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COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF LOUIS V. VOLPE
DOCKET NO. 2013-22
CLAIM OF LOUIS V. VOLPE

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Hearing Examiner's proposed *Opinion and Recommendation*, Louis V. Volpe's ("Claimant") Brief on Exceptions to the *Opinion and Recommendation* and request for oral argument, and the Public School Employees' Retirement System's ("PSERS") Letter Brief Opposing Exceptions.

Claimant excepts to the *Opinion and Recommendation of the Hearing Examiner* on the grounds that: (1) Claimant's services to the School District of Philadelphia ("SDP") were critically necessary to secure over a billion dollars of financing; (2) Claimant had no duty to verify his part-time emergency return to service with PSERS; (3) Claimant is entitled to a waiver under the Retirement Code; and (4) Claimant was prejudiced by a fourteen year delay in correcting the record.

Claimant's first exception that his services were critically necessary to secure over a billion dollars of financing is denied. As enunciated by this Board in *Account of Dr. John K. Baillie*: "the emergency exception was [not] intended to allow a school employee to 'create' an emergency by announcing retirement during the course of a contract, retiring, and then returning to the same position to alleviate the 'emergency' he caused. We do not believe such an 'emergency' creates an increase in workload. The workload remains the

same." *Account of Dr. John K. Baillie*, Docket No. 2008-01, p. 43 (PSERB June 17, 2009). Thus, we do not agree with Claimant that the mere importance of his daily work *before* retirement creates an emergency under Section 8346(b) *upon* his retirement. Furthermore, the record is clear that SDP did not act timely to find a replacement, either temporary or permanent. SDP had no succession plan in place, allowed Claimant's job duties to go unperformed for at least six weeks after his retirement, and did not take any action to fill Claimant's position until late August or September 1998 when *Claimant* was contacted to return to service. Indeed, it was not until after his return in 1998 that SDP attempted to find a replacement for Claimant. (Notes of Transcript p. 75-78)

Claimant's next two exceptions are intertwined to the extent he essentially asserts that the Hearing Examiner "penalized" him by not granting a waiver because he did not notify PSERS of his return to service. In furtherance of his argument, Claimant insists that PSERS has no role in evaluating a return to service under the emergency provision except when determining if "there was a phony retirement or an effort to achieve an increase in PSERS payouts." *Claimant's Brief on Exceptions,* at p. 8, FN 2.[1] Preliminarily, Claimant's argument fails on its most basic level. PSERS would have no reason to evaluate whether an annuitant returned in an emergency capacity under Section 8346 if such annuitant never experienced a break in service and, thus, was not eligible to become

[1] Claimant also believes that PSERS' failure to issue a Management Directive or regulation regarding the reemployment of annuitants supports his position that PSERS has no reviewing authority under Section 8346 yet has failed to offer any legal support for such a proposition. Thus, his argument is without merit. Additionally, a Management Directive is an administrative tool, not an administrative regulation that enjoys the force and effect of law. It is merely a "tool for managing people in the executive branch of government," not a tool that can be issued for public school employees. *Cutler v. State Civil Service Comm.,* 924 A.2d 706, 711-712 (Pa. Cmwlth. 2007)(citations omitted).

an annuitant. The circumstances Claimant is advocating, therefore, would never arise. We, thus, find that PSERS' role under Section 8346 is *not* as limited as Claimant suggests.

In *Account of Dr. John K. Baillie,* this Board noted that it will not interfere with an employer's decision to hire an annuitant, but emphasized the necessity and requirement under the Board's fiduciary duty to determine the consequences of that hiring decision on an annuitant's retirement benefits:

> . . . To fulfill these functions, the Board must have the authority to review a school employer's initial determination that an emergency return to service exists and to determine whether that decision was reasonable.
>
> This Board, accordingly, believes that it has authority to review and reverse employers' declarations of emergencies insofar as such emergencies affect Retirement Code benefits and the proper administration of the Retirement Code. An employer is entitled to employ whomever it wants, but the Board is not obligated to treat the employment as an emergency return to service, when to do so would violate the Board's administrative interpretation of the Retirement Code. Regarding whether the employment status of an annuitant is an emergency or a non-emergency return to service, "[i]n case of doubt, the Board will determine whether any person is a school employee . . . ." 22 Pa. Code § 215.5.
>
> Even the Hearing Examiner acknowledges that PSERS does have the right to review an employer's declaration of an emergency to ensure that the emergency return to service provisions of the Retirement Code are being properly administered. (HEO at 33-34). The Hearing Examiner also acknowledges that a primary responsibility of this Board is found at 24 Pa.C.S. § 8502(m), which requires this Board to ensure that retirement covered compensation is credited to members' accounts. (HEO at 31-32). He opines that the role of PSERS and the Board relative to decisions made by an employer is limited to those functions that assure member contributions are properly credited and final average salary is properly calculated. *Christiana v. Public School Employees' Retirement Bd.*, 646 A.2d 645 (Pa. Cmwlth. 1994), *aff'd*, 669 A.2d 940 (Pa. 1996) (annuities purchased by the school district for the superintendent were not includable as compensation for purposes of determining superintendent's final average salary). (HEO at 31-32). But to fulfill those functions to assure that member contributions of an annuitant who returns to service are properly credited/categorized and that final average salary is properly calculated, the Board must also have authority to determine whether an emergency return to service actually exists.

Account of Dr. John K. Baillie, Docket No. 2008-01, p. 32 (PSERB June 17, 2009); *see also, Baillie v. Public School Employees' Retirement Board*, 993 A.2d 944 (Pa. Cmwlth. 2010).

Next, we agree, as did the Hearing Examiner, that there is no positive duty under the Retirement Code requiring an annuitant to notify PSERS of a return to school service. This Board, however, must consider Claimant's knowledge of the return to service restrictions and his lackadaisical approach in returning to service for fourteen years when weighing the factors of a *discretionary* waiver under Section 8303.1(a). We, therefore, agree with the Hearing Examiner that Claimant does not meet all four requirements of the waiver-of-adjustment provision.

As discussed thoroughly by the Hearing Examiner, the record is clear that Claimant was cognizant of his rights under the Retirement Code, including the return to service requirements at the time he returned in 1998. [2] When Claimant received his finalized benefit letter dated March 11, 1999, which reminded him of the ramifications of returning to service, Claimant had already returned to service, and chose to continue working for SDP for fourteen more years while receiving an annuity from PSERS. The evidence of record also establishes that PSERS made contact with Claimant and SDP regarding PSERS' right to review SDP's determination of an emergency, which served as a continuing reminder of the consequences of Claimant's continued employment for fourteen years. *See,* Findings of Fact Nos. 58-60; 68-72. Thus, Claimant was aware of the relevant law and the consequences of noncompliance from the beginning of his return.

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[2] Tellingly, Claimant testified that he was aware of the 95 day maximum return to work limitation for PSERS annuitants and developed a work schedule to avoid exceeding that limitation. (Notes of Transcript p. 130)

In this particular case, Claimant cannot assert that he was uninformed regarding the return to service restrictions, PSERS' role in monitoring his return to service, and the consequences thereof. Claimant knew or should have known that his continued service to SDP for fourteen years doing the same work he was doing prior to retirement did not constitute a bona fide emergency under the Retirement Code.

Moreover, Claimant's argument flows from a presumption that PSERS must be omnipresent and omniscient with regard to every PSERS annuitant returning to service. This Board finds no support for the idea that the General Assembly intended for Sections 8506 and 8502(g) to be interpreted in the harsh and literal manner Claimant suggests. PSERS cannot know of every annuitant hired by a reporting unit unless the reporting unit, the annuitant or a third party advises PSERS. Nonetheless, PSERS does not simply sit idly by and wait to stumble across an annuitant who returned to service, but proactively informs its members of the rules and consequences of returning to service after retirement.

The waiver-of-adjustment provision is discretionary with this Board. The information and warnings provided to Claimant placed him on sufficient notice so as to render him ineligible to receive a waiver under Section 8303.1(a). Claimant has failed to assert any facts that would justify the granting of a waiver for any portion of the fourteen years.

Finally, Claimant asserts that PSERS' fourteen year delay in adjusting his account is prejudicial because the "records from [SDP] relating to [Claimant's] reemployment in 1998 as an annuitant no longer exit (sic)." First, such a statement is simply false. Claimant was able to present ample oral testimony and documentary evidence of his return in late August or early September of 1998 as well as the nature of

the work he was performing. The only fact that was unclear was the exact date Claimant returned to service in 1998. The Hearing Examiner's calculation of a return to service date within a two month period does not support Claimant's claim of prejudice nor has Claimant provided any actual evidence of prejudice.

Claimant's request for oral argument before the Board is discretionary to the extent the Board believes it will be helpful to understand or resolve certain issues. Section 201.12 of the Board's regulations provide:

> (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.

The Board does not believe that oral argument is necessary for the Board to adjudicate this matter. Thus, Claimant's request for oral argument is DENIED.

The 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 and deny Claimant's exceptions. Accordingly:

IT IS HEREBY ORDERED that

1. Claimant's request that his post-retirement employment with SDP be deemed a return to school service during an emergency, without loss of annuity, is DENIED and his Appeal and Request for Administrative Hearing is DISMISSED;
2. Claimant's request for a waiver of adjustments under Section 8303.1, 24 Pa.C.S. § 8303.1, of the Retirement Code is DENIED; and
3. Claimant's account shall be calculated as a frozen annuity, based on a retirement date of July 11, 1998, followed by a non-emergency return to

service, under 24 Pa.C.S. § 8346(a), effective August 26, 1998, which continued, without any other returns to service, until Claimant re-retired on December 3, 2012.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 7, 2016

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

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE:	:	
ACCOUNT OF LOUIS V. VOLPE	:	**DOCKET NO. 2013-22**
CLAIM OF LOUIS V. VOLPE	:	

OPINION AND RECOMMENDATION

Ruth D. Dunnewold
Hearing Officer

Date of Hearing: May 18, 2015
Hearing Officer: Ruth D. Dunnewold
For the Claimant: Elliot A. Strokoff, Esquire
For PSERS: Jennifer A. Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Louis V. Volpe ("Claimant") on July 16, 2013, from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") dated June 18, 2013 ("ESRC denial letter"), denying Claimant's request that PSERS not consider Claimant to have returned to service in an non-emergency capacity. On August 5, 2013, PSERS filed its Answer to Claimant's appeal.[1]

By letter dated December 17, 2013, PSERS notified the School District of Philadelphia ("SDP") of Claimant's appeal[2] and explained that the SDP may elect to participate as an intervenor because the SDP, Claimant's former employer, may have a financial interest in the appeal. PSERS' letter directed the SDP to file a petition to intervene no later than December 31, 2013. The SDP did not file any petition to intervene.

By letter dated November 5, 2015,[3] Ruth D. Dunnewold was appointed by the Board's then-Secretary, Jeffrey B. Clay, to act as Hearing Officer for Claimant's administrative hearing. By letter of November 5, 2014, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on his appeal was scheduled for March 25, 2015 in Harrisburg, PA. PSERS filed a Motion for Summary Judgment ("MSJ") on January 15, 2015. However, by letter filed February 27, 2015, PSERS withdrew its MSJ and indicated its desire to proceed to an administrative hearing on the issues of whether Claimant had a bona fide break in service following his 1998 retirement and whether he returned in an emergency capacity beginning with the 1998 – 1999 school year.

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[1]Frederick Alcaro, Assistant Counsel, filed PSERS' Answer, but a Withdrawal/Notice of Appearance filed November 24, 2014 withdrew Mr. Alcaro's appearance and entered the appearance of Jennifer A. Mills, Assistant Counsel.

[2]PSERS' letter of December 17, 2013 informed the SDP of seven such appeals, including this Claimant's, and provided the SDP with the opportunity to participate in the appeals by timely filing a single petition to intervene which encompasses any or all of the accounts.

