

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

IN RE: COMMUNITY COLLEGE OF PHILADELPHIA
 DOCKET NO. 2019-15

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the pleadings, the Community College of Philadelphia's ("CCP") Motion for Summary Judgment, the Public School Employees' Retirement System's ("PSERS") Partial Motion for Summary Judgment, PSERS' Reply to Claimant's Motion for Summary Judgment, Claimant's Response to PSERS' Partial Motion for Summary Judgment, Claimant's Reply Brief in Support of Its Motion for Summary Judgment, the proposed Opinion and Recommendation of the Hearing Examiner ("HEO"), PSERS' Brief on Exceptions, and Claimant's Brief in Opposition to PSERS' Exceptions.

PROCEDURAL HISTORY

On December 4, 2019, the Board, through its former Secretary, issued an Order to Show Cause why an order to offer PSERS membership to all employees of CCP who qualify for PSERS membership pursuant to the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101 et seq., and to enroll Paul Hanley in PSERS, should not be entered. On February 3, 2020, CCP filed a Response to Order to Show Cause with New Matter, and on February 18, 2020, PSERS filed its Reply to New Matter. After one continuance, a hearing was scheduled for June 13, 2022 – June 15, 2022. CCP filed a Motion for Summary Judgment on May 27, 2022, and PSERS filed a Partial Motion for Summary Judgment on May 31, 2022. The Board continued the hearing scheduled in June, and delegated the motions to the Hearing Examiner, Debra Sue Rand, Esq., to issue a proposed opinion and recommendation regarding the parties' motions. On August 25, 2022, PSERS filed a Reply to CCP's Motion for Summary Judgment, and on August 26, 2022, CCP filed a Response to PSERS' Partial Motion for Summary

Judgment. On September 29, 2022, CCP filed a Reply Brief in Support of Its Motion for Summary Judgment. Thereafter, on October 13, 2022, the Hearing Examiner issued the HEO, concluding that the Board does not have the authority to issue the Order to Show Cause. (See HEO, Conclusion of Law 2 and Discussion at pp. 8 – 11). In the alternative, the HEO concludes, *inter alia*, that the Retirement Code does not require CCP to offer PSERS membership to its employees who were not previously members of PSERS through another employer. (See HEO, Conclusions of Law 5 and Discussion pp. 14 – 27). On December 14, 2022, PSERS filed a Brief on Exceptions raising three main grounds of error with the HEO. PSERS argues that the hearing examiner erred in failing to grant PSERS' partial motion regarding mandatory PSERS membership for qualifying employees who are not otherwise enrolled in a retirement plan. Specifically, PSERS avers that qualifying CCP employees who are not enrolled in another retirement plan are mandatory members of PSERS, labor organizations cannot bargain away the statutory mandate that all qualifying community college employees enroll in a retirement plan, and that the Board has authority to determine whether an individual is a member of PSERS, authority it properly exercised through an order to show cause. PSERS argues that the hearing examiner also erred by failing to apply the correct standard for a motion for summary judgment and by failing to recognize that the choice of retirement plans rests with the community college employee. On February 1, 2023, CCP filed a Brief in Opposition to PSERS' Exceptions. CCP argues that the hearing examiner correctly determined that the Board lacked authority to issue the Order to Show Cause and correctly determined that the Board unlawfully commingled prosecutorial and adjudicative authority in this matter. CCP further avers that the hearing examiner correctly determined that the operative statutes do not require PSERS membership for Mr. Hanley, and that the hearing examiner properly applied the summary judgment standard. CCP argues that the case involves a single employee and the relevant analysis involves the application of the law to his unique situation. CCP further contends the applicable statutes do not mandate PSERS membership where employees have the option to enroll in an independent retirement program, and, for employees represented by unions, collective bargaining agreements may designate an independent retirement program. CCP concludes that PSERS' other exceptions lack merit. Specifically, CCP argues that the

hearing examiner correctly found that PSERS' regulation regarding enrollment was not effective because it contradicts the plain language of the Retirement Code, and that PSERS is incorrect in its assertion that PSERS should always be presented to employees as an option.

After a careful review of the entire record, the Board disagrees with the HEO and agrees with PSERS' exceptions. Accordingly, based on its independent review, the Board issues the following Findings of Fact, Conclusions of Law, Discussion, and Conclusion:¹

FINDINGS OF FACT

1. CCP is a community college located within the Commonwealth of Pennsylvania. (PSERS' Memorandum of Facts and CCP's Response, ¶ 1).

2. The Board is charged with the administration of PSERS pursuant to the Retirement Code, including membership eligibility. See 24 Pa.C.S. §§ 8301(a), 8501(a), 8502, 8521.

