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

IN RE: ACCOUNT OF DANIEL E. WATERS
DOCKET NO. 2016-10
CLAIM OF DANIEL E. WATERS

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS"). This issue in this appeal is whether the supplemental, per diem payments that Daniel E. Waters ("Claimant") received as a superintendent during the 2010-2011, 2011-2012, and 2012-2013 school years for working more than 246 days should be included as retirement-covered compensation.

PSERS filed its Motion for Summary Judgment on November 9, 2017, and served a copy by First Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated November 9, 2017, PSERS notified Claimant that he had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. Claimant did not file a response.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. *See Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment. 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. *See Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa.

Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984). Judgment may be entered against a party who does not respond to a motion for summary judgment. Pa.R.C.P. 1035.3(d).

Claimant did not respond to PSERS' motion and, therefore, he has not disputed any of the facts set forth therein. Nor has Claimant identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter. Consequently, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether the supplemental, per diem payments Claimant received are retirement-covered compensation.

FINDINGS OF FACT

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

1. Claimant was enrolled in PSERS in February 1973 through his employment with the Hatboro Horsham School District. (PSERS Motion for Summary Judgment ("MSJ"), Memorandum of Fact #1)
2. On July 1, 1988, Claimant began working for the Tredyffrin/Easttown School District ("Tredyffrin/Easttown") as a full-time, salaried employee. (MSJ, Memorandum of Fact #2)
3. On April 19, 1999, Tredyffrin/Easttown's Board of School Directors voted to appoint Claimant as substitute Superintendent for the period January 1, 2000 through December 28, 2000 and as Superintendent for a term of five (5) years from December 28, 2000 until December 29, 2005. (PSERS-1 ("2000-2005 contract"))
4. On or about December 29, 2000, Claimant became Tredyffrin/Easttown's Superintendent. (MSJ, Memorandum of Fact #4)

5. For the 1999-2000 school year, Tredyffrin/Easttown reported Claimant to PSERS as a full-time, salaried employee who worked 270 days and, for the 2000-2001 through 2004-2005 school years, Tredyffrin/Easttown reported Claimant to PSERS as a full-time, salaried employee who worked 260 days. (MSJ, Memorandum of Fact #7)

6. On or about December 29, 2005, the District reappointed Claimant as Superintendent for a term of five (5) years, through December 28, 2010. (PSERS-2 ("2005-2010 contract"))

7. On December 29, 2010, Claimant was reappointed as Tredyffrin/Easttown's Superintendent for the period December 29, 2010 through June 30, 2015. (PSERS-3 ("2010-2015 contract"))

8. For the 2005-2006 through 2014-2015 school years, Tredyffrin/Easttown reported Claimant to PSERS as a full-time, salaried 260-day employee. (MSJ, Memorandum of Fact #22)

9. During a review of Claimant's account in May 2010, PSERS staff discovered that Tredyffrin/Easttown had reported significant supplemental payments to PSERS for Claimant, and PSERS asked Tredyffrin/Easttown about the payments.¹ (MSJ, Memorandum of Fact #17)

10. In April 2011, Tredyffrin/Easttown responded to PSERS' May 2010 inquiry by providing PSERS with copies of Claimant's employment agreement. (MSJ, Memorandum of Fact #23)

11. Pursuant to the 2000-2005 contract, Claimant was a contracted, 12-month employee with an annual base salary of \$125,000 per year and, as Superintendent, he was to "devote his full-time, skill, labor and attention to the discharge of his duties," which were listed in the 2000-2005 contract as follows:

1. Waters shall be the chief administrative officer of the District. In this position, Waters shall carry out the following duties unless

¹ School employers report supplemental payments to PSERS separately from base salary. (MSJ, Memorandum of Fact #18)

otherwise directed by the Board, and, where required by The Code, with the approval of the Board:

- i. the duties of Superintendent of Schools as set forth in The Code;
- ii. the organization, reorganization and arrangement of the administrative and supervisory staffs, including instructional and noninstructional personnel, to best serve the District's public schools;
- iii. the supervision of the administration of instruction within the District and the business affairs of the District in a manner designed to further the best interests of the District and maintain and improve educational opportunities for all students;
- iv. the responsibility for selection, placement and transfer of personnel to achieve efficiency and harmony within the District;
- v. attendance at all Board meetings (with the exception of executive session(s) devoted to the preparation of Waters' performance evaluation or any discussion relating to Waters' contract); attendance at all meetings of Board and citizen committees; participation as ex-officio member on all Board committees; and providing administrative recommendations on all items of business considered by the Board and Board committees; and
- vi. the duty and authority to act at his discretion upon all emergency matters, subject to later report to the Board.

