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

IN RE: ACCOUNT OF RICHARD W. COMO  
DOCKET NO. 2019-05  
CLAIM OF RICHARD W. COMO

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner, the Public School Employees' Retirement System's ("PSERS") Motion for Summary Judgment, Claimant's Response to PSERS' Motion, Claimant's Brief on Exceptions ("Exceptions"), and PSERS' Brief Opposing Exceptions.

Claimant excepts to the Hearing Examiner's proposed Opinion and Recommendation based on his factual, legal, and constitutional arguments that a hearing should be held to address breaks in employment and distinctions between his prior job positions; he should be allowed a partial retirement benefit based on work performed in job positions held prior to committing the forfeitable offenses; and the forfeiture of his entire pension is unconstitutional.<sup>1</sup> Claimant's Exceptions, however, merely reargue issues previously raised in his Response to PSERS' Motion, which the Hearing Examiner adequately addressed to the extent permissible, understanding that constitutional arguments cannot be addressed in this forum. Moreover, although Claimant argues that facts surrounding his employment history should be developed through a hearing, the Board finds that there is no dispute of material facts between the

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<sup>1</sup> Claimant notes, in his Exceptions, that one issue he previously raised in his response to PSERS' Motion, that he was appealing his criminal conviction, is no longer at issue as the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal. (Exceptions, p. 1).

parties. As a matter of law, Claimant's breaks in employment and changes in job position, which PSERS has acknowledged, do not result in a partial forfeiture under the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315 ("Forfeiture Act").

This Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation attached hereto, and we hereby adopt them as our own, with the following modification: On page fourteen, in the final paragraph, change Claimant's conviction date from January 26, 2018, the date he was found guilty, to March 16, 2018, the date Claimant was sentenced.<sup>2</sup>

Claimant also has requested oral argument before the Board. Section 201.12 of the Board's regulations provides:

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

22 Pa. Code § 201.12(a). Because Claimant does not offer any new arguments, authority, or contradicting material facts, we believe that the Hearing Examiner adequately addressed Claimant's Exceptions. The Board, therefore, does not believe that oral argument will be helpful in enabling the Board to understand and resolve the issues.

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<sup>2</sup> The Forfeiture Act was amended on March 28, 2019, for crimes committed on or after that date. Because Claimant committed his crimes prior to March 28, 2019, his appeal must be addressed based on the law in place at the time he committed his crimes.

IT IS HEREBY ORDERED, that Claimant's appeal from the forfeiture of his pension and eligibility under the PSERS' Health Option Program pursuant to the Forfeiture Act, is DENIED and Claimant's request for oral argument is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: 12/17/21

By:   
Christopher SantaMaria, Chairman

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

**IN RE:**

**ACCOUNT OF RICHARD W. COMO  
CLAIM OF RICHARD W. COMO**

**DOCKET NO. 2019-05**

**NOTICE**

The attached *Opinion* and *Recommendation* have been submitted to the Public School Employees' Retirement Board (Board) for its consideration. Procedure for exceptions is pursuant to 1 Pa. Code §§35.211 – 35.214. Specifically, any party who wishes to file exceptions to all or part of the *Opinion* and *Recommendation* to the Board shall file them in the form of a *Brief on Exceptions* within 30 days after service of a copy of this *Opinion* and *Recommendation*. 1 Pa. Code §35.211. A *Brief Opposing Exceptions* may be filed in response to a *Brief on Exceptions* within twenty (20) days of receipt of the *Brief on Exceptions*. *Id.* Exceptions and Briefs on Exceptions should be submitted to the attention of Glen R. Grell, Secretary, Public School Employees' Retirement Board, 5 North Fifth Street, Harrisburg, PA 17101, with copies to the opposing party. Failure to file a Brief on Exceptions within the time allowed under the General Rules of Administrative Practice and Procedure at 1 Pa. Code §§35.213 shall constitute a waiver of all objections to the *Opinion* and *Recommendation*.

*M Foerster*

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**Michael T. Foerster  
Hearing Officer**

***For Claimant:*** Samuel C. Stretton, Esquire  
103 South High Street  
P.O. Box 3231  
West Chester, PA 19381-3231

***For PSERS:*** Cayla B. Jakubowitz, Esquire  
Public School Employees' Retirement System  
5 North Fifth Street  
Harrisburg, PA 17101

***Docket Clerk:***

Julie Vitale, Appeal Docket Clerk  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD  
5 North Fifth Street  
Harrisburg, PA 17101

***Date of mailing:***

9/20/21

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

**IN RE:**

**ACCOUNT OF RICHARD W. COMO  
CLAIM OF RICHARD W. COMO**

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**DOCKET NO.      2019-05**

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**OPINION AND RECOMMENDATION**

