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

IN RE:

ACCOUNT OF KAY M. KRING  
DOCKET NO. 2018-12  
CLAIM OF KAY M. KRING

ACCOUNT OF MICHELLE A. CLAAR  
DOCKET NO. 2018-13  
CLAIM OF MICHELLE A. CLAAR

**OPINION AND ORDER OF THE BOARD**

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the Hearing Examiner's proposed Opinion and Recommendation, Kay M. Kring's ("Kring") and Michelle A. Claar's ("Claar") (collectively "Claimants") Motions for Default Judgment, Claimants' Briefs on Exceptions to Hearing Examiner's Opinion and Recommendation, and the Public School Employees' Retirement System's ("PSERS") letter brief opposing exceptions.

The issue on appeal is whether a \$200 annual payment that Claimants received in exchange for permanently reducing their annual sick leave by five days is "compensation" under the Public School Employees Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101, et seq. The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation, and agrees that the \$200 annual payment was not retirement-covered compensation. Further, for the reasons explained below, the Board denies the Motions for Default Judgment.

## DEFAULT JUDGMENT

As a preliminary matter, the Board first addresses Claimants' identical Motions for Default Judgment. Claimants move for default judgment on the basis that the Hearing Examiner issued his proposed Opinion and Recommendation more than 60 days after Claimants filed their reply briefs on January 25, 2023. A review of the record reveals that the Hearing Examiner issued his proposed Opinion and Recommendation on April 5, 2023, which was 70 days after Claimants' reply briefs were filed.

The 60-day time frame was part of the Board's instructions, in the Board's March 4, 2021 letter appointing the independent Hearing Examiner. The 60-day time frame is a Board preference; it is not mandated by law. See 24 Pa.C.S. § 8101, et seq.; 1 Pa. Code § 31.1, et. seq.; 22 Pa. Code §§ 201.1, 201.11; 2 Pa.C.S. § 501, et seq. Further, the Hearing Examiner's delay does not bind the Board. The Hearing Examiner's function is to conduct an administrative hearing during which the parties can present evidence and their factual and legal arguments. The role encompasses assisting the Board in analyzing and interpreting the evidence in light of the relevant statutes and case law, by drafting a proposed opinion, which provides analysis of the facts and law, and a recommendation based on that analysis. The Board, however, is the ultimate finder of fact and may "adopt or reject, in whole or in part, or supplement" the Hearing Examiner's proposed Opinion and Recommendation. 22 Pa. Code § 201.11(c); see *Dowler v. Pub. Sch. Employees' Ret. Bd.*, 620 A.2d 639 (Pa. Cmwlth. 1993).

Additionally, default judgment is the remedy applied when one party fails to file a responsive pleading, as otherwise required. See 1 Pa. Code §§ 35.35, 35.37 (default is appropriate when a respondent fails to file *an answer to the original complaint* or a response to *an order to show cause* and, as a result, facts set forth therein *may* be deemed admitted); see, e.g., *Pa. Institutional Health Servs. v. Dep't of Corr.*, 647 A.2d 692, 694-95 (Pa. Cmwlth. 1994). Default judgment is not available here, where the Board's appointed Hearing Examiner, who is not a party to the

appeal, does not issue his proposed opinion in the time frame requested by the Board. Accordingly, Claimants' Motions for Default Judgment are denied.

## **EXCEPTIONS**

Claimants except to the proposed Hearing Examiner's Opinion and Recommendation on several grounds. In raising their exceptions, which are identical, Claimants object to the Hearing Examiner's History, Findings of Fact, Conclusions of Law, and Discussion. Although Claimants raise numerous objections, their exceptions can be grouped into three categories. The Board will address Claimants' exceptions categorically, which will avoid the duplication of addressing Claimants' objections individually.

### **1. Claimants' exceptions to findings of fact.**

Claimants raise various objections to the Hearing Examiner's proposed findings or characterizations of facts. Having independently reviewed the record, the Board finds that the Hearing Examiner's findings of fact are supported by the evidence and Claimants' objections are without merit.