(PSERS-1)

12. Pursuant to the 2005-2010 contract, Claimant was a contracted, 12-month employee with an annual base salary of \$185,000 and he was to “devote his full time, skill, labor and attention to the discharge of his duties,” which were listed in the 2005-2010 contract as follows:

1. Dr. Waters shall be the chief administrative officer of the District. In this position, Dr. Waters shall carry out the following duties unless otherwise directed by the Board, and, where required by The Code, with the approval of the Board:
 - i. the duties of Superintendent of Schools as set forth in The Code;
 - ii. the organization, reorganization and arrangement of the administrative and supervisory staffs, including instructional and noninstructional personnel, to best serve the District’s public schools;
 - iii. the supervision of the administration of instruction within the District and the business affairs of the District in a manner designed to further the best interests of the District and maintain and improve educational opportunities for all students;
 - iv. the responsibility for selection, placement and transfer of personnel to achieve efficiency and harmony within the District;
 - v. attendance at all Board meetings (with the exception of executive session(s) devoted to the preparation of Dr. Waters’ performance evaluation or any discussion relating to Dr. Waters’ contract); attendance at all meetings of Board and citizen committees; participation as ex-officio member on all Board committees; and providing

administrative recommendations on all items of business considered by the Board and Board committees; and

- vi. the duty and authority to act at his discretion upon all emergency matters, subject to later report to the Board.

(PSERS-2)

13. Effective January 1, 2006, Claimant's 2005-2010 contract was amended to increase Claimant's base salary to \$192,955.00 per year and to provide an additional per diem rate for days worked over 246 days per contract year, which was defined as January 1 through December 31:

"Dr. Waters agrees to devote his time, skill, labor and attention to his employment with the Board on a full time basis for two hundred forty six (246) days per contract year (defined as January 1 through December 31). For each day that Dr. Waters works in addition to the 246 days ("base days") in a particular year, he is entitled to compensation in the amount of Seven Hundred Forty-Two Dollars and Thirteen Cents \$742.13 per day up to a maximum of Ten Thousand Three Hundred and Eighty Nine Dollars and Forty Two Cents (\$10,389.42) (representing fourteen (14) additional days) per year. The 246 base days includes [sic] days actually worked by Dr. Waters during a particular year less any leave days taken pursuant to this Agreement," Nothing in this subsection is intended to limit Dr. Waters right to carryover or be reimbursed for vacation days as provided in Appendix C of the 2001 ACP.

(PSERS-2, First Amendment)

14. The First Amendment did not amend Claimant's duties as Superintendent.

(PSERS-2, First Amendment)

15. Effective January 1, 2007, Claimant's 2005-2010 contract was amended to increase Claimant's base salary to \$199,515.00 per year and to provide an additional

per diem rate for days worked over 246 days per contract year, which was defined as January 1 through December 31:

“Dr. Waters agrees to devote his time, skill, labor and attention to his employment with the Board on a full time basis for two hundred forty six (246) days per contract year (defined as January 1 through December 31). For each day that Dr. Waters works in addition to the 246 days (“base days”) in a particular year, he is entitled to compensation in the amount of Eight Hundred Eleven Dollars and Three Cents (\$811.03) per day up to a maximum of Ten Thousand Seven Hundred and Forty Three Dollars and Four Cents (\$11,354.42) [sic] (representing fourteen (14) additional days) per year. The 246 base days includes [sic] days actually worked by Dr. Waters during a particular year less any leave days taken pursuant to this Agreement,” Nothing in this subsection is intended to limit Dr. Waters right to carry over or be reimbursed for vacation days as provided in the Appendix C of the 2001 ACP.

