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

IN RE: ACCOUNT OF JOAN W. CHALKER
DOCKET NO. 2014-17
CLAIM OF JOAN W. CHALKER

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 proposed Opinion and Recommendation of the Hearing Officer, The Public School Employees' Retirement System's ("PSERS") Motion for Summary Judgment, Claimant's Response to PSERS' Motion and Cross-Motion for Summary Judgment, PSERS' Response to Claimant's Cross-Motion, Claimant's Brief on Exceptions and request for oral argument, and PSERS' Brief Opposing Exceptions and response to oral argument.

Claimant excepts to the Hearing Officer's proposed Opinion and Recommendation on the basis that 18 U.S.C. § 1519 is not substantially the same as 18 Pa.C.S. § 4910.

We note that Claimant's Exceptions merely reargue an issue previously raised in her Response to PSERS' Motion and Cross-Motion for Summary Judgment. The Hearing Officer adequately addressed this issue.

Claimant has requested oral argument before the Board. 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.

22 Pa. Code § 201.12(a).

Because Claimant does not offer any new arguments, authority, or contradicting facts, we believe that the Hearing Officer adequately addressed Claimant's exceptions. The Board, therefore, does not believe that oral argument will be helpful in enabling the Board to understand and resolve the issues, and Claimant's request for oral argument is DENIED.

This Board finds appropriate the Hearing Officer's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation attached hereto, and we hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED, that Claimant's request that her retirement benefit not be subject to the Public Employee Pension Forfeiture Act, 43 P.S. § 1311 et seq., is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 12/7/2018

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

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

**In Re:
Account of Joan W. Chalker
Claim of Joan W. Chalker**

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Docket No. 2014-17

OPINION AND RECOMMENDATION

**Hearing Officer: Jackie Wiest Lutz, Esquire
For the Claimant: Joseph G. Poluka, Esquire
For PSERS: Dwight A. Decker, Jr., Esquire**

HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed on October 31, 2014 by Joan W. Chalker ("Claimant"), from a September 25, 2014 decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System's ("PSERS"), which denied Claimant's request that her retirement benefit not be subject to the Public Employee Pension Forfeiture Act, 43 Pa. C.S. §§1311 *et. seq.* ("Pension Forfeiture Act" or "Act").

The ESRC based its determination on Claimant's guilty plea on October 21, 2013 in the United States District Court for the Eastern District of Pennsylvania to Counts 55, 57, and 62 of a *Superseding Indictment*, which alleged that Claimant committed *Obstruction of Justice*, in violation of 18 U.S.C. §1519 (relating to the destruction, alteration, or falsification of records in a federal investigation), and 18 U.S.C. §1512(c)(2) (relating to tampering with a witness, victim, or informant).

The crimes to which Claimant pled guilty were committed in her capacity as the Chief Executive Officer ("CEO") of the school, Planet Abacus, arising from her assistance in the creation, alteration, and falsification of documents between July 2009 and April 2010, in response to federal grand jury subpoenas that were issued to certain schools in connection with a criminal investigation being conducted by the Federal Bureau of Investigation ("FBI") and the Office of the Inspector General of the United States Department of Education regarding Dr. Dorothy June Hairston-Brown. In response to the subpoenas, Claimant, at the direction of Dr. Brown, created, and backdated school-related records, including minutes of board meetings, contracts, loan agreements, and board resolutions, which were then submitted by Dr. Brown.

Claimant terminated her employment at Planet Abacus on July 15, 2012. On March 19, 2013, PSERS received an *Application for Retirement* from Claimant electing Option 2, and requesting a total withdrawal of her contributions and interest in the amount of \$175,791.41. PSERS processed Claimant's retirement application, and Claimant began receiving a monthly retirement benefit of \$5,226.48 in May 2013, until PSERS notified Claimant by letter dated October 29, 2013, that due to the Pension Forfeiture Act, any right she may have accrued to receive benefits from PSERS has been forfeited.

Claimant appealed PSERS determination to the ESRC on December 30, 2013.

On September 25, 2014, the ESRC issued its decision from which Claimant now appeals, finding that the enumerated state crime under the Pension Forfeiture Act that is substantially the same as Section 1519 is 18 Pa. C.S. §4910 (Tampering with or fabricating physical evidence) and/or, alternatively, 18 Pa. C.S. §4911 (Tampering with public records or information), and that the enumerated state crime under the Forfeiture Act that is substantially the same as Section 1512(c)(2) is 18 Pa. C.S. §5101 (Obstructing administration of law or other governmental function). The ESRC determined that the crimes to which Claimant pled guilty are related to public office or public employment, and that any right Claimant may have accrued to receive benefits from PSERS for service rendered has been forfeited as of the date of her guilty plea. The ESRC also determined that under the Pension Forfeiture Act, Claimant's entire pension, not just the portion of Claimant's pension that was earned after committing these crimes, must be forfeited.

On November 20, 2014, Jennifer A. Mills, Esquire, on behalf of PSERS, filed an *Answer* to Claimant's Appeal.