[3]The hearing examiner received this letter on November 6, 2014, so the year 2015 on the appointment letter is clearly a typographical error.

In an additional letter, dated February 27, 2015, PSERS made an unopposed request for a continuance of the hearing for the purposes of preparation and informal discovery with Claimant. An Order Granting PSERS' Request for Continuance, dated March 4, 2015, granted the request and continued the March 25, 2015 hearing, directing that the hearing be rescheduled at a mutually agreeable date and time in May 2015. By letter dated March 4, 2015, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing on his appeal was rescheduled for May 18, 2015. On or about April 28, 2015, the Board's Appeal Docket Clerk sent a reminder notice of the hearing to Claimant.

The hearing was held as scheduled at the Public School Employees' Retirement System in Harrisburg. Claimant attended the hearing and was represented by Elliot A. Strokoff, Esquire, while Jennifer A. Mills, Esquire, Assistant Counsel, represented PSERS. At the close of the hearing, the parties elected to file post-hearing briefs. Thereafter, the hearing transcript was filed on June 3, 2015, and an Order Establishing Briefing Schedule, dated June 4, 2015, was issued. The dates set forth in the briefing schedule were amended by Orders dated June 23, 2015 and July 15, 2015. Claimant filed his Reply Brief, the last brief filed in the matter, on August 27, 2015.

By Order Re-Opening Record dated October 14, 2015, the Hearing Officer *sua sponte* re-opened the evidentiary record to receive further evidence to clarify the date in 1998 on which Claimant returned to post-retirement employment with the SDP. The Order Re-Opening Record directed PSERS' Appeal Docket Clerk to schedule a second day of hearing to receive such evidence, but indicated that, should the parties be able to arrive at a stipulation as to the date in 1998 on which Claimant returned to post-retirement employment with the SDP, the submission of such a stipulation to the hearing officer for inclusion in the record would be an acceptable alternative to conducting a second day of hearing. After a pre-hearing conference was conducted on November 5, 2015, the parties indicated their willingness to attempt to arrive at a stipulation to obviate the need for an additional day of hearing.

On January 4, 2016, the Hearing Examiner received from PSERS' counsel a Stipulation of Fact, signed by both parties, in which the parties stipulated that "the School District of Philadelphia initially paid Claimant in 1998 a daily rate of $380.00." The Stipulation of Fact also asked that it be entered into the evidentiary record in this matter. Accordingly, the Stipulation of Fact is now marked as Joint Exhibit 1 and is hereby admitted into the evidentiary record as of January 4, 2016. An Order Closing Record was issued on January 5, 2016. Accordingly, the record is closed and the matter is now before the Board for final disposition.

FINDINGS OF FACT

1. In June 1968, Louis Volpe ("Claimant") began employment with the School District of Philadelphia ("SDP"), by virtue of which, he became a member of the Public School Employees' Retirement System ("PSERS"). Notes of Testimony ("NT") at 121, 168.

2. From about 1983 on, the SDP employed Claimant as a Subsidies Technical Assistant. NT at 121 – 122.

3. As a Subsidies Technical Assistant, Claimant's responsibilities included projecting and tracking revenues and cash flow, assisting in the preparation of the SDP's budget, reviewing the State budget, confirming the amount of subsidies received, working with the City of Philadelphia ("City") for the collection of taxes, legislative analysis, assisting in the issue of bonds and notes for financing the SDP's operations, preparing the SDP's Annual Financial Reports ("AFRs") to the Pennsylvania Department of Education ("PDE"), overseeing pupil accounting, and supervising two or three people, one of whom handled the transportation subsidy, a very complex subsidy which Claimant did not actually do. NT at 89 – 91, 122 – 124, 126, 130 – 131, 134 – 136, 168.

4. The SDP's accounting system was not compatible with the Commonwealth's requirements and was different from other school districts' accounting systems, so Claimant had to separate the accounting records of the SDP, intermediate unit and vo-tech, which were combined for City Council purposes, in order to submit separate AFRs to the PDE for each entity. NT at 125 – 126, 180 – 181, 187 – 189.

5. The SDP's revenue and daily cash flow projections were extremely complicated to perform because of the many different categories of revenue and the differences, between the State and the SDP, in the way items were coded, but the SDP amended its coding system during the 1999 – 2000 school year to make 75% to 80% of its codes similar to the State's codes. NT at 138, 190 – 191.

6. Although the SDP's accounting system was different from that of other school districts, someone with a basic understanding of accounting and a financial background could have figured the system out on their own, as Claimant had done. NT at 131 – 132, 181, 188.

7. Over the course of four or five years, Claimant had figured the system out on his own, teaching himself how to separate the accounting records for the AFRs and developing his own formulas for projecting tax collections. NT at 131 – 132, 140 – 141, 179 – 180.

8. The SDP revenue and daily cash flow projections which Claimant performed were necessary for preparation of the cash flow statements which both provided the SDP with access to public markets for short-term note borrowing, an essential source of revenue to the SDP, and proved to bond rating agencies the SDP's capacity to repay money it borrowed through note and bond issues. NT at 70 – 71, 73 – 74, 136.

9. During the course of Claimant's tenure with the SDP, Claimant became known to the bond rating agencies for his expertise, to personnel at the SDP as a person whose expertise was vital to the SDP when it prepared bond and note issues and who could translate financial information from one department to another, and to entities like the City and the State, to whom he was a liaison for a variety of revenue-related matters. NT at 71, 72 – 73, 74, 84, 90 – 91, 123, 136.

10. Between 1996 and 1998, the SDP had a great diminishment of staff in the finance office and as a result, did not have as many people to turn to who could provide the detailed data necessary to the SDP's finances. NT at 67.

11. The Act of April 2, 1998, P.L. 229, No. 41 ("Act 41 of 1998"), which was effective immediately, allowed PSERS members who met certain criteria, including at least 30 years of service, to retire prior to reaching the superannuation age without any reduction of the maximum single life annuity to which they would be entitled. *See* 24 Pa.C.S. § 8313; NT at 67.

12. In May 1998, although he had not really been thinking about retirement prior to that, Claimant decided to take advantage of the early retirement allowed by Act 41 of 1998, so he advised the SDP Budget Director, Jack Myers, that he would be retiring. NT at 67, 127, 176 – 177.

13. At that time, Claimant was 52 years old, had reached 30 years of service credit with PSERS, and wanted to get away from numbers completely because he was "saturated" with them. NT at 121, 128.

14. During Claimant's 30-year tenure with the SDP, there was no succession plan in place, Claimant had not developed any manuals, document or guidelines pertaining to his responsibilities, and if he had been sick for an extended period of time (which had never happened), there would have been no one to take over his job. NT at 176 – 177.

15. When Claimant told Mr. Myers that he planned to retire, there were no discussions with Mr. Myers or with anyone else at the SDP about who would take on Claimant's responsibilities, Claimant had no discussions with anyone at the SDP about returning to work at the SDP after he had retired, and there was no prearranged termination and/or agreement that the SDP would re-employ Claimant after his retirement. NT at 55, 128 – 129, 177.

16. Prior to his retirement, Claimant started showing some of the people in accounting how to do the budget and the AFRs. NT at 142, 169.

17. On May 14, 1998, Claimant attended a PSERS Retirement Exit Counseling session. Exhibit PSERS-1; NT at 170.

18. During the Retirement Exit Counseling session, Claimant was advised, with regard to work after retirement, that he could "work anywhere except for a PSERS employer," and that he could "work in a PA public school under emergency/teacher shortage provision. . . up to 95 days per school year without the pension being affected" but that "[a]fter 95 days, pension is frozen (Frozen Annuity) and retiree is re-enrolled in PSERS." Exhibit PSERS-1; NT at 170.

19. On May 14, 1998, Claimant signed an Exit Counseling Checklist which included a checkmark indicating that a review of work after retirement had occurred. *Id.*

20. Claimant completed an Application for Retirement dated May 20, 1998 and submitted it to PSERS. Exhibit PSERS-2, pages 1 and 6; NT at 127, 171.

21. PSERS received Claimant's Application for Retirement on June 17, 1998, Claimant's last day working at the SDP was July 10, 1998, and his effective retirement date was July 11, 1998. Exhibit PSERS-2, pages 1 and 7; NT at 121, 128, 171 – 172.

22. Claimant decided he would be a bartender, so he went to bartending school and secured a bartending job at the Drexelbrook Country Club. NT at 128, 143.

23. In an Initial Benefit Letter dated July 21, 1998, PSERS informed Claimant of his initial, estimated retirement benefit, based on an effective retirement date of July 11, 1998. Exhibit PSERS-3; NT at 172.

24. PSERS' letter dated July 21, 1998, included the following paragraph:

> EMPLOYMENT AFTER RETIREMENT
> In Act 23, of August 5, 1991, an annuitant's return to school service during emergency is defined as "when, in the judgement of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers, an annuitant may be returned to school service for a period not to exceed 95 full day sessions." A half a day or less counts as half a day.

Exhibit PSERS-3, page 2.

25. PSERS' letter dated July 21, 1998, provided contact information for PSERS' Member Service Center if Claimant should have any questions. Exhibit PSERS-3, page 3.

26. At the time Claimant retired from the SDP, the SDP had finished up a July 1998 note issue and was looking at a January 1999 bond issue because the SDP still needed to issue notes and bonds to obtain funds it needed to operate and still had to submit AFRs to the State. NT at 65, 66, 122, 124 – 125.

27. Christina Ward was employed by the SDP from 1981 through 2014 in various positions, beginning with being Administrative Assistant to the then-Managing Director of the SDP, Clarence (Clay) Armbrister, a position Ward held until 2002. NT at 62, 63 – 64, 70.

28. Part of Ms. Ward's responsibilities included preparing the prospectus, a document included with a bond issue, which would explain the operations of the SDP for potential bondholders. NT at 64 – 65.

29. While he was employed at the SDP and up until his retirement, Claimant had been the person Ms. Ward interacted with on bond issue matters and to whom Ms. Ward went for revenue information that she would include in the prospectus. NT at 64 – 65, 86.

30. After Claimant's retirement in July 1998, no one else at the SDP took on Claimant's duties, including revenue projections. NT at 132, 133, 174 – 175.

31. Claimant's retirement was "a big headache" for Ms. Ward because she had no one to go to at the SDP to provide her with the details and information necessary to a bond or note issue, and she did not know how she was going to pull all of the information together for a planned January 1999 bond issue. NT at 65 – 66, 68, 74, 87.

32. In September or fall 1998, knowing Claimant was not there and she wanted him back, Ms. Ward proposed to Mr. Armbrister that she contact Claimant to see if he would be willing to "come back for a couple days." NT at 68, 110.

33. At that point, Ms. Ward did not know what Claimant would be willing to do, but she did not think he would want to come back full time because he wanted to be retired. NT at 69.

34. Ms. Ward also knew the SDP's budget was under extraordinary constraints, so they were looking for ways to save money, and she knew that re-employment of retirees could not exceed 95 days without jeopardizing the retiree's retirement. NT at 69, 114, 116.

35. Mr. Armbrister and Ms. Ward discussed the fact that they would not want to damage in any way Claimant's ability to receive his pension, thought there would be no such danger if he were "living within the rules and regulations of the 95-day emergency period," and believed it was okay under the Retirement Code for Claimant to receive a salary from the school district and his annuity at the same time. NT at 70, 83, 113, 114.

36. Mr. Armbrister agreed Claimant could come back and help through a difficult time but stipulated that they would need to fix the problem by training someone else so that the SDP did not have to rely just on Claimant. NT at 75.

37. Taking those things into consideration, Ms. Ward contacted Claimant more than a month after he had last worked at the SDP, in the fall of 1998, and asked him to come back; she did not ask him to render services as an independent contractor under a consulting agreement, nor did she ask him not to retire. NT at 68 – 69, 87, 108, 113 – 114, 129, 173 – 174.