Claimants fixate on the reason their accounts were initially reviewed by PSERS, arguing that the review of member accounts with 30 years of service is not credible because Kring did not have 30 years of service. This contention is not supported by the record. The credible facts of record are that PSERS reviews member accounts in various instances, including, but not limited to, when a member files a retirement estimate or application, is approaching their superannuation date, or has worked for 30 years and could be retiring soon. (Notes of Testimony ("N.T.") 15). In this instance, PSERS instituted a review of accounts with "30 years or more" of service whereupon PSERS discovered the \$200 payment to Kring was being incorrectly reported as retirement-covered compensation. (N.T. 50-51, 57). In 2017, Kring had approximately 38 years of service, which was in excess of 30 and consistent with PSERS' witness's testimony that Kring had "30 plus years of service." (N.T. 16; see PSERS-10; N.T. 14, 18, 92, 34-35, 50). Therefore, Claimants' objections on this point are unsupported by the record. Further, had Kring's account

not been reviewed at that time, it would nonetheless have been reviewed during her retirement process and required adjustment. (N.T. 15-16). Indeed, a member is entitled only to the benefits authorized in the Retirement Code, and to the extent payments are included in a member's account as "compensation" and should not be, the law requires that the record be corrected. See 24 Pa.C.S. § 8534(b); *Cannonie v. Pub. Sch. Employees' Ret. Sys.*, 952 A.2d 706 (Pa. Cmwlth. 2008).

Claimants also object to the Hearing Examiner's reference to the provision of the collective bargaining agreement that states "[n]o employee who exercises this one-time option shall have any claim for damages against the school district by reason of the disallowance by the Pennsylvania School Employees' Retirement System of the \$200 increment's eligibility for calculation of the said employee's retirement benefits." (Kring Exhibit 7A, p. 9; PSERS-1, pp. 22-23). Claimants allege that this statement was a "statement to protect the district from damages and was not a statement that the \$200 increment was non-retirement covered compensation." *Claimants' Briefs on Exceptions*, p.3, ¶ 8. The Board finds that the statement quoted above is not dispositive and the result in this matter would not change even in the absence of that statement, but it does suggest that the parties to the collective bargaining agreement understood there could be no guarantee that the \$200 payment would constitute compensation as it is defined in the Retirement Code. The Board notes, however, that there is a typo in footnote 4 of the proposed Opinion and Recommendation, which should begin, "Although not dispositive..." the "not" having been omitted and is corrected by this Order, below.

**2. Claimants' objections to the Hearing Examiner's conclusion that the \$200 payment is not compensation.**

Claimants object to the Hearing Examiner's conclusion that the \$200 annual payment at issue is not "compensation," as defined by the Retirement Code, because it was a payment for unused sick leave. In doing so, Claimants re-raise their argument that the payment was not for unused sick leave. They allege that the payments were for not "accruing" the sick leave, rather than not "using" the sick leave. *Claimants' Briefs on Exceptions*, pp. 4-7. They also maintain that the five

days became “extra” days of work. *Id.* Claimants’ distinctions do not alter the outcome.

The Retirement Code’s definition of “compensation” is a restrictive one, which excludes both remuneration that is not based on the standard salary schedule and payments for unused sick leave. 24 Pa.C.S. § 8102; see *Whalen v. Pub. Sch. Employees’ Ret. Bd.*, 265 A.3d 570, 576 (Pa. 2021). The Hearing Examiner correctly concludes and explains that the \$200 annual payment was for unused sick leave. Despite Claimants’ protestations, whether the scenario is opting not to “use” accrued leave for a payment or opting to no longer “accrue” leave for a payment, only the timing is different. The result is the same — Claimants gave up five days of sick leave in exchange for money. Stated differently, whether an employee accumulates unused sick leave throughout the years to receive a lump sum payment at termination or whether they agree, up front, not to use sick leave each year in exchange for an annual payment, they still will have received payment in lieu of using sick days.

Moreover, the \$200 annual payment was not, as Claimants assert, for “extra” days worked. Claimants were paid annual salaries, pursuant to a salary schedule, for each full school year. (Kring Exhibit 7A, “Appendix A” Salary Provisions; PSERS-1 pp. 8, 10). Claimants’ salaries compensated them for working the entire school year, including payment for taking any sick or personal days when they were otherwise expected to work. Thus, the \$200 payment they received in addition to their salary, that they received in exchange for giving up five of those sick days, annually, was not for “additional days” or “extra work” beyond the normal and expected school year. The \$200 annual payments were paid to Claimants regardless of their actual days worked, or not worked. (N.T. 72-74). The \$200 annual payment, therefore, was a payment outside of the standard salary schedule and, for that additional reason, is not “compensation.” See *Whalen*, 265 A.3d at 577-78; see also *Baillie v. Pub. Sch. Employees’ Ret. Bd.*, 993 A.2d 944, 953 (Pa. Cmwlth. 2010) (holding that the optional work days at issue were really vacation days that were not used and, therefore, the payments earned for working on those days were not retirement-covered compensation).