3. Paul Hanley is a part-time employee of CCP. (PSERS' Memorandum of Facts and CCP's Response, ¶ 6).

4. Mr. Hanley has worked for CCP since 1995. (PSERS' Memorandum of Facts and CCP's Response, ¶ 7).

5. From 1995 until October 2017, Mr. Hanley was not enrolled in any retirement plan. (PSERS' Memorandum of Facts and CCP's Response, ¶ 8).

6. In the fall of 2017, Mr. Hanley sought to become a member of PSERS. (PSERS' Memorandum of Facts, ¶¶ 3-5; CCP's Statement of Undisputed Facts, ¶ 28).

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

7. On September 27, 2017, Mr. Hanley emailed a *PSERS/SERS Enrollment Form* to Lolita Lukes, a CCP employee. (PSERS' Memorandum of Facts and CCP's Response, ¶ 3; PSERS-1).

8. On September 28, 2017, Ms. Lukes signed the form and noted a PSERS effective date of October 1, 2017. (PSERS' Memorandum of Facts and CCP's Response, ¶ 4; PSERS-2).

9. In October 2017, CCP enrolled Mr. Hanley in PSERS. (PSERS' Memorandum of Facts, ¶ 5; CCP's Statement of Undisputed Facts, ¶ 33).

10. CCP only offers an independent retirement program to its employees, unless the employee has previously been enrolled in PSERS or the State Employees' Retirement System ("SERS") through a prior employer, in which case, they may enroll in their prior system. (PSERS' Memorandum of Facts and CCP's Response, ¶ 11).

11. Mr. Hanley was not a member of PSERS through a prior employer. (PSERS' Memorandum of Facts and CCP's Response, ¶ 12).

12. On November 1, 2017, after learning that Mr. Hanley was not previously enrolled in PSERS through another employer, CCP adjusted his account with PSERS by removing all salary and service credit and voiding his contract record. (PSERS' Memorandum of Facts, ¶ 5; CCP's Statement of Undisputed Facts, ¶ 33).

13. Despite Mr. Hanley's efforts, and communications with PSERS and CCP, CCP prohibited him from participating in PSERS. (PSERS' Memorandum of Facts and CCP's Response, ¶¶ 13-32; PSERS-3 – PSERS-17).

14. For the first time since he began employment with CCP in 1995, on or around August 2018, Mr. Hanley enrolled in an independent retirement program offered through CCP. (PSERS' Memorandum of Facts and CCP's Response, ¶ 33; PSERS-18).

15. On December 4, 2019, the Board issued the Order to Show Cause on CCP to file a written answer "to show cause why CCP should not notify and offer PSERS membership to all employees of CCP who qualify for PSERS membership pursuant to

the Retirement Code, and enroll Mr. Hanley as a member of PSERS.” (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 34; PSERS-19).

16. The Order to Show Cause encompasses Mr. Hanley and other similarly situated CCP employees. (PSERS-19).

17. On February 3, 2020, CCP filed a response with New Matter. (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 35; PSERS-20).

18. On February 13, 2020, the Board issued an Order: (1) docketing the matter before the Board with CCP named as Claimant; (2) directing PSERS to respond to CCP’s New Matter; and (3) directing that the case be referred to a hearing examiner pursuant to the General Rules of Administrative Procedure (“GRAPP”) and the Board’s regulations. (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 36; PSERS-21).

19. On February 18, 2020, PSERS filed a Reply to New Matter. (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 37; PSERS-22).

20. On June 25, 2021, the Board appointed Debra Rand, Esq. as the hearing examiner to oversee the administrative proceedings, and scheduled a hearing for November 1-5, 2021. (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 38; PSERS-23, PSERS-24).

21. After CCP filed an unopposed request for a continuance, which was granted, by letter dated February 28, 2022, the matter was rescheduled for a hearing on June 13-15, 2022. (PSERS’ Memorandum of Facts and CCP’s Response, ¶ 39; PSERS-25).

22. On May 27, 2022, CCP filed a Motion for Summary Judgment.²

23. On May 31, 2022, PSERS filed a Partial Motion for Summary Judgment.

² The Board can take official notice of the filings in a proceeding before with the Board. See 1 Pa. Code § 35.173.

24. On June 3, 2022, the Board delegated the matter to Hearing Examiner Rand to issue a proposed opinion and recommendation regarding the parties' motions, pursuant to Section 201.6(c), 22 Pa. Code § 201.6(c), of the Board's regulations.

25. On June 10, 2022, PSERS requested an extension to file a response to CCP's Motion.

26. On June 13, 2022, the Hearing Examiner issued an Order Extending Time for Response to Summary Judgment Motions.

27. On August 25, 2022, PSERS filed a Reply to CCP's Motion for Summary Judgment.

28. On August 26, 2022, CCP filed a Response to PSERS' Memorandum of Facts in Support of Its Partial Motion for Summary Judgment.

