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

IN RE: ACCOUNT OF NANCY C. BOWERS  
DOCKET NO. 2012-45  
CLAIM OF NANCY C. BOWERS

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the pleadings, transcript, exhibits, briefs, the Hearing Officer's proposed Opinion and Recommendation, Member's Brief on Exceptions, and the Public School Employees' Retirement System's ("PSERS") Brief Opposing Claimant's Exceptions.

Nancy C. Bowers ("Claimant") is seeking to have her final average salary ("FAS") adjusted from \$81,336 to \$93,911. The Hearing Officer recommended that the Board deny Claimant's request. Claimant excepted to the Hearing Officer's proposed Opinion and Recommendation and submitted a brief in support of her exceptions. PSERS filed a response to Claimant's exceptions. After review and consideration of the arguments made in the parties' briefs, the Board generally finds appropriate the Hearing Officer's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with certain modifications, some of which are based on the parties' briefing on the exceptions and some of which are based on the Board's independent review. In light of the number of modifications, the Board issues its own Opinion and Order, which follows<sup>1</sup>:

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<sup>1</sup> The Board may adopt or reject, in whole or in part, the proposed opinion and recommendation of the Hearing Officer or issue its own opinion and order. 22 Pa.Code § 201.11(c).

## FINDINGS OF FACT

1. Claimant became a member of PSERS upon her employment with the Williamsport Area School District in September 1973. (Notes of Testimony (“N.T.”) 37; Exhibit M-1)

2. In August 1983, Claimant began working at the Pennsylvania College of Technology (“Penn College”) as an instructor of mathematics. (Exhibit M-1; N.T. 14)

3. At all times relevant and material to this matter, Penn College offered eligible employees a phased-in retirement whereby an employee would be able to teach only one semester (fall or spring) based on the college’s need and the employee’s ability to fill the need. (N.T. 14-15)

4. In the spring of 2007, Claimant told Penn College that she was interested in the phased-in retirement. (N.T. 41).

5. In July 2007, Claimant spoke with Jeremy Wible of PSERS’ office in Lock Haven about the phased-in retirement. Mr. Wible referred Claimant to his supervisor, Michele Earnest, because he was not familiar with the term “phased-in retirement.” (N.T. 17, 169, 171, 173)

6. Claimant first spoke with Ms. Earnest on August 14, 2007. (N.T. 44; Exhibit PSERS-19)

7. Claimant told Ms. Earnest that, under the phased-in retirement, she would have a full teaching load of 15 credits in the fall and not teach in the spring. (N.T. 17)

8. Claimant asked Ms. Earnest how PSERS would calculate her FAS under the phased-in retirement; Claimant understood from Ms. Earnest that her fall salary would be annualized, i.e., if Claimant earned \$10,000 in a year, PSERS would annualize her earnings to \$20,000 and she would receive a half a year of service credit. (*Id.*)

9. Claimant’s handwritten notes of the August 14, 2007, conversation with Ms. Earnest show a FAS estimate of \$74,708.79. (N.T. 45; Exhibit PSERS-19)

10. On August 14, 2007, Ms. Earnest informed Claimant that Penn College would report Claimant as having 0.5 years of credited service for those years in which she worked only one semester. (N.T. 17; Exhibit PSERS-19)

11. By letter dated August 14, 2007, Claimant put her request to participate in the phased-in retirement program for the following two years in writing to Penn College. (N.T. 40, 42)

12. Claimant decided to participate in the phased-in retirement because her husband already was retired, but she was not really ready to retire, and she loved teaching. (N.T. 43)

13. On September 4, 2007, Claimant asked Penn College to allow her to participate in a third year of phased-in retirement. (N.T. 42)

14. Claimant decided to teach the additional year because she felt that she was not ready to retire and because of Penn College's difficulty in hiring faculty to fill the position. (N.T. 49)

15. When she decided to participate in the phased-in retirement for the two-year and, shortly thereafter, three-year period in 2007, Claimant did not know what her salaries would be for the 2008-2009, 2009-2010, and 2010-2011 school years. Nor did she know that she would teach in May and June of 2010 and 2011. (N.T. 46-47)

16. In an email dated August 14, 2008, to Ms. Earnest, Mr. Wible, and Katie Hanna of PSERS, Claimant requested something in writing regarding the calculation of her FAS: "My concern is that over these last three years before retirement, where I actually teach one semester (1/2 year), that my salary is actually annualized. Both Jeremy and Michelle assured me that would be the case.... For example if I earn \$40,000 for 1/2 year, my annualized salary is \$80,000 for retirement calculations." (Exhibit M-2)

17. By letter dated September 5, 2008, Ms. Earnest replied to Claimant: "This letter is to verify that your Final Average Salary will be annualized if you work part time (fall semester only) for the last three years of your employment with PA College of Technology. I have sent you an estimate for the tentative date of retirement of August 2010 per your request which shows the annualized figure." (Exhibit M-3)

18. By letter dated September 5, 2008, Claimant received a *Normal Retirement Estimate* from Ms. Earnest that estimated a FAS of \$83,193 and an Option 1 monthly benefit of \$4,855.03 if Claimant withdrew all of her money, with a retirement date of August 30, 2010. The estimate stated: "This document is intended to provide

you with an **ESTIMATE** of your retirement benefits. The calculations are based on a combination of information from you and PSERS as it appears above, and is subject to final audit. Changes to your final average salary, years of service, retirement date ... will change your benefit amount.” (Exhibit M-4)

19. Mr. Wible did not respond to Claimant’s August 14, 2008, email and did not make any assurances to Claimant regarding the calculation of her FAS pursuant to the phased-in retirement. Nor did he have any involvement with the September 5, 2008, correspondence. (N.T. 170-172)