(PSERS-2, Second Amendment)

16. The Second Amendment did not amend Claimants duties as Superintendent.

(PSERS-2, Second Amendment)

17. Effective January 1, 2008, Claimant’s 2005-2010 contract was amended to increase Claimant’s base salary to \$224,515.00 per year and to provide an additional per diem rate for days worked over 246 days per contract year, which was defined as January 1 through December 31:

Dr. Waters agrees to devote his time, skill, labor and attention to his employment with the Board on a full time basis for two hundred forty six (246) days per contract year (defined as January 1 through December 31). For each day that Dr. Waters works in addition to the 246 days (“base days”) in a particular year, he is entitled to compensation in the amount at his then current per diem rate up to fourteen (14) additional days per year. The 246 base days includes [sic] days actually worked by Dr. Waters

during a particular year and any leave days taken pursuant to this Agreement. Nothing in this subsection is intended to limit Dr. Waters right to carry over or be reimbursed for vacation days as provided in the Administrator Compensation Plan in effect at the time. Any payment received pursuant to this provision in the last year of his employment shall be considered part of Dr. Waters' base salary for purposes of calculating his "Retirement Supplemental Pension" set forth in the Administrator Compensation Plan in effect at the time the payment is made.

(PSERS-2, Third Amendment)

18. The Third Amendment did not amend Claimant's duties as Superintendent.

(PSERS-2, Third Amendment)

19. Claimant's 2010-2015 contract provided, in pertinent part, that Claimant's base compensation was \$224,515.00 per year and it continued to provide for an additional per diem rate for days worked over 246 days per contract year, which was defined as January 1 through December 31:

Dr. Waters agrees to devote his time, skill, labor and attention to this employment with the Board on a full time basis for two hundred forty six (246) days per contract year (defined as January 1 through December 31). For each day that Dr. Waters works in addition to the 246 days ("base days") in a particular year, he is entitled to compensation at his then current per diem rate up to fourteen (14) additional days per year. The 246 base days includes [sic] days actually worked by Dr. Waters during a particular year and any leave days taken pursuant to this Agreement. Nothing in this subsection is intended to limited Dr. Waters right to carry over or be reimbursed for vacation days as provided in the Administrator Compensation Plan in effect at the time. Any payment received pursuant to this provision shall be considered part of Dr. Waters' base salary for purposes of calculating his "Retirement Supplemental Pension" set forth in the Administrator Compensation Plan in effect at the time the payment

was made. For the period from December 29, 2014 through June 30, 2015, Dr. Waters shall be entitled to compensation at his then current per diem rate up to seven (7) additional days above 123 days worked during that time period.

(PSERS-3)

20. Pursuant to the 2010-2015 contract Claimant's "Duties" were as follows:

1. Dr. Waters shall be the chief administrative officer of the District. In this position, Dr. Waters shall carry out the following duties unless otherwise directed by the Board, and, where required by The Code, with the approval of the Board:
 - i. the duties of Superintendent of Schools as set forth in The Code;
 - ii. the organization, reorganization and arrangement of the administrative and supervisory staffs, including instructional and noninstructional personnel, to best serve the District's public schools;
 - iii. the supervision of the administration of instruction within the District and the business affairs of the District in a manner designed to further the best interests of the District and maintain and improve educational opportunities for all students;
 - iv. the responsibility for selection, placement and transfer of personnel to achieve efficiency and harmony within the District;
 - v. attendance at all Board meetings (with the exception of executive session(s) devoted to the preparation of Dr. Waters' performance evaluation or any discussion relating

- to Dr. Waters' contract); attendance at all meetings of Board and citizen committees; participation as ex-officio member on all Board committees; and providing administrative recommendations on all items of business considered by the Board and Board committees; and
- vi. the duty and authority to act at his discretion upon all emergency matters, subject to later report to the Board.