29. On September 7, 2022, CCP requested leave to file a reply brief in support of their Motion for Summary Judgment.

30. On September 8, 2022, the Hearing Examiner issued an Order Granting CCP's request to file a reply brief.

31. On September 29, 2022, CCP filed a Reply Brief in Support of Its Motion for Summary Judgment.

32. On October 13, 2022, Hearing Examiner Rand filed the HEO.

33. On November 4, 2022, PSERS requested an extension to file exceptions to the HEO.

34. On November 9, 2022, the Board issued an Order granting PSERS' request for an extension of time to file exceptions.

35. On December 14, 2022, PSERS filed a Brief on Exceptions.

36. On February 1, 2023, CCP filed a Brief in Opposition to the Exceptions filed by PSERS.

CONCLUSIONS OF LAW

1. The Board is charged with the administration of PSERS. 24 Pa.C.S. § 8502.
2. Pursuant to the Retirement Code, the Board has the authority to determine who is a member of PSERS, and to do so, the Board may issue an Order to Show Cause. *See Discussion*, part A.
3. There is no commingling of prosecutorial and adjudicatory functions by the Board that would mandate new proceedings. *See Discussion*, part A.
4. The Public School Code of 1949 ("Public School Code") mandates that community college employees "be eligible for inclusion" in PSERS, SERS, or any independent retirement program approved by their employer. 24 P.S. § 19-1913-A(f).
5. The Retirement Code provides that PSERS membership is mandatory for a community college employee who is a full-time or part-time salaried employee "as of the effective date of employment" **or** a community college employee who is a part-time per diem employee or a part-time hourly employee and has rendered, respectively, either 80 days or 500 hours in a school year (collectively, "qualifying community college employee"). 24 Pa.C.S. § 8301(a), (b), and (c); *see Discussion*, part B.
6. There are exceptions to the mandatory enrollment rule in the Retirement Code for a qualifying community college employee. A qualifying community college employee is not a mandatory member of PSERS if the employee is either: (a) enrolled in SERS or an independent retirement program approved by their employer; or (b) is a part-time employee who has an individual retirement account and who elected not to enroll in PSERS upon qualification. 24 Pa.C.S. § 8301(a), (b), and (c); *see Discussion*, part B.
7. A qualifying community college employee must be enrolled in PSERS, if they are not eligible for enrollment, or do not enroll, in SERS or the employer's independent retirement program. 24 Pa.C.S. § 8301; 22 Pa. Code 213.1, *see Discussion*, part B.

8. The Board's regulations provide that, under Section 8301(a) of the Retirement Code, "certain school employees may elect not to join [PSERS] in favor of an optional alternate retirement program approved by the employer" and that "[e]very employee who is eligible for membership in the optional alternate retirement program shall make the election within 30 days of the first date of active employment. Employees not exercising the option to join the optional alternate retirement program shall be deemed to have chosen to commence active membership in [PSERS], unless they have elected membership in [SERS]." 22 Pa. Code § 213.1(b)(1).

9. A qualifying community college employee has the right to choose membership in PSERS in lieu of SERS or their employer's independent retirement program, and an employer cannot remove that statutory right. *See Discussion*, part C.

10. A collective bargaining agreement ("CBA") cannot change the mandates of the Retirement Code. 24 Pa.C.S. § 8103(f); 43 P.S. § 1101.703; *see Discussion*, part C.

11. This matter is not moot. *See Discussion*, part D.

12. CCP is not entitled to summary judgment.

13. PSERS is entitled to partial summary judgment on the issues of the law.

DISCUSSION

Before the Board are two competing Motions for Summary Judgment involving the Board's Order to Show Cause regarding whether CCP must offer PSERS membership to employees of CCP who qualify for PSERS membership pursuant to the Retirement Code. Preliminarily, the Board may "adopt or reject, in whole or in part" the HEO, or the Board may "issue its own opinion and order." 22 Pa. Code § 201.11(c). The HEO "will not become the opinion and order of the Board unless it is adopted by the Board." 22 Pa. Code § 201.11(a).

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. A motion for summary judgment eliminates 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 where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. In addition, partial summary judgment may be granted as to specific legal issues. Pa.R.C.P. 1035.2. 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). Here, both parties have filed motions for summary judgment, alleging that there are no material facts that would preclude this Board from ruling on the issues raised in their respective motions.

CCP seeks summary judgment based on issues of law and fact. PSERS seeks partial summary judgment on the interpretation of the law, leaving open issues of fact for a hearing. Both motions require the Board to interpret the interplay between the Retirement Code and the Public School Code, and resolve the question of who chooses an employee's retirement plan -- the qualified community college employee or the employer. CCP asserts that the Board is without authority to issue an order to show cause related to an employer's membership enrollment practices. As to the merits of the case,

CCP argues that it is not required to offer PSERS as a retirement option to its employees who were not previously enrolled in PSERS through a prior employer. CCP maintains that it complies with its duty under the Public School Code by offering employees eligibility in an independent retirement program, and that the Retirement Code does not compel a contrary result. PSERS asserts that all qualifying community college employees must be offered the opportunity to enroll in PSERS. PSERS maintains that membership in PSERS is mandatory for qualifying community college employees, though employees may opt for membership in SERS or the community college's independent retirement program, if eligible. For the reasons discussed below, the Board agrees with PSERS' exceptions, denies CCP's Motion for Summary Judgment, and grants PSERS' Partial Motion for Summary Judgment.