On November 8, 2017, Glen R. Grell, Board Secretary, appointed Jackie Wiest Lutz, Esquire as hearing examiner for the administrative hearing, which was scheduled for June 6, 2018.

On May 24, 2018, a *Praecipe to Withdraw/Enter Appearance* was filed on behalf of PSERS, in which Jennifer A. Mills, Esquire and Megan Alley, Esquire withdrew their appearance, and Dwight A. Decker, Jr. Esquire, entered his appearance on behalf of PSERS. On the same date, PSERS filed a *Motion for Summary Judgment*, a *Memorandum of Facts*, a *Memorandum of Law in Support of Motion for Summary Judgment*, and a request for a continuance of the hearing scheduled for June 6, 2018, pending disposition by the Board of PSERS' motion.

On May 29, 2018, an *Order Granting Continuance* was issued by the appointed hearing officer.

On June 26, 2018, Claimant, through counsel filed an *Opposition to PSERS' Motion for Summary Judgment and her Cross-Motion for Summary Judgment*, an *Answer to PSERS' Memorandum of Facts*, and a *Memorandum of Law in Opposition to PSERS' Motion for Summary Judgment and in Support of her Cross-Motion for Summary Judgment*.

PSERS filed a *Response to Claimant's Cross-Motion for Summary Judgment* on July 25, 2018.

By Order dated August 23, 2018, the Board delegated this matter to the appointed hearing examiner pursuant to 22 Pa. Code §201.6 (c), to issue a proposed opinion and recommendation regarding PSERS' *Motion for Summary Judgment*.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Joan W. Chalker (“Claimant”) was enrolled in PSERS on September 1, 1960 by virtue of her full-time, salaried employment with the Marple Newtown School District (“Marple Newtown”). (MOF,¹ ¶ 1)
2. On October 1, 1974, Claimant terminated her employment with Marple Newtown. (MOF, ¶ 2)
3. In July 1978, Pension Forfeiture Act, 43 P.S. §1311, *et. seq.*, was adopted. (MOF, ¶ 3)
4. On July 1, 1998, Claimant was enrolled in PSERS through her full-time, salaried employment with the Laboratory Charter School (“Laboratory”), a reporting unit of PSERS. (MOF, ¶ 4)
5. On August 22, 2007, Claimant began working at Planet Abacus Charter School (“Planet Abacus”), a reporting unit of PSERS, in a full-time salaried position, and was reported to PSERS for such service. (MOF, ¶ 5; Official Notice – Board records²)

¹ “MOF” refers to the factual allegations set forth in paragraph form in the *Public School Employees’ Retirement System’s Memorandum of Facts*, which the Claimant admitted in Claimant’s *Answer to the Public School Employees’ Retirement System’s Memorandum of Facts*.

² Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

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

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained:

6. On August 30, 2007, Claimant terminated employment at Laboratory. (MOF, ¶ 7; Official Notice – Board records)
7. Beginning in May 2008, federal grand jury subpoenas were issued to certain schools in connection with a criminal investigation being conducted by the FBI and the Office of the Inspector General of the United States Department of Education regarding Dr. Dorothy June Hairston-Brown (“Dr. Brown”). (MOM, ¶ 7; PSERS’ Exhibit 2, ¶ 7)
8. In response to the subpoenas, Claimant, at the direction of Dr. Brown, created and backdated a large number of school-related records, including minutes of board meetings, contracts, loan agreements, and board resolutions between July 2009 and April 2010, which were then submitted by Dr. Brown. (MOF, ¶ 8; PSERS’ Exhibit 1, pgs. 57, 59 and 64; PSERS’ Exhibit 2, ¶’s 8-10)
9. On July 15, 2012, Claimant terminated employment at Planet Abacus. (MOF, ¶ 9; Official Notice – Board records)
10. On July 24, 2012, Claimant was indicted relating to her conduct of assisting with responding to the federal grand jury subpoenas in May of 2008. (MOF, ¶10)

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

521 A. 2d at 994 n. 6.

11. On January 22, 2013³, a *Superseding Indictment* was filed against Claimant in the United States District Court for the Eastern District of Pennsylvania, charging Claimant with, *inter alia*, Obstruction of Justice, in violation of Title 18, United States Code, Sections 1519 (relating to the destruction, alteration, or falsification of records in a federal investigation), and Obstruction of Justice, in violation of Title 18 United States Code, Sections 1512(c)(2) (relating to tampering with a witness, victim, or informant. (MOF, ¶ 11; PSERS' Exhibits 1 and 2)

12. On March 19, 2013, PSERS received an *Application for Retirement* from Claimant, electing an Option 2 monthly payment plan, and requesting a total withdrawal of her contributions and interest in the amount of \$175,791.41. (MOF, ¶ 12; Official Notice – Board records)

13. PSERS processed Claimant's retirement application, and Claimant began receiving a monthly retirement benefit of \$5,226.48 in May 2013. (MOF, ¶ 13; Official Notice – Board records)

