1122 n.5 (citing 24 P.S. § 11-1101(1) and *Charleroi Area Sch. Dist.*, 347 A.2d at 736). “School psychologists” also are identified as “professional employes” in Section 11-1142 of the School Code:

- (a) Except as hereinafter otherwise provided, *all school districts and career and technical school districts shall pay all regular and temporary* teachers, supervisors, directors and coordinators of career and technical education, *psychologists*, teachers of classes for exceptional children, supervising principals, career and technical teachers, and principals *in the public schools of the district the minimum salaries and increments for the school year 1968-1969 and each school year thereafter, as provided in the*

following tabulation in accordance with the column in which the professional employe is grouped and the step which the professional employe has attained by years of experience within the school district each step after step 1 constituting one year of service. When a school district, by agreement, places a professional employe on a step in the salary scale, each step thereafter shall constitute one year of service. When a district adopts a salary scale in excess of the mandated scale, it shall not be deemed to have altered or increased the step which the employe has gained through years of service.

- (b) Professional employes shall be grouped in the following columns:

Class E. Supervisors, directors and coordinators of career and technical education, who devote one-half or more of their time to supervision of instruction, and psychologists, holding a standard or college certificate.

24 P.S. § 11-1142 (emphasis added).

As a “school psychologist,” Dr. Koch was thus a “professional employe” by law. Because Dr. Koch was a “professional employe” for the school years 2010-2011 through 2016-2017, he also was a “school employe” for purposes of the Retirement Code. See 24 P.S. §§ 11-1101, 11-1106; 24 Pa.C.S. § 8102 (“school employe”).

In addition, under the School Code, an “education specialist” is a “professional employe,” 24 P.S. § 11-1123(o)(6), and, under the Pennsylvania Department of Education’s (“PDE”) regulations, an “educational specialist” is defined to include a school psychologist: “*Educational specialist* -- Professional certified personnel whose primary responsibility is to render professional service other than classroom teaching, such as dental hygienist, home and school visitor, instructional technology specialist, social restoration specialist, nutrition service specialist, elementary counselor, secondary counselor, school nurse and *school psychologist*,” 22 Pa. Code § 49.1.

Accordingly, both the Legislature and PDE have determined that school psychologists must be employed as “professional employes,” not independent contractors. Because there is no “doubt” that Dr. Koch was a “professional employe”

during the school years at issue, the Board is without jurisdiction to deem the relationship between Dr. Koch and the District as that of an independent contractor of the District.

The Commonwealth Court's treatment of school psychologists as "professional employees" further supports this determination. See *McCoy*, 391 A.2d at 1122 n.5 (Pa. Cmwlth. 1978) (citations omitted); *Charlroi Area Sch. Dist.*, 347 A.2d at 736; see generally *Cherry*, 642 A.2d at 466. In *McCoy*, a supervisor of special education challenged his demotion to a school psychologist. 391 A.2d at 1122. McCoy, relying on his rights as a professional employee, argued that his employer violated the School Code by demoting him. *Id.* at 1122-23. The Commonwealth Court agreed with McCoy, explaining that McCoy was a professional employee entitled to the protections of the School Code, his demotion was proper because his employer complied with the dictates of the School Code, and specifically noted that the position McCoy was demoted to, i.e. school psychologist, was a professional employee position: "[A] 'School Psychologist' falls within the category of 'school counselor' which is a 'professional employee' under Section 1101(1), 24 P.S. § 11-1101(1)." *Id.* at 1122, n.5 (citing *Charlroi*, 347 A.2d 736)). Therefore, the Commonwealth Court's holding in *McCoy*, embraces the conclusion that school psychologists and special education supervisors are professional employees and, consequently, entitled to the rights and protections provided by the School Code.

The District excepts to the HEO, arguing first the School Code is silent regarding whether "school psychologists" are "professional employees" and asserting that *McCoy* is inapposite. See *Response to POs* at 6-7 (Exceptions 1 and 2). As addressed above, however, the School Code is not silent on this topic. In fact, the School Code, PDE's regulations, and *McCoy* establish that a school psychologist is a "professional employe."