20. Claimant received the September 5, 2008, correspondence from Ms. Earnest after she made her decision to participate in Penn College’s phased-in retirement for three years. (N.T. 42, 48; Exhibits M-3 and M-4)

21. On February 26, 2010, PSERS received a *Request for Retirement Estimate* from Claimant in which she identified her tentative retirement date as August 11, 2010, and her estimated FAS as \$87,890. (Exhibit PSERS-6; N.T. 49-50)

22. *Requests for Retirement Estimates* are randomly assigned to PSERS’ employees when received. (N.T. 132-133)

23. On March 5, 2010, Colleen Curry of PSERS responded and sent a *Normal Retirement Estimate* to Claimant using a retirement date of August 11, 2010, and estimating Claimant’s FAS at \$75,642.00. The estimate contained the following notation: “Final average salary based on reported wages and is subject to final audit. Final average salary provided by member is high.” (Exhibit M-5; N.T. 50-51, 133-135)

24. After receiving the March 5, 2010, estimate, Claimant asked Ms. Earnest to prepare another estimate using the amount of \$87,890 as Claimant’s estimated FAS, and Ms. Earnest complied with that request. (Exhibit M-7; N.T. 52-53)

25. During 2010, Claimant decided not to retire because Penn College asked her to extend her phased-in retirement to four years when the search committee was unable to find a viable candidate and needed a qualified teacher for the fall semester. (N.T. 19, 29, 43)

26. During the 2008-2009 through 2010-2011 school years, Claimant worked full-time during the fall semesters and was on unpaid leaves of absence during the

spring semesters. Her fall salary was paid out over the entire year at her request. (N.T. 17-18, 21, 38-39; see also N.T. 92)

27. In May and June of 2010 and 2011, Claimant taught courses at Penn College's request because Penn College did not have a teacher. (N.T. 30)

28. On May 31, 2011, PSERS received a *Request for Retirement Estimate* from Claimant in which she identified her tentative date of retirement as August 1, 2011, and her estimated FAS as \$94,478. (Exhibit PSERS-9; N.T. 49-50)

29. Todd Fulton, a regional representative of PSERS for nine years, was assigned to prepare the estimate. (N.T. 130, 137)

30. Mr. Fulton noticed that Claimant's estimated FAS was significantly higher than the numbers in her account and he called Claimant to talk about that number and to ascertain where it was coming from. (N.T. 137-138)

31. On June 3, 2011, Mr. Fulton spoke with Claimant on the telephone; he discovered that although PSERS' account for Claimant indicated that she was working every month of the school year, she was actually working only five or six months during the school year; also, there was some confusion as to whether Penn College had correctly reported Claimant's spring school service. (N.T. 60, 138-139)

32. Mr. Fulton explained to Claimant on the June 3rd call that, based on the information Claimant had given him, not only was her FAS going to be lower than \$94,000, but it was going to be quite a bit lower; not only lower than that but lower than what PSERS' system even showed at that point. (N.T. 139)

33. Claimant asked Mr. Fulton to look at the September 5, 2008, letter from Ms. Earnest, and Mr. Fulton explained to Claimant that based on what Claimant had explained to him, the letter was not going to apply. The letter only applied if Claimant was working every month of the school year. (N.T. 139-140)

34. Mr. Fulton explained to Claimant that, when computing her FAS, PSERS would use actual salary earned rather than the annual salary that would have been earned had she worked the full year. He informed Claimant that PSERS would only count half the year as well, meaning PSERS would be going to some other school year and pulling in half a year's salary to calculate the FAS. (N.T. 141-142)

35. As of the June 3, 2011, telephone call with Mr. Fulton, Claimant knew that her formula for calculating her FAS was not the same formula used by PSERS. (N.T. 63)

36. By letter dated June 13, 2011, Claimant received the *Normal Retirement Estimate* that Mr. Fulton prepared, which was based on the information Claimant had provided to him. The estimate used a retirement date of August 1, 2011, a \$81,786 FAS, and a monthly benefit under Option 1 of \$4,883.00 if she withdrew all of her money. The estimate contained the following note: "Estimate [sic] assumes 129 days of paid employment in 2010 and 2011 school years. Final Average Salary was calculated manually based on the number of months the member actually worked from 2008 to 2011." (Exhibit PSERS-10, N.T. 140-145)

37. Mr. Fulton included the note on the estimate to indicate to Claimant that he was basing the FAS on the months she actually worked, which is what would happen when her retirement benefit was calculated. (N.T. 144)

38. After speaking with Mr. Fulton, Claimant did not inquire with Penn College as to whether she could extend her employment. (N.T. 63-64)

39. Claimant's last day of work with Penn College was June 16, 2011. (N.T. 31, 146)

40. Penn College listed Claimant's last day of work as August 10, 2011. (N.T. 31)

41. On August 16, 2011, PSERS received Claimant's *Application for Retirement*. She elected the Option 1 monthly payment plan, which results in a reduced monthly payment, and she elected to withdraw all her contributions and interest from PSERS, which also reduces the monthly payment. (Exhibit PSERS-11; N.T. 146-147)

42. By letter dated November 9, 2011, PSERS informed Claimant that her final monthly retirement benefit was \$5,006.31 based on 35.55 years of Class T-D service and a \$83,629.01 FAS. PSERS used the compensation that Claimant earned during the 2006-2007 through 2008-2009 school years to calculate her FAS. (N.T. 156; Exhibit M-10; Exhibit PSERS-15)