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**Michael T. Foerster  
Hearing Officer**

**Submitted on Motion for Summary Judgment**  
**Hearing Officer:      Michael T. Foerster**  
**For the Claimant:     Samuel C. Stretton, Esquire**  
**For PSERS:             Cayla B. Jakubowitz, Esquire**



## HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Richard W. Como ("Claimant"). On May 14, 2019, through counsel, Claimant appealed a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS"), dated April, 26, 2019 ("ESRC denial letter"), that declared that Claimant's right to receive retirement benefits from PSERS had been forfeited. On May 21, 2019, through Assistant Counsel Cayla B. Jakubowitz, PSERS filed its *Answer* to Claimant's appeal. By letter dated June 18, 2018 ("ESRC second denial letter"), PSERS informed Claimant that, because the Forfeiture Act directs that all benefits be forfeited, he was no longer eligible for coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant. By letter received by PSERS on June 29, 2018, Claimant filed an appeal of the denial of coverage through PSERS' Health Options Program. By letter dated April 26, 2019, the ESRC denied Claimant's appeals, which resulted in the aforementioned May 14, 2019 appeal.

On May 10, 2021, Attorney Jakubowitz moved for summary judgment saying that there is no genuine issue of material fact and, specifically, that the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315, compelled forfeiture of Claimant's pension benefits. On June 3, 2021, Counsel to Claimant answered and briefed his opposition to the requested summary judgment.

By letter dated July 15, 2021, the Board's Secretary, Glen R. Grell, appointed the undersigned to act as Hearing Officer to issue a proposed opinion and recommendation regarding PSERS' Motion for Summary Judgment ("MSJ").

## FINDINGS OF FACT

1. Claimant was first enrolled in the Public School Employees' Retirement System ("PSERS") in September 1969 by virtue of his employment with the Upper Merion School District ("Upper Merion"). PSERS Memorandum of Facts ¶ 1, admitted.<sup>1</sup>
2. In June 1983, Claimant terminated service with Upper Merion. PSERS Memorandum of Facts ¶ 2, admitted.
3. On June 27, 1983, PSERS received Claimant's first *Application for Retirement* in which he elected the Maximum Single Life Annuity and requested a withdrawal of his total contributions and interest. PSERS Memorandum of Facts ¶ 3, admitted; PSERS-1 attached to Motion.
4. PSERS processed Claimant's first *Application for Retirement*, and he began receiving a monthly retirement benefit, effective July 31, 1983. PSERS Memorandum of Facts ¶ 4, admitted.
5. Claimant returned to public school service for the Coatesville Area School District ("Coatesville") in June 1986, was reenrolled in PSERS, his retirement benefit with PSERS stopped, and his annuity was frozen per the Public School Employees' Retirement Code. *See generally* 24 Pa. C.S. §8346(a). PSERS Memorandum of Facts ¶ 5, admitted.
6. In approximately December 1987, Claimant left his employment with Coatesville. PSERS Memorandum of Facts ¶ 6, admitted.
7. From December 1987 until approximately June 1988, Claimant worked for Upper Merion. PSERS Memorandum of Facts ¶ 7, admitted.
8. Thereafter, in August 1988, Claimant returned to work with Coatesville as an assistant principal. PSERS Memorandum of Facts ¶ 8, admitted.

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<sup>1</sup> PSERS has made its allegations in its *Memorandum of Facts* which covered the PSERS *Motion for Summary Judgment*. Claimant has responded with an *Answer*. This pleading back-and-forth is vetted in the Discussion section.



9. Claimant, in 2005, became Superintendent of Coatesville, which employment terminated on September 2, 2013. PSERS Memorandum of Facts ¶ 9, clarified by Answer to same.
10. From September 1969 to June 1983 and June 1986 to September 2013, Claimant accrued service credit with PSERS as an active school employee. PSERS Memorandum of Facts ¶ 10, admitted.
11. On October 30, 2013, PSERS received Claimant's second *Application for Retirement* in which he elected the Maximum Single Life Annuity and requested a withdrawal of his total contributions and interest. PSERS Memorandum of Facts ¶ 11, admitted; PSERS-2 attached to Motion.
12. PSERS processed Claimant's second *Application for Retirement* and, by letter dated November 4, 2013, informed Claimant of his finalized retirement benefit. PSERS Memorandum of Facts ¶ 12, admitted; PSERS-3 attached to Motion.
13. Effective November 30, 2013, Claimant began receiving a monthly annuity from PSERS that was calculated using the service credit he earned prior to his first retirement and the credit he earned thereafter; he also received a lump-sum rollover of his total contributions and interest. PSERS Memorandum of Facts ¶ 13, admitted; PSERS-3 attached to Motion.
14. In December 2014, a Police Criminal Complaint was filed against Claimant in the Court of Common Pleas of Chester County, alleging that, as Superintendent of Coatesville, Claimant, *inter alia*, illegally diverted funds, and attempted to divert additional funds, from Coatesville and the Coatesville Student Council between the fall of 2012 and the summer of 2013 to purchase commemorative non-championship rings for Coatesville's football team and certain other individuals. PSERS Memorandum of Facts ¶ 14, admitted; PSERS-4 attached to Motion.
15. On January 16, 2018, the Commonwealth submitted an *Amended Information*. PSERS Memorandum of Facts ¶ 15, admitted; PSERS-5 attached to Motion.
16. On January 26, 2018, following a trial by jury, Claimant was found guilty of two felony counts of 18 Pa. C.S. § 3927(a) (counts 2 and 6 relating to theft by failure to make required disposition of