14. On October 21, 2013, Claimant pled guilty in the United States District Court for the Eastern District of Pennsylvania to Counts 55, 57 and 62 of the *Superseding Indictment*, in violation of 18 U.S.C. §§1519 and 1512(c)(2). (MOF, ¶14; and PSERS' Exhibit 2, ¶ 10, and PSERS' Exhibit 3)

15. The crimes to which Claimant pled guilty were “[i]n connection with the conduct” that she committed in her capacity as a “top-level administrator of the school [i.e., Chief Executive Officer (“CEO”) of Planet Abacus]” “arising from her assistance in the

³ In its MOF, PSERS alleges that the *Superseding Indictment* was filed against Claimant on January 23, 2013. This is believed to be a typographical error on PSERS' part.

creation, alteration, and falsification of documents between July 2009 and April 2010.”

(PSERS’ Exhibit 1, pgs. 57, 59 and 64, and PSERS’ Exhibit 2, ¶’s 8 and 10)

16. By letter dated October 29, 2013, PSERS informed Claimant that, due to her guilty plea, her pension benefits had been forfeited under the Pension Forfeiture Act and the retirement benefits she was currently receiving would be terminated. (MOF, ¶ 16; PSERS’ Exhibit 4)

17. By letter dated December 33, 2013, Claimant filed an appeal with the Executive Staff Review Committee (“ESRC”). (MOF, ¶ 16; PSERS’ Exhibit 5)

18. The ESRC consists of the Executive Director and additional senior staff members as appointed by the Executive Director. (Official Notice – 22 Pa. Code §201.2a)

19. By letter dated September 25, 2014, the ESRC denied Claimant’s appeal, explaining:

The Pension Forfeiture Act states that all benefits payable to a public employee (including School District employees) must be forfeited if the employee is convicted of, pleads guilty or no defense to a crime related to public office or public employment enumerated in the Forfeiture Act. On October 21, 2013 when you [Claimant] pleaded guilty to two Federal crimes, each of which is substantially the same as a Pennsylvania state crime enumerated in the Pension Forfeiture Act, any right you may have accrued to receive benefits from PSERS for service rendered prior to October 21, 2013, was forfeited as of that date.

(MOF, ¶ 18; PSERS’ Exhibit 6)

20. Following the Board’s granting of an extension of time for Claimant to file an appeal from the ESRC’s determination, Claimant filed an *Appeal and Request for Administrative Hearing* on October 30, 2014. (MOF, ¶ 19; PSERS’ Exhibit 2)

21. On November 20, 2014, PSERS filed its Answer to Claimant’s *Appeal and Request for Administrative Hearing*. (MOF, ¶ 20; PSERS’ Exhibit 7)

22. On November 8, 2017, Glen R. Grell, Secretary, Public School Employees' Retirement Board, appointed Jackie Wiest Lutz, Esquire as the hearing examiner for Claimant's appeal. (Official Notice – Board records)
23. On November 8, 2017, the Appeal Docket Clerk notified the parties by letter that the administrative hearing on Claimant's appeal was scheduled for June 6, 2018. (Official Notice – Board records)
24. On May 24, 2018, PSERS filed a *Motion for Summary Judgment, a Memorandum of Facts, and a Memorandum of Law in Support of Motion for Summary Judgment*, requesting that summary judgment be entered in its favor and against Claimant, and that the administrative hearing scheduled for June 6, 2018 at 1:00 p.m. be continued, pending disposition by the Board of PSERS' *Motion for Summary Judgment*. (Official Notice – Board records)
25. On May 29, 2018, the Hearing Examiner issued an *Order Granting Continuance* pending disposition by the Board of PSERS' *Motion for Summary Judgment*. (Official Notice – Board records)
26. On or about June 25, 2018, Claimant, through counsel, filed *Dr. Chalker's Opposition to the Public School Employees' Retirement System's Motion for Summary Judgment and her Cross-Motion for Summary Judgment* and *Dr. Chalker's Memorandum of Law in Opposition to the Public School Employees' Retirement System's Motion for Summary Judgment and in Support of her Cross-Motion for Summary Judgment*. (Official Notice – Board records)
27. On July 25, 2018, PSERS filed its *Response to Claimant's Cross-Motion for Summary Judgment*. (Official Notice – Board records)

28. By Order dated August 23, 2018, the Board delegated this matter to the appointed hearing examiner pursuant to 22 Pa. Code §201.6(c), to issue a proposed opinion and recommendation regarding PSERS' *Motion for Summary Judgment*. (Official Notice – Board records)