43. The November 9, 2011, FAS calculation was erroneous because PSERS' system did not reflect the number of months Claimant actually worked during her final

years; because the school had reported Claimant's salaries on a monthly basis year round to PSERS, PSERS' records showed Claimant as having worked 11 or 12 months during the 2007-2008 through 2010-2011 school years. (Exhibit PSERS-15; N.T. 157-159)

44. By letter dated December 12, 2011, to PSERS, Claimant contended that she was not correctly informed about how her FAS would be calculated if she became a part-time employee. (Exhibit M-14)

45. On March 1, 2012, PSERS notified Claimant that an adjustment had been made to her retirement account and that effective with her March 2012 monthly check, her new monthly benefit would be \$4,847.06. (Exhibit M-12)

46. By letter dated April 2, 2012, PSERS explained to Claimant that the March 2012 adjustment was made after PSERS requested additional information from Penn College and it was determined that Claimant was on unpaid leaves of absence during her last four years of employment with Penn College. Claimant's FAS was adjusted from \$83,629.02 to \$81,336.39 and her gross monthly benefit changed from \$5,006.31 to \$4,847.06. (Exhibit M-14)

47. A member's FAS is calculated using a formula set forth in PSERS' Comprehensive Benefit Calculations Manual, which is known as the "Buck Audit." (N.T. 86-87; Exhibit PSERS-2)

48. In the early 2000s, PSERS contracted with Buck Consultants, actuaries who specialize in pension systems, to review PSERS' calculations to assure that the calculations were consistent with the Public School Employees' Retirement Code ("Retirement Code") in determining benefits, including determining FAS. (N.T. 86-87)

49. The Buck Audit was not promulgated as a regulation under the Pennsylvania Code. (N.T. 119; 22 Pa.Code § 201.1 et seq.)

50. PSERS has additional rules for calculating FAS, including PSERS Business Rule FAS-2012-01, that clarify the Buck Audit. (Exhibit PSERS-3; N.T. 88)

51. When a member has worked for only a portion of a school year that ranks as one of his or her highest compensated years, PSERS uses the compensation received during that portion in combination with the compensation received during a

portion from another high year to make up one full year towards the member's highest three years. (Exhibits PSERS-1, 2, and 3; N.T. 100-103)

52. In calculating *Normal Retirement Estimates*, PSERS employees do not necessarily follow the Buck Audit because the estimate may be based on anticipated earnings or based on the member's anticipated happenings. (N.T. 88-89)

53. For purposes of benefit calculations and audit, PSERS credits money with service when the money was earned, not when it was paid. (Exhibit M-14)

54. Penn College did not report Claimant to PSERS as part-time while she participated in the phased-in retirement program; the college reported to PSERS that Claimant was a full-time employee during her last four years of employment. (N.T. 92; Exhibit M-14)

55. PSERS calculates Claimant's FAS using the following compensation and periods of membership to reach Claimant's highest three years:

Rank	School Year	Actual Pay	Membership Period	Year Divisor	Pay Used
1	2008-2009	\$43,168.98	0.5	0.5	\$43,168.98
2	2007-2008	\$41,945.50	0.5	0.5	\$41,945.50
3	2006-2007	\$80,658.10	1	1	\$80,658.10
4	2010-2011	\$54,763.48	0.7	0.7	\$55,557.15*
5	2005-2006	\$75,598.10	1	0.3	\$22,679.43
<b>Total</b>				<b>3.0</b>	<b>\$244,009.16</b>

\*Annualized salary used.

PSERS adds the compensation attributed to each period together and divides them by three to reach a FAS of \$81,336.39. (Exhibit PSERS-1; Exhibit M-14)

56. "Period of membership" is "the fraction of the fiscal year during which an individual was an active member." (PSERS-2 at 17)

57. "Year divisor" is "used to identify the membership periods that produce [FAS]." (PSERS-2 at 19)

58. Claimant calculates her FAS by doubling her fall salaries for the 2008-2009 through 2010-2011 school years and then adding her May and June 2010 and 2011 salaries to come up with the following: (1) \$86,186 in 2008-2009; (2) \$94,345 in 2009-2010; and (3) \$101,202 in 2010-2011. She adds those salaries together and divides them by three to reach her FAS estimate of \$93,911. (Exhibit M-18)



59. During the 2008-2009 through 2010-2011 school years, Claimant earned the following amounts from Penn College: (1) \$43,168.98 in 2008-2009; (2) \$49,334.90 in 2009-2010; and (3) \$54,763.48 in 2010-2011. (Exhibit PSERS-1)

60. The highest amount Claimant ever received in one year from Penn College was approximately \$80,000. (N.T. 68; Exhibit PSERS-1)

61. Ms. Earnest retired from PSERS. (N.T. 167)

62. An administrative hearing on Claimant's appeal was held on May 1, 2013. (Exhibits PSERS-17 and 18; Transcript, passim)

63. Claimant was present at the hearing, represented by counsel, and had the right to testify and present evidence in support of her appeal and to cross examine witnesses. (Transcript, passim)

## DISCUSSION

Claimant was a mathematics instructor at Penn College. During her last four years of employment, Claimant participated in Penn College's phased-in retirement program during which she worked a full-time schedule during the fall semesters and was on unpaid leaves of absence during the spring semesters. Claimant's last day of service with Penn College was June 16, 2011, and she filed her *Application for Retirement* with PSERS on August 16, 2011. Claimant receives a monthly retirement benefit from PSERS in the gross amount of \$4,847.06 that is based on her Class T-D membership with PSERS, her 35.55 years of credited school service, and a FAS of \$81,336.39.