38. Claimant hemmed and hawed, telling Ms. Ward he would have to talk it over with his wife, he would have to think about it, and he would get back to Ms. Ward. NT at 68 – 69, 129.

39. By then, Claimant had decompressed a little and could stand to see numbers again, so he called Ms. Ward back two days later and agreed to come back "for a little while," anticipating that he would work 95 days or less as an annuitant during that fiscal year, with no intent of returning for more than that fiscal year. NT at 70, 74, 129, 130, 142.

40. Claimant did not ask the SDP to verify in writing or otherwise that returning to work would not affect his PSERS pension, did not contact PSERS at any time to confirm that his pension would not be affected, and was not aware of any obligation on his part to notify PSERS that he had returned to work as an annuitant; he believed that everything was okay with his coming back to work for the SDP after his retirement because he did not believe the SDP would ask him to return if it would jeopardize his annuity. NT at 137, 178.

41. After about six weeks during which the SDP had not employed him, Claimant returned to work at the SDP part time, two days a week, a schedule which the 95-day limitation dictated and which was all he was willing to do at that point. NT 78, 92, 108, 130, 132, 137, 174.

42. Claimant's title upon his return was Revenue Specialist, and he performed all of the duties he had performed as a Subsidies Technical Assistant except for supervising, and responsibilities related to pupil accounting and the transportation subsidy; other people took on those responsibilities that Claimant no longer did. NT at 89, 93 – 94, 130 – 131, 133 – 134, 175.

43. As a part time Revenue Specialist with the SDP upon his return to employment there, Claimant was paid, initially, a flat daily rate of $380.00 from which no deductions were made for employee contributions to PSERS, and the SDP made no employer contributions to PSERS related to Claimant's employment. Exhibit CL-22, paragraph 10; Joint Exhibit 1.[4]

44. After his return to employment with the SDP, Claimant received paycheck on October 7, 1998, in the gross amount of $9,120.00, for his pay since his return to employment. Exhibit PSERS-17.

45. When the gross amount of $9,120.00 is divided by the flat daily rate of $380.00, it yields 24 as the number of days which Claimant's first paycheck covered after his return to employment with the SDP. Exhibit PSERS-17; Joint Exhibit 1.

46. Claimant worked three to five days a week when he first returned to employment with the SDP, so distributing the 24 days as if he had worked three days a week yields an approximate starting date eight weeks prior to October 7, 1998, or August 12, 1998, while distributing the 24 days as if he had worked five days a week yields a starting date just shy of five weeks prior to October 7,

[4]By Order Re-Opening Record dated October 14, 2015, the Hearing Officer *sua sponte* re-opened the evidentiary record to receive further evidence to clarify the date in 1998 on which Claimant returned to post-retirement employment with the School District of Philadelphia. Ultimately, on January 4, 2016, the Hearing Examiner received from PSERS' counsel a Stipulation of Fact, signed by both parties, in which the parties stipulated that "the School District of Philadelphia initially

(footnote continued on next page)

1998, or approximately September 1, 1998; and averaging three and five to obtain four days of work per week yields a starting date six weeks prior to October 7, 1998, or August 26, 1998. Official notice of mathematical facts and of 1998 calendar.[5]

47. It was less expensive to bring Claimant back to work at the SDP on a part time basis than to hire a full time employee to replace him, and the SDP was under budget constraints. NT at 116.

48. Because no one had performed Claimant's duties after his retirement in July 1998, for the first few weeks after he returned to employment with the SDP in the fall of 1998, Claimant worked three to five days a week to bring everything up to date, and then he began working two days a week, on average. Exhibit PSERS-17, paragraph 9; NT at 132 – 133, 174 – 175.

49. Additionally, because he was the only one with complete knowledge of the duties of his position, Claimant's responsibilities upon his return to employment with the SDP included training someone to take over his responsibilities, consistent with Mr. Armbrister's stipulation that they would need to train someone else so that the SDP did not have to rely solely on Claimant. NT at 75, 76, 77 – 78, 112, 119, 137 – 138, 142.

50. The SDP did not attempt to transfer Claimant's duties to a particular position at the school district, but initially Ms. Ward or Mr. Armbrister, and eventually, various other people at the school district, would decide who Claimant would be training as his replacement, designating a specific person or people, who were already working for the SDP in other areas, to be trained in Claimant's duties. NT at 101 – 102, 167, 186.

51. Claimant trained a number of people subsequent to his return to employment with the SDP, but the training only occurred when the trainees, who were employed with the SDP in other

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paid Claimant in 1998 a daily rate of $380.00." This Opinion and Recommendation has marked that Stipulation of Fact as Joint Exhibit 1 and admitted it into the record as of January 4, 2016.

[5]A court may take judicial notice of laws of nature and mathematics, *see Horen v. Davis*, 118 A. 22, 24 (Pa. 1922), as well as of times, days and dates related to the calendar. *Wilson v. Van Leer,* 17 A. 1097, 1098 – 1099 (Pa. 1889); *Mentz v. U.C.B.R.*, 370 A.2d 1232, 1233 (Pa. Cmwlth. 1977).

positions, had time for the training, and each of the new trainees ultimately left for one reason or another. NT at 76 – 78, 86, 101 – 102, 111 – 112, 137, 139, 142, 186 – 187.[6]

52. Although Ms. Ward did not have all the knowledge Claimant had, she was learning his duties after his return, had a basic understanding of Claimant's position and the duties that he performed, worked with him on analyzing legislation that could possibly impact the school district's budget in the next fiscal year, and was able to provide assistance with training possible replacements, as was the treasurer. NT at 108, 116 – 117.

53. Claimant received a letter from PSERS, dated March 11, 1999 ("finalized benefit letter"), which informed Claimant of his finalized retirement benefit of $3,123.28, based on 30.12 years of credited service, a final average salary of $72,274.00, and an effective date of retirement of July 11, 1998. Exhibit PSERS-4; NT at 173.

54. The finalized benefit letter included, on page 3, a paragraph reiterating the Retirement Code's provisions regarding employment after retirement, as well as a toll-free contact number for the Member Service Center, in case Claimant should have any questions. Exhibit PSERS-4, page 3.

55. In March 1999, Claimant began working two days a week for Foundations, an educational company which provided charter schools with budget and accounting services similar to those which Claimant provided to the SDP, including assisting charter schools in the filing of their AFRs. NT at 143, 144, 146,178.

56. Ms. Ward was aware of Claimant's work with charter schools through Foundations. NT at 114.

57. At the beginning of the 1999 – 2000 school year, because the individual whom the SDP had tried to train to take over Claimant's responsibilities had left, Ms. Ward asked Claimant to return for that school year as well. NT at 108 – 109, 110, 184, 185.

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[6]The record contains no specifics about the time frame(s) in which all of the trainees mentioned came and went.

58. In or about the year 2000, Claimant received a PSERS Retired Member Handbook ("2000 Handbook"), which he read. NT at 150 – 151, 153.

59. The 2000 Handbook included information about Employment After Retirement at pages 34 – 37. Exhibit CL-1, pages 35 – 37.

60. The section of the 2000 Handbook about Employment After Retirement included a discussion of the elements of permissible returns to employment in the limited circumstances of an emergency and a shortage of appropriate subject certified teachers, and the discussion incorporated the following statement:

> The employer makes the determination that these elements have been satisfied. However, *PSERS reserves the right to review an employer's determination that a qualifying emergency or shortage exists.*

Exhibit CL-1, page 34 (emphasis added).

61. In the school years subsequent to the 1998 – 1999 school year and through school year 2006 – 2007, Ms. Ward had conversations with Claimant each year about staying for the next school year; she never assumed he would just continue and did not think it was an open-ended employment situation, because they were trying to prepare for his retirement by training people. NT at 110, 184, 185.

62. In 2001, because of the increase in the number of charter schools that came on board with Foundations, Foundations asked Claimant to work more than two days a week, but Claimant declined because he was working for the SDP two days a week, and he had had to quit his bartending job because between it, the SDP and Foundations, Claimant was working seven days a week, so adding additional days with Foundations did not seem like retirement. NT at 144 – 145.

63. Prior to 2002, the lines of responsibility, in terms of Claimant's chain of command, were loose or blurred, but by 2002, he was officially placed in Ms. Ward's department, under her direction. NT at 88 – 89.

64. In the latter half of 2007, the SDP and PSERS began discussions about the propriety of the SDP's employment of PSERS annuitants as tutors under the Retirement Code's emergency service provision at 24 Pa.C.S. § 8346(b)(1). Exhibit PSERS-10; Exhibit CL-4.

65. As result of those discussions, PSERS expressed the expectation that the SDP would advertise positions and attempt to find qualified non-retirees, prior to filling the positions with PSERS annuitants. *Id.*

66. Claimant did not ask the SDP to verify in writing or otherwise that returning to work would not affect his PSERS pension, did not contact PSERS at any time to confirm that his pension would not be affected, and was not aware of any obligation on his part to notify PSERS that he had returned to work as an annuitant; he believed that everything was okay with his coming back to work for the SDP after his retirement because he did not believe the SDP would ask him to return if it would jeopardize his annuity. NT at 137, 178.

67. Ms. Ward never had any communications with PSERS about the propriety of Claimant's post-retirement return to employment, nor did anyone in the SDP ever lead Ms. Ward to believe that PSERS had approved Claimant's continued post-retirement employment with the SDP. NT at 114 – 115.

68. In approximately 2007, the SDP's human resources ("HR") department required Ms. Ward to submit documentation justifying the SDP's employment of Claimant as an annuitant. Exhibit PSERS-10 (*see* Memorandum addressed from Ms. Ward to Judith Gilliam); NT at 81 – 82, 115.

69. In mid-2008, PSERS and the SDP had additional contacts regarding the SDP's justification for its employment of annuitants working after retirement, PSERS began requiring the SDP to submit annual compliance certifications indicating that the SDP had met all requirements related to attempting to hire non-retirees prior to employing PSERS annuitants, and PSERS indicated that

> if in the view of PSERS the District does not meet the minimum threshold of bona fide recruitment efforts for non-retirees in all positions except for day-to-day per diem substitute teachers, PSERS will be forced to treat any retiree found to be employed in a non-emergency situation as a true return to service and remove them from the annuity payroll immediately.

Exhibit CL-5.

70. After these contacts, the SDP began to request pre-approval from PSERS for the use of annuitants in some instances. Exhibit CL-5, page 3 (*see* paragraph entitled "Gonzalez Status"); NT at 9.

71. In 2008, the SDP's HR department advised Ms. Ward that positions in which annuitants were employed would have to be advertised through the SDP's normal process, which involved posting the positions on the SDP's website. NT at 80.

72. Claimant became aware in 2008 that an issue had arisen between the SDP and PSERS about return to service, however, he did not check with PSERS to see if his return, in particular, was an issue, nor did he ask to enter into an independent contractor or consultant contract similar to his arrangement with Foundations; rather, he simply continued his part time employment with the SDP. NT at 179.

73. From June 12, 2009 to June 17, 2009, the SDP advertised Claimant's position on its website as a part time position, with a start date of July 1, 2009 and an end date of June 30, 2010 ("2009 – 2010 school year"), for which the SDP sought an individual with ten years of full time, paid, professional experience in governmental or school finance with knowledge of accounting, budgeting, state budget requirements, treasury operations, and child accounting. Exhibit PSERS-10; NT at 80, 99, 100, 104.

74. From May 18, 2010 to May 20, 2010, the SDP advertised Claimant's position on its website as a part time position, with a start date of July 1, 2010 and an end date of June 30, 2011 ("2010 – 2011 school year"), for which the SDP sought an individual with ten years of full time, paid,

professional experience in governmental or school finance with knowledge of accounting, budgeting, state budget requirements, treasury operations, and child accounting. Exhibit PSERS-10; NT at 80, 99, 100.