CONCLUSIONS OF LAW

1. When no factual issues are in dispute, no evidentiary hearing is required under the Administrative Agency Law, 2 Pa. C.S. §504. *United Healthcare Benefits Trust v. Insurance Comm'r of Pa.*, 620 A. 2d 81 (Pa. Cmwlth. 1993).
2. PSERS or the Claimant may file a motion for summary judgment that conforms to Pa. R.C.P. Nos. 1035.1 – 1035.5 directly with the Board. 22 Pa. Code §201.6.
3. The Board may, by order, delegate the motion for summary judgment to a hearing examiner to prepare a proposed opinion and recommendation. 22 Pa. Code §201.6(c)
4. A motion for summary judgment may properly be granted when there is no genuine issue of any material fact as to a necessary element of the cause of action or defense, and the moving party is entitled to judgment as a matter of law. *Liles v. Balmer*, 567 A. 2d 691 (Pa. Super. 1989); Pa. R. Civ. P. 1035.
5. In determining 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, giving the non-moving party the benefit of all reasonable inferences. *Thompson v. Nason Hosp.*, 535 A. 2d 1177, 1178 (pa. Super. 1988), *aff'd*, 591 A. 2d 703 (Pa. 1991).
6. PSERS' pensions are subject to forfeiture under the Pension Forfeiture Act, 43 P.S. §1311, *et. seq.*
7. No public employee is entitled to receive any retirement benefit, except a return of the contribution paid into any pension fund without interest, if such public employee is convicted or pleads guilty to any crime related to public employment; the benefits shall be forfeited upon entry of a plea of guilty, and no payment or partial payment shall be made during the pendency of an appeal. 43 P.S. §1313(a) and (b).

8. Claimant was a “Public Official” or “Public Employee” under the Pension Forfeiture Act during her commission of her Federal offenses. (Findings of Fact Nos. 4 – 8)
9. Claimant committed her crimes through her public employment, as CEO of Planet Abacus, when she assisted Dr. Brown by creating and backdating school-related records, including minutes of board meetings, contracts, loan agreements, and board resolutions in response to grand jury subpoenas. (Findings of Fact Nos. 4-8)
10. The Pension Forfeiture Act defines “Crimes related to public office or public employment” as all crimes enumerated under 43 P.S. §1312, and “all criminal offenses as set forth in Federal law substantially the same as the crimes enumerated [under 43 P.S. §1312].” 43 P.S. §1312.
11. Each time a public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of the Pension Forfeiture Act. 43 P.S. §1313(c).
12. Claimant’s guilty plea to *Obstruction of Justice* at 18 U.S.C. §1519 is an offense that is substantially the same as the state crime, *Tampering with or fabricating physical evidence*, at 18 Pa. C.S. §4910.
13. Claimant’s guilty plea to *Obstruction of Justice* at 18 U.S.C. §1519 is a guilty plea to a criminal offense under Federal law which is substantially the same as a “crime related to public office or public employment” under the Pension Forfeiture Act.
14. PSERS correctly determined that Claimant has forfeited her pension under the Pension Forfeiture Act. (Findings of Fact Nos. 1-19)

15. Claimant's entire pension with PSERS is subject to forfeiture. 43 P.S. §1313(a) and (c); *Shiomos v. State Emp. Retirement Bd.*, 626 A. 2d 158 (Pa. 1993).

DISCUSSION

This matter is before the appointed Hearing Officer on the parties' respective *Motions for Summary Judgment* and *Cross-Motion for Summary Judgment*.

(I) SUMMARY JUDGMENT MOTIONS

“Where there are no disputed facts, the motion proceedings, including briefs and arguments by both parties, provide ample opportunity for the parties to be heard and the Administrative Agency Law requires no more.” *United Healthcare Benefits Trust v. Insurance Comm'r of PA*, 620 A. 2d 81, 83 (Pa. Cmwlth. 1993). A motion for summary judgement may therefore be properly granted when the pleadings and any admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Liles v. Balmer*, 567 A. 2d 691 (Pa. Super. 1989); Pa. R.C.P. No. 1035.2.

There are no material factual issues in dispute. Under the Pension Forfeiture Act, a “public official” or “public employee”⁴ who pleads guilty to any crime related to public office or public employment forfeits his pension. Once the guilty plea to a crime related to public office or public employment is entered, enforcement of the Act is mandatory; the pension shall be forfeited. *Gierschick v. State Employees' Retirement Board*, 733 A.

⁴ The Pension Forfeiture Act relevantly defines “public official” or “public employee” to mean:

Any person who is elected or appointed to any public office or employment. . . or who is acting or who has acted in behalf of the Commonwealth or a political subdivision or any agency thereof including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits whether that person is acting on a permanent or temporary basis and whether or not compensated on a full or part-time basis. . . . [T]his term shall include all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision. For the purposes of this act such persons are deemed to be engaged in public employment.

43 P.S. §1312.

2d 29 (Pa. Cmwlth. 1999), *appeal denied*, 751 A. 2d 194, 561 Pa. 702. The Board has no discretion.

The Pension Forfeiture Act provides, in pertinent part:

§1313. Disqualification and forfeiture of benefits

(a) Notwithstanding any other provision of law, no public official or public employee. . . shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

(b) The benefits shall be forfeited upon entry of a plea of guilty. . . . Such conviction or plea shall be deemed to be a breach of a public officer's or public employee's contract with his employer.