Claimants, notably, acknowledge in their exceptions that “[t]he \$200 payment was not added to the standard salary schedule because employees who were hired after the \$200 option was offered, were not eligible to receive the increment. They were hired under a contract allowing for 10 days sick leave. The contracts of Kring and Claar hired them with 15 days sick leave.” *Claimants’ Briefs on Exceptions*, p.3, ¶¶ 27-28. As explained by Claimants, the \$200 payment was not added to the standard salary schedule because other employees accrued the same number of sick days — and were required to work the same number of school days — as Claimants, but those employees were not receiving an additional payment. *Id.*; (N.T.71, 77). This disparate treatment, where similarly situated employees receive different payments, is excluded from “compensation” under the Retirement Code. *See, e.g., Kirsch v. Pub. Sch. Employees’ Ret. Bd.*, 985 A.2d 671, 677-78 (Pa. 2009).

### **3. Claimants’ fairness arguments.**

Claimants’ final group of objections revolve around their claim that they were treated unfairly as the only individuals from their school district whose accounts were adjusted to remove the \$200 annual payment. *Claimants’ Briefs on Exceptions*, pp. 4-7. Claimants’ fairness argument is, in essence, a request for equitable relief, which is outside this Board’s authority to grant. *See Forman v. Pub. Sch. Employees’ Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Finnegan v. Pub. Sch. Employees’ Ret. Bd.*, 560 A.2d 848, 852 (Pa. Cmwlth. 1989), *aff’d* 591 A.2d 1053 (Pa. 1991).

In addition, as explained by PSERS’ witness and found credible by the Hearing Examiner and this Board, Kring’s account was reviewed in connection with PSERS’ review of member accounts who had accrued more than 30 years of service. (Finding of Fact 19). After PSERS’ discovery of the potential reporting error in her account, *the school district notified PSERS* that Claar’s account also contained the incorrectly reported compensation. (See Finding of Fact 20). Pursuant to its duty under the Retirement Code, PSERS was required to correct the error upon discovery. *See* 24 Pa.C.S. § 8534. PSERS notified the school district of the reporting error, the school district ceased reporting the \$200 payment as

compensation, and PSERS adjusted Claimants' accounts accordingly. (N.T. 26, 30). The school district, importantly, did not identify any other employee to PSERS as having previously received, and been credited with, the payment.<sup>1</sup> (N.T. 18). Consequently, Claimants' argument that they were treated unfairly, is not supported by the record. PSERS adjusted the accounts of all known members who received the \$200 annual payment.

Moreover, assuming arguendo that there are other school district members who received the \$200 annual payment and of whom PSERS is not yet aware, the remedy is not to ignore the mandates of the Retirement Code and include the \$200 annual payment as "compensation" for Claimants. If that were the case, an argument could be made that PSERS should never adjust accounts in similar situations because there always *could be* an error somewhere in its voluminous reporting records of which PSERS is not aware. Rather, the appropriate procedure is for PSERS to review and adjust the accounts as information is discovered, whenever it is discovered. See 24 Pa.C.S. § 8303.1; 22 Pa. Code § 213.3. Following such an adjustment, any affected member would then have the opportunity to exercise their own due process rights and appeal the adjustment, as Claimants are currently exercising before this Board.

For that same reason, Claimants challenge to the denial of their September 8, 2023 subpoena seeking the testimony of their former employer's business manager about, and documentation on, every employee who retired from their employer from 2004 to 2022 was correctly denied by the Hearing Examiner. As explained above, the identity of other employees who Claimants speculate may have received the \$200 annual payment is irrelevant to Claimants' appeal. Likewise, the Hearing Examiner appropriately excluded hearsay on the same subject offered by Claimants. See *Claimants' Briefs on Exceptions*, p. 4, ¶ 2; (N.T. 78-80); *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). The

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<sup>1</sup> For this reason, also, the Board rejects Claimants' request for a Finding of Fact that the \$200 annual payment was reported as "compensation" for all school district employees. See *Claimants' Briefs on Exceptions*, p.2, ¶ 1. The relevant and admissible evidence does not support such a finding.

relevant facts of record are undisputed. Furthermore, Claimants' subpoena request was not timely requested and was not in conformity with the General Rules of Administrative Practice and Procedure. See 1 Pa. Code § 35.142(a). Consequently, it was not error for the Hearing Examiner to deny Claimants' subpoena request and exclude hearsay.

