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

IN RE: ACCOUNT OF BRUCE E. GEORGE
DOCKET NO. 2011-25
CLAIM OF BRUCE E. GEORGE

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Proposed Opinion and Recommendation of the Hearing Officer. We note that neither party filed Exceptions to the Proposed Opinion and Recommendation of the Hearing Officer. The Board finds appropriate the Findings of Fact, Conclusions of Law, Discussion, and Recommendation. Accordingly, we hereby adopt them as our own.

IT IS HEREBY ORDERED that Claimant's request to recalculate his final average salary is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 7, 2013

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: :
Account of Bruce E. George :
Claim of Bruce E. George : Docket No. 2011-25
:

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PSERB
EXECUTIVE OFFICE

OPINION AND RECOMMENDATION

Date of Hearing: October 10, 2012
Hearing Examiner: Suzanne Rauer, Esquire
For the Claimant: Bruce E. George, *pro se*
For PSERS: Jennifer Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board (Board) on an appeal filed by Bruce E. George (Claimant) from a decision of the Executive Staff Review Committee (Committee) of the Public School Employees' Retirement System (PSERS) that denied Claimant's request to recalculate his final average salary.

Claimant was notified of the Committee's decision by letter dated November 2, 2011. Claimant was notified that if he wished to appeal the Committee's decision to the Board he must file an appeal and request a formal administrative hearing within 30 days of the date of the letter.

Claimant filed a timely request for an administrative hearing on November 23, 2011. On December 12, 2011, Jennifer A. Mills, Assistant Counsel, filed an Answer to claimant's appeal on behalf of PSERS.

On July 19, 2012, Suzanne Rauer, Esquire was appointed by Secretary Jeffrey B. Clay to act as hearing examiner for Claimant's administrative hearing and to file a proposed opinion and recommendation with Secretary Clay, in accordance with 22 Pa. Code §201.11(a) and (b).

On July 19, 2012, a hearing notice was issued by PSERS which scheduled the administrative hearing on Claimant's appeal for October 10, 2012.

On October 10, 2012, the hearing was held as scheduled at 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing, *pro se*. Jennifer Mills, Esquire, represented PSERS.

Following the close of testimony, the parties were granted the opportunity to file post-hearing briefs. On October 24, 2012, upon receipt of the hearing transcript, the

hearing examiner issued a briefing schedule, per the parties' agreement. Pursuant to the briefing schedule worked out between the parties, Claimant filed his post-hearing brief on February 21, 2013, PSERS filed its post-hearing brief on March 26, 2013, and Claimant filed his reply brief on April 8, 2013.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant is a member of the Public School Employees' Retirement System (PSERS) by virtue of his employment as a teacher for the West Branch Area School District (School District) for 35 years. (PSERS Exhibit 16)
2. Claimant terminated his position with the School District on June 5, 2009; Claimant's effective date of retirement was June 6, 2009. (PSERS' Exhibit 16)
3. During his service with the School District, Claimant was suspended from his position without pay on October 3, 2002, and was subsequently terminated from his teaching position with the School District on December 11, 2002. (PSERS Exhibit 5)
4. Claimant filed a grievance of his suspension without pay on October 4, 2002, and a grievance of his termination on March 20, 2003. (PSERS Exhibit 5)
5. Claimant agreed to arbitration of his grievances, and a hearing was held on March 26, 2003. (PSERS Exhibit 5)
6. By Opinion and Award dated August 15, 2003, the arbitrator determined that the School District had just cause to suspend Claimant, but did not have just cause to dismiss Claimant. (PSERS Exhibit 5, p. 22)
7. Claimant was awarded back pay for the period of time from December 11, 2002 through the end of the school year in 2003. (N.T. 48-50; PSERS Exhibit 5)
8. PSERS received Form PSERS-728, Reporting Unit Salary and Service Adjustment, from the School District on September 3, 2003, requesting PSERS to adjust Claimant's retirement account to include the additional salary of \$33,021.24 in the 2002-2003 school year, and additional service of 145 days in the 2002-2003 school year, based upon the arbitration award. N.T. 11-12; PSERS Exhibits 4 and 5)

9. Upon receipt of the PSERS Form 726 for Claimant, PSERS, in a simple accounting practice, posted the arbitration-ordered adjustment for Claimant for the 2002-2003 school year on the date it was received, September 3, 2003, in the 2003-2004 school year. (N.T. 14)

10. In the 2004-2005 school year, PSERS' technology became more sophisticated and PSERS began reporting adjustments in salary to the year that it was earned rather than to the year that it was reported by the school district. (N.T. 14)