At issue on appeal is the proper calculation of Claimant's FAS under the Retirement Code, 24 Pa.C.S. § 8101, et seq.; whether PSERS is estopped from applying its standard formula for calculating a member's FAS due to representations made by a PSERS employee; and, if not, whether the discretionary "waiver of adjustments" provision of Section 8303.1 of the Retirement Code is applicable. Claimant also challenges PSERS' use of the Buck Audit in calculating her FAS and the Hearing Officer's rulings on two hearsay objections.

## 1. Burden of Proof

Claimant has the burden of establishing the facts necessary to sustain her claim. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). While a member is entitled to a liberal construction of the Retirement Code, she has only those rights created by the retirement statutes and none beyond. *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Dowler v. Public School Employees' Retirement Board*, 620 A.2d 639, 644 (Pa. Cmwlth. 1993); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992).<sup>2</sup> The agency must construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa.C.S. § 1921(a), (b). Neither the Board nor PSERS has the authority to grant rights beyond those specifically set forth in the Retirement Code. See *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

The standard of proof in an administrative proceeding is a preponderance of the evidence. *Stoner v. Bur. Of Prof. & Occ. Aff., State Bd. of Medicine*, 10 A.3d 364, 376 n.7 (Pa. Cmwlth. 2010), *appeal denied*, 34 A.3d 834 (Pa. 2011). A preponderance of the evidence is such evidence as leads a fact-finder to find a contested fact to be more probable than its nonexistence. *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

## 2. Final Average Salary

The core issue on appeal is the calculation of Claimant's FAS. FAS is a key component in calculating a retirement benefit. To determine a monthly benefit, PSERS first calculates the member's "maximum single life annuity" by taking the member's FAS and multiplying it by the member's years of service and his or her 2.0% (T-C) or 2.5% (T-D) membership class multiplier. See 24 Pa.C.S. §§ 8102 ("standard single life

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

annuity” definition) and 8342 (maximum single life annuity). PSERS then factors in, among other things, the member’s payment plan election and whether the member withdraws his or her contributions and interest. See 24 Pa.C.S. § 8345.

Claimant asserts that her FAS should be \$93,911. Claimant calculates her FAS by doubling her full-time, fall salaries for the 2008-2009 through 2010-2011 school years and then adding the compensation that she received for her May and June of 2010 and 2011 work to come up with the following: (1) \$86,186 in 2008-2009; (2) \$94,345 in 2009-2010; and (3) \$101,202 in 2010-2011. She adds those salaries together and divides them by three to reach a FAS of \$93,911. (Exhibit M-18) This formula, she claims, is appropriate because she alleges that she provided part-time service to Penn College vis-à-vis her 10-month work year and, accordingly, her fall salaries should be “annualized” pursuant to the Retirement Code’s definition of FAS.

PSERS asserts, however, that Claimant’s formula runs afoul of the definition of FAS because it ignores the fact that Claimant did not work and earn compensation during the spring semesters of the school years at issue. PSERS calculates Claimant’s FAS at \$81,336.39 using the compensation that Claimant earned during the periods she worked. (Exhibit M-14; Exhibit PSERS-1)

Section 8102 of the Retirement Code provides the following definition of FAS, which is central to the issue on appeal:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received; except, if the employee was not a member for three such periods, the total compensation received as an active member annualized in the case of part-time service divided by the number of such periods of membership[.]

24 Pa.C.S. § 8102. Under the regulations duly promulgated by the Board (“Board’s regulations”), FAS is further defined as follows:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months. In the case of a part-time employee, compensation shall be annualized by multiplying actual earnings by the reciprocal of the fractional portion of time worked during nonoverlapping periods of 12 consecutive months or equivalent

consecutive pay periods during which compensation is received. \* \* \* Final average salary is an average of the 3 highest school years. For terminations before the end of the school year, salary for that part of the year may be used in combination with a proportionate percentage of a prior year. School years with part-time service may be annualized for salary calculation. Either annualized or actual retirement-covered compensation is allocated to months for each school year. For final average salary purposes, retirement-covered compensation is credited in the school year in which it is earned, not paid. Retirement-covered compensation is not recognized for any period of creditable nonschool service purchased by the member.

22 Pa.Code § 211.2(b). The Retirement Code and the Board's regulations, therefore, direct that only the compensation that a member receives *as an active member*, regardless of whether the member provided full-time or part-time service, is to be used to calculate a FAS. If a member provided part-time service *while active*, PSERS is to annualize the compensation that the member received while performing that part-time service on the basis of the fractional portion of the school year for which credit is received.

The Retirement Code defines an "active member," in pertinent part, as a "school employee for whom pickup contributions . . . are properly being made to [PSERS]." 24 Pa.C.S. § 8102. "School employee" is defined "any person *engaged in work* relating to a public school . . . and for which work he is receiving regular remuneration," and "compensation" is defined as "[p]ick-up contributions plus any remuneration *received as a school employee*...." 24 Pa.C.S. § 8102 (emphasis added). Thus, as the Commonwealth Court has stated, active member status requires actual work for which compensation is paid. *Trakes v. Public School Employees' Retirement System*, 768 A.2d 357, 365 (Pa. Cmwlth. 2001) (citing *Hoerner v. Public School Employees' Retirement Board*, 684 A.2d 112, 118 (Pa. 1996); *Watrel v. Department of Education*, 518 A.2d 1158, 1161 (Pa. 1986); see generally *Hairston-Brown v. Public School Employees' Retirement Board*, 78 A.3d 720 (Pa. Cmwlth. 2013), *appeal denied*, 87 A.3d 817 (Pa. 2014). When a PSERS member is on an unpaid leave of absence, she is not earning and receiving retirement-covered compensation for which contributions are being made to PSERS and she is not an "active member." She is, by law, an "inactive member." 24 Pa.C.S. § 8102; 22 Pa.Code § 211.2(b).