The District also maintains that PDE's Certification Staffing Policy Guidelines ("CSPGs") numbers 76 and 81, distinguish "school counselors" and "school psychologists" and, therefore, the District claims that PSERS' reliance on *McCoy* is flawed. See *Response to POs*. at 7-8 (Exception 2). Preliminarily, CSPGs are PDE's

“written policy and guideline statements” issued under PDE’s regulations for the purpose of carrying out its mission under the School Code. *Davenport v. Dep’t of Ed.*, 850 A.2d 802, 804 (Pa. Cmwlth. 2004) (citing 22 Pa. Code § 49.13). To the extent the Board may rely on CSPGs for their persuasive authority, they also support the conclusion that both school counselors and school psychologists are educational specialists and “professional employees.” Both CSPGs numbers 76 and 81 are organized under the CSPGs that pertain to “Educational Specialist Certification,” and CSPG 81 states that a “person *employed* in the position of school psychologist must hold a valid Pennsylvania certificate as a School Psychologist and is qualified to serve in grades PK-12.... A person *employed* in a position as a school psychologist is qualified to perform the following duties and functions.... When a school district *employs* an individual in the job title ‘school psychologist,’ this person must be a certified school psychologist.” CSPG 81, “School Psychologist (PK-12)” (emphasis added), *available at* <https://www.education.pa.gov/Educators/Certification/Staffing%20Guidelines/Pages/CSPG81.aspx>. Accordingly, the CSPGs are not dispositive here. They do, however, illustrate that the District’s opposition is to PDE’s classification of school psychologists as professional employees, which is a matter to take up with PDE, not this Board.⁵

The District further excepts to the Hearing Examiner’s proposed opinion, arguing that the unpublished opinion of *Disston v. Public School Employees’ Retirement Board*, 25 C.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 546 (Pa. Cmwlth. Jan. 8, 2009), shows that guidance counselors may be independent contractors and, therefore, Dr. Koch could also be an independent contractor as determined through the application the *Zimmerman* factors. See *Response to POs* at 9 (Exception 3). *Disston*, however, supports the opposite conclusion. Firstly, Dr. Koch is not a guidance counselor. Also, in *Disston*, an intermediate unit contracted with an individual to provide guidance counselor services to a nonpublic parochial school

⁵ PDE’s exclusive authority over school psychologists is further exemplified by PDE’s licensure of “school psychologists” as distinct from the Department of State’s licensure for psychologists. See 63 P.S. § 1203(4).

under Act 89. See 24 P.S. § 9-922.1A; 22 Pa. Code § 112.1. Such contracting was permitted as an exception to the School Code's general requirement that professional employees be employed. See 22 Pa. Code § 112.25(4); see also *Thorpe v. Pub. Sch. Employees' Ret. Bd.*, 879 A.2d 341, 349-50 (Pa. Cmwlth. 2005) (explaining that Act 89 provides a specific exception to the School Code's requirement that school districts employ professional employees). Here, no such exception exists and, consequently, consideration of the *Zimmerman* factors is improper.

Unless the District was permitted to either employ Dr. Koch or retain his services as an independent contractor, the *Zimmerman* factors are irrelevant. See *Hawes v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 1277, 1281 n.6 (Pa. Cmwlth. 2001). The District has identified no section of the School Code, Retirement Code, or other law that would cast doubt on Dr. Koch's status and permit the Board to assume jurisdiction and assert its own judgment, using the *Zimmerman* factors, in place of the statutory dictates. Notably, a school district may not evade its statutorily mandated responsibilities to employ necessary qualified professional employees. See *Hawes*, 778 A.2d at 1281 n.6; *Thorpe*, 879 A.2d 341, 349-50 (citing *Hawes*). The Board is thus without jurisdiction or authority to change Dr. Koch's statutorily proscribed employment status to that of independent contractor. Jurisdiction to void the employment contract or define the relationship between Dr. Koch and the District in this matter lies elsewhere.

CONCLUSION

Based on all the above, the Board concludes that the School Code dictates the relationship between Dr. Koch and the District and, accordingly, the Board is without subject matter jurisdiction or authority to redefine the employment relationship between the District and Dr. Koch. The authority to do so lies elsewhere. Thus, PSERS properly determined the service Dr. Koch rendered with the District during the 2010-2011 through 2016-2017 school years were that of a "school employee" and, therefore, eligible for credit with PSERS.

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

IN RE: ACCOUNT OF GARY D. KOCH, PH.D.
DOCKET NO. 2020-03
CLAIM OF BLACKHAWK SCHOOL DISTRICT

ORDER

AND NOW, upon consideration of the Public School Employees' Retirement System's ("PSERS") Preliminary Objections:

IT IS HEREBY ORDERED:

- (1) PSERS' First Preliminary Objection is SUSTAINED, as the Public School Employees' Retirement Board does not have subject matter jurisdiction over the Blackhawk School District's Appeal and Request for Administrative Hearing;
- (2) The Blackhawk School District's request to have intervenor, Gary D. Koch, Ph.D., classified as an independent contractor for the 2010-2011 through 2016-2017 school years is DENIED; and
- (3) The Blackhawk School District's appeal is DISMISSED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 3/5/21

By: 
Christopher SantaMaria, Chairman