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

IN RE: ACCOUNT OF JEFFREY W. ROSENBERG
DOCKET NO. 2016-18
CLAIM OF JEFFREY W. ROSENBERG

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal. PSERS requests dismissal of Jeffrey W. Rosenberg's ("Claimant") Appeal and Request for Administrative Hearing, which requests that the \$12,500 lump sum payment he received in connection with a grievance be recognized as retirement-covered compensation for the 2010-2011 school year. PSERS asserts that there is no issue of material fact and thus PSERS is entitled to summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on October 26, 2017, and served a copy by First Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated October 26, 2017, PSERS notified Claimant that he had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. On November 21, 2017, Claimant filed a response ("Claimant's Reply").

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. *See Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the

party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying “(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.” Pa.R.C.P. No. 1035.3(a). “An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.” Pa.R.C.P. No. 1035.3(b).

In Claimant’s response to PSERS’ motion, Claimant asserts the following regarding PSERS’ proposed Memorandum of Facts:

1. PSERS’ recitation of facts numbered 1 through 3, 5 through 9, and 11 through 13 “appear accurate as individual details and occurrences of fact[.]” (Claimant’s Reply at 1)

2. Claimant does not have personal knowledge of PSERS’ Memorandum of Fact #4, but wishes to supplement the record with the following fact: “Upon receiving a *Normal Retirement Estimate* from PSERS dated April 16, 2015, Claimant inquired with an employee of the [School District of Philadelphia] SDP regarding the adjusted final average salary used by PSERS, who appeared to have no knowledge of the adjustment but indicated that the matter would be reviewed by SDP.”

3. Claimant objects to the Executive Staff Review Committee's ("ESRC") June 14, 2015 determination being contained in PSERS Memorandum of Fact # 10 to the extent such determination is being offered as a factual assertion or conclusion of law. (Claimant's Reply at 1-2)

The Board has carefully reviewed the entire record in this matter as well as Claimant's Reply and finds that there is not a genuine issue as to any material fact. Claimant's lack of personal knowledge of Memorandum of Fact #4 does not create a material issue of fact because his communication with SDP does not contradict the facts asserted by PSERS or raise additional facts needing to be resolved at an administrative hearing. Memorandum of Fact #10 provides a timeline and identification of the ESRC determination letter marked as PSERS-4, the contents of which speak for itself. Claimant's appeal of such determination is now before this Board for review and final determination. Thus, Claimant's objection regarding Memorandum of Fact #10 is unsubstantiated and no material issue exists regarding the ESRC determination.

Accordingly, the Board finds that there are no disputed material facts that would prevent this Board from considering PSERS' motion. The Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether the \$12,500 lump sum payment is retirement-covered compensation for the 2010-2011 school year.

FINDINGS OF FACT

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

1. In January 1977, Claimant was enrolled in PSERS through his employment with the School District of Philadelphia ("SDP").
2. In reviewing the account, PSERS' staff contacted the SDP on January 28, 2015 to request an explanation for a supplemental wage payment made to Claimant in the amount of \$12,693.57 that was reported to PSERS in March 2011. (PSERS MSJ, Memorandum of Fact #2; see also PSERS-4, Attachment A)

3. On February 5, 2015, the SDP confirmed that Claimant received a grievance payout of \$12,500; the SDP was unable to provide PSERS with additional information. (PSERS MSJ, Memorandum of Fact #3)

4. Prior to April 16, 2015, PSERS adjusted Claimant's account to remove the supplemental wages, and Claimant received an estimate reflecting the adjustment to the final average salary. (PSERS-3)

5. Upon receiving a *Normal Retirement Estimate* from PSERS dated April 16, 2015, Claimant inquired with an employee of the SDP regarding the adjusted final average salary used by PSERS, who appeared to have no knowledge of the adjustment but indicated that the matter would be reviewed by SDP. (Claimant's Reply)

6. Shortly thereafter, on May 5, 2015, Claimant filed an *Application for Retirement* with PSERS. (PSERS-1)

7. By facsimile dated June 11, 2015 and received June 15, 2015, the SDP followed up with PSERS providing additional information that the \$12,500 settlement payout related to an arbitration proceeding regarding Claimant's re-assignment to a teaching position at the Academy at Palumbo after the SDP's site selection process of 2010. The SDP informed PSERS that:

As [a] long-term employee, [Claimant] taught at the University City High School and was the athletic director.