(c) Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of this act.

43 P.S. §1313 (a) – (c).

Claimant does not dispute that she was a “public employee” or “public official” within the meaning of the Pension Forfeiture Act during the commission of her Federal offenses. Claimant similarly does not dispute that she committed her crimes through her public employment, as CEO of Planet Abacus, when she assisted Dr. Brown by creating and backdating school-related records, including minutes of board meetings, contracts, loan agreements, and board resolutions in response to grand jury subpoenas. The sole issue before the Board is whether the federal crimes of 18 U.S.C. §1519 (Destruction, alteration, or falsification of records in Federal investigations and bankruptcy), and 18

U.S.C. §1512(c)(2), to which Claimant pled guilty, are “substantially the same” as *any* state crime enumerated under Section 2 of the Pension Forfeiture Act.

Pertinent to Claimant’s claim, Section 2 of the Pension Forfeiture Act defines “Crimes related to public office or public employment,” as:

Any of the criminal offenses as set forth in the following provisions of Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes. . . when committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime:

...

Section 4104 (relating to tampering with records or identification)

...

Section 4910 (relating to tampering with or fabricating physical evidence).

Section 4911 (relating to tampering with public records or information).

...

Section 5101 (relating to obstructing administration of law or other governmental function).

...

In addition to the foregoing specific crimes, the term also includes all criminal offenses as set forth in Federal law substantially the same as the crimes enumerated herein.

43 P.S. §1312.

In support of its *Motion for Summary Judgment*, PSERS maintains that Claimant’s guilty plea to *Obstruction of Justice* under 18 U.S.C. §1519 (Counts 55 and 57 of the *Superseding Indictment*) is “substantially the same” as: 18 Pa. C.S. § 4910 (Tampering with or fabricating physical evidence); 18 Pa. C.S. §4911(a)(1) (Tampering with public records or information); and/or 18 Pa. C.S. §4104 (Tampering with records or identification). PSERS further asserts that Claimant’s guilty plea to *Obstruction of Justice*

under 18 U.S.C. §1512(c)(2) (Count 62 of the *Superseding Indictment*) is “substantially the same” as 18 Pa. C.S. §5101 (Obstructing administration of law or other governmental function). *Only one disqualifying offense is necessary to trigger the forfeiture provisions.*

In her *Cross-Motion for Summary Judgment*, Claimant argues the converse.

Claimant maintains that her guilty plea to the federal offense *Obstruction of Justice* under 18 U.S.C. §1519 is not substantially the same as 18 Pa. C.S. §§ 4910, 4911(a)(1) or 4104(a), and that Claimant’s guilty plea to the federal offense *Obstruction of Justice* under 18 U.S.C. §1512(c)(2) is not substantially the same as 18 Pa. C.S. §5101.⁵ For reasons that follow, PSERS’ *Motion for Summary Judgment* is granted; Claimant’s *Cross-Motion for Summary Judgment* is denied.

(II) COMPARISON OF ELEMENTS FEDERAL AND STATE CRIMES

In *DiLacqua v. City of Philadelphia*, 83 A. 3d 302 (Pa. Cmwlth. 2014), the Commonwealth Court, citing its earlier holdings in *Scarantino v. Public Sch. Employees’ Ret. Bd.*, 68 A. 3d 375 (Pa. Cmwlth. 2013); and *Roche v. State Employees’ Ret. Bd.*, 731 A. 2d 640 (Pa. Cmwlth. 1999), reiterated that when determining whether a state crime

⁵ Claimant also maintains that PSERS has changed the theory of its case on appeal by now arguing that 18 U.S.C. §1519 is also substantially the same as 18 Pa. C.S. §§4911 and 4104(a), even though its October 29, 2013 letter to Claimant, advising Claimant that her pension was being forfeited, never referenced 18 Pa. C.S. §§4911 and 4104(a). Claimant argues that by failing to specify these two offenses initially, PSERS has waived this argument and cannot raise it on appeal. Claimant is mistaken. The Board is the ultimate fact finder who makes both credibility determinations *and conclusions of law*. *Greene v. Pub. Sch. Employees’ Ret. Sys.*, 878 A. 2d 153, 167 n. 7 (Pa. Cmwlth. 2005). The Board may accept or reject any determination of the ESRC. Because the Board is the ultimate fact finder, an issue is not waived if it is raised before the Board. *Dowler v. Pub. Sch. Employees’ Ret. Sys.*, 620 A. 2d 639, 645 (Pa. Cmwlth. 1993). Waiver applies only during appellate review. *Id.*

More importantly, whether Claimant is subject to the Pension Forfeiture Act is a question of law. The legal question to be addressed by the Board is whether the federal crimes to which Claimant pled guilty are substantially similar to *any of the crimes enumerated in the Pension Forfeiture Act*. Akin to the “right for any reason” doctrine used during appellate review, where the correct basis for the ESRC’s decision is clear upon the record, and the established facts support a legal conclusion producing the same outcome, the Board may sustain a determination of the ESRC for any valid reason appearing from the record. *See, Arrio v. Ingram Micro, Inc.*, 965 A. 2d 1194, 1200 (Pa. 2009) (“an appellate court may uphold an order of a lower court for any valid reason appearing from the record”).

and a federal crime are substantially the same for the purposes of the Pension Forfeiture Act, the *elements* of the two crimes, *including the required mens rea* must be compared.