75. From June 1, 2011 to June 3, 2011, the SDP advertised Claimant's position on its website as a part time position, with a start date of July 1, 2011 and an end date of June 30, 2012 ("2011 – 2012 school year"), for which the SDP sought an individual with ten years of full time, paid, professional experience in governmental or school finance with knowledge of accounting, budgeting, state budget requirements, treasury operations, and child accounting. Exhibit PSERS-10; NT at 80, 100, 103 – 104.

76. The SDP told Claimant that the advertisements for his position for the 2009 – 2010, 2010 – 2011 and 2011 – 2012 school years were on the school district's website, Claimant looked at them, and Claimant applied for the position for each of those school years. NT at 182, 183, 184.

77. At no time between 1998 and 2012 did Claimant ask the SDP to verify in writing or otherwise that his post-retirement return to employment would not affect his pension; call PSERS himself to confirm that it would not affect his pension; or receive anything indicating that PSERS found his working for the SDP to be acceptable. NT at 137, 178 – 179.

78. Periodically after his retirement in July 1998, whenever there was a change in the amount of Claimant's gross and/or net benefit amount, usually because the tax rate had changed, Claimant received a statement from PSERS ("benefit breakdown letter") explaining the change and indicating the new monthly benefit amount. Exhibits CL-6, CL-7, CL-8, CL-9 and CL-21; NT at 154 – 155, 156, 157, 158 – 159.

79. The only way PSERS can find out whether a school district is employing annuitants is through information provided by the employer, by the annuitant, or by a whistleblower. NT at 45.

80. Since neither Claimant nor the SDP informed PSERS of Claimant's post-retirement return to employment with the SDP in 1998, PSERS did not find out about it, had no reason to know about it, and had no way of finding out about it, until a whistleblower brought it to PSERS' attention. Exhibit PSERS-5; NT at 9, 45.

81. After receiving information from a whistleblower that the SDP had been employing numerous annuitants in unapproved capacities and had not reported their employment to PSERS, PSERS sent a letter to the SDP, dated February 6, 2012, asking for information about individuals who were working for the SDP, after retirement, in certain job titles. Exhibit PSERS-5; NT at 9.

82. In response to PSERS' letter dated February 6, 2012, the SDP, in an email to PSERS dated February 21, 2012, provided a list of individuals who were working for the SDP after retirement in the questioned capacities; the list included Claimant. Exhibit PSERS-6; NT at 10.

83. Although the SDP had requested preapproval of the use of some annuitants prior to PSERS' sending its letter dated February 6, 2012, the SDP had not requested preapproval of the use of the annuitants listed in the February 21, 2012 email, including Claimant. NT at 9, 36.

84. After receiving the email dated February 21, 2012, PSERS sent a letter dated April 4, 2012, to Andrew M. Rosen, Deputy, Employee Relations, at the SDP, in which PSERS requested specific information regarding the nature of the emergency, the SDP's efforts to recruit non-annuitants, the year each annuitant began working after retirement, and copies of job advertisements, all of which comprise the information that PSERS routinely seeks when determining whether an annuitant is truly serving in an emergency capacity. Exhibit PSERS-7; Exhibit CL-4; Exhibit CL-5; NT at 11, 12.

85. Via a cover letter dated April 27, 2012, from Mr. Rosen, Claimant received a copy of PSERS' letter dated April 4, 2012. Exhibit PSERS-9; NT at 147.

86. When Claimant learned, through receipt of the copy of PSERS' letter dated April 4, 2012, that PSERS was questioning his post-retirement return to employment with the SDP while Claimant continued to receive an annuity from PSERS, Claimant resigned from his employment with the SDP, effective June 30, 2012. NT at 148, 159.

87. In August 2012, Claimant entered into an independent contract agreement to act as a consultant with Phoenix Capital Partners, an arrangement which PSERS' representative, Mr. Peechatka, agreed did not jeopardize Claimant's pension entitlement, through which Claimant provided the same revenue and cash flow projections to the SDP that he had previously performed in his post-retirement employment with the SDP from the 1998 – 1999 through the 2011 – 2012 school years. Exhibit CL-22, page 5, paragraph 22; NT at 149 – 150.

88. From 2012 until 2014, when Ms. Ward left the SDP, Ms. Ward continued to work with Claimant, although during that time, he was employed by a third party under a consulting agreement. NT at 119.

89. Between the time of PSERS' letter dated April 4, 2012 and a subsequent letter from the SDP dated October 3, 2012, PSERS allowed the SDP additional time in which to respond to PSERS's inquiry and provide additional justification for Claimant's post-retirement return to employment with the SDP. NT at Exhibit PSERS-8; Exhibit PSERS-10; Exhibit PSERS-11; NT at 14, 17, 19, 20.

90. By letter dated November 8, 2012, PSERS notified Claimant of the following:

a. PSERS had determined that Claimant's post-retirement return to employment with the SDP since 1998 "was not rendered in an approved capacity as per the [Retirement Code];"

b. PSERS was stopping Claimant's retirement benefit effective with his November 2012 benefit payment;

c. PSERS was rescinding Claimant's retirement because he did not have a 90-day break in service before his return to employment with the SDP;

d. PSERS was calculating the appropriate debits and credits to be placed on Claimant's account as a result of his return to active employment;

e. Once Claimant's public school employment has ended, if Claimant desired to receive a retirement benefit from PSERS again, Claimant must submit an Application for Retirement; and

f. Claimant had a right to appeal to PSERS' Executive Staff Review Committee ("ESRC").

Exhibit PSERS-12; NT at 22 – 23.

91. Claimant received retirement benefits from PSERS from July 1998 until November 2012. NT at 23.

92. From July 1998 through November 2012, neither Claimant nor the SDP remitted retirement contributions to PSERS. NT at 59 – 60.

93. PSERS determined that Claimant's retirement should be rescinded rather than treated as a return to service because Claimant's return to service less than 90 days after retiring meant he did not have a bona fide break in service. Exhibit PSERS-12; NT at 27 – 28.

94. In determining whether or not an annuitant who returns to service has a bona fide break in service, PSERS generally relies on there being a 90-day period between the date of retirement and the date of return, but that is not a hard and fast rule, and it is possible someone could have a bona fide break in service if that period is less than 90 days. NT at 26.

95. PSERS' 90-day break in service rule is an internal rule which has not been published anywhere. NT at 50.

96. When PSERS rescinds a retirement benefit, the account is treated as if the member never retired, and all of the benefits received are owed back to PSERS. NT at 24.

97. When a member is returned to service, the benefit is frozen and a different calculation is performed that may be more beneficial to the member and additionally, the repayment does not include contributions and interest as part of the debt. NT at 25, 28.

98. If Claimant had a break in service but did not return to service in an approved capacity, then his benefit would be recalculated as a return to service, which may increase his monthly benefit because if he worked at least three years after his return, he could eliminate the effect of the frozen annuity. NT at 28.

99. By letter dated November 14, 2012, PSERS notified Claimant that as a result of the rescind, he owed $808,180.42, an amount which PSERS later reduced after determining that medical insurance and premium assistance should not be included in the amount of overpaid annuity to be recovered. Exhibit PSERS-13; NT at 24, 32.

100. On December 3, 2012, Claimant filed a new Application for Retirement with PSERS, indicating an effective date of retirement of June 29, 2012, the last day for which the SDP paid him. Exhibit PSERS-14; NT at 29.

101. By Statement of Amount Due dated December 4, 2012, PSERS informed Claimant that he owed PSERS $48,636.89 for 7.80 years of unreported and uncredited service that he rendered with the SDP from the 1998 – 1999 through the 2011 – 2012 school years. Exhibit PSERS-15; NT at 30.

102. PSERS processed Claimant's new Application for Retirement based on his having 37.96 years of service, and subsequently informed Claimant that he was overpaid $650,711.26 in benefit payments received after his return to service date in the 1998 – 1999 school year. Exhibit PSERS-16; NT at 31 – 32.

103. PSERS' rescission of Claimant's annuity, followed by Claimant's re-retirement, resulted in a reduction of Claimant's monthly annuity from $3321.61 (the gross amount set forth in his January 2009, December 2009, December 2010 and January 2012 benefit breakdown letters) to $1,384.66 (the amount set forth in his December 20, 2012 finalized benefit letter), which is a reduction of more than 5%. Exhibit PSERS-16; Exhibits CL-6 through CL-9.

104. By letter dated January 30, 2013, Claimant filed a timely appeal to the ESRC of PSERS' determination; in his January 30, 2013 letter, Claimant indicated that he first returned to employment with the SDP in mid- to late August 1998. Exhibit PSERS-17; NT at 33.

105. Following Claimant's appeal to the ESRC, the SDP, by letter dated February 13, 2013, submitted additional justification for using annuitants, including Claimant, but the SDP never requested a return to service for any of the annuitants mentioned in the letter, including Claimant. Exhibit PSERS-18; NT 34 – 35, 36.

106. By letter dated June 18, 2013, the ESRC notified Claimant that it had denied his appeal based on its determination that Claimant's post-retirement employment with the SDP, beginning in the 1998 – 1999 school year and ending in the 2011 – 2012 school year, was not rendered in an emergency capacity under section 8346(b) of the Retirement Code; the letter also notified Claimant of his right to appeal to the Board. Exhibit PSERS-19 and Attachment A thereto; NT at 36.

107. On July 16, 2013, Claimant filed an Appeal and Request for Administrative Hearing. Exhibit CL-22.

108. On August 5, 2013, PSERS filed its Answer to Claimant's Appeal and Request for Administrative Hearing. Exhibit CL-23.

109. A hearing on the appeal was held on May 18, 2015, before Hearing Examiner Ruth D. Dunnewold. NT, *passim.*

110. Claimant was present and represented by counsel at the hearing, and had the opportunity to be heard, cross-examine witnesses, make a closing statement for the record, and file a post-hearing brief in support of his appeal. NT at 5 and *passim.*

CONCLUSIONS OF LAW

1. Claimant was afforded notice and an opportunity to be heard in connection with his appeal. Finding of Fact 110.

2. Claimant failed to demonstrate by a preponderance of the evidence that his return to school service during the 1998 – 1999 school year was the result of an emergency. Findings of Fact 1 – 92.

3. Claimant had a bona fide break in service between his retirement on July 11, 1998 and his post-retirement return to the employment of the SDP in August or September 1998. Findings of Fact 1 – 92.

4. Claimant's bona fide break in service was followed by a non-emergency return to service under 24 Pa.C.S. § 8346(a). Findings of Fact 1 – 92.

5. Because Claimant had a non-emergency return to service under 24 Pa.C.S. § 8346(a) when he returned to employment with the SDP in the fall of 1998 and kept working part time continuously for the SDP until he re-retired in 2012, he had no other returns to service between 1998 and 2012, and consequently, the "shortage of other personnel" type of permissible return to school service, which only came into existence in 2004, does not apply to Claimant. Findings of Fact 1 – 92.

6. Claimant failed to demonstrate by a preponderance of the evidence that he satisfies all four prongs of the Retirement Code's waiver-of-adjustment provision, 24 Pa.C.S. § 8303.1(a), so he does not qualify for a waiver based on "undue hardship." Findings of Fact 1 – 92.

7. Claimant failed to demonstrate by a preponderance of the evidence that the essential elements of estoppel – an inducement of a party to believe that certain facts exist, an act of justifiable reliance upon that belief and a detriment to the actor – exist in this case. Findings of Fact 1 – 92.