After the [SDP]'s site selection process of 2010, [Claimant] was re-assigned to a teaching position at the Academy at Palumbo. This assignment did not include the additional responsibilities of athletic director. The arbitration ruling found that due to the reassignment, [Claimant] lost the opportunity to earn additional contract amounts of \$10,000.

(PSERS-2)

8. By letter dated June 22, 2015 and received by PSERS on June 24, 2015, Claimant appealed PSERS' adjustment asserting, among other things:

3. I lost my athletic director (AD) position. This position paid \$9132 per year. Because I coached, my AD compensation would have been \$6088. Over 2 years it would have been \$12,176. (I was able to pick up coaching positions at my next assignment.)

4. I was also denied 390 additional Promise Academy teaching hours at the hourly rate of \$57.56 for a total compensation of \$22,448.

5. The total compensation lost between the AD position and the additional teaching hours for the 2010-2011 school year was \$28,536.

6. The Philadelphia Federation of Teachers, on my behalf, asked for \$20,000.

7. The [SDP] agreed that I was incorrectly force transferred, and that I lost the aforementioned compensation (that otherwise would have been part of my retirement covered compensation). However, they agreed to compensate me \$12,500 for my lost wages. I accepted the offer and I received the compensation.

(PSERS-3)

9. With his June 22, 2015 letter to PSERS, Claimant enclosed: (1) a February 24, 2011 letter regarding the settlement that stated that "the SDP agrees to pay grievant [Claimant] \$12,500"; (2) a March 4, 2011 Direct Deposit Payroll stub that identifies the \$12,500 as "GRIEVANCE PY"; and (3) two retirement estimates, including the April 16, 2015 estimate from PSERS that reflected the \$12,500 adjustment to Claimant's estimated final average salary. (PSERS-3)

10. Claimant terminated school service on June 30, 2015. (PSERS MSJ, Memorandum of Fact #9)

11. By letter dated August 30, 2016, the ESRC denied Claimant's June 24, 2015 appeal stating: "The \$12,500.00 settlement payment you received was not designated to a specific school year, and it does not correspond to the wages you would have earned had you not been reassigned. This payment is a damage award and not back pay that should be recognized as retirement-covered compensation." (PSERS-4)

12. Claimant appealed the ESRC's decision on September 22, 2016 to this Board. (PSERS-5)

13. On October 11, 2016, PSERS filed an Answer. (PSERS-6)

14. On October 26, 2017, PSERS filed a Motion for Summary Judgment.

15. On November 21, 2017, Claimant filed a response to PSERS' motion.

16. This matter is ripe for Board adjudication.

DISCUSSION

Claimant requests that the \$12,500 lump sum payment that he received in connection with a grievance be deemed retirement-covered compensation for the 2010-2011 school year and included in his final average salary. A PSERS member's final average salary is a major component in the calculation of the retirement benefit, and a higher final average salary generally equates to a higher monthly benefit. See 24 Pa.C.S. §§ 8102 ("standard single life annuity") and 8342. Section 8102 of the Public School Employees' Retirement Code ("Retirement Code") provides the following definitions, which are pertinent to the issue on appeal:

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

"Compensation." Pickup contributions . . . plus any remuneration received as a school employee . . . excluding any . . . emolument received by a school employee during his school service which is not based on the standard salary schedule under which he is rendering service. . . .

24 Pa.C.S. § 8102. Pennsylvania courts have consistently upheld a restrictive interpretation of the definition of compensation under the Retirement Code to “reflect the Legislature’s intention to preserve the actuarial integrity of the retirement fund by excluding from the computation of employees’ final average salary all payments which may artificially inflate compensation for the purpose of enhancing retirement benefits.” *Christiana v. Pub. Sch. Employees’ Ret. Bd.*, 669 A.2d 940, 944 (Pa. 1996) (quotation marks omitted); *see generally Dowler v. Pub. Sch. Employees’ Ret. Bd.*, 620 A.2d 639 (Pa. Cmwlth. 1993); *Office of Admin. et al. v. State Employees’ Ret. Bd.*, 180 A.3d 740, 752 (Pa. 2018) (the PSERS Retirement Code definition of “compensation” is significantly more limiting than the State Employees’ Retirement Code definition because it excludes any payment received outside the standard salary schedule from retirement-covered compensation.) Consequently, PSERS must exclude from the computation of a member’s final average salary any payments that are explicitly excluded by law, that are not based on the member’s standard salary schedule, or that artificially inflate a member’s final average salary. *See e.g., Baillie v. Pub. Sch. Employees’ Ret. Bd.*, 993 A.2d 944 (Pa. Cmwlth. 2010); *Beardsley v. State Employees’ Ret. Bd.*, 691 A.2d 1016 (Pa. Cmwlth. 1997).