funds received); the amount identified for count 2 was \$4,137.75; the amount identified for count 6 was \$6,931.50; Claimant was also found guilty of two felony counts of 18 Pa. C.S. §§ 901 and 3927(a) (counts 11 and 12 relating to criminal attempt to commit theft by failure to make required disposition of funds); the amounts identified were, respectively, \$5,913.50 and \$15,000.00. PSERS Memorandum of Facts ¶ 16, admitted; PSERS-6 attached to Motion; PSERS-4 & 5 attached to Motion.

17. The criminal offenses were committed in Claimant's capacity as the Superintendent for Coatesville and were committed through his public office as a school employee. PSERS Memorandum of Facts ¶ 17, admitted.

18. Criminal charges also were brought against Claimant, alleging that, between 2009 and 2013, as Superintendent of Coatesville, Claimant manipulated the sale of his personal electric generator to the district, arranged to have his son hired with the district, and submitted inaccurate expense reimbursement requests. PSERS Memorandum of Facts ¶ 18, admitted; PSERS-4 & 5 attached to Motion.

19. On January 26, 2018, Claimant was found guilty of twelve additional counts, which were not covered by the Forfeiture Act at the time Claimant committed the crimes; Claimant was found not guilty of the remaining four counts against him. PSERS Memorandum of Facts ¶ 19, admitted; PSERS-6 attached to Motion.

20. On March 16, 2018, Claimant was sentenced; for all crimes, forfeitable and otherwise, Claimant was sentenced to serve 3 to 23 months in prison followed by a period of probation; he was also ordered to repay the \$6,931.50 and \$4,137.75 as a fine and restitution, respectively. PSERS Memorandum of Facts ¶ 20, admitted; Sentencing Sheet from the Court of Common Pleas of Chester County and the Docket Sheet, *Commonwealth of Pennsylvania v. Richard Wallace Como*, CP-15-CR-0000780-2015, PSERS 7 and 8.

21. By letter dated March 21, 2018, PSERS informed Claimant that due to his conviction for the forfeitable offenses of 18 Pa. C.S. § 3927 and 18 Pa. C.S. §§ 901 and 3927, his PSERS pension benefits

had been forfeited under the Forfeiture Act and the retirement benefits he was receiving would be terminated effective March 16, 2018. PSERS Memorandum of Facts ¶ 21, admitted; PSERS 9.

22. By letter received April 11, 2018, Claimant filed an appeal with the PSERS Executive Staff Review Committee (“ESRC”); Claimant asserted:

- a. only a portion of his pension should be forfeitable because:
  - i. that his misconduct only occurred during a portion of his employment,
  - ii. he worked for more than one public school employer,
  - iii. he changed job classifications,
  - iv. he had breaks in employment
- b. Claimant also contended that the forfeiture of his pension was unconstitutional; and,
- c. finally, he asserted that he was appealing the criminal conviction.

PSERS Memorandum of Facts ¶ 22, admitted; PSERS 10.

23. Claimant admitted that misconduct occurred during his tenure as Superintendent. Answer ¶ 22.

24. By letter dated June 18, 2018, PSERS informed Claimant that, because the Forfeiture Act directs that all benefits be forfeited, he was no longer eligible for coverage through PSERS’ Health Options Program, which was available to him only through his status as a PSERS annuitant. PSERS Memorandum of Facts ¶ 23, admitted; PSERS 11.

25. PSERS notified Claimant that his coverage would be terminated effective June 30, 2018. PSERS Memorandum of Facts ¶ 23, admitted; PSERS 11.

26. By letter received by PSERS on June 29, 2018, Claimant filed an appeal of the denial of coverage through PSERS’ Health Options Program, in which he reiterated his averments set forth in his appeal received April 11, 2018, and requested that his medical benefits be reinstated. PSERS Memorandum of Facts ¶ 24, admitted; PSERS 12.