DISCUSSION

Claimant's primary argument is that he permissibly returned to school service with the SDP in 1998 as an annuitant under section 8346(b) of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"), 24 Pa.C.S. § 8346(b), and for that reason, he should not suffer the loss of his annuity. At the time of Claimant's retirement and subsequent return to employment with the SDP in 1998, section 8346(b) provided as follows:

* * *

> (b) Return to school service during emergency.—When, in the judgment of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers, an annuitant may be returned to school service for a period not to exceed 95 full day sessions in any school year without loss of his annuity. In computing the number of days an annuitant has returned to school service, any amount of time less than one-half of a day shall be counted as one-half of a day.

* * *

24 Pa.C.S. § 8346(b) (1991) (amended 2004). Under the terms of this provision as it stood in 1998, an annuitant could return to service without the loss of his annuity in only two situations: (1) where an emergency creates an increase in work load such that there is a serious impairment of service to the public; or (2) in the event of a shortage of appropriate certified teachers. Since Claimant was not a teacher, this second type is clearly inapplicable. Accordingly, the focus here must be on the first type of permissible return ("emergency return").

PSERS' ability to override the judgment of the employer as to the existence of an emergency

Before examining the evidence to discern why it does not support the existence of all of the elements of an emergency return, there is a threshold issue to address. That threshold issue lies in Claimant's argument that PSERS acts without authority and ignores a legislative mandate when it reviews the school district's decision that an emergency existed which justified Claimant's post-retirement return to employment with the SDP. In making that argument, Claimant disregards the fact

that the issue already has been decided by the Commonwealth Court, in the case of *Baillie v. Public School Employees' Retirement Board*, 993 A.2d 944 (Pa. Cmwlth. 2010).

The claimant in *Baillie* retired on a Friday and then returned to school service the following Monday under a new employment contract, based on his employer's determination that his retirement created an emergency within the meaning of section 8346(b). The Board determined that Baillie had not been recalled from retirement for an emergency, and Baillie appealed. On appeal to the Commonwealth Court, Baillie contended, among other things, that PSERS did not have the authority to review the employer's decision that an emergency warranted his temporary return to service. *Baillie*, 993 A.2d at 948. However, the Commonwealth Court found that, while the employer may make the initial determination that an emergency exists, the final decision for matters affecting disbursements to annuitants must rest with PSERS, because PSERS would breach its fiduciary duty under the Retirement Code if PSERS allowed a member to receive an annuity after returning to school service under circumstances that do not constitute an "emergency." *Id.* at 950. In short, the court held that PSERS has the authority to review whether a public employer's decision to return a retired employee to work was, in fact, done on the basis of an emergency as defined in section 8346(b) of the Retirement Code. *Id.*

Claimant attempts to distinguish *Baillie* on its facts. However, the issue of PSERS' authority under the Retirement Code is an issue of law that is not fact-dependent. Determining PSERS' authority under the law is a matter of statutory construction – a question of law, *see Com. v. Diego*, 119 A.3d 370, 373 (Pa. Super. 2015) – with the court's object being to construe the language of the Retirement Code and discern its meaning. *Tritt v. Cortes*, 851 A.2d 903 (Pa. 2004). The court's conclusion of law on that question is not dependent on the facts, because the interpretation holds true regardless of the facts in any given case. Therefore, the Commonwealth Court's holding in *Baillie* must apply here, and it unquestionably establishes that PSERS has the authority to review whether the

SDP's decision to return Claimant to work was, in fact, done on the basis of an emergency as defined in section 8346(b) of the Retirement Code.

Emergency/bona fide recruitment efforts

With PSERS' statutory authority established, the next step is to consider whether the evidence supports the finding that Claimant's post-retirement return to employment with the SDP met all of the requisite elements for an emergency return to school service under section 8346(b). The Claimant bears the burden of establishing those facts upon which he relies in order to prevail. *Wingert v. State Employes' Retirement Bd.*, 589 A.2d 269 (Pa. Cmwlth. 1991). Additionally, the degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence, *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), which is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the proponent's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950).

The essential elements of an emergency return to school service under section 8346(b) are (1) there is an emergency (2) which creates an increase in the work load (3) such that there is a serious impairment of service to the public. Claimant argues that his retirement was the emergency and that it created an increase in the work load. However, the evidence supports neither the existence of the first element, an emergency, nor the existence of the second element, an increase in the work load.

Other than technical words and phrases, all of the words and phrases used in any legislation are to be construed according to their common meaning and accepted usage. Statutory Construction Act of 1972, 1 Pa.C.S. § 1501 *et seq.*, at § 1903; *Allstate Insurance Company v. Heffner*, 421 A.2d 629 (Pa. 1980). When a statute does not define a term, it is acceptable practice to resort to the dictionary definition in order to determine the term's common meaning and accepted usage. *C.f. Commonwealth*

v. Cahill, 95 A.3d 298, 301 – 302 (Pa. Super. 2014); *Hankin v. Upper Moreland Township*, 502 A.2d 109, 111 (Pa. Cmwlth. 1986). The Retirement Code does not define "emergency," so the dictionary definition may be consulted for the term's common meaning.

A review of several dictionaries indicates that "emergency" may be defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action. . . an urgent need for assistance or relief,"[7] "[a] serious, unexpected, and often dangerous situation requiring immediate action,"[8] or "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action."[9] From these uniform definitions, it is clear that an emergency is sudden, unexpected, unforeseen, and requires immediate action. The term "emergency" does not, therefore, refer to a voluntary act of retirement, with significant advance notice, where the retiree is able to work and, in fact, continues to work in the same job. *Account of Dr. John K. Baillie*, Docket No. 2008-01, at 36 (PSERB June 17, 2009).

In *Account of Dr. John K. Baillie*, (the PSERB decision that the Commonwealth Court upheld in *Baillie, supra,* 993 A.2d 944), the Board determined that no emergency existed where the claimant apprised his employer of his retirement three and a half months in advance and the employer did not replace the claimant until the following school year. *Id.* at 36. Furthermore, the Board held that "when the occurrence is under the control of the individual – such as Claimant's sudden decision to retire – and the individual continues to be available and willing to work, it cannot be said that an emergency exists as to that individual." *Id.*

That reasoning is equally applicable here. Claimant had worked for the SDP for 30 years, and the enactment of the early retirement provision in April 1998 made retirements of such long-tenured staff members likely, as opposed to unexpected. On top of that, Claimant in May 1998 advised the

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[7] *Merriam-Webster* (Oct. 7, 2015), http://www.merriam-webster.com/dictionary/emergency.
[8] *Oxford Dictionaries* (October 7, 2015), http://www.oxforddictionaries.com/us/definition/american_english/emergency.
[9] WEBSTER'S NEW WORLD DICTIONARY 444 (3d coll. ed. 1994).

SDP that he would be retiring, and he set a retirement date in July 1998, approximately two months down the road. The consequences of an announced retirement in such a situation are not sudden or unexpected. Additionally, as in *Account of Dr. John K. Baillie*, the time frame for Claimant's retirement allowed the SDP some time to address the upcoming vacancy prior to Claimant's retirement. *Account of Dr. John K. Baillie* at 37. Therefore, Claimant's retirement was not sudden, unexpected, or unforeseen.

Moreover, despite the fact that, in the SDP's words, Claimant's work was "vital to the financial mission of the District," Exhibit PSERS-10 at page 5, the SDP had no succession plan in place, allowed Claimant's job duties to go unperformed for at least six weeks after his retirement, and did not do anything to fill Claimant's shoes until late August or September 1998, when Ms. Ward realized that Claimant's retirement was a big headache for her, and she wanted him back. It is difficult to believe, given these facts, that the SDP considered Claimant's retirement to be an emergency. Based on this evidence, then, Claimant's announcement of his retirement in May 1998 and his subsequent retirement in early July 1998 did not fall within the common definition of "emergency," because those events clearly did not require or engender immediate action on the part of the SDP. As noted in *Account of Dr. John K. Baillie*, the term "emergency" does not refer to a voluntary act of retirement, with significant advance notice, where the retiree is able to work and, in fact, continues to work in the same job. *Account of Dr. John K. Baillie* at 36.

Claimant further argues that this was an emergency because the SDP made bona fide efforts to replace him but faced so many challenges that it never found a suitable replacement. However, this argument must be rejected, because it is contrary to prior case law. In *Account of Dr. John K. Baillie*, claimant Baillie similarly focused on the shortage of available candidates to fill his position after his retirement and the many challenges facing the employer in searching for a suitable replacement candidate. The Board, however, determined that the factors on which Baillie focused were irrelevant

to the way the Board approached such a case. Instead, the Board's approach focused on how the employer would have behaved if the annuitant had retired and been unable to return to work. In such a situation, the Board believed, the employer would have found a timely replacement, either temporary or permanent, because it would not have been able to rely on the annuitant's return. *Account of Dr. John K. Baillie* at 57 – 58. Clearly, the SDP did not act in such a fashion here. It would have made such an effort if a true emergency had existed. *Account of Dr. John K. Baillie* at 50. Therefore, the evidence does not support the finding that an emergency existed.

As to the existence of an increase in work load, the second element of an emergency return to school service under section 8346(b), Claimant argues that the SDP made the judgment that an emergency existed, necessitating the SDP's request that Claimant return to work part time as an annuitant in the 1998 – 1999 school year and for every school year thereafter through the 2011 – 2012 school year, in order to provide critical services to the SDP which no non-retiree could provide. Claimant's Post-Hearing Brief at 14. In other words, Claimant asserts that his retirement, coupled with the SDP's inability to find a non-retiree to fill his shoes, resulted in a work load only he could address, thereby *creating* the emergency under which he returned to post-retirement employment with the SDP.

When he makes this argument, however, Claimant erroneously reverses the actual statutory language and improperly changes its meaning. In the actual language of the emergency return to service provision of the Retirement Code, an "emergency *creates* an increase in the work load." 24 Pa.C.S. § 8346(b) (emphasis added). **The work load does not create the emergency.** Indeed, in *Account of Dr. John K. Baillie*, the Board pointed out this very thing: the Retirement Code's language requires that an emergency creates an increase in the work load, and not that an increase in work load creates the emergency. *Account of Dr. John K. Baillie* at 49. So Claimant's argument that his retirement resulted in a work load that created an emergency for the SDP must be rejected as well.

Even if, for the sake of argument, Claimant's retirement could properly be characterized as an emergency, the evidence does not support the finding that there was an *increase* in the work load within the SDP as a result of Claimant's retirement. For example, the SDP's handling of Claimant's vacant position does not suggest that an increase in work load occurred. As already noted, the SDP had no succession plan in place, allowed Claimant's job duties to go unperformed for a lengthy period after his retirement, and did nothing to address his vacant position until late August or early September 1998, when Ms. Ward realized that Claimant's retirement was a big headache for her and she wanted him back. The work load remained the same; the thing that changed was that neither Claimant nor anyone else was there to handle it. An increase in work load is a *required* consequence of an emergency under section 8346(b), and as discussed above, is the second essential element of an emergency return. Here, that second essential element is missing.

Since the first two elements of such an emergency return are missing, it is unnecessary to reach the question of whether the third element, serious impairment of service to the public, exists. The evidence simply does not support the finding of two of the three elements essential to an emergency return. It follows that Claimant's return to service in the fall of 1998 was not a permissible return under section 8346(b).

Furthermore, since there was no emergency return in 1998, when Claimant had actually retired, there was certainly no such permissible return in subsequent school years. Because Claimant continually returned to perform the same part time duties in subsequent school years, the SDP had even more time to find a replacement, whether by hiring an employee or locating a company to which it might subcontract Claimant's former responsibilities.[10] But the SDP did not even begin advertising Claimant's position until approximately 2008, and Claimant actually applied for it in subsequent

[10]In March 1999, Claimant began working for Foundations, an educational company which provided charter schools with services similar to those he provided to the SDP, so subcontracting out such services was not unheard of in the school years subsequent to 1998 – 1999.

school years. These circumstances certainly evidence the SDP's *preference* for having Claimant continue in the same role, but the SDP's preference is not an emergency for retirement purposes under 24 Pa.C.S. § 8346(b). Nor is PSERS required to recognize that preference as an emergency. *Account of Dr. John K. Baillie* at 57. The record simply does not support the existence of an emergency in any of the school years during which Claimant continued to work part time after his 1998 retirement.