Id. at 310.

(A) 18 U. S. C. §1519 (Destruction, alteration, or falsification of records in a federal investigation)

The Federal offense to which Claimant pled guilty, *Obstruction of Justice*, at 18 U.S.C. §1519 provides as follows:

§1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

The statute expressly targets and criminalizes the knowing falsification of any record with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of the federal government. The specific elements of this offense require that someone: a) knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry; b) in any record, document, or tangible object; c) with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.

(i) 18 Pa. C. S. §4910 (Tampering with or fabricating physical evidence)

The state crime, *Tampering with or fabricating physical evidence*, at 18 Pa. C.S. §4910, provides as follows:

§4910. Tampering with or fabricating physical evidence

A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with intent to mislead a public servant who is or may be engaged in such proceeding or investigation.

This state crime, like the Federal offense, *Obstruction of Justice*, at 18 U.S.C. §1519, expressly targets and criminalizes the falsification by any person of any record, by means of alteration, destruction, removal, or concealment with the intent to impair its verity or availability in an official proceeding or investigation. The elements of section 4910 (1) require that someone: a) believing that an official proceeding or investigation is pending or about to be instituted; b) alters, destroys, conceals or removes any record, document or thing; c) with intent to impair its verity or availability in such proceeding or investigation.

The elements of section 4910 (2) require that someone: a) believing that an official proceeding or investigation is pending or about to be instituted; b) makes, presents or uses any record, document or thing; c) with intent to mislead a public servant who is or may be engaged in such proceeding or investigation.

The parties seemingly agree that the second two elements of the Federal and state crimes are substantially the same. Additionally, under both statutes, the burden is on the government to establish beyond a reasonable doubt that the defendant violated each element of the crime.⁶ The burdens of proof are therefore the same. The only *issue* in dispute pertains to the required *mens rea*. The Federal crime requires that a defendant *knowingly* alter or falsify a record or document with the intent to impede, obstruct, or influence an investigation, whereas the state crime requires that a defendant alter a record or document *with intent* to impair or mislead, *believing* that an investigation is pending or about to be instituted.

Citing *United States v. Moyer*, 674 F. 3d 192 (3d Cir. 2012), Claimant argues:

Despite the position taken by the [ESRC], courts in this Circuit have explicitly held that the federal crime contains no requirement that the defendant believe that an official proceeding or investigation was pending or about to be instituted. *See, e.g., United States v. Moyer*, 674 F. 3d 192, 208 (3d Cir. 2012) (“By the plain terms of §1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime.”)⁷

However, Claimant mischaracterizes *Moyer*. The *Moyer* court went on to explain:

Indeed, “[i]t is well settled that mens rea requirements typically do not extend to the jurisdictional elements of a crime – that ‘the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.’” (Citations omitted) The government therefore need not prove that Nestor actually knew that the “matter” at issue was within the jurisdiction of the federal

⁶ *See, United States v. Nestor*, 2011 U.S. Dist. LEXIS 55890 (in order to convict Nestor of violating 18 U.S.C. §1519, the jury had to find proof of the following elements beyond a reasonable doubt: 1) defendant Nestor knowingly falsified a document; 2) the document related to a matter within the jurisdiction of a federal agency, and 3) the defendant falsified the document with the intent to impede, obstruct, or influence the investigation of the matter).

⁷ PSERS’ Exhibit 2 – (Claimant’s Request for Administrative Hearing, page 5).

government when he falsified documents. It need only prove that he knowingly falsified them.

Id. at 208-209.

As PSERS aptly responds, the language relied upon by Claimant in *Moyer* was intended to show that a defendant need not have knowledge, at the time of the criminal act, that the *federal government* was the party that had jurisdiction over the “matter” at issue. Instead, the knowingly element refers to a person’s act of knowingly altering or falsifying a document with intent to impede, obstruct, or influence the investigation or proper administration of any matter. Citing *United States v. Yielding*, 657 F. 2d 688, 714 (8th Cir. 2011), the *Moyer* court explained:

The most natural reading of §1519, which we accept, is to interpret “knowingly” as modifying its surrounding verbs only: “alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry.” . . . Although the Supreme Court has occasionally interpreted “knowingly” more broadly when scienter is not otherwise expressed in the criminal statute. . . that “concern[] [is] not present here,” because §1519 expressly “requires proof that an accused *knowingly* falsified a document, with *intent* to impede, obstruct, or interfere with the investigation or proper administration of a matter,” *Yielding*, 657 F. 3d at 714.