A. The Board has authority to issue an order to show cause.

CCP argues that the Board lacks the authority to issue an order to show cause related to an employer's membership enrollment practices. PSERS responds that the Board has authority to determine whether an individual is a member of PSERS, and that authority is properly exercised through an order to show cause.

The Board is statutorily required to ensure the administration of the system and maintain compliance with the Retirement Code. See 24 Pa.C.S. §§ 8411, 8501(a), 8502, 8505, 8521, 8534(b); 22 Pa. Code § 201.1 et seq. The Retirement Code directly provides a broad mandate that the Board "shall perform such other functions as required for the execution of this part and shall have the right to inspect the employment records of employers." 24 Pa.C.S. § 8502(f). The Retirement Code's directives provide authority to the Board to issue an Order to Show Cause. See *Commonwealth v. Beam*, 788 A.2d 357, 360 (Pa. 2002) (holding that agencies have "the implied authority necessary to the effectuation of its express mandates." (internal citation omitted)); *Commonwealth v. Ctr. Twp.*, 95 A.3d 354, 369 (Pa. Cmwlth. 2014); see also *Commonwealth v. Butler Cnty. Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982) (explaining that powers can be "expressly conferred or given by necessary implication."); 22 Pa. Code § 201.1 ("Under 1 Pa. Code § 31.1 (relating to scope of part), 1 Pa. Code Part II (relating to [GRAPP]), is applicable to the activities of and proceedings before the Board, except as provided in, or

inconsistent with, this chapter.”); 1 Pa. Code § 35.14 (“Whenever an agency desires to institute a proceeding against a person under statutory or other authority, the agency may commence an action by an order to show cause setting forth the grounds for the action.”).³

The Board routinely interprets, applies, and enforces the Retirement Code. The Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania have agreed with the Board’s exercise of, and ordered the Board to exercise, its authority over employers to ensure compliance with the Retirement Code. See, e.g., *Baillie v. Pub. Sch. Emps.’ Ret. Bd.*, 993 A.2d 944 (Pa. Cmwlth. 2010) (acknowledging PSERS’ authority to review “whether the public school employer has exercised its discretion properly” regarding an employer’s declaration of emergency, because PSERS otherwise cannot administer the retirement system); *Kirsch v. Pub. Sch. Emps.’ Ret. Bd.*, 985 A.2d 671, 676 (Pa. 2009) (holding that PSERS’ interpretation of 24 Pa.C.S. § 8102 regarding the final average salaries was correct, despite the school district’s interpretation and contributions at a higher rate); *Volpe v. Pub. Sch. Emps.’ Ret. Bd.*, 178 A.3d 973 (Pa. Cmwlth. 2017) (unpublished) (holding the Board has authority to review an employer’s decision as to whether an annuitant is working in a return to service exception or whether he needed to be reenrolled in PSERS). As to membership eligibility, specifically, the Commonwealth Court previously has concluded that the retirement board is the entity charged with determining such eligibility pursuant to the law set forth in the retirement code and the relevant regulations. *Perry v. State Emps.’ Ret. Sys.*, 872 A.2d 273, 277 (Pa. Cmwlth. 2005);⁴ see also *Blackhawk Sch. Dist. v. Pub. Sch. Emps.’ Ret. Bd.*, 268 A.3d 1136 (Pa. Cmwlth. 2021) (unpublished) (holding the Board has authority under the Retirement Code to determine whether a provider was a PSERS-eligible school employee or an independent contractor and remanding to the Board for a hearing on the issue). It is, therefore, within the Board’s scope of authority to determine whether an employee is

³ Notably, GRAPP is the accepted practice and procedure that governs all agencies of the Commonwealth, unless otherwise provided by law. 1 Pa. Code § 31.1(a).

⁴ Cases interpreting provisions of the State Employees’ Retirement Code (“SERS Code”) “are equally applicable in deciding issues arising under similar or identical provisions” of the Retirement Code. *Krill v. Pub. Sch. Emps.’ Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

eligible for membership in PSERS and whether the law provides the employee with the choice of retirement plans.