Bona fide retirement

Under the reasoning in *Account of Dr. John K. Baillie*, Docket No. 2008-01, where a post-retirement return to employment occurs without the existence of an emergency, the retirement is either a sham, paper retirement, or the post-retirement return is a return to service within the meaning of 24 Pa.C.S. § 8346(a).[11] *Account of Dr. John K. Baillie* at 57. Accordingly, the next question in this case is whether Claimant had a break in service before he returned to employment with the SDP after his July 1998 retirement. If there was no break in service, then Claimant's retirement was a sham, paper retirement, as in *Account of Dr. John K. Baillie*, and PSERS' decision to rescind Claimant's retirement was appropriate. However, if there was a break in service, Claimant's post-retirement return to employment with the SDP was a return to service under the Retirement Code at 24 Pa.C.S. § 8346(a), and the frozen annuity provision there would apply.

PSERS argues that Claimant did not experience a bona fide break in service and that consequently, Claimant's post-retirement return to employment with the SDP "was, in reality, a

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[11] In 1998, section 8346(a) read as follows:

(a) General rule.--If an annuitant returns to school service or enters State service and elects multiple service membership, any annuity payable to him under this part shall cease and in the case of an annuity other than a disability annuity the present value of such annuity, adjusted for full coverage in the case of a joint coverage member who makes the appropriate back contributions for full coverage, shall be frozen as of the date such annuity ceases. An annuitant who is credited with an additional 10% of membership service as provided in section 8302(b.2) (relating to credited school service) and who returns to school service, except as provided in subsection (b), shall forfeit such credited service and shall have his frozen present value adjusted as if his 10% retirement incentive had not been applied to his account. In the event that the cost-of-living increase enacted December 18, 1979 occurred during the period of such State or school employment, the frozen present value shall be increased, on or after the member attains superannuation age, by the percent applicable had he not returned to service.

* * *

(footnote continued on next page)

continuation of his previous service with [the] SDP." PSERS' Brief to the Hearing Examiner ("PSERS' Brief") at 26. The Retirement Code states that a member of the retirement system is entitled to receive an annuity "upon termination of service." *Baillie, supra*, 993 A.2d at 951 (citing 24 Pa.C.S. § 8346(a)). Consistent with that requirement, PSERS' witness, Troy Peechatka, testified that a bona fide break in service is a bona fide termination from employment which allows the retired employee to become an annuitant and begin receiving benefits. NT at 25 – 26. Furthermore, as PSERS points out, whether an employee has severed his connection with his employer is a question of fact. PSERS' Brief at 24. Similarly, in *Account of Dr. John K. Baillie*, the Board indicated that the issue of whether Baillie's return to service was in reality a continuation of his previous service with his employer "is very fact-based and does not lend itself to the enumeration of broad general policies." *Account of Dr. John K. Baillie* at 47.

Nonetheless, PSERS, in analyzing this particular case of a post-retirement return to employment, relies on a broad general policy, embodied in PSERS' stated rule that at least 90 days must elapse between the date of retirement and the return to employment in order to raise the presumption that a bona fide termination from employment and a bona fide break in service have occurred. PSERS' Brief at 24. If there is a difference of less than 90 days, PSERS generally will not view the termination as a bona fide break in service. *Id.*

Applying this broad general rule as if it has no exceptions is problematic for several reasons. First, nowhere is there any indication of a source for, or a written implementation of, PSERS' 90-day rule, so PSERS has not given notice of it anywhere. Indeed, the Executive Staff Review Committee ("ESRC") decision in this matter did not refer to any such rule. Exhibit PSERS-19. Also, as Mr. Peechatka testified, the rule is not set forth in the Retirement Code or in any PSERS regulation, NT at 50, and while he believed it to be in existence at the time he began working for PSERS a little over

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24 Pa.C.S. § 8346(a) (1992) (amended 2001).

eight years ago, he could not point to any PSERS publication which enunciated the rule. NT at 50 – 51. In fact, in the section of the 2000 Handbook admitted into evidence at the hearing, entitled "Employment After Retirement," there is no reference whatsoever to any 90-day rule. Exhibit CL-1, pages 34 – 35. Nor did the Board ever mention such a rule in its decision in *Account of Dr. John K. Baillie*. Moreover, Mr. Peechatka testified that PSERS' 90-day rule is *not* a hard and fast rule, but is applied depending on the facts, and he added that it is possible for someone to have a bona fide break in service if there are fewer than 90 days between retirement and a post-retirement return to employment. NT at 26.

In support of its 90-day rule, PSERS cites *Chickey v. U.C.B.R.*, 332 A.2d 853 (Pa. Cmwlth. 1975) and *Ortiz v. U.C.B.R.*, 400 A.2d 685 (Pa. Cmwlth. 1979), two Unemployment Compensation Board of Review cases. But *Chickey* and *Ortiz* are inapplicable to this situation for several reasons. These two cases focused on whether school teachers, who had a reasonable expectation of returning to their school employment in the fall, after a summer break, were eligible for unemployment compensation. Ultimately, the court determined that, because the school teachers had an understanding that they would return to their teaching jobs at the beginning of the next succeeding school year, they were not "available for work" within the meaning of the Unemployment Compensation Law. *Chickey, supra*, 332 A.2d at 855 – 856; *Ortiz, supra*, 400 A.2d at 688 – 689. They were, therefore, ineligible for unemployment compensation. *Chickey,* 332 A.2d at 857 – 858; *Ortiz*, 400 A.2d at 689.

Nowhere in either of these U.C.B.R. cases did the Commonwealth Court make any statement that remotely resembles PSERS' rule that at least 90 days must elapse between the date of retirement and the return to employment in order raise the presumption that a bona fide termination from employment and a bona fide break in service have occurred. Indeed, in *Chickey* and *Ortiz*, the court neither mentioned nor examined the length of time that the school teachers were on summer break. Rather, the court looked at whether the school teachers' temporary absence from duty, where the

employees were neither actively working nor receiving compensation from the employer, but contemplated returning to the employer's active work force at a specified date in future, constituted availability for suitable work, which would make them eligible for unemployment compensation. In other words, the key to whether the school teachers were employed, or separated from their employer (and therefore eligible for unemployment compensation), had nothing to do with the length of time they were on break, and everything to do with their expectation of returning to their jobs after the break had ended. If, therefore, these cases have any value to an analysis of the facts in this case, that sole value is to suggest that, in determining whether Claimant had truly severed his employment relationship with the SDP at the time he retired in 1998, it is necessary to examine Claimant's expectation of returning to the job from which he had just retired.

In addition to *Baillie, supra*, 993 A.2d 944, PSERS cites two federal Tax Court cases, *Estate of Fry v. Commissioner*, 19 T.C. 461 (1952) and *Reinhardt v. Commissioner*, 85 T.C. 511 (1985), in support of its position that Claimant never severed his connection with the SDP and, consequently, never had a bona fide break in service. The courts in *Baillie, Fry* and *Reinhardt* all closely examined their individual facts to determine if the employee at issue had truly severed his connection with his employer. The commonality among those three cases was the fact that each employee premeditated a contrived retirement and either returned to the position from which he had purportedly retired within less than a week of the retirement date, *see Baillie* and *Reinhardt*, or never ceased receiving his salary and continued to provide various services to the employer despite having "retired." *See Fry*. Therefore, the Commonwealth Court in *Baillie*, and the Tax Court in *Fry* and *Reinhardt*, determined that the employees in those matters had never severed their connections with their respective employers, making their purported retirements nothing but shams.

Given the courts' close examination of the facts in *Baillie, Fry* and *Reinhardt*, and coupling the direction derived from those cases with the fact-based determination rendered in *Account of Dr. John*

K. Baillie and the lack of any support for the existence of a hard and fast 90-day rule such as PSERS posits, there is no basis for blindly applying PSERS' 90-day rule in this case without first examining the facts to determine if Claimant had a bona fide termination from employment and a bona fide break in service. And a focus on the facts of Claimant's case results in the determination that it is distinguishable from *Baillie, Fry* and *Reinhardt* because there is no evidence here of a premeditated, contrived retirement and return to the position within a few days.

Instead, the facts adduced at the hearing in this matter indicate that in May 1998, although he had not really been thinking about retirement prior to that, Claimant decided to take advantage of the early retirement allowed by Act 41 of 1998, so he advised the SDP Budget Director, Jack Myers, that he would be retiring. At that time, Claimant was 52 years old, had reached 30 years of service credit with PSERS, and wanted to get away from numbers completely because he was "saturated" with them. When Claimant told Mr. Myers that he planned to retire, there were no discussions with Mr. Myers or with anyone else at the SDP about who would take on Claimant's responsibilities, nor did Claimant have any discussions with anyone at the SDP about returning to work at the SDP after he had retired.

On May 14, 1998, Claimant attended a PSERS Retirement Exit Counseling session. During the Retirement Exit Counseling session, Claimant was advised, with regard to work after retirement, that he could "work anywhere except for a PSERS employer," and that he could "work in a PA public school under emergency/teacher shortage provision. . . up to 95 days per school year without the pension being affected" but that "[a]fter 95 days, pension is frozen (Frozen Annuity) and retiree is re-enrolled in PSERS." Exhibit PSERS-1. On May 14, 1998, Claimant signed an Exit Counseling Checklist which included a checkmark indicating that a review of work after retirement had occurred. *Id.* Claimant then completed an Application for Retirement, dated May 20, 1998, and submitted it to PSERS. PSERS received Claimant's Application for Retirement on June 17, 1998.

Prior to his retirement, Claimant started showing some of the people in accounting how to do the budget and the SDP's Annual Financial Reports ("AFRs") to the State. Claimant's last day working at the SDP was July 10, 1998, and his effective retirement date was July 11, 1998. After Claimant's retirement in July 1998, no one else at the SDP took on Claimant's duties, including revenue projections. Claimant's retirement was "a big headache" for Ms. Ward because she had no one to go to at the SDP to provide her with the details and information necessary to a bond or note issue, and she did not know how she was going to pull all of the information together for a planned January 1999 bond issue.

In August or September, knowing Claimant was not there and she wanted him back, Ms. Ward proposed to Mr. Armbrister that she contact Claimant to see if he would be willing to "come back for a couple days." At that point, Ms. Ward did not know what Claimant would be willing to do, but she did not think he would want to come back full time because he wanted to be retired. Mr. Armbrister agreed Claimant could come back and help through a difficult time but stipulated that they would need to fix the problem by training someone else so that the SDP did not have to rely just on Claimant. Ms. Ward then contacted Claimant more than a month after he had last worked at the SDP, in the fall of 1998, and asked him to come back.

Claimant, who had decided he would be a bartender in his retirement, had gone to bartending school and secured a bartending job at the Drexelbrook Country Club. When Ms. Ward called to ask him to come back, Claimant hemmed and hawed, telling Ms. Ward he would have to talk it over with his wife, he would have to think about it, and he would get back to Ms. Ward. By then, Claimant had decompressed a little and could stand to see numbers again, so he called Ms. Ward two days later and agreed to come back "for a little while," anticipating that he would work 95 days or less as an annuitant during that fiscal year, with no intent of returning for more than that fiscal year.