## **CONCLUSION**

Accordingly, this Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with the following modifications:

1. On page 2, the first sentence of the first full paragraph is amended to indicate that the hearing convened on September 27, 2022.
2. On page 4, footnote 4 is amended to begin "Although not dispositive..."
3. On page 5, Finding of Fact 19 is amended to read "In 2017, as part of a review of member accounts with 30 or more years of service, PSERS discovered that the annual \$200 payment to Kring was incorrectly reported by NBCSD to PSERS as retirement-covered compensation from the 2005 school year through 2017. (N.T. 16, 34-35, 50-51, 57)."
4. The Board supplements the Hearing Examiner's Proposed Opinion with the following, additional finding of fact:

NBCSD did not identify any other employee to PSERS as having previously received, and been credited with, the \$200 annual payment. (N.T. 18).

With the above modifications, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own and, accordingly:

IT IS HEREBY ORDERED that

1. Claimants' request to have the \$200 annual payment deemed retirement-covered compensation is DENIED,

2. Claimants' Appeals and Requests for Administrative Hearing are DISMISSED, and
3. Claimants' Motions for Default Judgment are DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: 12/15/23

By:   
\_\_\_\_\_  
Christopher Santa Maria, Chairman

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

**Account of Kay M. Kring : Docket No.: 2018-12  
Claim of Kay M. Kring : (Consolidated)**

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

**Account of Michelle A. Claar : Docket No.: 2018-13  
Claim of Michelle A. Claar : (Consolidated)**

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**OPINION AND RECOMMENDATION**

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**Date of Hearing: September 22, 2022**  
**Hearing Examiner: Jason C. Giurintano, Esquire**  
**For the Claimants: *Pro se***  
**For PSERS: Dwight Decker, Jr., Esquire**

## I. HISTORY

This consolidated matter is before the Public School Employees' Retirement Board (the "Board") on an appeal filed by Michelle Claar and Kay Kring (collectively, "Claimants," or individually "Kring" and "Claar"). Claimants are retired teachers who were employed by the Northern Bedford County School District ("NBCSD"). Claimants are appealing a decision by PSERS to not include a \$200 annual payment they received from the NBCSD as part of the "retirement-covered compensation" component of their retirement benefit.<sup>1</sup>

More specifically, at the beginning of the 1986/87 school year, pursuant to a collective bargaining agreement, the NBCSD offered the following one-time, irrevocable option to its teachers: the teacher may opt to reduce their annual sick day allotment from 15 days to 10 days, and in exchange for that 5-day reduction, the teacher would receive \$200 annually. Both Claimants elected this option. From 2005 through 2017, the NBCSD reported the \$200 to PSERS as "retirement-covered compensation" for Claimants.

In 2017, as part of a review of member accounts with 30 years of service, PSERS discovered that the NBCSD incorrectly reported the \$200 annual payment to Claimants as retirement-covered compensation. By letters dated April 19, 2017, PSERS notified both Claimants of its initial determination the \$200 annual payment was not retirement-covered compensation. PSERS adjusted Claimants' PSERS accounts to remove the annual \$200 payment and returned the associated contributions to NBCSD so that NBCSD could return the contributions to Claimants.

Claimants appealed PSERS' initial determination to the PSERS' Executive Staff Review Committee ("ESRC"). By letters dated May 30, 2018, the ESRC denied both Claimants' appeals on the basis the \$200 payment was not "retirement-covered compensation" because it was tied to

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<sup>1</sup> If Claimants are successful in the present proceeding, it would mean an additional ~\$15 to each of their respective benefits.

a reduction in annual sick days. Claimants appealed the ESRC decision and a hearing was scheduled.

The hearing on Claimant's appeal convened on September 22, 2022, at 5 N. 5<sup>th</sup> Street, Harrisburg, PA 17101. Dwight Decker, Jr., Esquire, represented PSERS at the hearing. Claimants appeared *pro se*. Following the close of testimony, both parties requested the opportunity to file post-hearing briefs. Following receipt of the Notes of Testimony ("N.T"), a briefing schedule was established by the Hearing Examiner. Both parties submitted timely briefs<sup>2</sup> and this matter is now ripe for disposition.

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<sup>2</sup> PSERS' brief also raises an objection to Claimants' reliance upon any evidence not on the evidentiary record and/or that was specifically excluded from the record. That objection will be sustained.