Claimant does not dispute that she was on unpaid leaves of absence and, thus, an “inactive member” of PSERS during the spring semesters at issue. Rather, she argues that, because she was “part-time” vis-à-vis a 10-month work year,<sup>3</sup> her fall salaries should be annualized (in this case, doubled) pursuant to Section 8102 and treated as a full year of salary in calculating her FAS. Thus, she believes that she should be treated no differently than other members of the system who worked the entire school year during their three highest years. The evidence shows and Claimant admits, however, that she worked a full-time schedule in the fall, not a part-time schedule, and not at all in the spring. There is no authority in the Retirement Code for annualizing an active member’s salary for periods during which they were full-time and counting a portion of that annualized salary as having been received during periods of inactive membership, as Claimant requests here. In fact, regardless of when a school employee’s salary is paid, the salary is credited to the period in which it was earned as an active member. See *Abramski v. Public School Employees’ Retirement System*, 512 A.2d 106 (Pa. Cmwlth. 1986); 22 Pa.Code § 211.2(b) (“For final average salary purposes, retirement-covered compensation is credited in the school year in which it is earned, not paid.”). Accordingly, the compensation that Claimant earned during the fall semesters cannot be used to create a fictitious salary for the spring semesters.

Claimant, in her exceptions, asserts that “there is no statutory authority for weighting the annualized salary of a member who provided part-time service.” Member’s Brief on Exceptions at 6. Claimant ostensibly takes issue with PSERS’ refusal to count her last three years of partial service as full years towards her highest three in calculating her FAS. Rather, PSERS counted each of Claimant’s last four fall semesters as half years (0.5) in its FAS calculation and counted Claimant’s May and June 2010 and 2011 work as two-tenths of a year (0.2). (See PSERS-1)

As stated above, FAS is calculated using the compensation that a member receives during periods of active membership and that compensation is attributed to the

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<sup>3</sup> Claimant asserts that her FAS should be based on a 10-month work year commencing with Penn College’s convocation in August and ending at commencement in May, not a 12-month school year. The issue is addressed below.

periods during which it was earned. The Retirement Code prohibits the conversion of periods of inactive membership during which a member was not being compensated for school service to compensated periods of active membership in calculating a FAS, regardless of whether the inactive member was part-time or full-time for any other portion of the year. The only way, therefore, to use a high-salaried school year during which a member was active and compensated for only a portion of the year towards his or her FAS is to credit (or weight) that year accordingly. Crediting a member for the portion of the school year during which they were active in the calculation of his or her FAS is consistent with the Retirement Code and the Board's regulations. See 24 Pa.C.S. § 8102; 22 Pa.Code § 211.2(b). This Board previously approved the use of partial school years in *In re: Account of Charles S. Morgante*, Docket No. 2005-18 (PSERB June 12, 2006). Thus, the Board finds that PSERS appropriately factored in the 2007-2008 through 2010-2011 school years as partial years when calculating Claimant's FAS. To ignore partial years completely would result in a lower FAS for Claimant because it would exclude three of her highest salaried semesters from consideration. (See PSERS-1)

In conclusion, Claimant's proposed FAS formula impermissibly uses periods in the spring when she was an inactive member under the Retirement Code and uses a fictional salary based on the premise that she was part-time throughout the years at issue. To adopt Claimant's method of calculating her FAS would convert periods of inactive membership and no service to active membership and service, which would plainly contravene the express language of the Retirement Code. The Board, therefore, finds that PSERS correctly calculated Claimant's FAS at \$81,336.39.<sup>4</sup>

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<sup>4</sup> Even if Claimant's service for the 2007-2008 through 2010-2011 school years was deemed part-time and her periods of inactive membership were ignored, the result would not be a FAS of \$93,911; the result would be a FAS of \$83,337.96, as calculated in November 2011 when PSERS' records erroneously reflected that Claimant had been working and, thus, active and receiving compensation for 11 or 12 months during the school years at issue. (Exhibit PSERS-15)

### 3. The Commonwealth Documents Law

Aside from regulations, administrative agencies rely on a second category of agency pronouncements that come in a number of formats, including manuals, memoranda, and policy statements. *Northwestern Youth Services, Inc. v. Dept. of Pub. Welfare*, 66 A.3d 301, 310 (Pa. 2013). An agency's rules that interpret a statute need not be promulgated in accordance with the Commonwealth Documents Law, 45 P.S. §§ 1102-1602, if they genuinely track the meaning of the statute. *See id.* at 311; *Borough of Pottstown and Pottstown Police Pension Fund v. Pennsylvania Municipal Retirement Board*, 712 A.2d 741, 743 (Pa. 1998). Such rules are "entitled to great deference and will not be reversed unless clearly erroneous." *Popowsky v. Pennsylvania Public Utility*, 706 A.2d 1197, 1203 (Pa. 1997) (quoting *Alpha Auto Sales v. Dept. of State*, 644 A.2d 153, 155 (Pa. 1994)); *see Gowden v. State Employees' Retirement Board*, 875 A.2d 1239, 1241 n. 4 (Pa. Cmwlth. 2005) (citing *McCormack v. State Employees' Retirement Board*, 844 A.2d 619, 622 n. 2 (Pa. Cmwlth. 2004)), *aff'd without op.*, 927 A.2d 201 (Pa. 2007). Judicial deference to an administrative agency's interpretive rules derives from the agency's specialized role and expertise. *Northwestern Youth Services, Inc.*, 66 A.3d at 311.