An Order to Show Cause is needed for the Board to fulfill its statutory obligations. The Retirement Code authorizes the Board to administer the system, and as part of those duties, the Board is ensuring CCP's compliance with statutory mandates. CCP, as an employer, is required to enroll employees in PSERS if the employees qualify for mandatory PSERS membership. 24 Pa.C.S. §§ 8301, 8506(d).⁵ Employers must report the work status of their employees to PSERS each month, "in a manner prescribed by the board," 24 Pa.C.S. § 8506(a), and employers are required to provide the Board with "service and compensation records as well as other information requested by the board." 24 Pa.C.S. § 8506(b).⁶ When an employer fails to perform their statutorily required duties pursuant to Section 8506 of the Retirement Code, including those duties which are the subject of the Order to Show Cause, the Board is authorized to perform those duties. 24 Pa.C.S. § 8502(g) ("[i]n the event the employer fails to comply with the procedures as mandated in section 8506 (relating to duties of employers), the board shall perform such duties and bill the employer who shall pay for the cost of same."). Notably, the Board is statutorily obligated to correct errors, including those made by employers. See 24 Pa.C.S. § 8534(b); *Baillie*, 993 A.2d at 950. The Board, therefore, is authorized to ensure the employers' duties are performed so that the retirement system is administered according to the Retirement Code. Thus, the Board has the authority to issue an Order to Show Cause regarding CCP's membership enrollment practices. 1 Pa. Code § 35.14.

Further, the Order to Show Cause does not commingle prosecutorial and adjudicative functions of the Board as CCP suggests. The cases cited in support of this

⁵ The Order to Show Cause seeks an Order compelling CCP to do just that: "notify and offer PSERS membership to all employees qualified under the Retirement Code," and "enroll Mr. Hanley in PSERS if it is determined that he qualifies for membership based on the documentation provided." (PSERS-19).

⁶ The Order to Show Cause seeks an Order compelling CCP to do just that: "provide the relevant data, including payroll records, regarding Mr. Hanley during the requested time period." (PSERS-19).

position, importantly, involve boards with the authority to revoke professional licenses. *Bunch v. State Bd. of Auctioneer Exam'r*, 620 A.2d. 578 (Pa. Cmwlth. 1993); *Lyness v. State Bd. of Med.*, 605 A.2d 1204 (Pa. 1992). The instant proceeding is not prosecutorial or disciplinary in nature, and the Board cannot find CCP guilty of a crime, liable for civil fines, or revoke a license. The Order to Show cause does not seek to penalize, sanction, or punish CCP; it seeks to ensure compliance with the Retirement Code. Nothing more is sought by the Order to Show Cause. (PSERS-19).

B. PSERS membership is mandatory for qualifying community college employees who are not enrolled in SERS or an independent retirement program approved by CCP.

The Retirement Code and the Public School Code address retirement plans for community college employees.⁷ Pursuant to the Retirement Code, community college employees are mandatory members of PSERS unless they fit into one of four statutory exceptions:

(a) ***Mandatory membership.***— Membership in the system ***shall be mandatory*** as of the effective date of employment for ***all*** school employees ***except*** the following:

(1) Any officer or employee of the Department of Education, State-owned educational institutions, ***community colleges***, area vocational-technical schools, technical institutes, or The Pennsylvania State University ***and who is a member of the State Employees' Retirement System or a member of another retirement program approved by the employer.***

(2) Any school employee who is not a member of the system and who is employed on a per diem or hourly basis for less than 80 full-day sessions or 500 hours in any fiscal year or annuitant who returns to school service under the provisions of section 8346(b) (relating to termination of annuities).

(3) Any officer or employee of a governmental entity who subsequent to December 22, 1965 and prior to July 1, 1975 administers, supervises, or teaches classes financed wholly

⁷ The Board notes that the SERS Code also addresses retirement plans for community college employees. See 71 Pa.C.S. § 5101, et seq. SERS is not a party to the present case, and therefore, the Board does not opine on the implications of this case on CCP's and its employees' rights and obligations related to SERS membership.

or in part by the Federal Government so long as he continues in such service.

(4) Any part-time school employee who has an individual retirement account pursuant to the Federal act of September 2, 1974 (Public Law 93-406, 88 Stat. 829), known as the Employee Retirement Income Security Act of 1974.

24 Pa.C.S. § 8301(a) (emphasis added);⁸ 22 Pa. Code 213.1. PSERS membership is thus, as a matter of law, mandatory for a community college employee who is a full-time or part-time salaried employee “as of the effective date of employment” or a community college employee who is a part-time per diem employee or a part-time hourly employee and has rendered, respectively, either 80 days or 500 hours in a school year (collectively, “qualifying community college employee”). 24 Pa.C.S. § 8301(a), (b), and (c).⁹ There are exceptions to the mandatory enrollment rule in the Retirement Code for a qualifying community college employee. A qualifying community college employee is not a mandatory member of **PSERS** if the employee is either: (a) enrolled in **SERS** or an **independent retirement program** approved by their employer; or (b) is a part-time employee who has an individual retirement account and who has elected not to enroll in PSERS upon qualification. 24 Pa.C.S. § 8301(a), (b), and (c).