## II. FINDINGS OF FACT

### Claimants' Status with PSERS

1. Claar first enrolled in PSERS in January 1985 due to her employment with NBCSD. (Official Notice- Agency Records<sup>3</sup>; N.T. 15, 103).
2. Claar retired on January 30, 2021, and withdrew all of her contributions and interest, including contributions associated with the \$200 payments made before 2005, as part of her retirement. (PSERS-6, PSERS-7, PSERS-8; N.T. 44).
3. Claar is currently receiving an annuity of \$4,035.96. (PSERS-7; N.T. 40, 47).
4. Kring was first enrolled in PSERS in August 1979 due to her employment with the NBCSD. (Official Notice- Agency Records; N.T. 14, 92).

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<sup>3</sup> Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa.Code § 35.173, which provides, in pertinent part, as follows:  
§ 35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa.Code §35.173.

In *Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987), the Pennsylvania Commonwealth Court explained:

“Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A. 2d at 994 n. 6.

5. Kring retired on June 11, 2021, and withdrew all of her contributions and interest, including contributions associated with the \$200 payment made before 2005, as part of her retirement. (PSERS-9, PSERS-10, PSERS-11; N.T. 45).

6. Kring is currently receiving an annuity of \$5,140.06 from PSERS. (PSERS-10; N.T. 43, 47).

Claim Background

7. The collective bargaining agreement with NBCSD and its teachers that was in effect September 1, 1986, through August 31, 1989 (“1986 CBA”) provided Claimants with an option to irrevocably elect to reduce their sick leave accrual from 15 days to 10 days in exchange for an annual payment of \$200. (Kring Exhibit 7A, p. 9; N.T. 71, 89).

8. The 1986 CBA, stated, in relevant part:

\* \* \*

b) Beginning with the 1986/87 school term the following one-time option may be exercised by each professional employee:

(1) The employee may irrevocably opt for 10 days of sick leave, rather than 15, and receive an additional increment of \$200 in lieu of the difference of 5 days of sick leave.

\* \* \*

**No employee who exercises this one-time option shall have any claim for damages against the school district by reason of the disallowance by the Pennsylvania School Employees' Retirement System of the \$200 increment's eligibility for calculation of the said employee's retirement benefits.**

(Kring Exhibit 7A, p. 9).<sup>4</sup>

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<sup>4</sup> Although dispositive of the instant proceedings, the above CBA provision that states “*No employee who exercises this one-time option shall have any claim for damages against the school district by reason of the disallowance by the Pennsylvania School Employees' Retirement System of the \$200 increment's eligibility for calculation of the said employee's retirement benefits*” suggests that even back in 1986, it was known that the \$200 payment may not be recognized as retirement compensation by PSERS. (Kring Exhibit 7A, p. 9; PSERS-1, pp. 22-23).

9. Kring elected to reduce her annual sick leave from 15 days to 10 days in exchange for the annual \$200 payment at the end of the 1985/86 school year. (N.T. 92).
10. In exchange for electing to reduce her sick leave from 15 days to 10 days, NBCSD annually paid Kring an additional \$200 beginning in the 1986/87 school year. (N.T. 92).
11. Claar elected to reduce her annual sick leave from 15 days to 10 days in exchange for the annual \$200 payment at the end of the 1988/89 school year. (N.T. 104).
12. In exchange for electing to reduce her sick leave from 15 days to 10 days, NBCSD annually paid Claar an additional \$200 beginning in the 1989/90 school year. (N.T. 104).
13. Steve Foremny ("Foremny") is currently employed by PSERS as a retirement administrator; he has been in that position for six (6) years (N.T. 10-11).
14. Foremny oversees the PSERS' Account Verification Section. (N.T. 11).
15. The Account Verification Section is responsible for investigating data in member accounts to ensure their accuracy. (N.T. 11).
16. Data in the Account Verification Section is provided by School Districts. (N.T. 11).
17. In his role, Foremny must have knowledge of what is and is not retirement-covered compensation. (N.T. 12).
18. The annual \$200 payment was outside of the salary provisions of the 1986 CBA and outside the salary schedules of subsequent collective bargaining agreements. (N.T. 21-24; PSERS-I, pp. 8-11, Kring Exhibit 7A, p. 5).
19. In 2017, as part of a review of member accounts with 30 years of service, PSERS discovered that the annual \$200 payment to Kring was incorrectly reported by NBCSD to PSERS as retirement-covered compensation from the 2005 school year through 2017. (N.T. 16, 34-35).