27. By letter dated April 26, 2019, the ESRC denied Claimant's appeals, explaining that the right of a person to receive retirement benefits from PSERS is subject to the Forfeiture Act, which states that all benefits payable to a public employee must be forfeited if the employee is convicted of a crime related to public office or public employment enumerated in the Forfeiture Act; accordingly, the denial letter states that, by law, Claimant's right to receive any benefits from PSERS was forfeited as of the date of his sentencing. PSERS Memorandum of Facts ¶ 25, admitted; PSERS 13.

28. On May 14, 2019, Claimant filed an Appeal and Request for Administrative Hearing, to wit Claimant maintains his arguments presented to the ERSC and requests that the board reverse the forfeiture. PSERS Memorandum of Facts ¶ 26, admitted; PSERS 14.

29. On May 21, 2019, PSERS filed its Answer. PSERS Memorandum of Facts ¶ 27, admitted; PSERS 15.

30. Claimant appealed his criminal judgment to the Pennsylvania Superior Court, and by unpublished decision dated November 23, 2020, the Superior Court affirmed the judgment against Claimant in part, and reversed in part. PSERS Memorandum of Facts ¶ 28, admitted; PSERS 16.

31. As it relates to the forfeitable offenses of counts 2, 6, 11, and 12, third degree felony counts 18 Pa. C.S. § 3927(a) and 18 Pa. C.S. § § 901 and 3927(a), the Superior Court sustained Claimant's conviction as to all four counts. PSERS Memorandum of Facts ¶ 29, admitted; PSERS 16.

32. The criminal matter is presently in the Pennsylvania Supreme Court on a *Petition for Allocator*. Answer ¶ 28.

33. An administrative hearing is not scheduled in this matter. PSERS Memorandum of Facts ¶ 30.

34. On May 10, 2021, PSERS Attorney Cayla B. Jakubowitz moved for summary judgment saying that there is no genuine issue of material fact and, specifically, that the Public Employee Pension

Forfeiture Act, 43 P.S. §§ 1311-1315, compelled forfeiture of Claimant's pension benefits. Docket Entries.

35. On June 3, 2021, Counsel to Claimant answered and briefed his opposition to the requested summary judgment. Docket Entries.

36. By letter dated July 15, 2021, the Board's Secretary, Glen R. Grell, appointed the undersigned to act as Hearing Officer to issue a proposed opinion and recommendation regarding PSERS' MSJ. Docket Entries.

## CONCLUSIONS OF LAW

1. The rights of PSERS members are derived solely from the provisions of the Public School Employees' Retirement Code, 24 Pa. C.S. § 8101 *et seq.* ("Retirement Code"). See *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).
2. The Board's authority to grant or deny Claimant's request is limited to the provisions of the Retirement Code, and the Board has no authority to grant Claimant rights beyond those specifically set forth in the law. See *Forman, supra*; *Bittenbender v. State Employees' Retirement Board*,<sup>2</sup> 622 A.2d 403 (Pa. Cmwlth. 1992).
3. The General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et seq.* apply to the activities of and proceedings before PSERS and the Board, except as otherwise provided in the Board's rules and regulations. 22 Pa. Code §201.1.
4. The Board's rules and regulations provide that either party, PSERS or a claimant, may file a motion for summary judgment with the Board and that such a motion must conform with Pa. R.C.P. Nos. 1035.1 through 1035.5.
5. Claimant ultimately bears the burden of proof in this proceeding. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 751 A.2d 194 (Pa. 2000); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
6. The Public Employee Pension Forfeiture Act, Act of July 8, 1978, P.L. 752, No. 140, as amended March 28, 2019, P.L. 1, No. 143, P.S. §§1311 through 1315 ("Forfeiture Act"), in pertinent part, as follows:

Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to

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



receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is found guilty of a crime related to public office or public employment or pleads guilty or nolo contendere to any crime related to public office or public employment.

43 P.S. §1313(a).

7. The purpose of a summary judgment motion is to avoid a useless trial. *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 902 (Pa. 1989).

8. Summary judgment is appropriate only in those cases where the record, in the form of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, clearly demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Yount v. Pa. Dep't of Corr.*, 966 A.2d 1115, 1118 (Pa. 2009), citing *P.J.S. v. Pa. State Ethics Commission*, 723 A.2d 174, 176 (Pa. 1999); see also *Kelly by Kelly v. Ickes*, 629 A.2d 1002, 1004 (Pa. Super. 1993).

9. In deciding a motion for summary judgment, the Board must examine the record in the light most favorable to the non-moving party and accept as true all well-pleaded facts in the non-moving party's pleadings, as well as give the non-moving party the benefit of all reasonable inferences drawn from those pleadings. *Kelly by Kelly*, 629 A.2d at 1004, citing *Dibble v. Security of America Life Ins.*, 404 Pa. Super. 205, 590 A.2d 352 (1991); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 395 Pa. Super. 456, 577 A.2d 631 (1990).