The Retirement Code is not in conflict with the Public School Code, which provides that community college employees must be eligible for inclusion in **PSERS**, **SERS**, or an **independent retirement program**:

⁸ School employees who meet the requirements of Section 8301(a)(1) and (2) cannot be members of PSERS; school employees who meet the requirements of Section 8301(a)(3) and (4) have the right to elect membership in PSERS. 24 Pa.C.S. § 8301(b), (c).

⁹ Prior to Act 120 of 2010, a public school employee had to qualify for PSERS membership each school year. See 24 Pa.C.S. 8301(a)(2) (amended 2010); see Act 2010-120 (H.B. 2497), P.L. 1269, § 1.1, approved Nov. 23, 2010, eff. Nov. 23, 2010). Act 2010-120, however, changed member qualification requirements so that members generally are no longer required to requalify for membership every year. See 24 Pa.C.S. § 8301(a)(2); see 24 Pa.C.S. § 8102 (def. “Member”); see Act 2010-120 (H.B. 2497), P.L. 1269, § 1.1, approved Nov. 23, 2010, eff. Nov. 23, 2010 (adding “who is not a member of the system”).

(f) All administrative personnel, faculty, and other employees of the community colleges in the Commonwealth shall be **eligible for inclusion** in **[PSERS]**, **[SERS]**, or any **independent retirement program** approved by the Board of Trustees of a community college, and the Secretary of Education.

24 P.S. §19-1913(A)(f) (emphasis added). Both statutes can be read together without causing conflict. See 1 Pa.C.S. § 1932(b) ("Statutes in pari materia shall be construed together, if possible, as one statute."). In fact, the statutes complement one another. See *Perry*, 872 A.2d at 276.

The Public School Code does not, and cannot, remove PSERS as an option for qualifying community college employees, because eligibility for PSERS is statutorily determined by the Retirement Code. 24 Pa.C.S. § 8301. The "or" in Section 24 P.S. § 19-1913(A)(f) of the Public School Code does not limit a community college employee's eligibility to just one plan. Some employees may be **eligible** for more than one plan, but an employee may elect to **enroll** in only one plan. See 24 Pa.C.S. § 8301; 71 Pa.C.S. § 5301(a)(11), (12).

C. A qualifying community college employee has the right to choose their retirement program.

CCP's position is that the Public School Code leaves the choice of applicable retirement programs to the community college, not the community college employees. PSERS argues that qualifying community college employees are statutorily entitled to select PSERS membership.

The Retirement Code, not an employer, dictates eligibility for PSERS membership. As previously explained, qualifying community college employees must enroll in PSERS unless they are either: (a) enrolled in SERS or an independent retirement program approved by their employer; or (b) a part-time employee who has an individual retirement account and who elected not to enroll in PSERS upon qualification. 24 Pa.C.S. § 8301(a), (b), and (c). Indeed, Section 8301(a) provides as follows:

(a) **Mandatory membership.**— Membership in the system **shall be mandatory** as of the effective date of employment for **all** school employees **except** the following:

(1) Any officer or employee of the Department of Education, State-owned educational institutions, **community colleges**, area vocational-technical schools, technical institutes, or The Pennsylvania State University **and who is a member of the [SERS] or a member of another retirement program approved by the employer.**

24 Pa.C.S. § 8301(a). The Board's regulation, which relates to this section of the Retirement Code, provides that such school employees may **elect** not to join PSERS and provides the procedure and timeline for employees to exercise that choice:

(b) Under section 8301(a)(1) of the Retirement Code, certain school employees may **elect** not to join the System in favor of an optional alternate retirement program approved by the employer.

(1) Every employee who is eligible for membership in the optional alternate retirement program shall make the **election** within 30 days of the first date of active employment. Employees not **exercising the option** to join the optional alternate retirement program shall be deemed to have **chosen** to commence active membership in the System, unless they have **elected** membership in the State Employees' Retirement System.

22 Pa. Code § 213.1(b)(1) (emphasis added). Thus, a qualifying community college employee may **choose** to enroll in PSERS, in lieu of SERS or an independent retirement program. If a qualifying employee does not proactively choose to enroll in SERS or the independent retirement program, they are deemed to have chosen PSERS. 24 Pa.C.S. § 8301(a)(1); 22 Pa. Code § 213.1(b)(1).

The legislative history of the Public School Code, the Retirement Code, and the SERS Code, further demonstrates that the choice of retirement plans rests with the employee. (See PSERS' Motion for Summary Judgment pp. 8 – 12). Indeed, the SERS' Code provides that membership in SERS is mandatory, with exceptions, including school employees who "elect" membership in **PSERS** or their employer's **independent retirement program**:

(a) Mandatory membership.--Membership in the system shall be mandatory as of the effective date of employment for all State employees except the following:

(11) **School employees** who have **elected** membership in the Public School Employees' Retirement System.