(PSERS-3)

21. A "school year" is defined in the Public School Code of 1949 as July 1 through June 30. 24 P.S. § 1-102.

22. By letter dated April 29, 2011, PSERS informed both Tredyffrin/Easttown and Claimant, in pertinent part, as follows:

The enclosed spreadsheet captures the salary amounts that PSERS needs to have explained as I can find nothing in the agreements or the amendment to the December 29, 2005 through December 28, 2010 agreement to substantiate the salaries exceeding the contract amounts of \$185,000.00 (2005-2007) and \$224,515.00 (2008-2010). It appears as if the excess in 2008 and 2009 may be payment for days of service above the 246 contracted days and that these 14 additional days of service were reported as supplemental salary in 2008 and as part of base salary in 2009. The contracted amount of \$224,515.00 divided by 246 contracted days gives a daily salary of \$912.66. This daily salary multiplied by the additional 14 days of service equals \$12,973.24 which is within pennies of the excess salary reported for those years. While it is not inappropriate for a school district to compensate Mr. Waters for days worked over and above his contracted days, such payment is not reportable to PSERS for retirement purposes.

Perhaps the additional salary for days worked over the contracted 246 days was also reported to PSERS in 2007 and 2010. If this is the case, there is still considerable excess salary reported to PSERS for those years which must be substantiated. Likewise the small overpayment of \$7,801.31 in 2006 needs to be explained and confirmed as reportable for retirement purposes before PSERS can use that amount in Mr. Waters retirement benefit calculation.

(PSERS-4)

23. At the time, neither Tredyffrin/Easttown nor Claimant responded to PSERS' April 29, 2011 letter. (MSJ, Memorandum of Fact #)

24. On August 20, 2014, PSERS received a *Request for Retirement Estimate* from Claimant. (MSJ, Memorandum of Fact #26)

25. By letter dated October 14, 2014, PSERS informed Claimant that it had reviewed his retirement account, in response to his request for an estimate, and had determined that Tredyffrin/Easttown had reported non-retirement covered compensation to PSERS. (PSERS-5)

26. PSERS' October 14, 2014 letter informed Claimant that the following supplemental wages reported for the 2005-2006 through 2013-2014 school years were ineligible for retirement purposes and would be removed from his account:

Fiscal Year	Amount
2014	\$14,969.91
2013	\$15,524.34
2012	\$15,524.35
2011	\$15,524.35
2010	\$12,777.24

2009	\$13,922.77
2008	\$11,354.51
2007	\$ 3,517.85
2006	\$ 4,038.47

(PSERS-5)

27. PSERS' October 14, 2014 letter explained, among other things, that Claimant's "supplemental wages are not retirement-covered compensation because they are not based on the standard salary schedule, nor are they compensation received for additional services rendered; rather, they are payments received for working beyond your contracted days of 246 per fiscal year." (PSERS-5)

28. On November 14, 2014, Claimant appealed PSERS' October 14, 2014 determination to the Executive Staff Review Committee ("ESRC"). (PSERS-6)

29. On May 26, 2015, PSERS received Claimant's *Application for Retirement*. (PSERS-7)

30. On June 3, 2015, Tredyffrin/Easttown confirmed to PSERS that the supplemental payments reported for Claimant were for the days that Claimant worked beyond 246 days. (MSJ, Memorandum of Fact #32)

31. By letter dated May 19, 2016, the ESRC denied Claimant's appeal, explaining as follows:

Your employment contract as Superintendent of the Tredyffrin/Easttown School District ran from December 29 through December 28 each year of your employment. The base salary you received annually was, therefore, compensation for each 365-day period. The additional per diem rate you received for working on what were otherwise non-working days during the same contract period was, therefore, covered by your base salary and

was not compensation as defined by the Retirement Code. It must be excluded from calculation of your final average salary.