These facts do not support a finding that Claimant's retirement and post-retirement return to employment with the SDP was premeditated or contrived. Neither do they support a finding that Claimant's post-retirement return to employment with the SDP happened within less than a week of his retirement, or that he never ceased receiving his salary despite his retirement. Rather, these facts indicate that Claimant fully intended to retire, went to trade school to acquire a new and different skill, and after his retirement, began working for a completely different employer, in an entirely different capacity than at the SDP. And Claimant was not particularly eager to return to the employ of the SDP when Ms. Ward approached him about it subsequent to his retirement. Based on these facts, Claimant had no expectation of returning to the job from which he had just retired (the standard enunciated in *Chickey* and *Ortiz, supra*), because he had entirely severed his connection with the SDP and embarked on a new career. Therefore, Claimant met his burden of demonstrating, by a preponderance of the evidence, that he had a bona fide break in service and fully severed his employment relationship with the SDP in July 1998, a month to six weeks prior to Ms. Ward's contacting him in the fall of 1998 and persuading him to return to the employ of the SDP "for a little while."

Shortage of other personnel

Claimant further argues that his employment by the SDP in the period from July 4, 2004 to his re-retirement in 2012 was an additional type of permissible return to school service, pursuant to which an annuitant will not suffer the loss of his annuity. That additional type of permissible return exists in the event of a shortage of "other personnel," and it was added to the Retirement Code by the Act of July 4, 2004, P.L. 504, No. 63 ("Act 63").[12] However, the facts indicate that Claimant returned to

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[12]Act 63 amended section 8346(b) to its present language, which reads as follows:

* * *

(b) Return to school service during emergency.--When, in the judgment of the employer, an emergency creates an increase in the work load such that there is serious impairment of service to the public or in the event of a shortage of appropriate subject certified teachers or other personnel, an annuitant may be returned to school service for a period not to extend beyond the school year during which the emergency or shortage occurs, without loss of his annuity. The annuitant shall not be entitled to earn any credited service, and no contributions may be made by the annuitant, the employer or the Commonwealth on account of such employment.

(footnote continued on next page)

school service at the SDP in the fall of 1998 and kept working part time continuously for the SDP until he re-retired in 2012. Logically, upon his return to work in the fall of 1998, he was no longer retired, and could have no new returns to service after that unless he re-retired. It follows that the "other personnel" type of permissible return to school service, which only came into existence long after Claimant's return to service in 1998, does not apply to Claimant.

Waiver

Claimant next argues that this case is an appropriate one in which to apply a waiver of adjustments under the Retirement Code. Under the Retirement Code, the Board is duty-bound to correct errors in a member's record upon discovering them, and to adjust payments accordingly. 24 Pa.C.S. § 8534(b).[13] However, the Board *may* waive an adjustment under section 8534(b) if (1) the adjustment or portion of the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant; (2) the adjustment was not the result of erroneous information supplied by the member, beneficiary or survivor annuitant; (3) the member had no knowledge or notice of the error before adjustment was made, and the member, beneficiary or survivor annuitant took action with respect to their benefits based on erroneous information provided by the system; and (4) the member, beneficiary or survivor annuitant had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a).[14] The use of the term "may" in

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[13] **24 Pa.C.S. § 8534. Fraud and adjustment of errors.**

* * *

(b) *Adjustment of errors.* – Should any change or mistake in records result in any member, beneficiary, or survivor annuitant 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.

[14] **24 Pa.C.S. § 8303.1. Waiver of adjustments.**

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section 8303.1(a) indicates that the waiver is discretionary with the Board. Also, Claimant must satisfy all four prongs of this waiver-of-adjustment provision in order to qualify for a waiver, and it is his burden to prove that he satisfies them. *White v. PSERB*, 11 A.3d 1, 6 – 7 (Pa. Cmwlth. 2010).

The first prong of the waiver-of-adjustment provision requires that the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant, i.e. Claimant. 24 Pa.C.S. § 8303.1(a)(1). In its regulations at 22 Pa. Code § 213.3a(a),[15] the Board defines "undue hardship," which is used in subsection (1) of section 8303.1(a), as either an adjustment that causes a reduction in excess of 5% of the monthly annuity, or an adjustment that results in the member's losing eligibility for a benefit other than an annuity. 22 Pa. Code § 213.3a(a)(1) and (2). The evidence in this matter indicates that PSERS' rescission of Claimant's annuity, followed by Claimant's re-retirement, resulted in a reduction of Claimant's monthly annuity from $3,321.61 to $1,384.66, which is a reduction of more than 5%. Accordingly, Claimant satisfies the first prong of the waiver-of-adjustment provision.

To satisfy the second prong of the waiver-of-adjustment provision, Claimant must prove that the adjustment was not the result of erroneous information supplied by the member, beneficiary or

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(a) *Allowance.* –Upon appeal by an affected member, beneficiary or survivor annuitant, the board may waive an adjustment or any portion of an adjustment made under section 8534(b) (relating to fraud and adjustment of errors) if in the opinion of the board or the board's designated representative:

(1) the adjustment or portion of the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant;

(2) the adjustment was not the result of erroneous information supplied by the member, beneficiary or survivor annuitant;

(3) the member had no knowledge or notice of the error before adjustment was made, and the member, beneficiary or survivor annuitant took action with respect to their benefits based on erroneous information provided by the system; and

(4) the member, beneficiary or survivor annuitant had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made.

* * *

[15] **22 Pa. Code § 213.3a. Waiver of adjustments.**

(a) To find that an adjustment made under section 8534(b) of the Retirement Code (relating to fraud and adjustment of errors) meets the undue hardship test under section 8303.1(a)(1) of the Retirement Code (relating to waiver of adjustments), the Board requires that either:

(1) The adjustment causes a reduction in excess of 5% of the monthly annuity.

(2) The adjustment results in the member losing eligibility for a benefit other than an annuity.

(footnote continued on next page)

survivor annuitant. 24 Pa.C.S. § 8303.1(a)(2). The evidence relevant to this prong indicates that prior to his retirement in 1998, Claimant attended a PSERS retirement exit counseling session, during which he was advised, with regard to work after retirement, that he could work anywhere except for a PSERS employer, he could work in a Pennsylvania public school under the emergency/teacher shortage provision for up to 95 days per school year without his pension being affected, and after 95 days, his pension would be frozen and he would be re-enrolled in PSERS. Therefore, Claimant knew about both the Retirement Code's 95-day restriction on work as an annuitant and the impact of a post-retirement return to work.

Nonetheless, when he returned to employment with the SDP post-retirement, rather than proactively finding out for himself, by contacting PSERS, if the SDP was jeopardizing his retirement by asking him to come back, Claimant just assumed the SDP had his best interests at heart. In fact, Complainant failed to contact PSERS to inquire in any way, shape or form about the permissibility of his return to employment. Likewise, the SDP did not contact PSERS about the propriety of Claimant's post-retirement return to employment, even though, in 2007, the SDP and PSERS began discussions regarding the SDP's employment of PSERS annuitants as tutors under the Retirement Code's emergency service provision at 24 Pa.C.S. § 8346(b)(1).

Because neither Claimant nor the SDP notified PSERS about Claimant's post-retirement return to employment with the SDP, therefore, PSERS did not find out about it, and had no way of finding out about it, until a whistleblower brought it to PSERS' attention in 2012. So, while PSERS' adjustment to Claimant's retirement in 2012 was not the result of erroneous information supplied by Claimant, it *was* the result of his failure to supply pertinent information to PSERS despite his knowing about the possible impact – in the form of a frozen annuity – a return to service could have. The failure

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to supply pertinent information is not quite the same thing as supplying erroneous information to PSERS, so Claimant technically satisfies the requirements of section 8303.1(a)(2).

However, his failure to supply pertinent information is nonetheless a factor that militates *against* a discretionary waiver. And while there is no statutory requirement that Claimant or the SDP notify PSERS about a post-retirement return to employment, the fact that Claimant knew about the possible impact on his PSERS annuity should have caused Claimant, reasonably, to question whether his post-retirement return to employment with the SDP might have a negative impact on his annuity. This is analogous to the situation in *White, supra,* 11 A.3d at 9 – 10, where the Commonwealth Court determined that the fact that a claimant received disparate estimates of retirement benefit on several occasions was sufficient basis to cause the claimant reasonably to question all of the estimates, despite the fact that there is no statutory requirement that a claimant specifically question disparities in estimates prepared by PSERS.

To satisfy the third prong of the waiver-of-adjustment provision, Claimant must prove that he had no knowledge or notice of the error before the adjustment was made and that he took action with respect to his benefits based on erroneous information provided by PSERS. 24 Pa.C.S. § 8303.1(a)(3). On this question, the evidence indicates that in 2000, Claimant received the 2000 Handbook, which he read. The 2000 Handbook, in a discussion about permissible returns to employment in the limited circumstances of an emergency and a shortage of appropriate subject certified teachers, indicated that

> The employer makes the determination that these elements have been satisfied. However, *PSERS reserves the right to review an employer's determination that a qualifying emergency or shortage exists.*

Exhibit CL-1, page 34 (emphasis added). Despite this notice, Claimant made no inquiries to see if PSERS had reviewed the SDP's determination that Claimant's post-retirement return to employment had occurred in a bona fide emergency. Furthermore, around 2008, Claimant became aware that an issue had arisen between PSERS and the SDP regarding the SDP's use of annuitants, but he did not

check with PSERS in 2008 to see if his return, in particular, was an issue. NT at 179. Instead, he continued to work for the SDP for another four years. Based on these occurrences, he had knowledge or notice of a possible error in 2000, through the 2000 Handbook, and in 2008, through his learning of the issues that had arisen regarding the SDP's use of annuitants. Both of these things occurred well before PSERS made the adjustment to his annuity in late 2012.

Nor is there any evidence that Claimant took action with respect to his benefits based on erroneous information provided by PSERS. In fact, the evidence indicates that at no time between his retirement in 1998 and his re-retirement in 2012 did Claimant check with PSERS about any impact that his post-retirement return to employment with the SDP might have on his benefits. Claimant has not, therefore, satisfied the third prong of section 8303.1(a).

To satisfy the fourth and final prong of the waiver-of-adjustment provision, Claimant must prove that he had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a)(4). As indicates above, the evidence indicates that around 2008, Claimant became aware that an issue had arisen between PSERS and the SDP regarding the SDP's use of annuitants, but he did not check with PSERS in 2008 to see if his own return was an issue. However, the fact that Claimant became aware of the issue in 2008 gave him reasonable grounds to believe that his post-retirement return to employment with the SDP might not be acceptable under the Retirement Code and that his retirement might be subject to correction for an error. Therefore, Claimant did not prove that he satisfies 24 Pa.C.S. § 8303.1(a)(4) either. Since he must satisfy all four prongs of section 8303.1(a) in order to qualify for a waiver, *White, supra,* 11 A.3d at 6, Claimant does not qualify for a waiver.

Even assuming, for the sake of argument, that Claimant had satisfied all four prongs of 24 Pa.C.S. § 8303.1(a), the facts do not, from the standpoint of exercising the discretion to grant a waiver under that provision, favor Claimant. That is, even if an "emergency" had existed in 1998, it was

unreasonable for Claimant to return to work in the 1998 – 1999 school year and continue to work each school year thereafter, for an additional 14 years, in the belief that the "emergency" still existed. Indeed, for the first six years, "emergency" was the only permissible reason for his return, under the Retirement Code.

Then, from 2004 to 2012, the "shortage of other personnel" permissible return was in effect, but at that point, Claimant had been contracting his services to charter schools through Foundations for five years and knew that there was another way in which the SDP could find someone, whether it was him or some other independent contractor, to fill the vacancy left by Claimant's absence. Additionally, although Ms. Ward did not have all the knowledge Claimant had, she was learning his duties after his return in 1998, had a basic understanding of Claimant's position and the duties that he performed, worked with him on analyzing legislation that could possibly impact the school district's budget in the next fiscal year, and was able to provide assistance with training possible replacements. NT at 116 – 117. And by 2002, Claimant was officially placed in Ms. Ward's department, under her direction, NT at 89, so Ms. Ward had, literally, years in which to learn how to do the functions Claimant was doing. Other trainees may have come and gone, but Ms. Ward was there the entire time and there is no indication that she could not have learned his functions. It was, therefore, not reasonable for either Claimant or the SDP to deem there to be a "shortage of other personnel" to fill his shoes from 2004 to 2012. These factors all militate against a discretionary waiver of the adjustment even if Claimant had satisfied all four prongs of the statutory provision permitting a waiver.