(12) **School employees** who have **elected** membership in an independent retirement program approved by the employer

71 Pa.C.S. § 5301(a)(11), (12) (emphasis added); see 4 Pa. Code § 243.1 (“The Commonwealth employees listed in section 5301(a)(1)—(11) of the code (relating to mandatory and optional membership) shall have the option to elect membership or nonmembership in the System.”); 4 Pa. Code § 243.3). The SERS’ Code illustrates that the Legislature intended for the election to be that of the “school employee,” not the employer. The Board’s regulation, like the SERS’ Code, makes it clear that a qualifying community college employee has the right to choose their retirement program.

Moreover, as evidenced by the Charter School Law, where the Legislature intended to provide employers with the choice of retirement plans, the law was written to make that choice clear:

All employees of a charter school shall be enrolled in [PSERS] in the same manner as set forth in 24 Pa.C.S. § 8301(a) (relating to mandatory and optional membership) **unless** at the time of the application for the charter school the sponsoring district or the board of trustees of the charter school has a retirement program which covers the employees or the employee is currently enrolled in another retirement program.

24 P.S. § 17-1724-A(c).

CCP asserts that the Board’s regulation regarding employee selection of retirement programs is *ultra vires*, and without statutory authority. The Board, however, is explicitly authorized to “adopt and promulgate rules and regulations for the uniform administration of the system,” 24 Pa.C.S. § 8502(h), and duly promulgated regulations carry the force of law. *Bayada Nurses, Inc. v. Dep’t of Labor & Indus.*, 958 A.2d 1050, 1056-57 (Pa. Cmwlth. 2008). The Board notes that 22 Pa. Code § 213.1 was first promulgated through the required regulatory procedures under Pennsylvania law in 1976 and was last updated in 2008. The regulation is consistent with Section 8301 of the

Retirement Code and explains how to implement the provision for the uniform administration of the system.

Neither the Retirement Code nor the Public School Code delegates the employee's statutory right to choose their retirement plan to the employer, or grants the employer the authority to deny an employee membership in PSERS. The employer's role, pursuant to the Retirement Code, is to cause an application for membership to be filed with the Board if the qualifying employee elects PSERS, or if the qualifying employee does not elect and is not enrolled in another plan. 24 Pa.C.S. § 8506(d); 22 Pa. Code § 213.1(b)(1). Pursuant to the Public School Code, the employer is permitted to approve and provide an independent retirement program as an option to their employees. See 24 P.S. §19-1913(A)(f). An employer's decision to offer an independent retirement program does not change an employee's eligibility for PSERS membership. 24 Pa.C.S. § 8301. The "or" in Section 19-1913(A)(f) of the Public School Code, therefore, cannot be read to provide that an employer makes the "election" for all qualifying community college employees, merely by offering an independent retirement program to some of its employees. See 24 Pa.C.S. § 8301(a)(1); 71 Pa.C.S. § 5301(a)(11), (12); 24 P.S. §19-1913(A)(f). Rather, the availability of an independent retirement program provides a qualifying employee with a choice of retirement plans. Consistent with both the Retirement Code, the Public School Code, and the SERS Code, the employee, not the employer, elects their retirement plan from among those options for which they qualify.

CCP also argues that the Faculty & Staff Federation of the Community College of Philadelphia, Local 2025, American Federation of Teachers, AFL-CIO ("Federation") negotiated collective bargaining agreements on behalf of employees to enroll in CCP's independent retirement program, to the exclusion of PSERS and SERS, and that CCP employees delegated the right to select a retirement plan to the Federation. The facts before the Board in support of this position, however, are disputed.

The facts regarding the collective bargaining agreements, however, do not present a genuine issue of material fact because, as a matter of law, a collective bargaining agreement cannot circumvent the terms of the Retirement Code. 24 Pa.C.S. § 8103(f); 43 P.S. § 1101.703. Specifically, the Public Employee Relations Act ("PERA"), 43 P.S. §

1101.101 et seq., prohibits employers and labor organizations from reaching agreements contrary to the law:

The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania[.]

43 P.S. § 1101.703. Further, the Retirement Code prohibits collective bargaining agreements from altering the terms of the Retirement Code:

Exclusive source of rights and benefits.— Regardless of any other provision of law, pension and benefit rights of school employees shall be determined solely by this part or any amendment thereto, or the plan document established by the board, **and no collective bargaining agreement** nor any arbitration award between the employer and the employer's employees or the employee's collective bargaining representatives shall be construed to do any of the following:

(1) Change any of the provisions of this part.