10. A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the adjudicator. *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938, 940 (Pa. Super. 1998).

11. Examined in a light most favorable to the Claimant, and giving Claimant all benefits of reasonable inferences drawn from the pleadings and attachments thereto, it is clear that no issue of material fact exists and that PSERS is entitled to a judgment as a matter of law. Findings of Fact Nos. 1 – 36.

12. Claimant was afforded notice and an opportunity to be heard and participated vigorously in this appeal. Findings of Fact Nos. 22 – 28, 34 – 36; Docket entries.

## DISCUSSION

Presenting for the Board are PSERS' *Motion for Summary Judgment* and Claimant's opposition to the same. In this case, analysis will focus on the various documents presenting especially the System's *Memorandum of Facts* and Claimant's *Answer* thereto. PSERS made its allegations in its *Memorandum of Facts*; Claimant in his *Answer* had to admit or deny given the procedural status of the matter. Review of the documents, and indeed the specific allegations/answers, shows that there is little dispute about the over-arching facts. Specific paragraph answers shows that there are often restatements of all or parts of the allegations without any explicit denial. These will be construed as admissions. Sometimes there is commentary to only one portion of the PSERS allegation of fact without comment on other portions within that PSERS allegation. That which was not addressed by Claimant was thus admitted. Where there was disagreement, the finding (here in this document) paired down the PSERS allegation to what was not disputed by Claimant.

Regarding Motions for Summary Judgment, PSERS regulations state: "(b) *Summary judgment.* The System or the claimant may file a motion for summary judgment directly with the Board. The motion must conform to Pa. R.C.P. Nos. 1035.1—1035.5." 22 Pa. Code §201.6(b). Our Rules of Civil Procedure state, at the rules cited just above, that a party may file for summary judgment, which is essentially a tool of judicial efficiency. If the matter has been vetted, issues are clear, and one party is entitled to a judgment then trial, or hearing in a case such as this, would be unnecessary. The moving party files its motion for summary judgment and then opposing party must respond. The rules state further:

### **Rule 1035.3. Response. Judgment for Failure to Respond.**

(a) ... the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying:

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.

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Pa. R.C.P. No. 1035.3. This framework is critical to deciding the motion. Once the System's attorney called the question, Claimant was obligated (1) to point to some issue of fact that would affect the outcome,<sup>3</sup> or (2) to point to some inadequacy in PSERS' case.<sup>4</sup>

The sole issue for the Board is whether either of the above arguments should preclude the PSERS motion for summary judgment. Is there some issue of fact or some inadequacy in the PSERS case? Summary judgment is appropriate when there is no genuine issue of material fact. *See* Pa. R.C.P. No. 1035.2. In determining whether the party moving for summary judgment (i.e., PSERS) has met its burden, the Board must examine the record in the light most favorable to the non-moving party (i.e., Claimant), giving such non-moving party the benefit of all reasonable inferences. *See Thompson v. Nason Hosp.*, 535-A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *See El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817,818 (Pa Cmwlt. 1984).

Here, we are presented with a motion and a response that largely agree on the facts. Claimant started working in Pennsylvania public education, and thus became a contributing member to PSERS, in 1969. There he worked until 1983 when he left to become a football coach at Duke University. When he left, he opted to retire from the System and chose a Maximum Life Annuity. That proved to be a short career detour, instead of an exit, as Claimant returned to Southeastern Pennsylvania and to public

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<sup>3</sup> As stated in Pa. R.C.P. No. 1035.3 at (a)(1) there must be some evidence in the record that controverts evidence that the moving party (PSERS) asserted evidence or questions the credibility of a witness or witnesses.

<sup>4</sup> Or Claimant, per (a)(2), must point to something that is missing from the System's case, e.g., some evidence necessary for the moving party to prevail that is not in the record.

education in 1986. Claimant reenrolled in PSERS, his retirement benefit with PSERS stopped, and his annuity was frozen per the Public School Employees' Retirement Code. Through the intervening years, Claimant shuffled school districts and rose on the job ladder. In fact, Claimant rose to the title of Superintendent. Throughout, Claimant was a contributing member of PSERS.