20. When PSERS began reviewing the \$200 payment, NBCSD notified PSERS that Claar was subject to the same provision, *i.e.*, a reduction of five (5) sick days for a \$200 payment. (N.T. 16).
21. In April 2017, NBCSD stopped reporting the \$200 payment to PSERS as retirement-covered compensation for Claimants. (N.T. 30).
22. By letters dated April 19, 2017, PSERS notified Claimants that the annual \$200 payment was not retirement-covered compensation. (PSERS-2, PSERS-3; N.T. 27-28).
23. PSERS adjusted Claimants' PSERS accounts to remove the annual \$200 payment and returned the associated contributions to NBCSD so that NBCSD could return the contributions to Claimants. (PSERS-2; PSERS-3; N.T. 20-23, 30-32).
24. PSERS adjusted Claimants' accounts back to the 2005 school year and not the school year they first elected the option because the reporting system in place prior to that time did not contain specific records of the \$200 payment being made and NBCSD did not provide proof of the payments prior to that time. (N.T. 34-35, 47).
25. All Claimants' contributions related to the annual \$200 payment were returned directly to Claimants or returned to NBCSD as part of the adjustment process. (N.T. 46-47; PSERS-8, PSERS-11).
26. The \$200 payment was not included in the calculation of Claimants' retirement benefits. (N.T. 46-47; Official Notice- Agency Records).
27. The \$200 payment was outside the standard salary schedule and not added to the Claimants' base salary. (N.T. 21-24; PSERS-1, pp. 8-11, Kring Exhibit 7A, p. 5).
28. Employees of NBCSD hired after Claimants receive the same 10 days of sick leave, but they do not receive the \$200 payment, which is separate from the published salary schedule. (PSERS-1, pp. 8-11, 22-23).

29. If the annual \$200 payment were to be included in the computation of Claimants' retirement benefits, it would amount to an approximate difference of **\$15 per month**. (N.T. 25-26).

30. Employees of NBCSD hired after Claimants receive the same 10 days of sick leave, but they do not receive the \$200 payment, which is separate from the published salary schedule. (PSERS-1, pp. 8-11, 22-23).

Procedural Due Process

31. Claimants appealed PSERS' initial determination that the annual \$200 payment was not retirement-covered compensation to the PSERS' Executive Staff Review Committee ("ESRC"). (N.T. 36).

32. By letters dated May 30, 2018, the ESRC denied Claimants' appeals. (PSERS-4, PSERS-5; N.T. 36-38).

33. Claimants timely filed their respective Appeals of the ESRC decision. (Official Notice-Agency Records).

34. The Board consolidated Claimant's Appeals by Order dated August 24, 2018. (Official Notice- Agency Records).

35. A hearing was held on September 27, 2022, before Hearing Examiner, Jason C. Giurintano, Esq. (N.T., *passim*).

36. Claimants proceeded *pro se*, appeared, and had the opportunity to testify, examine witnesses, and offer evidence. (N.T., *passim*).

### III. CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal. (Findings of Fact No. 1-6).
2. Claimants were afforded an opportunity to be heard in connection with her appeal. (Findings of Fact Nos. 31-36).
3. Claimants have the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991); 22 Pa. Code §§ 201.12(d), 201.10, and 201.8(a).
4. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code (the "Code"), 24 Pa.C.S. § 8101, *et seq.*
5. PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 542 Pa. 678, 668 A.2d 1139 (1995).
6. Claimants have only those rights recognized by the Retirement Code and none beyond. *Bittenbender v. State Employees' Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992).
7. The annual \$200 payment paid to Claimants was a payment outside the normal salary schedule for unused sick leave, which is excluded from the definition of compensation; Payments not based on the standard salary schedule and payments for unused sick leave are excluded from the definition of compensation under the Retirement Code. 24 Pa.C.S. § 8102.
8. The annual \$200 payment that Claimants received in exchange for electing to reduce their sick leave accrual from 15 to 10 days per year is not retirement-covered compensation. 24 Pa.C.S. § 8102.
9. Equitable relief is not available under the Retirement Code. *See Finnegan v. Pub. Sch. Employees' Ret. Bd.*, 560 A.2d 848 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991); *Bittenbender*, 622 A.2d at 405.

