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

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

OPINION AND ORDER OF THE BOARD

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

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

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

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

Claimant’s next two exceptions are intertwined to the extent he essentially asserts that the Hearing Examiner “penalized” him by not granting a waiver because he did not notify PSERS of his return to service. In furtherance of his argument, Claimant insists that PSERS has no role in evaluating a return to service under the emergency provision except when determining if “there was a phony retirement or an effort to achieve an increase in PSERS payouts.” *Claimant’s Brief on Exceptions*, at p. 8, FN 2.¹ Preliminarily, Claimant’s argument fails on its most basic level. PSERS would have no reason to evaluate whether an annuitant returned in an emergency capacity under Section 8346 if such annuitant never experienced a break in service and, thus, was not eligible to become

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

an annuitant. The circumstances Claimant is advocating, therefore, would never arise.

We, thus, find that PSERS' role under Section 8346 is *not* as limited as Claimant suggests.

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

. . . To fulfill these functions, the Board must have the authority to review a school employer's initial determination that an emergency return to service exists and to determine whether that decision was reasonable.

This Board, accordingly, believes that it has authority to review and reverse employers' declarations of emergencies insofar as such emergencies affect Retirement Code benefits and the proper administration of the Retirement Code. An employer is entitled to employ whomever it wants, but the Board is not obligated to treat the employment as an emergency return to service, when to do so would violate the Board's administrative interpretation of the Retirement Code. Regarding whether the employment status of an annuitant is an emergency or a non-emergency return to service, "[i]n case of doubt, the Board will determine whether any person is a school employee" 22 Pa. Code § 215.5.

Even the Hearing Examiner acknowledges that PSERS does have the right to review an employer's declaration of an emergency to ensure that the emergency return to service provisions of the Retirement Code are being properly administered. (HEO at 33-34). The Hearing Examiner also acknowledges that a primary responsibility of this Board is found at 24 Pa.C.S. § 8502(m), which requires this Board to ensure that retirement covered compensation is credited to members' accounts. (HEO at 31-32). He opines that the role of PSERS and the Board relative to decisions made by an employer is limited to those functions that assure member contributions are properly credited and final average salary is properly calculated. *Christiana v. Public School Employees' Retirement Bd.*, 646 A.2d 645 (Pa. Cmwlth. 1994), *aff'd*, 669 A.2d 940 (Pa. 1996) (annuities purchased by the school district for the superintendent were not includable as compensation for purposes of determining superintendent's final average salary). (HEO at 31-32). But to fulfill those functions to assure that member contributions of an annuitant who returns to service are properly credited/categorized and that final average salary is properly calculated, the Board must also have authority to determine whether an emergency return to service actually exists.

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

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

As discussed thoroughly by the Hearing Examiner, the record is clear that Claimant was cognizant of his rights under the Retirement Code, including the return to service requirements at the time he returned in 1998.² When Claimant received his finalized benefit letter dated March 11, 1999, which reminded him of the ramifications of returning to service, Claimant had already returned to service, and chose to continue working for SDP for fourteen more years while receiving an annuity from PSERS. The evidence of record also establishes that PSERS made contact with Claimant and SDP regarding PSERS' right to review SDP's determination of an emergency, which served as a continuing reminder of the consequences of Claimant's continued employment for fourteen years. See, Findings of Fact Nos. 58-60; 68-72. Thus, Claimant was aware of the relevant law and the consequences of noncompliance from the beginning of his return.

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

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

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

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

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

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

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

(a) The right to oral argument is discretionary with the Board and will be granted to the extent the Board believes it will be helpful in enabling the Board to acquire an understanding of and to resolve the issues. When oral argument is granted, the Secretary of the Board will schedule the argument for the next available Board meeting.

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

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation attached hereto, and we hereby adopt them as our own and deny Claimant's exceptions. Accordingly:

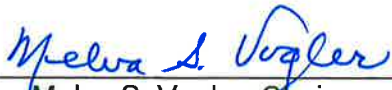
IT IS HEREBY ORDERED that

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

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

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 7, 2016

By: 
Melva S. Vogler, Chairman