11. A salary adjustment reported prior to the 2004-2005 school year was not moved to the year in which it was earned until a member filed an application to retire and PSERS audited the account. (N.T. 21, 23)

12. On March 8, 2004, PSERS notified Claimant that on January 27, 2004, PSERS updated Claimant's service for the school year 2002-2003, giving him an additional 0.67 year in service pursuant to information provided by the School District, based upon the arbitration award. (N.T. 15; PSERS Exhibit 6)

13. Claimant's Statement of Account from PSERS for the school year 2001-2002 showed a final average salary of \$50,699.00 based upon an early retirement date of June 30, 2002. (PSERS Exhibit 1)

14. Claimant's Statement of Account from PSERS for the school year 2002-2003 showed a final average salary of \$49,909.00 based upon an early retirement date of June 30, 2003. (PSERS Exhibit 2)

15. Claimant's Statement of Account from PSERS for the school year 2003-2004 did not show a final average salary or a benefit estimate, but instructed Claimant to contact his PSERS regional office if he wanted a benefit estimate. (PSERS Exhibit 3)

16. Statements of Account are automatically generated, and the final average salary calculated by the PSERS' computer system for purposes of the Statements of Account are based upon when any salary adjustment was posted rather than when it was earned. (N.T. 21)

17. PSERS does not manually calculate or audit the final average salaries reported in the Statements of Accounts before those statements are mailed to members. (N.T. 21)

18. PSERS audits an account when a member elects to retire, which audit includes a review of the final average salary, years of service and calculation of benefits. (N.T. 21, 23-24)

19. Audit of a member's account at time of retirement is performed by PSERS retirement staff, internal PSERS auditors, and then auditors with the Commonwealth Treasury. (N.T. 23-24)

20. Annual Statements of Account are not audited before being sent out to members because of the sheer volume of Statements of Account that are sent out annually. (N.T. 24)

21. Retirement estimates requested by members are not audited before being sent out so as not to "add, delay or bog down that process." (N.T. 24)

22. In 2005, Claimant, on behalf of his wife's divorce attorney, requested that PSERS provide him with the value of his retirement account. (N.T. 38, 50)

23. On February 16, 2005, PSERS provided Claimant with an early retirement estimate based upon a retirement date of February 28, 2005 and a final average salary of \$53,206.00. (PSERS Exhibit 8; N.T. 16-17)

24. In estimating Claimant's final average salary for the February 16, 2005 report, PSERS adjusted Claimant's account by moving the \$33,021.24 arbitration award from 2003-2004 to 2002-2003. (N.T. 18-19; PSERS Exhibit 9)

25. Claimant's Statement of Account from PSERS for the school year 2004-2005 showed a final average salary of \$66,617.47 based upon an early retirement date of June 30, 2005 and upon normal retirement as of September 8, 2008. (N.T. 15; PSERS Exhibit 7)

26. Claimant's 2004-2005 Statement of Account stated that **"The final average salary may not be accurate for the 2004-2005 statement year."** (Emphasis added) (N.T. 16; PSERS Exhibit 7)

27. Claimant's 2004-2005 Statement of Account stated that **"Salaries reported to PSERS are placed in the school year in which they are earned."** (Emphasis added) (N.T. 15-16; PSERS Exhibit 7)

28. Claimant did not question the discrepancy between the final average salary of \$53,206.00 as reported in the February 16, 2005 report from PSERS and the final average salary of \$66,617.47 reported in Claimant's 2004-2005 Statement of Account. (N.T. 20)

29. Claimant's Statement of Account from PSERS for the school year 2005-2006 showed a final average salary of \$68,620.07 based upon an early retirement date of June 30, 2006 and upon normal retirement as of September 8, 2008. (PSERS Exhibit 10)

30. Claimant's Statement of Account from PSERS for the school year 2006-2007 showed a final average salary of \$69,136.80 based upon an early retirement date of June 30, 2007 and upon normal retirement as of September 8, 2008. (PSERS Exhibit 11)

31. Claimant's Statement of Account from PSERS for the school year 2007-2008 showed a final average salary of \$70,078.51 based upon an early retirement date of June 30, 2008 and upon normal retirement as of September 8, 2008. (PSERS Exhibit 12)

32. In each of those Statements of Account, which were auto generated, the \$33,021.24 arbitration award remained in the year in which it was received, 2003-2004, rather than being transferred to the year in which it was earned, 2002-2003, thereby artificially inflating the final average salary. (N.T. 21)

33. Each of those Statements of Account included an explanation that stated under the section entitled "Final Average Salary (FAS)":

FAS is an average of your three highest school years' salaries. School years with part-time service may be annualized for benefit calculation. **Salaries reported to PSERS are recognized in the school year in which they were earned, not when paid. Because your salaries have not been audited, your FAS may be overstated.** (Emphasis added.)