(PSERS-8)

32. The ESRC determination also explained:

Your position as Superintendent is contracted for fiscal years (i.e., December 29 through December 28). Beginning with the 2006 amendment, you were required to work 246 days, but had you not worked on the 14 days designed as optional additional days, you still would have received your base salary for those days, but not the per diem pay. You were not required to perform any additional duties on those days beyond your existing duties as Superintendent. This is no different from a member cashing in unused vacation days and asking that the extra amounts be added to his/her salary. The per diem payments you received, therefore, do not constitute retirement-covered compensation. See *Account of Dr. John K. Baillie*, Docket No. 2008-01, at 59 (PSERB June 11, 2009), *aff'd*, 993 A.2d 944 (Pa. Cmwlth. 2010).

* * *

You also, again, were reported to PSERS as a 260-day employee during the relevant time period and the “additional days” you were permitted to work were conveniently set at 14, which would give you 260 days of work. This is the precise manipulation that was rejected in *Baillie*.

(PSERS-8)

33. Claimant filed an Appeal and Request for Administrative Hearing on June 15, 2016, seeking relief only with respect to the \$15,524.34 in supplemental payments that he received during each of the 2010-2011, 2011-2012, and 2012-2013 school years.

(PSERS-9)

34. Claimant asserts that the supplemental payments were paid to him because he was required to render services above the stipulated contracted term of service, i.e., working on “planned vacation days.” (PSERS-9)

35. On July 1, 2016, PSERS filed an Answer. (PSERS-10)

36. By letter dated July 12, 2016, the Appeal Docket Clerk for the Public School Employees’ Retirement Board notified Tredyffrin/Easttown of Claimant’s appeal and of its ability to intervene. (Official Notice, Board’s Record)

37. Tredyffrin/Easttown did not intervene in this appeal. (Official Notice, Board’s Record)

38. On November 9, 2017, PSERS filed a Motion for Summary Judgement. (Official Notice, Board’s Record)

39. Claimant did not file a response to PSERS’ motion. (Official Notice, Board’s Record)

40. This matter is ripe for Board adjudication.

DISCUSSION

Claimant requests that the supplemental, per diem payments he received as Tredyffrin/Easttown’s Superintendent during the 2011-2012, 2012-2013, and 2013-2014 school years for working more than 246 days be deemed retirement-covered compensation and included in his final average salary. A PSERS member’s final average salary is a major component in the calculation of the retirement benefit, and a higher final average salary generally equates to a higher monthly benefit. See 24 Pa.C.S. §§ 8102 (“standard single life annuity”) and 8342. Section 8102 of the Public School Employees’ Retirement Code (“Retirement Code”) provides the following definitions, which are pertinent to the issue on appeal:

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

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

Under the Retirement Code, the Board has a right to determine the propriety of any payment. *Finnegan v. Pub. Sch. Employees’ Ret. Bd.*, 560 A.2d 848 (Pa. Cmwlth. 1989) (PSERS cannot provide a benefit that would produce a result that is contrary to

positive law), *aff'd without op.*, 591 A.2d 1053 (Pa. 1991). In doing so, the Board is bound to follow the intent of the General Assembly in administering the provisions of the Retirement Code. 1 Pa.C.S. § 1921(a); *Hughes v. Pub. Sch. Employees' Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlth. 1995). Therefore, while a member is entitled to a liberal administration of the retirement system, the Board is not permitted to circumvent the Retirement Code's express language. *Dowler*, 620 A.2d at 644.

Claimant maintains that the supplemental payments he received are retirement-covered compensation because he earned them when he was required to work more than the contracted 246 days. He asserts that the extra monies should count toward his final average salary because he had to forego "planned vacation days" to conduct necessary district business. (PSERS-9 at § F) Claimant further argues that the supplemental payments are covered "compensation" because his arrangement was similar to either: (1) "a salaried teacher who performs extra duty work" or who works "additional days in the summer or after contracted hours"; or (2) "an hourly employee who works overtime or additional days beyond the contracted yearly hours or days." (PSERS-9, November 1, 2014 Attachment)

Preliminarily, a review of Claimant's contracts from January 1, 2000 to June 30, 2015 and Tredyffrin/Easttown's reporting to PSERS show that he was a 12-month school administrator who worked a minimum of 260 days and received an annual, base salary for which he was to devote his full time, skill, labor, and attention to the discharge of his duties as superintendent. Claimant was not an hourly employee or a 180-day employee; he was a salaried superintendent who was contracted to work for a 365-day period pursuant to the Public School Code of 1949. Because Claimant was an employee contracted to perform school service as a "Superintendent of Schools as set forth in The [Public School] Code," the work year for such a school administrator is 260 days, from July 1 to June 30. See 24 P.S. §§ 1-102 and 10-1073(a) (district superintendents contracted for full school years). Thus, Claimant's base salary covered the time period July 1 through June 30. See also *Baillie*, 993 A.2d at 952.