In 2013, PSERS again received an application for retirement benefit. Unfortunately, this appears to have been secondary allegations of criminal wrong-doing. In 2014, authorities filed an Information against Claimant. In 2018, authorities filed an Amended Information against Claimant. On January 26, 2018, following a trial by jury, Claimant was found guilty of two felony counts of 18 Pa. C.S. § 3927(a) (counts 2 and 6 relating to theft by failure to make required disposition of funds received); the amount identified for count 2 was \$4,137.75; the amount identified for count 6 was \$6,931.50; Claimant was also found guilty of two felony counts of 18 Pa. C.S. §§ 901 and 3927(a) (counts 11 and 12 relating to criminal attempt to commit theft by failure to make required disposition of funds); the amounts identified were, respectively, \$5,913.50 and \$15,000.00.

Claimant was sentenced and 5 days later PSERS sent notification that Claimant's conviction, of forfeitable offenses, resulted in the forfeiture of his pension benefits. Claimant appealed that determination.<sup>5</sup> Claimant's appeal states that his misconduct only occurred during a portion of his employment and that he worked for more than one public school employer. During those terms of employment he changed job classifications and even had breaks in employment. From that Claimant argues that only a portion of his pension should be forfeitable. Claimant also contends that the forfeiture of his pension was unconstitutional. Finally, he argues that he is appealing the criminal conviction and this should forestall any enforcement. These arguments will be discussed *in seriatem*.

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<sup>5</sup> PSERS also determined, and sent notice of its determination, that Claimant lost any right to health benefit through the System as well. Claimant appealed this decision as well. As they are the same issues on the same facts, both determinations and appeals will be handled as one in this document.

The Forfeiture Act, 43 P.S. §§ 1311-1315, directs that no public employee shall be entitled to receive any retirement or other payment or benefit of any kind, if such public employee is convicted of crimes related to public office or employment. 43 P.S. § 1313(a). The definition of “crimes related to public office or public employment” identifies the state crime of theft by failure to make required disposition of funds received, 18 Pa. C.S. § 3927, “when the criminal culpability reaches the level of a misdemeanor of the first degree or higher” and “when committed by a ... public employee through his public office or position or when his public employment places him in a position to commit the crime.”<sup>6</sup> 43 P.S. § 1312.<sup>7</sup> The Forfeiture Act also covers criminal attempt to commit a forfeitable offense, 18 Pa. C.S. § 901. *See Luzerne County Ret. Bd v. Seacrist*, 988 A.2d 785, 788 (Pa. Cmwlth. 2010).

Once a triggering conviction occurs, the Forfeiture Act leaves no discretion to PSERS (or any administrative agency). *See* 43 P.S. § 1313(b); *Gierschick v. State Employees’ Ret. Bd.*, 733 A.2d 29, 33 (Pa. Cmwlth. 1999). “Indeed, the Board does not have the authority to reinstate Claimant’s pension benefits for equitable or other considerations.” *Account of Carol L. Hollern*, Docket No. 2019-06, at \*6 (PSERB Oct. 20, 2020) (citing *Apgar v. State Employees’ Ret. Sys.*, 665 A.2d 185, 189 (Pa. Cmwlth. 1994) and *Account of Jacqueline Ruchinski*, Docket No. 2018-06, at \*8 (PSERB Aug. 16, 2019)).<sup>8</sup>

To apply, on January 26, 2018, Claimant was convicted in the Court of Common Pleas of Chester County of two felony counts of 18 Pa. C.S. §3927(a)(relating to theft by failure to make required disposition of funds received) and two felony counts of 18 Pa. C.S. §§ 901 and 3927(a)(relating to

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<sup>6</sup> The Forfeiture Act defines a “public employee” to include “all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision. For the purposes of this act such persons are deemed to be engaged in public employment.” 43 P.S. § 1312.

<sup>7</sup> As indicated in the Memorandum of Facts, on March 28, 2019, through Act 1, the Legislature amended the Forfeiture Act and expanded the list of forfeitable crimes to all Pennsylvania crimes classified as felonies or punishable by a term of imprisonment exceeding five years, and all federal crimes and crimes of another state that are “substantially the same.” Pursuant to the enabling provision of the legislation, Act 1 applies to crimes related to public employment that are committed on or after the enactment date, March 28, 2019. Because Claimant committed his crimes prior to March 28, 2019, his appeal must be addressed based on the law in place at the time he committed his crimes.

<sup>8</sup> Board adjudications are available at [www.psers.pa.gov](http://www.psers.pa.gov).



criminal attempt to commit theft by failure to make required disposition of funds). *See* PSERS-4 through PSERS-8. Claimant committed the crimes in his capacity as Superintendent of the Coatesville Area School District (“Coatesville”) between 2012 and 2013. *See* PSERS-4 and 5. As a result of his conviction, by letter dated March 21, 2018, PSERS informed Claimant that his PSERS pension benefits had been forfeited under the Forfeiture Act and that the retirement benefits he was receiving would be terminated effective March 16, 2018. *See* PSERS-9. By letter dated June 18, 2018, PSERS informed Claimant that he also was no longer eligible for coverage through PSERS’ Health Options Program, which was available to him only through his status as a PSERS annuitant *See* PSERS-11. The following will address Claimant’s various arguments.