674 F. 3d 192, at 208.

Although there is no specific requirement under 4910(1) that a person “knowingly” alter, destroy, conceal or remove any record, document or thing, the person must do so with *intent to impair its verity or availability* in such proceeding or investigation. Section 302 of the Pennsylvania Crimes Code instructs that a person acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, *it is his conscious object to engage in conduct of that nature or to cause such a result*; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa. C.S. §302(b).

As PSERS argues, an individual cannot knowingly act to impede an investigation without believing that an investigation exists or is forthcoming. Thus, even though the *mens rea* elements of the Federal and state crimes contain different nomenclature, the *mens rea* required to establish the Federal offense is at least as strict as that which is required under state law. Both statutes clearly target the same behavior by making criminal the alteration or falsification of records or documents by any person, with the intent to impair or obstruct an official investigation.

The Commonwealth Court applied a similar analysis in *Scarantino v. Public School Employees' Retirement Board*, 68 A. 3d 375 (Pa. Cmwlth. 2013), where the Court concluded that although the third elements of the Federal crime of theft or bribery concerning programs receiving federal funds under 18 U.S.C. §666(a)(1)(B), and the state crime of bribery in official and political matters under 18 Pa. C.S. §4701, were not identical, the elements were substantially the same where the *mens rea* is at least as strict as that required under state law and “both statutes target the same behavior.” *Id.* at 381. In like vein, the court in *Brace v. County of Luzerne*, 873 F. Supp. 2d 616 (M.D. Pa. 2012), determined that the Federal and state crimes at issue in that pension forfeiture case were not identical, but were, nevertheless, substantially the same because “both statutes criminalize the conduct of a public official that solicits, accepts, or agrees to accept

something of value that is offered to the individual based on his or her status as a public official.” *Id.* at 623. These decisions instruct that while the elements of the state and Federal offense should be compared to determine if the offenses are “substantially the same” the lack of identity of all elements is not essential for a finding that the offenses are “substantially the same” for purposes of the Pension Forfeiture Act, if both statutes target the same behavior.

For these reasons, the Hearing Officer finds that the criminal offense, *Obstruction of Justice*, at 18 U.S.C. §1519, is substantially the same as the state crime, *Tampering with or fabricating physical evidence*, at 18 Pa. C.S. §4910 for purposes of the Pension Forfeiture Act, and the ESRC properly denied Claimant’s request that her retirement benefit not be subject to the Pension Forfeiture Act.⁸

(III) REQUEST FOR PARTIAL FORFEITURE

In her *Appeal and Request for Administrative Hearing* (“Appeal”), Claimant requests that if the Board determines that her pension is subject to forfeiture, then it should forfeit only the pension benefits earned from 2009 forward, as she did not engage in any misconduct prior to 2009.⁹ In support of this request, Claimant urges the Board to consider that she began her career in 1960 as a teacher at Marple Newtown High School,

⁸ Because only *one* disqualifying offense is necessary to trigger the forfeiture provisions of the Pension Forfeiture Act, the Hearing Officer need not address the substantially same offenses listed in sections 4911(a)(1) (Tampering with public records or information) or 4904(a) (Tampering with records or identification), or whether Claimant’s guilty plea to *Obstruction of Justice* under 18 U.S.C. §1512(c)(2) (Count 62 of the *Superseding Indictment*) is “substantially the same” as 18 Pa. C.S. §5101 (Obstructing administration of law or other governmental function). Indeed, this Board has already determined that the Federal offense, 18 U.S.C. §1519, is substantially the same as the Pennsylvania State crimes of tampering with records or identification under 18 Pa. C.S. §4104, and tampering with public records or information under 18 Pa. C.S. §4911. *Account of Martha I. Russell*, Docket No. 2009-18 (PSERB May 5, 2010); *Account of Viola Bush*, Docket No. 2009-19 (PSERB May 5, 2010).

⁹ Claimant did not address this argument in her *Memorandum of Law in Opposition to the Public School Employees’ Retirement System’s Motion for Summary Judgment and in Support of her Cross-Motion for Summary Judgment*, but she did preserve it through her appeal, so it will be addressed herein.

where she taught until 1974, when she left the profession to raise her son; it wasn't until 1998 that Brown hired Claimant to work at Laboratory, which was a 24-year gap in employment. Claimant argues that this 24-year gap in employment distinguishes her case from *Shiomos v. State Emp. Retirement Bd.*, 626 A. 2d 158 (Pa. 1993), relied upon by the ESRC in rejecting Claimant's request for partial forfeiture. Claimant is mistaken.