24 Pa.C.S. § 8103(f) (emphasis added). Thus, the terms of a collective bargaining agreement cannot violate or circumvent the terms of the Retirement Code. Accordingly, a labor organization cannot bargain away the statutory mandate that all qualifying community college employees enroll in a retirement plan. Moreover, an employee's choice of retirement plans is a statutory right, and therefore, that statutory right cannot be bargained away.

Parties can bargain over retirement benefits, outside of those provided for by the Retirement Code, see generally *PA State Educ. Ass'n v. Baldwin Whitehall Sch. Dist.*, 372 A.2d 960, 963-64 (Pa. Cmwlth. 1977), but collective bargaining agreements cannot negotiate away statutory rights provided for in the Retirement Code. 24 Pa.C.S. § 8103(f); 43 P.S. § 1101.703. As such, an employer and labor organization may bargain over the availability and terms of an independent retirement program, but in doing so, they cannot alter or remove the eligibility, mandatory membership, and employee choice provisions of the Retirement Code.

D. The case is not moot.

The undisputed facts before the Board are as follows: CCP only offers PSERS to employees who previously have been enrolled in PSERS. (F.F. 10). Mr. Hanley sought PSERS membership, completed CCP's *Enrollment Form*, and CCP enrolled him in PSERS. (F.F. 6-9). Shortly thereafter, CCP learned that Mr. Hanley was not previously enrolled in PSERS and adjusted his account with PSERS by removing all salary and service credit and voiding his contract record, thereby, removing him from PSERS membership. (F.F. 11-12). Despite Mr. Hanley's efforts, and communications with PSERS and CCP, CCP prohibited him from participation in PSERS. (F.F. 13). Thereafter, in August of 2018, Mr. Hanley, for the first time since his employment with CCP in 1995, enrolled in the independent retirement program offered through CCP. (F.F. 4, 5, 14). The fact that Mr. Hanley later enrolled in CCP's independent retirement program does not change his PSERS eligibility in 2017 when he first sought, and presumably qualified for, PSERS membership. (F.F. 6-9).¹⁰ Mr. Hanley, based on the currently known facts, had **no retirement plan** until August 2018. (F.F. 9-14). As previously established, the Retirement Code mandates enrollment in PSERS "as of the effective date of employment," unless the employee is either enrolled at that time in another plan or is a part-time hourly or per diem employee who has not yet qualified for PSERS. 24 Pa.C.S. § 8301(a)(1), (2). Mr. Hanley's experience demonstrates that CCP does not offer PSERS as a retirement option to all employees who are eligible for the choice, and that CCP does not enroll certain qualifying community college employees in PSERS. See 24 Pa.C.S. § 8301; 24 Pa.C.S. § 8506.

Importantly, the "conduct complained of is capable of repetition yet likely to evade judicial review." See *Lutz v. Tanglwood Lakes Cmty. Ass'n, Inc.*, 866 A.2d 471, 473 (Pa. Cmwlth. 2005). The Order to Show Cause was not limited in scope to Mr. Hanley, as it involves "all employees of CCP who qualify for PSERS membership." (PSERS-19). Mr. Hanley's situation illustrates that CCP likely has qualified employees **not** enrolled in any retirement plan. Both the Retirement Code and the Public School Code are clear that the

¹⁰ The facts regarding Mr. Hanley's qualification for PSERS membership would need to be further developed at a hearing.

intent of the Legislature was that community college employees have a retirement plan. It is likely that there are qualifying CCP employees that have not been offered, or were denied, PSERS membership.

CONCLUSION

For these reasons, the Board agrees with PSERS' exceptions and concludes that CCP's Motion for Summary Judgment must be DENIED, PSERS' Motion for Partial Summary Judgment shall be GRANTED, and this matter is referred back to the Hearing Examiner to conduct an administrative hearing and issue a proposed opinion and recommendation to determine which CCP employees must be enrolled in PSERS, in accordance with the Opinion and Order of the Board.

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

IN RE: COMMUNITY COLLEGE OF PHILADELPHIA
DOCKET NO. 2019-15

ORDER

AND NOW, upon consideration of the record before the Board:

IT IS HEREBY ORDERED that CCP's Motion for Summary Judgment is DENIED; and PSERS' Motion for Partial Summary Judgment is GRANTED.

WHEREFORE,

1. CCP must offer PSERS to all CCP employees who qualify for mandatory membership in PSERS under Section 8301 of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8301, and enroll the CCP employees who choose PSERS;
2. CCP must enroll in PSERS all CCP employees who qualify for mandatory membership in PSERS and who are not enrolled in SERS or an independent retirement program sponsored by CCP; and
3. This matter is referred back to the Hearing Examiner to conduct an administrative hearing and issue a proposed opinion and recommendation to determine which CCP employees must be enrolled in PSERS, in accordance with the foregoing Opinion and Order of the Board.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 03/21/2025

By: 
Richard Vague, Chairman