PSERS calculates a member's FAS using the formula set forth in the Buck Audit and some additional, clarifying rules including PSERS Business Rule FAS-2012-01. (Exhibits PSERS-2 and PSERS-3; N.T. 86-88). Claimant excepts to PSERS' utilization of the Buck Audit excerpt on FAS and PSERS' Business Rule FAS-2012-01 in calculating her FAS because they have not been approved as regulations under the Commonwealth Documents Law. Member's Brief on Exceptions at 5-6. Claimant does not, however, explain in her brief on exceptions why she believes these documents should have been promulgated as regulations. *See id.*

Pursuant to Section 35.212 of General Rules of Administrative Practice and Procedure ("GRAPP"), a brief on exceptions *shall* contain the grounds upon which the exceptions rest and the argument in support of the exceptions. 1 Pa.Code. § 35.212 (a)(1)(iv). Claimant argues only that she was not told about the Buck Audit or business rule prior to the administrative hearing and that PSERS' members are not entitled to a

copy of it.<sup>5</sup> Member's Brief on Exceptions at 6. Claimant fails to include any argument explaining why she believes the Buck Audit excerpt and the business rule were subject to the Commonwealth Documents Law or how they do not track the Retirement Code. Claimant, as the party with the burden of proof in this matter, needed to do so. Claimant's omission is particularly inexcusable given that the Hearing Officer pointed out the same deficiency in Claimant's post-hearing brief and opined that the argument was "presumably waived." Proposed Opinion and Recommendation at 18. Claimant, nevertheless, failed to correct the defect in her exceptions to the Board. This Board will not invent Claimant's argument to entertain it and, therefore, deems it waived. See, e.g., *American Rock Mechanics, Inc. v. Workers' Compensation Appeal Board*, 881 A.2d 54, 56 (Pa. Cmwlth. 2005) (concluding that an issue was waived for failure to develop it or cite authority for it).

Even if Claimant had briefed the issue as required, however, this Board would not find in her favor. Claimant challenges the "weighting" of her partial years of active membership during the 2007-2008 through 2010-2011 school years in calculating her FAS. Member's Brief on Exceptions at 6. As discussed above, however, the use of partial years is consistent with the Retirement Code's directive that PSERS consider only the compensation that a member "received as an active member" in calculating a FAS. 24 Pa.C.S. § 8102. Implied in that directive is that PSERS disregard periods of inactive membership. Thus, if a member renders school service (part-time or full-time) and receives retirement-covered compensation for only half a school year, PSERS is bound by the Retirement Code to consider only the compensation earned during that half a year of active membership in calculating a FAS. The Buck Audit excerpt and the business rule at issue provide instructions as to how to implement that directive, i.e., how to identify and use the periods during which a member was active and receiving compensation in calculating the member's FAS. The Board thus concludes that the

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<sup>5</sup> Claimant makes no assertion that she requested, either informally or through a subpoena, any documentation from PSERS as part of her preparation for the administrative hearing.



documents set forth interpretive rules that genuinely track the meaning of the Retirement Code and need not be promulgated as regulations.<sup>6</sup>

#### 4. School Year

Claimant excepts to the Hearing Officer's proposed Opinion and Recommendation on the belief that the correct definition of "school year" was not applied. Member's Brief on Exceptions at 5. She asserts that her "school year" should commence with Penn College's convocation in August and end at commencement in May. *Id.* at 6. Claimant has referred to this 10-month period as her "work year" with Penn College. Member's Post-Hearing Brief at 3, ¶¶ 7 and 12. She believes that if this 10-month period is used, her fall salaries will double for the 2008-2009, 2009-2010, 2010-2011 years, her May and June compensation will be added to those doubled salaries, and that the three years will count as her highest three for purposes of her FAS. (Exhibit M-18) She argues that PSERS' use of a 12-month "school year" beginning on July 1 and ending on June 30 of the following year is "contrary" to that which is contained in the statute. Member's Brief on Exceptions at 4, 6. PSERS, in response, refers the Board to Section 8102 of the Retirement Code and Section 211.3(g) of the Board's regulations. PSERS' Brief Opposing Claimant's Exceptions at 6-7.

Section 8102 of the Retirement Code defines a "school year" as the "12-month period which the governmental entity uses for purposes of administration regardless of actual time during which a member renders service." 24 Pa.C.S. § 8102. The Board's regulations use the same 12-month period. 22 Pa.Code § 211.2(b). Section 211.3(g) of the Board's regulations further provides that, "for purposes of the Retirement Code," the 12-month school year "commences on July 1 and ends on June 30 of the following year." 22 Pa.Code § 211.3(g). Contrary to Claimant's assertion, therefore, the law requires that PSERS use the 12-month school year from July 1 through June 30 in calculating a retirement benefit. The law does not allow for the use of a 10-month

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<sup>6</sup> Fortunately for Claimant, the application of PSERS' Business Rule FAS-2012-01 results in a FAS for her of \$81,336. If that rule is not applied, Claimant's FAS is either \$80,824.42 or \$79,527.03. (N.T. 103-104; Exhibit PSERS-4)

school year. In fact, the Retirement Code states that “actual time during which a member renders service” is not determinative of a “school year.” 24 Pa.C.S. § 8102. Consequently, Claimant’s normal “work year” is irrelevant. Furthermore, changing Claimant’s “school year” from a 12- to 10-month period would not result in her FAS being recalculated to \$93,911.<sup>7</sup> Again, the Retirement Code prohibits the Board from annualizing and counting Claimant’s full-time, fall salaries as she requests.