Appellant Shiomos became a member of the State Employees' Retirement System on January 3, 1972, when he entered judicial office. He began his second term of office on January 4, 1982, and retired on March 1, 1984 with 15.5411 years of credited service. Shiomos, like Claimant, withdrew from his pension fund his accumulated deductions (contributions and statutory interest), and began receiving a gross monthly annuity from his pension. Shiomos then assumed status as a senior judge. On June 29, 1988, Shiomos was convicted of two counts of extortion under the Hobbs Act, 18 U.S.C. §1951, premised on the fact that he extorted, by use of his position as a senior judge, monies from individuals, including a Roofer's Union, in December of 1985 and October of 1986. On December 8, 1988, SERS notified Shiomos that his pension would be forfeited under the Pension Forfeiture Act retroactive to June 29, 1988, the date of his conviction.

Shiomos, like Claimant, argued that only his pension benefits accumulated after 1982 should be subject to forfeiture. Quoting section 3 of the Pension Forfeiture Act, 43 P.S. §1313(a)(quoted at length *supra.*) the Court rejected this argument, explaining in relevant part:

[W]hen appellant Shiomos assumed his second term in office in 1982 he did so fully aware of the existence of Act 140 and its applicability to public employees in his position. Section 3 of Act 140 declares: "Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a

termination and renewal of the contract for purposes of this act.” 43 P.S. §1313(c). By assuming his second term in office subsequent to the enactment of Act 140 appellant became subject to Act 140 *and the terms and conditions of Act 140 were incorporated into his renewed pension contract.*

...

As a reasonable condition of public employment, the employee reaffirms his commitment to perform his job with honesty and integrity every time he or she begins a new term of office, receives a promotion or appointment, or experiences a change in job classification. . . With each appointment there is a renewal of the agreement to perform the term of public service without violating Act 140; *an agreement which encompasses all that has gone before. . . .* [A]ll previous accumulated rights to receive such benefits are subject to forfeiture by and through the “renewed” agreement which is formed each time a person chooses to become a “public official” as defined by §1312.

...

[A]t every new term of employment a public official or employee renews and amends his or her pension contract to include the new public service and to place at risk that which may have already been earned. Such is the nature of the public employment agreement.

Id. at 162-163.

The triggering event for forfeiture of retirement benefits is a conviction or guilty plea to a crime related to public office or public employment. If a public employee is convicted, or pleads guilty or no defense to any crime related to public office or public employment, *the public employee forfeits his right to receive any retirement benefit or payment of any kind, except a return of the contribution paid into any pension fund, without interest.* 43 P.S. §1313(a). That is what occurred here. The Board has no discretion.

(IV) REQUEST FOR PRE-TERMINATION HEARING

In her Appeal, Claimant also maintains that she is entitled to a pre-termination hearing prior to the forfeiture of any benefits. Claimant maintains that a factual dispute exists because one element of 18 Pa. C.S. §5101, which is not contained in 18 U.S.C. §1512(c)(2), is that the defendant committed the obstruction by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act. Claimant disputes that she committed any obstruction by force, violence, physical interference or obstacle, or any other unlawful act. Claimant also disputes that she committed any obstruction by breach of any official duty that she owed to Planet Abacus, because she did not receive any benefit as a result of her conduct and acted in good faith.

This argument is flawed. Claimant's guilty plea to *Obstruction of Justice*, at 18 U.S.C. §1519, is substantially the same as the state crime, *Tampering with or fabricating physical evidence*, at 18 Pa. C.S. §4910 for purposes of the Pension Forfeiture Act. As stated, *supra.*, at footnote 9, only *one* disqualifying offense is necessary to trigger the forfeiture provisions of the Pension Forfeiture Act. Thus, it matters not whether Claimant believes a factual issue is in dispute regarding her guilty plea to 18 U.S.C. §1512(c)(2). In addition, as PSERS correctly responds, the Pension Forfeiture Act leaves the Board no discretion once a triggering conviction or guilty plea occurs: "The benefits shall be forfeited upon entry of a plea of guilty" to any crime related to public office or public employment. 43 P.S. §1313(b).

PSERS correctly determined that Claimant's entire pension must be forfeited as a matter of law. Examining the record in the light most favorable to the Claimant, and giving the Claimant the benefit of all reasonable inferences, Claimant has advanced no

compelling argument that persuades the hearing officer to conclude otherwise.

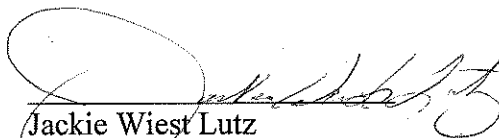
Accordingly, the following recommendation is made to the Board:

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

In Re:	:	
Account of Joan W. Chalker	:	Docket No. 2014-17
Claim of Joan W. Chalker	:	
	:	

RECOMMENDATION

AND NOW, this 31st day of August 2018, upon consideration of the foregoing Findings of Fact, Conclusions of Law, and Discussion, the Hearing Officer recommends that PSERS' *Motion for Summary Judgment* should be **GRANTED**; Claimant's *Cross-Motion for Summary Judgment* should be **DENIED**; Claimant's request that she not be subject to the Pension Forfeiture Act should be **DENIED**; and Claimant's appeal should be **DISMISSED**.


Jackie Wiest Lutz
Chief Hearing Officer

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Date of Mailing: August 31, 2018