Estoppel

Nor are the elements of estoppel present in the record. Claimant cited *Finnegan v. Com., PSERB*, 560 A.2d 848 (Pa. Cmwlth. 1989), in support of his argument that PSERS is estopped from rescinding Claimant's retirement retroactive to July 11, 1998. The Commonwealth Court explained in *Finnegan* that

> [t]he essential elements of estoppel are: an inducement of a party to believe that certain facts exist, an act of justifiable reliance upon that belief and a detriment to the actor. *Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 457 A.2d 502 (1983).*

Finnegan, 560 A.2d at 850. In *Finnegan*, PSERS staff members repeatedly told Ms. Finnegan that she could purchase 15 years of out-of-state teaching and government service, which was erroneous, but which induced her to retire early in the belief she had the requisite amount of total credited service to make her eligible to do so. Missing in Claimant's case, however, is any statement made by anyone at PSERS which induced Claimant to enter into post-retirement employment by the SDP with the expectation that his annuity would not be impacted. There is no evidence that PSERS ever made any such statement; indeed, Claimant and Ms. Ward both testified that they never contacted, inquired of, or heard from PSERS with regard to Claimant's return to employment with SDP.

In support of his estoppel argument, Claimant asserts that PSERS' finalized benefit letter, dated March 11, 1999, *see* Exhibit PSERS-4, was a statement by PSERS that induced him to believe his annuity was safe despite his return to employment with the SDP after his retirement. He makes the same assertion about subsequent benefit breakdown letters from PSERS as to the amount of his annuity. But going forward from the time Claimant filed his Application for Retirement in May 1998, all of PSERS' actions, in processing Claimant's retirement and updating him with periodic benefit breakdown letters, were based on information which Claimant and the SDP had provided to PSERS. And everything Claimant and the SDP provided to PSERS indicated that Claimant had retired and had never returned to employment with the SDP after his retirement. Neither Claimant nor the SDP provided anything to the contrary.

The only way PSERS can find out whether a school district is employing annuitants is through information provided by the employer, by the annuitant, or by a whistleblower. NT at 45. As already remarked above, neither Claimant nor the SDP ever contacted PSERS about Claimant's post-retirement return to employment with the SDP. Therefore, until a whistleblower brought Claimant's

continued post-retirement employment to PSERS' attention in 2012, NT at 9, PSERS never knew about it, and had no reason to know about it. There is simply no way that PSERS' unwitting ignorance can magically transform PSERS' routine processing of Claimant's Application for Retirement and subsequent periodic benefit breakdown letters into an inducement or representation to Claimant to believe that PSERS had somehow learned about and approved of his post-retirement return to employment with the SDP.

Even if PSERS' routine processing of Claimant's Application for Retirement and subsequent benefit breakdown letters to Claimant could be seen as inducements or representations by PSERS, Claimant knew he had returned to post-retirement employment with the SDP, knew what the rules were on return to work after retirement, had read the 2000 Handbook, which stated that "PSERS reserves the right to review an employer's determination that a qualifying emergency or shortage exists," Exhibit CL-1, page 34, and knew he had never told PSERS about his return or inquired of PSERS about the propriety of his return. Under these circumstances, Claimant certainly had no reasonable justification for relying on PSERS' processing of his retirement and issuance of subsequent benefit breakdown letters as indicators that PSERS had approved of his post-retirement return to employment with the SDP. For all of the above reasons, the elements of estoppel simply do not exist in this case.

Claimant's return to service date

Based upon the determination, above, that Claimant met his burden of demonstrating, by a preponderance of the evidence, that he had a bona fide break in service and fully severed his employment relationship with the SDP in July 1998, a month to six weeks prior to his return to service with the SDP, PSERS must make actuarial adjustments to Claimant's account based on a frozen annuity, rather than on a rescission of retirement. Such a calculation requires an answer to the question of what date Claimant returned to work for the SDP in 1998. The parties were none too specific on this

issue, and eventually stipulated to the daily rate, $380.00, which the SDP paid to Claimant upon his initial return to work for the SDP in 1998. Using this rate and a review of all the other evidence in the record pointing to this date, it is possible to arrive at a reasonable presumed date of return for Claimant. The available evidence indicates as follows.

Claimant's last day of working at the SDP prior to his retirement was July 10, 1998, and his effective retirement date was July 11, 1998. NT at 121, 128, 171. In his initial appeal letter dated January 30, 2013, Claimant stated that he worked three to five days a week when he first returned to employment with the SDP, which he believed would make his start date mid- to late August 1998. Exhibit PSERS-17. He also testified that Ms. Ward first contacted him about coming back more than a month after he had last worked for the SDP. NT at 129. A month beyond July 11, 1998 would put him at August 11, 1998, so if his return date was more than a month after July 11, 1998, it had to be beyond August 11, 1998.

Claimant also testified that Ms. Ward contacted him in late August or early September about coming back, NT at 129, and Ms. Ward testified that she contacted him in September or the fall of 1998. NT at 68, 110. Claimant called her back two days later, or the next week, and agreed to return to employment with the SDP. NT at 70 and 129. Claimant agreed that he was not employed by the SDP for about six weeks. NT at 132. Claimant worked three to five days a week when he first returned to employment with the SDP, and after his return to employment with the SDP, Claimant received paycheck on October 7, 1998, in the gross amount of $9,120.00, for his pay since his return to employment. Exhibit PSERS-17. Initially upon his return, he worked at a flat daily rate of $380.00. Joint Exhibit 1.

When the gross amount of $9,120.00 is divided by the flat daily rate of $380.00, it yields 24 as the number of days which Claimant's first paycheck covered after his return to employment with the SDP. Exhibit PSERS-17; Joint Exhibit 1. Distributing the 24 days as if he had worked three days a

week yields an approximate starting date eight weeks prior to October 7, 1998, which would be August 12, 1998. However, that date is only one day more than a month after he first retired, so seems unlikely in light of his testimony that Ms. Ward first called him more than a month after he retired and his testimony that he was not employed by the SDP for six weeks. That date is also inconsistent with Claimant's testimony that Ms. Ward first contacted him in late August or early September and Ms. Ward's testimony that she first contacted him in September or fall 1998. So the available evidence does not support August 12, 1998 as the appropriate return date.

Distributing the 24 days as if Claimant had worked five days a week yields a starting date just shy of five weeks prior to October 7, 1998, which would be approximately September 1, 1998. That date would be consistent with Claimant's testimony that Ms. Ward first contacted him in late August or early September, as well as with his being contacted more than a month after he retired. However, it is not consistent with Claimant's testimony that he worked three to five days a week at first, since it is based on his working a nearly five full days a week from September 1 until October 7.

Distributing the 24 days by averaging three and five to obtain four days of work per week yields a starting date six weeks prior to October 7, 1998, which would be August 26, 1998. This is consistent with Claimant's testimony that Ms. Ward first contacted him in late August and with her contacting him more than a month after he retired. It also works out to more than three days a week some weeks and less than five days a week other weeks. Additionally, it is consistent with Ms. Ward's testimony that she contacted him in the fall of 1998 because, when discussing a school's schedule, most people view "fall" as starting when the new school year begins, rather than at the actual autumn equinox. It is also consistent with the statement that Claimant was not employed by the SDP for about six weeks after his retirement. NT at 132. Accordingly, the facts most logically support establishing August 26, 1998 as the date upon which Claimant returned to work at the SDP after retiring in July 1998. That is, therefore, the date which PSERS should utilize to calculate Claimant's frozen annuity.

CONCLUSION

PSERS is a creature of statute which derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). Consequently, Claimant has only those rights created by the Retirement Code and none beyond that. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burris v. State Employes' Retirement Board*,[16] 745A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board,* 622 A.2d 403 (Pa. Cmwlth. 1992).

Based on all of the above, the facts of record support the conclusion that Claimant had a true retirement, followed by a non-emergency return to service under 24 Pa.C.S. § 8346(a). The general rule enunciated in section 8346(a) is this: if an annuitant returns to school service, any annuity payable to him under the Retirement Code shall cease and in the case of an annuity other than a disability annuity, the present value of such annuity shall be frozen as of the date such annuity ceases. This provision dictates that an annuitant may not continue to receive retirement benefits if the annuitant returns to service under non-emergency conditions. Therefore, at the time Claimant returned to school service in the fall of 1998, his annuity was to cease by operation of law, and its present value was to be frozen. 24 Pa.C.S. § 8346(a); *see also Account of Dr. John K. Baillie* at 82, n.23. It follows that Claimant's account should have been frozen as of the date of his return to service, established in the Discussion above as August 26, 1998, and he must repay the annuity amounts he received, from that date until his re-retirement in 2012, by way of cash payment or actuarial debt. *Account of Dr. John K. Baillie* at 82, n.23.

In a prior case, the Board has held that the moment an annuitant returns to school service, his status as an annuitant for purposes of the Retirement Code ends "*by operation of law*" on the first day

[16]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. Employes' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

of his return, and that is true whether the return is in a full time or a part time capacity. *C.f. Account of Douglas Goerlitz*, Docket No. 2010-16, at 20 (PSERB October 13, 2011) (emphasis in original). This is because a PSERS member cannot simultaneously be an active member *and* an annuitant. *Id.* Accordingly, Claimant's annuity should have ceased, effective upon the date of his return to school service in the 1998 – 1999 school year, August 26, 1998, and the present value of his annuity should have been frozen as of that date. Yet Claimant continued to collect his annuity until 2012.

Under section 8521(e) of the Retirement Code, 24 Pa.C.S. § 8521(e), PSERS and its Board "stand in a fiduciary relationship to the members of the system regarding the investments and disbursements of any of the moneys of the fund." *Baillie, supra*, 993 A.2d at 949. Additionally, under the Retirement Code, PSERS is responsible for the "uniform administration" of the public school employees' retirement system. *Id., citing* 24 Pa.C.S. § 8502(h). The Retirement Code also "requires PSERS to correct all intentional or unintentional errors in members' accounts," which means "PSERS has the duty correct errors made by public school employers and to make actuarial adjustments to an individual member's benefit payments." *Baillie, supra*, 993 A.2d at 950, *citing* 24 Pa.C.S. § 8534(b). It follows that PSERS was correct in making actuarial adjustments to Claimant's account, but those actuarial adjustments should have been calculated as a frozen annuity, based on a true retirement, followed by a non-emergency return to service under 24 Pa.C.S. § 8346(a), rather than as a rescission based on a sham retirement and uninterrupted continuation of school service.

Based upon all of the foregoing, the following recommendation will be made to the Board:

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE:	:	
ACCOUNT OF LOUIS V. VOLPE	:	**DOCKET NO. 2013-22**
CLAIM OF LOUIS V. VOLPE	:	

RECOMMENDATION

AND NOW, this **9th** day of **February, 2016**, 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) **DENY** Claimant's request that Claimant's post-retirement employment with the School District of Philadelphia ("SDP") be deemed a return to school service during an emergency, without loss of annuity;

(2) **DENY** Claimant's request for a waiver of adjustments, under the Retirement Code at 24 Pa.C.S. § 8534(b);

(3) **AFFIRM** PSERS' determination that actuarial adjustments shall be made to Claimant's account; and

(4) **DIRECT** that PSERS' actuarial adjustments to Claimant's account shall be calculated as a frozen annuity, based on a true retirement, followed by a non-emergency return to service, under 24 Pa.C.S. § 8346(a), effective August 26, 1998, which continued, without any other returns to service, until Claimant re-retired in 2012.

Ruth D. Dunnewold
Hearing Officer

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