#### IV. DISCUSSION

The material facts here are relatively simple and undisputed. Claimants are both teachers who retired in 2021 from the NBCSD. At the beginning of the 1986/87 school year, the collective bargaining agreement in place with NBCSD allowed teachers, *e.g.*, Claimants, to elect to reduce their annual sick day allotment from 15 days to 10 days. In exchange for that 5-day reduction, the employee would receive a payment of \$200 annually. Both Claimants affirmatively chose that election—Kring at the end of the 1985/86 school year, and Claar at the end of the 1988/89 school year. Thus, from the time of their election, until they retired, each received a \$200 annual payment.

PSERS' witness Foremny, who oversees the PSERS' Account Verification Section testified succinctly and persuasively as to the process and procedures PSERS utilized in reaching their decision that is the basis for this appeal. From 2005 through 2017, NBCSD reported to PSERS the \$200 payments to Claimants were "retirement-covered compensation."<sup>5</sup> In 2017, as part of a review of member accounts with 30 years of service, PSERS discovered that the annual \$200 payment to Claimant Kring was incorrectly reported to PSERS as "retirement-covered compensation. Shortly thereafter, NBCSD notified PSERS that Claar's \$200 payments were also reported to PSERS as "retirement-covered compensation."

The gist of this appeal is whether the annual \$200 payment Claimants received in exchange for a reduction of five (5) of their annual sick days constitutes "retirement-covered compensation." As a practical matter, if Claimants are successful in this proceeding, it would mean an approximate \$15 increase in their respective monthly benefits.

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<sup>5</sup> PSERS only adjusted Claimants' accounts back to the 2005 school year because the record-keeping and reporting system in place prior to that time did not contain specific records of the \$200 payment being made, and NBCSD did not provide proof to PSERS of the payments prior to that time. Thus, what is at issue in the present proceeding is the \$200 payment from only 2005-2017. (N.T. 34-35, 47).

By letters dated April 19, 2017, PSERS notified Claimants of its initial decision the annual \$200 payment was not retirement-covered compensation. PSERS then adjusted Claimants' PSERS accounts to remove the annual \$200 payment and returned the associated contributions to NBCSD so that NBCSD could return the contributions to Claimants.

Claimants appealed PSERS' determination to the ESRC. The ESRC ruled against Claimants and Claimants now appeal the ESRC decision.

### Burden

As the appellant, Claimants bear the burden of establishing the relief they seek under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. §8101 *et. Seq.* See, L. Draper v. PSERS, 2012 WL 8681657 at \*1 (Pa. Cmwlth. October 26, 2012). See also Gierschick v. State Employee's Retirement Board, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); Wingert v. State Employees' Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Claimant must satisfy his burden by a preponderance of the evidence. Lansberry v. Pennsylvania Public Utility Commission, 578 A. 2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1992). "A preponderance of the evidence is "such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence." Sigafoos v. Pennsylvania Bd. of Probation and Parole, 503 A. 2d 1076 (Pa. Cmwlth. 1986). Claimant's burden of proof has also been described as a 'more likely than not standard', or evidence that is sufficient to tip the mythical scales in her favor. Agostino v. Township of Collier, 968 A. 2d 258 (Pa. Cmwlth. 2009).

### Credibility of Witnesses and Weight of the Evidence

In an administrative proceeding, the fact finder determines questions of the credibility of witnesses and the weight of the evidence. *See e.g., Nepa v. Department of Public Welfare*, 551 A.2d 354 (Pa. Cmwlth. 1988) (determination of the credibility of witnesses in health care

providers' appeal is the province of the fact finder). In weighing any evidence, a factfinder "may rely on his or her experience [and] common sense" to arrive at a proper conclusion. *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009). *See also, Summers v. Certaineed Corp.*, 997 A.2d 1152, 1161 (Pa. 2010) ("The credibility of witnesses, professional or lay and the weight to be given their testimony is strictly within the proper province of the trier of fact.").

In that regard, the Hearing Examiner found the testimony of Claimants credible, however even assuming, *arguendo*, all their testimony was believed, it would not change the outcome here. The Hearing Examiner found the PSERS' witness credible as well.

*The Annual \$200 Payment Does Not Constitute "Retirement-Covered Compensation."*

PSERS administers the retirement system for Pennsylvania public school employees pursuant to the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). 24 Pa.C.S. § 8101, *et seq.* PSERS is a creature of the legislature and its members have only those rights created by the Retirement Code and none beyond. *See Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

The Retirement Code's definition of the term "compensation" expressly excludes the following:

- (1) any other remuneration or other 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;
- (2) payments for unused sick leave or vacation leave; or
- (3) any other payment or emolument which may be provided for in a collective bargaining agreement which may be determined by the Public School Employees' Retirement Board to be for the purpose of enhancing compensation as a factor in the determination of final average salary.