The Retirement Code does not identify damage awards or settlement payments as recognized “compensation,” but the Board allows the constructive awarding of such amounts as “compensation” when ordered by a court for the purpose of upholding a member’s contractual rights for a specified period. *See Abramski v. Pub. Sch. Employees’ Ret. Sys.*, 512 A.2d 106, (Pa. Cmwlth. 1986); *Weaver v. State Employees’ Ret. Bd.*, 129 A.3d 585 (Pa. Cmwlth. 2015). This interpretation of the Retirement Code allows a member, who successfully challenges or settles an adverse employment action, to be made whole while ensuring against potential windfalls. To have a settlement payment recognized as retirement-covered compensation for a particular school year, a claimant must prove that the amount he received represents the actual pay that he would have earned in that school year had the purported adverse employment action

not occurred.¹ This policy ensures that PSERS does not erroneously factor into a member's final average salary an arbitrary payment that "is not based on the member's standard salary schedule under which he is rendering service." 24 Pa.C.S. § 8102; see generally *Martsolf v. State Employees' Ret. Bd.*, 44 A.3d 94, 97 (Pa. Cmwlth. 2012), appeal denied, 62 A.3d 380 (Pa. 2013); *Office of Admin. et al.*, 180 A.3d at 752.

The Commonwealth Court's decision in *Martsolf* explains what elements are necessary to establish a payment made under a settlement agreement as "compensation."² In *Martsolf*, the Pennsylvania State Police ("PSP") removed a member of the State Employees' Retirement System ("SERS") from his position with the PSP. Martsolf filed grievances and eventually entered into a settlement agreement with the PSP in which the parties agreed he would be reinstated, but would immediately and permanently resign. The PSP agreed to pay him a \$40,000 lump sum settlement. Martsolf claimed that the \$40,000 represented back pay and, therefore, was retirement-covered compensation. The Commonwealth Court rejected the claim, explaining that the agreement lacked the necessary detail to accept the payment as retirement-covered compensation:

[T]he issue is whether the settlement payment is back pay and compensation under the Code or some other "appropriate relief." Answering that question, unless a settlement agreement provides that wages lost are being compensated and for what periods, all that settlement agreement indicates is that a grievance is being "brought" and settled, nothing else. The settlement agreement is silent as to the basis of the award, and there is no way of determining whether any hours are

¹ A claimant bears the burden of establishing the facts necessary to sustain his claim. See *Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999).

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

connected to the payment, how many hours would be attached, and where to place the contribution in Martsolf's account.

Martsolf, 44 A.3d at 97 (emphasis added). Notably, even if the *Martsolf* agreement had provided such details, the Commonwealth Court stated that the SERS Board was not obliged to accept the payments because it is not bound by an agreement to which it was not a party. See *id.* at 97 n. 4.

Here, Claimant requests that a payment of \$12,500 be recognized as back pay for wages lost during the 2010-2011 school year as a result of a grievance. The February 24, 2011 letter confirms that the parties settled a grievance and that the SDP agreed to pay \$12,500 to Claimant. The letter, however, does not identify the payment as back pay for a particular position and does not associate the payment to any time period:

This letter is to confirm the settlement agreement reached between the School SDP of Philadelphia ("SDP") and the Philadelphia Federation of Teachers with respect to AAA Case No. 14390 00910 10. The terms of the settlement are those stated on the record at the February 8, 2011 hearing and the following: The union agrees that an applicant who is a member of the Staff Selection Committee must recuse himself/herself from consideration of their own application. In addition, the SDP agrees to pay grievant Jeffrey Rosenberg \$12,500.

(PSERS-3) (emphasis added).