Indeed, when Claimant was first hired as the superintendent, he was required to work a minimum of 260 days. Effective January 1, 2006, Claimant's 2005-2010 contract

was amended to lower his number of work days from 260 days to 246 days per contract year, but provided him with the option of working an “additional” 14 days at a per diem rate. The same provision allowing for the reduction in work days and per diem payments was included in Claimant’s 2010-2015 contract. Claimant, however, consistently worked in excess of the contracted 246 days for a per diem amount and Tredyffrin/Easttown consistently reported to PSERS that Claimant was a full-time, salaried employee who worked a minimum of 260 days a year. During the 2005-2006 through 2013-2014 school years, the record shows that school district business required that Claimant work, consistently, more than 246 days like other school district superintendents and year-round employees, and Claimant admits that Tredyffrin/Easttown “contemplated” that he would be required, each year, to perform services that would not fit within the 246-day work year. (PSERS-9 at § F) Moreover, the amendments did not reduce Claimant’s base salary, but rather *increased* it, and it did not add any new duties for Claimant in consideration for the additional monies. During each of the three years at issue, Claimant earned an additional \$15,524.34.²

This situation is analogous to the contractual arrangement addressed in *Baillie v. Public School Employees’ Retirement Board*. In *Baillie*, the Commonwealth Court reviewed an intermediate unit executive director’s contract that lowered the executive director’s days of work from 260 to 230 without a decrease in base salary, but then provided the executive director with per diem payments for up to 30 days if he worked beyond 230 days. 993 A.2d at 946. The Court determined that the per diem payments were compensation for unused vacation leave or compensation paid to enhance the administrator’s upcoming retirement annuity and, therefore, were not retirement-covered compensation. *Id.* at 953. The Court agreed with the Board that an employer is not permitted to convert *any portion* of a mandatory work year as optional. *Id.* at 952.

As explained above, Claimant’s standard “base salary” or “base compensation” covered the full school year. (PSERS-1, -2, -3); see 24 P.S. § 1-102 (def. of “school

² Although Claimant seeks relief only with respect to the three years that would affect his final average salary (PSERS-9 at § G), the analysis herein equally applies to all the supplemental, per diem payments he earned.

year”).³ His contractual duties never changed. (PSERS-1, -2, -3) When Claimant’s contract was amended to reduce his working days by 14, there was no corresponding decrease to his standard base salary or to his duties. Rather, his standard base salary *increased* from \$185,000 to \$192,955.00 and his duties remained the same. (PSERS-2, First Amendment) He was not performing additional duties and the supplemental per diem payments Claimant received were not part of Claimant’s standard base salary. The per diem amounts Claimant received were for working between 246 to 260 days performing the same duties he was already contracted to perform. Such payments, therefore, were *additional* amounts that were not based on his standard salary but were payments received for working on preplanned days off. (PSERS-1, -2, -3)