Misconduct only occurred during one portion and one employer of Claimant’s employment

Claimant first enrolled as a member of PSERS in September 1969 by virtue of his employment with the Upper Merion School District. From then and there, Claimant came and went. Upon his return he moved between school districts and always up the figurative ladder. The parties agree that Claimant worked for different public school employers during his career, had a break in employment, and changed job positions.

Claimant indisputably committed the forfeitable offenses while he was the Superintendent of Coatesville. Findings of Fact Nos. 20 & 23. He asks that he, however, forfeit only a portion of his retirement benefit. Specifically, he asks that he only forfeit either (1) the benefits he earned during his time as Coatesville’s Superintendent; or (2) the benefits he earned during his full employment with Coatesville. Claimant posits that, upon taking employment as Superintendent with Coatesville, he was in an entirely new job classification, and as such, he avers that there was no renewal of his employment contract for purposes of forfeiture. Further, he maintains that he engaged in misconduct only for a specific period of time and, thus, his entire benefit should not be forfeited. Alternatively, Claimant

contends that the benefits he accrued while employed for Upper Merion should not be forfeited, as this service was distinct from his employment with Coatesville.

Section 1313(a) of the Forfeiture Act requires the forfeiture of Claimant's entire pension, including his coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant:

Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

43 P.S. §1313(a); see *Shiomos v. State Employees' Ret. Bd.*, 533 Pa. 588, 626 A.2d 158, 162 (1993)(quoting 43 P.S. § 1313(a)). Indeed, the Pennsylvania Supreme Court has previously rejected the argument that a pension may be forfeited only in part:

As a reasonable condition of public employment, the employee reaffirms his commitment to perform his job with honesty and integrity every time he or she begins a new term of office, receives a promotion or appointment, or experiences a change in job classification; regardless of whether such public employment is on a full or part-time basis. With each appointment there is a renewal of the agreement to perform the term of public service without violating [the Forfeiture Act]; an agreement which encompasses all that has gone before. Thus, whether or not a public employee's right to receive retirement benefits has vested, or he or she is in actual receipt of benefits, all previous accumulated rights to receive such benefits are subject to forfeiture by and through the "renewed" agreement which is formed each time a person chooses to become a "public official" as defined by [Section 1312].

*Shiomos* at 596, 626 A.2d at 162 (emphasis added).

The fact that Claimant held different positions over the years, with different employers, does not change the outcome. At most, the changes in contract solidify the outcome as Claimant accepted and adopted the terms of the Forfeiture Act with each change. See 43 P.S. § 1313(c). Nor does the fact that Claimant completed some of his service without disciplinary misconduct allow for a different result. See *Public Sch. Employes' Ret. Bd v. Matthews*, 806 A.2d 971 (Pa. Cmwlth. 2002). The Commonwealth Court's decision in *Matthews* is instructive. In *Matthews*, the Court addressed whether a public employee must forfeit retirement benefits that inured to her by virtue of one position of public

employment when she committed her crime while employed in a different position of public employment. Matthews became a PSERS member by virtue of her employment as a cafeteria worker with the Tussey Mountain School District. *Id.* at 972. Simultaneously, Matthews worked for the district as a tax collector, although she was not a member of PSERS in that capacity. *Id.* Matthews, in her position as tax collector, pled guilty to a forfeitable offense. *Id.* Our Commonwealth Court held that, although Matthews committed the crime in her position as a tax collector, her pension with PSERS as a cafeteria worker was forfeited. *Id.* at 974-75. The Court noted that the Forfeiture Act “contains no requirement that the pension benefits that are forfeited be necessarily connected to the public employment related to [the] crime.” *Id.* at 975.

Here, there is no dispute that Claimant’s job classification changed multiple times during his career and, at a minimum, changed when he became Superintendent with Coatesville in 2005. (PSERS-10); 43 P.S. § 1313(c). In each instance, as a matter of law, Claimant renewed his agreement to perform his term of public service without violating the Forfeiture Act: “Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes job classification, there is a termination and renewal of the contract for purpose of this act.” 43 P.S. § 1313(c); *see* Apgar, 655 A.2d at 188. With each change in contract, he agreed that his entire pension would be forfeited if he committed “any crime related to public office or public employment.” 43 P.S. § 1313(a). Thus, as a matter of law, Claimant’s entire pension has been forfeited.

#### Claim that the pension forfeiture is unconstitutional

Claimant contends that the forfeiture of his pension benefits is excessive and violates his due process rights in violation of the Eighth and Fourteenth Amendments to the United States Constitution, is an impairment of contracts in violation of Article 1, Section 10 of the United States Constitution and Article I, Section 17 of the Pennsylvania Constitution, and infringes on a liberty interest in his pension.