Similarly, the SDP's June 11, 2015 facsimile does not identify the payment as back pay but, instead, refers to the \$12,500 as a "settlement payment." SDP, however, does relate the payment to an adverse action that occurred in 2010 because of Claimant's forced reassignment to another school. Specifically, SDP stated in the June 11, 2015 facsimile that Claimant "lost the opportunity to earn additional contractual amounts of \$10,000" because of the loss of responsibilities as athletic director due to the reassignment. Notably, however, the \$12,500 "settlement payment" does not correspond to the "\$10,000" salary Claimant would have received as the athletic

director; nor does SDP in the facsimile relate the \$12,500 to the salary of the athletic director position for the 2010-2011 school year. Indeed, according to Claimant, the salary of the athletic director position is \$9,132 per year, which is consistent with SDP's reference to \$10,000 in the June 11, 2015 facsimile. (PSERS-3, June 22, 2015 Appeal, ¶3)

Claimant explains that the \$12,500 is a negotiated amount and that the parties settled on a lump sum payment of \$12,500, which was "substantially less money than [he] would have earned had there not been an adverse action by the SDP." (Claimant's Reply at 5). Claimant avers that his claimed lost wages occurred over a period of two years totaling \$28,536 and is not isolated to the position of athletic director but lost additional teaching hours. Yet, Claimant attempts to place the entire \$12,500 into the 2010-2011 school year by emphasizing that the \$12,500 was included in his March 4, 2011 paycheck payable during the time period ending February 25, 2011. (PSERS-3; see Claimant's Reply at 4) He also argues that his reassignment occurred in September, 2010 and the \$12,500 was issued on March 4, 2011 and thus is reportable in the 2010-2011 school year. (Claimant Reply at 4).

For the payment to be considered retirement-covered compensation, the agreement must provide that the member is being compensated for wages lost and must identify the time period that such wages would have been earned, not received. See *Abramski*, 512 A.2d 106. The letters presented recognize the amount of \$12,500 as a settlement or grievance payment. The letters do not identify the \$12,500 as wages, back pay, or retirement-covered compensation. The letters do not address the remittance of member or employer contributions on the \$12,500. SDP connects the grievance to the athletic director position only, whereas Claimant associates it with the athletic director position and lost additional teaching hours. (PSERS-2; PSERS-3) Neither the February 24, 2011 letter nor the June 11, 2015 facsimile sufficiently identify the period of time to which the \$12,500 is to constitute retirement-covered compensation.³ Because the payment is not properly identified in any of the

³ Although Claimant has not lost credited service as a result of the reassignment, his claimed lost wages must correspond to a period of time during which school service

documentation as back pay for a particular time period during which school service should have been rendered, the entire amount must be deemed a settlement or damage award.⁴

Neither the Board nor PSERS was a party to the grievance or the negotiations. The Board is not authorized to recognize a settlement as creating retirement credit where none is due. See *Watrel v. Dep't of Education*, 488 A.2d 378 (Pa. Cmwlth. 1985); *McCormack v. State Employees' Ret. Bd.*, 844 A.2d 619 (Pa. Cmwlth. 2004). Based on the record, the \$12,500 amount does not represent actual back pay that would have been earned during the 2010-2011 school year. See *Martsolf*, 44 A.3d at 95.

Accordingly, Claimant's appeal must be dismissed.

CONCLUSION

For the above stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether to accept Claimant's request that a \$12,500 lump sum payment that he received in connection with a grievance be deemed retirement-covered compensation for the 2010-2011 school year. Accordingly, PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DENIED.

would have been rendered, particularly if the \$12,500 was a compromised amount. Otherwise, PSERS is unable to connect the \$12,500 to the exact hours and days during which Claimant would have earned such amount. See e.g. *Hoerner v. Pub. Sch. Employees' Ret. Bd.*, 684 A.2d 112, 118 (Pa. 1996) (To receive credited service under the Retirement Code, the member must be engaged in school service with a school employer from which regular remuneration is received in return for such service.); *Hairston-Brown v. Pub. Sch. Employees' Ret. Bd.*, 78 A.3d 720, 728 (Pa. Cmwlth. 2013) (A member, who works multiple positions or for multiple employers, renders service at different times and, therefore, must provide PSERS with the accurate number of hours that the member rendered school service.)

⁴ Even to the extent the \$12,500 was intended to compensate Claimant for the 2010-2011 school year only, the payment was paid in March and would, therefore, include a payment for future losses, which is not back pay but a damage award or settlement that is also not retirement-covered compensation.

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

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DOCKET NO. 2016-18
CLAIM OF JEFFREY W. ROSENBERG

ORDER

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

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request that the \$12,500 lump sum payment he received from the School District of Philadelphia be deemed retirement-covered compensation for the 2010-2011 school year.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 10, 2018

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