#### 5. Estoppel

Claimant refers to Ms. Earnest’s representations as to how Claimant’s fall salaries would likely be annualized in the FAS calculation to support her claim that her FAS should be \$93,911. She argues, in her exceptions, that “PSERS’ representatives” in its Lock Haven office “bolstered and confirmed” her belief as to how her FAS should be calculated and that they never informed her that PSERS would weight the annualized salary of a part-time employee.<sup>8</sup> Member’s Brief on Exceptions at 6, 7. Claimant apparently seeks to estop PSERS from calculating her FAS below \$93,911.

The elements that must be demonstrated to apply the doctrine of equitable estoppel to a Commonwealth agency are: (1) the agency must have intentionally or negligently misrepresented some material fact; (2) the agency must have known or had reason to know that the other party would justifiably rely on the misrepresentation; and (3) the other party must have been induced to act to her detriment because she did justifiably rely on the misrepresentation. *Miller v. State Employees’ Retirement System*, 626 A.2d 679, 682 (Pa. Cmwlth. 1993) (quoting *Hauptmann v. Department of Transportation*, 429 A.2d 1207, 1210 (Pa. Cmwlth. 1981)). “One who asserts estoppel must establish the essential elements thereof by clear, precise, and unequivocal evidence.” *Pennsylvania Liquor Control Board v. Venesky*, 516 A.2d 445, 448 (Pa.

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<sup>7</sup> Nor would it result in counting Claimant’s May and June 2010 and 2011 compensation as she requests. If a 10-month work year was used, Claimant’s May and June compensation and service would not be included in calculating her FAS or her years of credited service.

<sup>8</sup> Mr. Wible of PSERS’ Lock Haven office testified that he did not make any assertions to Claimant regarding her FAS under the phased-in retirement, and the Board finds his testimony credible. (N.T. 166, 170-172)

Cmwlth. 1986). Estoppel, however, cannot be used to avoid the provisions of the Retirement Code:

[T]he [System] is a creature of statute. As such, its members enjoy only those rights created by the Retirement Code and none beyond it. The retirement system creates a contract between the Commonwealth and its employees and, contracts should be liberally construed to effectuate the parties' intentions. Liberal construction of the Retirement Code does not, however, permit the Retirement Board to circumvent the express language of the Code. The Retirement Board lacks authority to grant equitable relief in conflict with statutory mandates of the Retirement Code, and this Court may not revise the Code to achieve equitable results.

*Barringer v. State Employees' Ret. Bd.*, 987 A.2d 163, 165 (Pa. Cmwlth. 2009) (citations omitted). Indeed, even where a member has received inadequate, incorrect, or even no information from the government entity, the Board must apply the statutory provisions of the Retirement Code. See *Tyson v. Public School Employees' Retirement Board*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999).

As explained above, the use of Claimant's proposed FAS formula would contravene Section 8102's directive that only "compensation received as an active member" be considered in calculating a FAS. 24 Pa.C.S. § 8102. Thus, regardless of Ms. Earnest's representations, equitable estoppel does not apply and the Board is not authorized to grant Claimant the relief she seeks.

In addition to the positive law in the Retirement Code that prohibits the recalculation of Claimant's FAS to \$93,911, the evidence shows that Claimant did not rely on Ms. Earnest's representations to her detriment. To the contrary, Claimant testified that she made her initial decision to participate in the phased-in retirement program before speaking with Ms. Earnest in August 2007, and she put her request to participate in the phased-in retirement for three years with Penn College in writing before Ms. Earnest's September 2008 communications. In addition, she testified that she decided to participate in the phased-in retirement because her husband had already retired, but she was not really ready to retire, and she loved teaching. Claimant made subsequent decisions to extend her phased-in retirement and to teach summer school based upon the needs of the college and her feeling that she was not ready for full retirement.

Moreover, neither Earnest nor any other PSERS employee estimated Claimant's FAS at \$93,911. In fact, Mr. Fulton informed Claimant, prior to school termination and prior to retirement, that Ms. Earnest's representations were not applicable under Claimant's circumstances, that Claimant's FAS would not be \$93,911, and that her FAS would be in the range of \$81,000. Claimant admits that as of the June 3, 2011, telephone call with Mr. Fulton, she knew that her formula for calculating her FAS was not going to apply. With the knowledge that her FAS would be lower than she anticipated, Claimant chose not to inquire with Penn College as to whether she could extend her employment as she had on other occasions.

Further, at the time she made her initial decision to participate in the phased-in retirement for two years and when she later extended it to three years, Claimant did not know what her salaries would be for the 2008-2009 through 2010-2011 school years or that Penn College would ask her to teach summer school in 2010 and 2011. The FAS estimate that Claimant had at the time was one showing a figure of \$74,708.79. Claimant, therefore, could not have based her decision to participate in the phased-in retirement with the anticipation of a \$93,911 FAS. Further, the September 5, 2008, correspondence from Ms. Earnest estimated an Option 1 monthly benefit for Claimant, withdrawing her contributions and interest, at \$4,855.03 which is within \$8 of Claimant's current monthly benefit as calculated pursuant to her Option 1 selection at retirement (i.e., \$4,847.06). (Exhibits M-4, M-12, M-14, PSERS-11)

#### 6. Waiver of Adjustments

Claimant asserts that the "waiver of adjustments" provision set forth in Section 8303.1 of the Retirement Code permits the Board to set her FAS at \$93,911. Member's Brief on Exceptions at 7. She asserts, *inter alia*, that a discretionary waiver is appropriate here because she has suffered a 12.77% reduction in her monthly annuity due to PSERS' failure to use a FAS of \$93,911 in the calculation of her retirement benefit.<sup>9</sup> *See id.*

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<sup>9</sup> Claimant calculates the reduction at 12.77% using an incorrect formula. See Member's Post-Hearing Brief at 16. An annuitant's monthly benefit is not calculated by taking the member's FAS and multiplying it by the class of service multiplier and dividing