24 Pa.C.S. § 8102.

"Final average salary" is defined as the "highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months..." 24 Pa.C.S.

§ 8102. As a general matter, a higher final average salary typically leads to a higher monthly benefit due to the statutory calculation of the retirement benefit. See 24 Pa.C.S. § 8102 (“standard single life annuity”). When the Board discovers that a member’s salary was reported incorrectly, the Retirement Code requires that the Board correct the error and adjust the member’s payments accordingly. See 24 Pa.C.S. § 8534(b).

The relief sought here by Claimants is not permitted by the statutory scheme of the Retirement Code. Section 8102 of the Retirement Code excludes payments received for “unused sick days” from the definition of “compensation.” 24 Pa.C.S. § 8102. Unused leave, whether by personal choice or business necessity, is intended to be excluded from covered compensation.” *Beardsley v. State Employees’ Ret. Bd.*, 691 A.2d 1016, 1021 (Pa. Cmwlth. 1997).

Claimants here are hoping to alter the effects of an elective decision they made years ago. Claimants’ receipt of the annual \$200 payment was a direct result of their decision to reduce the annual accrual of their sick leave from 15 days to 10 days. As a practical matter, the \$200 payment constitutes a payment for five (5) days of unused sick leave, which is expressly excluded from the definition of compensation by the Retirement Code.<sup>6</sup> Regardless of whether Claimants knew or anticipated the import of their election when it was made, there is simply no basis upon which to afford them relief. The Board is not authorized to grant relief if it would conflict with the statutory mandates of the Retirement Code. *Marinucci v. State Employees’ Ret. Sys.*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004).

Further, Claimants’ contentions that PSERS’ actions were arbitrary and/or discriminatory are also dismissed in turn. PSERS is under a statutory obligation to perform the actions it did in

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<sup>6</sup> The fact that the election was “irrevocable,” as opposed to made annually, does not mean the payment cannot be statutorily excluded from retirement-covered compensation. See *In re: Bath, et al*, Docket No. 2014-12 (PSERB March 13, 2019); *In re Hartline, et al.*, Docket Nos. 2012-14 through 2012-41.

relation to Claimants' accounts. Section 8534(b) of the Retirement Code requires PSERS to correct all intentional or unintentional errors in members' accounts. In other words, PSERS must correct errors made by public school employers and to make actuarial adjustments to an individual member's benefit payments. *Robertson v. Pub. Sch. Employees' Ret. Sys.*, 162 A.3d 569, 574 (Pa. Cmwlth. 2017)(quoting *Baillie v. Pub. Sch. Employees' Ret. Bd.*, 993 A.2d 944, 949-50 (Pa. Cmwlth. 2010)). PSERS uniformly adjusted the accounts of all known active members receiving the \$200 sick leave buyback payment from NBCSD. It just so happened that the only known active members to be receiving said payments were Claimants. (N.T. 18). In any event, their contributions related to the \$200 payment that remained in Claimants' accounts after the initial adjustment were returned to Claimants as contributions at the time of their retirements.

In sum, the Retirement Code expressly excludes payments for unused sick leave from the definition of compensation. 24 Pa.C.S. § 8102. The actions of PSERS were not arbitrary or discriminatory. Moreover, equitable relief is not available under the Retirement Code. *Finnegan v. Pub. Sch. Employes' Ret. Bd.*, 560 A.2d 848 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991). Accordingly, the decision of the PSERS ESRC must be affirmed. Based upon the foregoing findings of fact, conclusions of law, and discussion, the following proposed order shall issue:

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Account of Kay M. Kring : Docket No.: 2018-12  
Claim of Kay M. Kring : (Consolidated)

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COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Account of Michelle A. Claar : Docket No.: 2018-13  
Claim of Michelle A. Claar : (Consolidated)

RECOMMENDATION

AND NOW, this 5<sup>th</sup> day of April 2023, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Claimants' appeal should be **DENIED** and the decision of PSERS be **AFFIRMED**.

s/Jason Giurintano

Jason C. Giurintano, Esquire  
Hearing Examiner

*Claimants:*

Kay Kring

**Redacted**

Michelle Claar

**Redacted**

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***Docket Clerk:***

Julie Vitale | Appeal Docket Administrator  
Public School Employees' Retirement Board  
5 N 5th Street | Harrisburg, PA 17101-1905

***Date of Mailing:***

4/5/23