It should be noted that, “[a] statute is presumed constitutional, and the burden of proving otherwise is heavy.” *Morris v. Pub. Sch. Employes’ Ret. Sys.*, 538 A.2d 1385, 1389 (Pa. Cmwlth 1988), *appeal denied*, 557 A.2d 345 (Pa. 1989). Further this Board has recognized that the determination of a statute’s constitutionality is not within its bailiwick. *Account of Ross A. Scarantino*, Docket No. 2009-14, at \*15 (PSERB Dec. 13, 2011). That said, the Forfeiture Act has repeatedly been held to be constitutional.<sup>9</sup>

### Conviction is still on appeal

Claimant maintains that he cannot lose his pension at this time, as he has appealed his criminal conviction. Specifically, he asserts that there should be no determination of forfeiture until there has been a final review of his appeals through the Pennsylvania Superior Court and Pennsylvania Supreme Court. Preliminarily, the Superior Court has addressed Claimant’s appeal and has affirmed the judgment of sentence as to theft by failure to make required disposition of funds, 18 Pa. C.S. §3927 (Counts 2 and 6), and attempt to commit theft by failure to make required disposition of funds, 18 Pa. C.S. §§ 901 and 3927 (Counts 11 and 12). *Commonwealth v. Como*, No. 1687 EDA 2018, 2020 Pa. Super. Unpub.

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<sup>9</sup> Our Supreme Court has dismissed the argument that a forfeiture such as this is unconstitutional:

It is neither unconscionable nor unreasonable to require honesty and integrity during an employee’s tenure in public service. Nor is it violative of the Pennsylvania Constitution to provide that at every new term of employment a public official or employee renews and amends his or her pension contract to include the new public service and to place at risk that which may have already been earned. Such is the nature of the public employment agreement.

*Shiomos* at 596, 626 A.2d at 163; *see also Account of Carol L. Hollern*, Docket No. 2019-06, at \*7; *Account of Dennis L. Bruno*, Docket No. 2011-15, at \*17-18 (PSERB May 1, 2013). Rather, a forfeiture is the result of Claimant having breached his pension contract. *See Scarantino v. Pub. Sch. Employees’ Ret. Bd.*, 68 A.3d 375, 384-85 (Pa. Cmwlth. 2013). Indeed, a condition precedent for eligibility to receive pension benefits is that an employee cannot have been convicted of a forfeitable offense. *See id.* (citing *Commonwealth v. Abraham*, 58 A.3d 42, 49 (Pa. 2012)). Moreover, the Forfeiture Act does not serve as an unconstitutional impairment of contract because each time Claimant accepted a new job position, he assented to the terms of the Forfeiture Act. *See Shiomos* at 596, 626 A.2d at 162; *see also Apgar*, 665 A.2d at 188. Our Commonwealth Court has held that the Forfeiture Act does not violate the Pennsylvania or United States Constitutions as an excessive fine because the forfeiture of a pension is not a fine imposed for the conviction of an offense. *Scarantino, supra*. Finally, any due process challenge to the criminal proceedings would need to be addressed in that forum, Claimant is receiving due process rights before the Board through this appeal, and Claimant has articulated no legal support for an undefined liberty interest in his pension. Accordingly, the forfeiture of Claimant’s pension was not unconstitutional.

LEXIS 3666 (Pa. Super. Nov. 23, 2020), attached to the PSERS brief as PSERS-16. Regardless, the Board does not have the authority to delay a forfeiture determination. *See* 43 P.S. § 1313(b)(benefits are reinstated only upon a verdict of not guilty or proof that the indictment or criminal information finally dismissed). If circumstances should change in the future, Claimant may notify PSERS at that time and the facts can be reviewed.

### Conclusion

Considering the Findings of Fact, Conclusions of Law, and Discussion there appear to be no genuine issues of material fact and it, further, it appears that PSERS is entitled to a judgment as a matter of law. Consequently, the following recommendation is made:

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

IN RE:

ACCOUNT OF RICHARD W. COMO  
CLAIM OF RICHARD W. COMO

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DOCKET NO. 2019-05

**RECOMMENDATION**

AND NOW, this 17<sup>th</sup> day of September, 2021, upon consideration of the foregoing Findings of Fact, Conclusions of Law, and Discussion, the Hearing Officer for the Public School Employees' Retirement Board recommends that the Board:

- (1) **GRANT** PSERS' *Motion for Summary Judgment*; and,
- (2) **DISMISS** Claimant's administrative appeal.

*M Foerster*

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**Michael T. Foerster  
Hearing Officer**

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