The Retirement Code, preliminarily, mandates that the Board correct any error in a member's records that results in the member receiving more or less than he or she would have received had the records been correct and requires that the Board adjust the payments made to the member accordingly:

(b) *Adjustment of errors.* -- Should any change or mistake in records result in any member . . . receiving from the system more or less than he would have been entitled to receive had the records been correct, then regardless of the intentional or unintentional nature of the error and upon the discovery of such error, the board shall correct the error and so far as practicable shall adjust the payments which may be made for and to such person in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

24 Pa.C.S. § 8534(b).

Here, only one correction was made to Claimant's records with PSERS that impacted her monthly annuity and that correction occurred in March 2012 when PSERS changed its records to reflect that Claimant was not working during the spring semesters of the 2007-2008 through 2010-2011 school years, but was on unpaid leaves of absence. (Exhibits M-12 and M-14) Because Claimant had elected to receive her compensation for her fall service throughout the year, PSERS' records indicated that she was being paid for 10 or 12 months. (Exhibit PSERS-15) PSERS' calculation of Claimant's FAS in November 2011, therefore, was calculated incorrectly on the assumption that she had worked throughout the school year. (N.T. 157-158) The March 2012 correction resulted in Claimant's FAS being adjusted from \$83,629.02 to \$81,336.39. (Exhibits M-10, M-14) The Board has reviewed the entire record in this matter and finds no evidence that PSERS' records, at any time, reflected a FAS of \$93,911 for Claimant that would merit relief using that number.

Pursuant to Section 8303.1 of the Retirement Code, the Board may waive a Section 8534 adjustment on appeal if all of the following conditions are met: (1) the adjustment or portion of the adjustment will cause undue hardship to the member; (2)

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the result by 12 months. Moreover, Claimant is a Class T-D member, not a Class T-A member, and her class of service multiplier is 1.000, not the .714 that she uses in her formula. 24 Pa.C.S. § 8102.

the adjustment was not the result of erroneous information supplied by the member; (3) the member had no knowledge or notice of the error before the adjustment was made and the member took action with respect to their benefits based on erroneous information provided by the system; and (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a).

To find that an adjustment meets the “undue hardship” test under the first prong of Section 8303.1, the Board requires that: (1) the adjustment causes a reduction in excess of 5% of the monthly annuity; or (2) the adjustment results in the member losing eligibility for a benefit other than an annuity. 22 Pa.Code § 213.3a(a). The March 2012 correction in records resulted in Claimant’s monthly annuity changing from \$5,006.31 to \$4,847.06, which is a 3.18% reduction. As the adjustment was not “in excess of 5%” and there is no claim that Claimant lost eligibility for any benefit other than an annuity, the “undue hardship” prong of the test is not met and waiver does not apply. The remaining prongs under Section 8303.1 need not be addressed.

#### 7. Hearsay

Claimant contends that the Hearing Officer erred in sustaining hearsay objections to testimony of what a PSERS employee told Claimant concerning the determination of her FAS, claiming that such testimony was allowable as an admission by party opponent under Pennsylvania Rule of Evidence 803(25)(D). Member’s Brief on Exceptions at 3. Claimant, however, does not identify the substance of the testimony that she claims was improperly excluded or include an argument as to why that testimony should have been admitted as an exception to hearsay under Rule 803(25)(D).<sup>10</sup> In fact, in her brief on exceptions, she does not even cite to the specific

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<sup>10</sup> The Commonwealth Court has consistently applied the following standard to determine whether hearsay evidence is admissible at administrative hearings: (1) hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board; and (2) hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

rulings. Nor does she incorporate her opening brief. She also fails to state the relief she seeks, if any, or why she believes such relief is warranted. Without that information, the Board cannot meaningfully address her claim. See *D.Z. v. Bethlehem Area School District*, 2 A.3d 742, 749 (Pa. Cmwlth. 2010), *appeal denied*, 29 A.3d 798 (Pa. 2011); see generally 1 Pa.Code § 35.190 (b) (“An offer of proof made in connection with an objection taken to a ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by testimony[.]”); Pa.R.E. 103 (2) (“A party may claim error in a ruling to admit or exclude evidence only if . . . the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.”). Accordingly, the Board concludes that Claimant has failed to show that the Hearing Officer erred and that relief is warranted.

Moreover, to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *D.Z.*, 2 A.3d at 749; see also *Yacoub v. Lehigh Valley Medical Associates, P.C.*, 805 A.2d 579, 588 (Pa. Super. 2002) (For an error in evidentiary rulings to be the basis for a new trial, the rulings must be shown to have been not only erroneous but also harmful to the complaining party.); see generally Pa.R.C.P. No. 126 (“The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.”). As concluded above, PSERS cannot be estopped from calculating Claimant’s FAS using only the compensation that she “received as an active member.” 24 Pa.C.S. § 8102. Any statement that any PSERS employee made to Claimant to the contrary would not change the law or the result here. See *Tyson*, 737 A.2d at 328 (The Board “cannot be estopped from apply the statutory provisions of the Retirement Code, even where a member had received inadequate, incorrect or even no information from an employer or the board.”). Nor would any statement made by any PSERS employee change the fact that the March 2012 adjustment is not subject to a discretionary Section 8303.1 waiver. Therefore, any possible error was harmless, not prejudicial, and not material to the issue on appeal.

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF NANCY C. BOWERS  
DOCKET NO. 2012-45  
CLAIM OF NANCY C. BOWERS

ORDER

AND NOW, upon consideration of the entire record in this matter, IT IS  
HEREBY ORDERED THAT Claimant's request to have her final average salary set at  
\$93,911 is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: June 13, 2014

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