Claimant nonetheless attempts to distinguish *Baillie* on three grounds. (PSERS-9, November 1, 2014 attachment) First, *Baillie* was the executive director of an intermediate unit, not a superintendent. Both positions, however, are 12-month positions under the Public School Code of 1949. See 24 P.S. §§ 1-102 (def. of “school year”), 9-901-A, and 9-913-A(b) (executive directors contracted for full school years); 24 P.S. §§ 1-102; 10-1073(a) (district superintendents contracted for full school years). Second, the *Baillie* decision post-dates the July 1, 2006 amendment to Claimant’s contract and, therefore, does not apply. The relevant portions of the Retirement Code’s definition of “compensation” that were at issue in *Baillie* pre-date Claimant’s contract and are equally applicable to Claimant’s appeal, as is the *Baillie* interpretation. Third, the workday reduction to *Baillie*’s contract was limited to *Baillie*’s last three years of employment while Claimant’s reduction in the work year spanned the full five years of his contract. Although *Baillie*’s contract did not include the thirty (30) optional days until the last three years, his contract was first manipulated in 2002 to reduce his work days from 260 to 245, and then later manipulated to reduce his work days to 230. *Baillie*, 993 A.2d at 946. The Court also noted that the gradual reduction in the mandatory work year created an improper enhancement to *Baillie*’s final average salary in anticipation of retirement:

³ PSERS uses the salary history of a position to establish the standard salary schedule for an individual. See *generally Hoerner v. Pub. Sch. Employees’ Ret. Bd.*, 684 A.2d 112 (Pa. 1996).

By reducing the number of days that Baillie was required to work from 260 to 245, and then further reducing that number to 230, the Intermediate Unit effectively granted Baillie an 11.5 percent pay increase, in addition to his annual 3 percent cost-of-living salary increases. Under the principles established in *Christiana and Hoerner*, it is clear that the 30 "optional" days provided in Baillie's employment contract were intended to enhance compensation in order to boost Baillie's anticipated retirement annuity.

Baillie, 993 A.2d at 953. Accordingly, the holding set forth in *Baillie* is applicable to the instant appeal.

Claimant further argues that Tredyffrin/Easttown included language in his contracts that evidences an intent to include the supplemental payments in his "compensation" for retirement purposes and, correspondingly, reported the payments to PSERS as such. (PSERS-9 at § F) The Retirement Code does not dictate what an employer can pay its employees, but it does specify what constitutes retirement-covered compensation for purposes of PSERS and the law cannot be circumvented contractually. Accordingly, Tredyffrin/Easttown's description and treatment of the payments does not control. Moreover, the Board is not bound by "characterizations of money payments made to a PSERS member pursuant to a private contractual settlement which it is not a party" and PSERS was not a party to Claimant's contract with Tredyffrin/Easttown. *Hoerner*, 684 A.2d at 117 n. 10; see generally *Watrel v. Dep't of Education*, 488 A.2d 378, 380-381 (Pa.Cmwlth. 1985), *aff'd*, 518 A.2d 1158 (Pa. 1986); *Account of Barham, et al.*, Docket No. 2013-06, at *2 (PSERB Aug. 9, 2013). For Retirement Code purposes, the 246-work year, therefore, was a mere fiction used for calculating a per diem rate not tied to performing additional school service above what Claimant was already contracted to provide in exchange for his standard base salary. Rather, the extra pay Claimant received was for *not using* a preplanned vacation day,

which is the exact compensation setup previously rejected by this Board and the Commonwealth Court.⁴

CONCLUSION

For the above stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether the supplemental, per diem payments that Claimant received during the 2010-2011, 2011-2012, and 2012-2013 school years for working more than 246 days should be included as compensation. Accordingly, PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DENIED.

⁴ Claimant also asserts that he knows at least three PSERS annuitants who have had similar supplemental payments included in their final average salaries, and he claims that he has correspondence from PSERS to another annuitant confirming that his/her supplemental income qualifies as compensation. Claimant, however, has not provided the names of the three annuitants or any correspondence that would permit this Board or PSERS to investigate his claims. Regardless, if the factual scenarios were identical in all respects, the relief would not be to include the monies at issue in Claimant's final average salary. Rather, pursuant to Section 8543(b) of the Retirement Code, the Board would be required to correct the record and adjust the *other annuitants'* final average salaries. 24 Pa.C.S. § 8543(b).

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

IN RE: ACCOUNT OF DANIEL E. WATERS
DOCKET NO. 2016-10
CLAIM OF DANIEL E. WATERS

ORDER

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

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request to have the supplemental, per diem payments that he received during the 2010-2011, 2011-2012, and 2012-2013 school years for working more than 246 days included as compensation.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 10, 2018

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