34. On February 15, 2009, Claimant completed Form PSERS-151, Request for Retirement Estimate, and submitted it to PSERS. (N.T. 21-22; PSERS Exhibit 13)

35. As part of the Request for Retirement Estimate, Claimant provided a final average salary of \$71,112.00. (PSERS Exhibit 13)

36. PSERS calculated the estimate based upon a final average salary of \$71,112.00 as provided by Claimant in his PSERS-151, Request for Retirement Estimate, and not on a final average salary that PSERS had calculated for its records. (N.T. 22)

37. On May 5, 2009, PSERS issued a Normal Retirement Estimate to Claimant, based upon a final average salary as reported by Claimant of \$71,112.00, a retirement date of June 6, 2009, and 35.81 years of service credit. (PSERS Exhibit 14)

38. The May 5, 2009 Normal Retirement Estimate included a notification as follows:

This document is intended to provide you with an **ESTIMATE** of your retirement benefits. The calculations are based on a combination of information from you and PSERS as it appears above, and is subject to final audit. Changes to your final average salary, years of service, retirement date, and debts against your account will change your benefit amount.

(PSERS Exhibit 14)

39. Upon Claimant's submission of an application for retirement, PSERS on August 25, 2009 issued an Initial Retirement Benefit to Claimant, advising him that his initial gross monthly retirement benefit would be \$3,675.33. (PSERS Exhibit 15; N.R. 22-23, 25)

40. By correspondence dated April 10, 2010, PSERS advised Claimant that his finalized gross monthly retirement benefit was \$3,780.98, based upon 35.81 total years of school service, and an audited final average salary of \$61,536.93. (PSERS Exhibit 16; N.T. 24-25)

41. Claimant never received a monthly benefit based upon a final average salary that was higher than \$61,536.93. (N.T. 26)

42. Claimant did not earn at least \$70,000.00 in any one school year. (N.T. 26)

43. On May 19, 2010, Claimant filed an appeal with PSERS requesting that his final average salary be recalculated to include the lump sum payment of \$33,021.24 in the 2003-2004 school year, which was the school year in which he **received** the arbitration award payment. (PSERS Exhibit 17)

44. Claimant stated that because PSERS credited the lump sum payment to the year he had received the payment, the 2003-2004 school year, each of his Statements of Account included it in the 2003-2004 school year and his final average salary per those Statements of Account were as follows:

As of June 30, 2005, it was \$66,617.47
As of June 30, 2006, it was \$68,620.07
As of June 30, 2007, it was \$69,136.80
As of June 30, 2008, it was \$70,078.51

(PSERS Exhibit 17)

45. By correspondence dated May 20, 2010, PSERS denied Claimant's request for recalculation of his final average salary, stating as follows:

This additional salary (adjustment) was posted in the 2003-2004 school year and remained there until your initial benefit was processed. This is why your "Statements of Account" reflected a spiked final average salary. In fact, it doesn't appear that you ever earned more than what the statements indicated your final average salary was. This cash award was for salaries that you would have earned and belonged in the 2002-2003 school year.

(PSERS Exhibit 18)

46. Claimant appealed that May 20, 2010 decision to the PSERS Executive Staff Review Committee by correspondence received June 1, 2010, alleging as follows:

- a. The payment of \$33,021.24 was awarded to Claimant during the 2003-2004 school year;
- b. Claimant did not receive the money until the 2003-2004 school year;
- c. Claimant performed no service for the school district during the 2002-2003 school year for the cash award amount of \$33,021.24;
- d. Claimant's yearly Statements of Account credited the cash award of \$33,021.24 to the 2003-2004 school year;
- e. Claimant's May 5, 2009 "Normal Retirement Estimate" listed his final average salary as \$71,112.00; and
- f. Claimant made his irrevocable decision to retire using the information provided by PSERS in the May 5, 2009 "Normal Retirement Estimate".

(PSERS Exhibit 19)

47. By correspondence dated November 2, 2011, the PSERS Executive Staff Review Committee denied Claimant's request to include Claimant's arbitration award of \$33,021.24 in the 2003-2004 school year because that amount covered Claimant's lost wages for the period from December 11, 2002 through the end of the school year in 2003. (PSERS Exhibit 20)

48. The PSERS Executive Staff Review Committee also stated in its November 2, 2010 correspondence that "it was not reasonable for you to believe that your final average salary could be higher than any contracted yearly salary." (PSERS Exhibit 20)

49. Under section 8102 of the Retirement Code, the term "Final average salary" is defined, in pertinent part, to mean:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . . .

(Official Notice; 24 Pa. C.S. §8102)

50. Claimant's last three school years' salaries were \$59,987.00, \$61,536.00 and \$63,087.00. (PSERS Exhibit 20)

51. Inclusion of the \$33,021.24 arbitration award in the 2003-2004 school year when it was paid, rather in the 2002-2003 school year when it would have been earned, artificially inflated the final average salary in Claimant's Statements of Account. (N.T. 20-21)

52. Claimant knew that the \$33,021.24 arbitration award was for compensation he would have earned in the 2002-2003 school year had he not been terminated. (N.T. 49)

53. Claimant acknowledged that the \$33,021.24 arbitration award should have been credited to the 2002-2003 school year. (N.T. 38)

54. Claimant's Option 1 gross initial benefit of \$3,675.33 and Option 1 gross final benefit of \$3,780.98 were calculated using Claimant's corrected final average salary of \$61,536.93. (N.T. 24-25; PSERS Exhibits 15 and 16)

55. Claimant filed a Request for Administrative Hearing on November 23, 2011. (Docket No. 2011-25)

56. An administrative hearing was held in Harrisburg before Hearing Examiner Suzanne Rauer on October 10, 2012, at which time Claimant appeared *pro se* and presented his case through testimony and exhibits. (Transcript, *passim*)

CONCLUSIONS OF LAW

1. Claimant was afforded an opportunity to be heard in connection with his appeal. (Findings of Fact Nos. 55-56)
2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
3. Section 8102 of the Public School Employees' Retirement Code defines the term "Final average salary" to mean "[t]he highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . . ." 24 Pa. C. S. §8102.
4. Claimant's final average salary was correctly calculated in accordance with the Retirement Code's definition of final average salary. (Findings of Fact Nos. 1-54)
5. Granting Claimant a Waiver of Adjustment under the Retirement Code at 24 Pa. C.S. §8303.1 would result in a windfall for Claimant based upon a final average salary of Claimant's own estimation, in that he was put on notice on two occasions that the figures upon which he based his estimated final average salary were questionable. (Findings of Fact Nos. 1-54)
6. Claimant has failed to proffer sufficient evidence to support his appeal. (Findings of Fact Nos. 1-54)

DISCUSSION

It is well settled in Pennsylvania that Claimant bears the burden of establishing the facts necessary to sustain his claim. *See Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). While a member is entitled to a liberal construction of the Retirement Code, he has only those rights created by the retirement statutes and none beyond. *Burris v. State Employees' Retirement Board*, 745 A.2d 704 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992); *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *allocator denied*, 668 A.2d 1139 (Pa. 1996). The agency must construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa. C.S. §1921(a), (b). PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001).

Claimant testified that when he requested a retirement estimate, PSERS advised him by correspondence dated May 5, 2009 that his Option 1 estimated retirement benefit would be \$4,456.91. PSERS' estimate was based upon Claimant's self-reported final average salary of \$71,112.00. When Claimant received that estimate, he made what he termed an irrevocable decision to retire.¹ Claimant's initial gross retirement benefit was \$3,675.33, and his finalized gross retirement benefit after audit was \$3,780.98. Claimant correctly stated that his finalized retirement benefit was \$675.93 less than the estimated

¹ As Claimant noted in his brief, "The fact that I could have stopped my retirement with PSERS by filing an *Intent to Change the Terms of the Retirement Plan* by September 29, 2009, as I was informed in my Initial Retirement Benefit letter dated August 25, 2009, is meaningless. By the time I got that letter, my job was gone from me forever."

retirement benefit, which was based upon Claimant's self-reported final average salary. Claimant has two minor children (Claimant's Exhibit 1) and did not need to retire, but only did so based upon the estimated retirement benefit. Claimant alleged that he had no reasonable grounds to believe the self-reported information upon which his estimated retirement benefit was based was incorrect.

As PSERS notes in its brief, Claimant's "final average salary" under section 8102 of the Retirement Code is:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months with the compensation for part-time service being annualized on the basis of the fractional portion of the school year for which credit is received. . . .
(24 Pa. C.S. §8102)

Therefore, when calculating a member's final average salary, PSERS must do so consistent with this statutory definition.

Testimony and evidence presented at the hearing showed, and the parties agreed, that during his service with the School District, Claimant was suspended from his position without pay on October 3, 2002, and was subsequently terminated from his teaching position with the School District on December 11, 2002. Claimant filed a grievance of his suspension without pay on October 4, 2002, and a grievance of his termination on March 20, 2003. Claimant agreed to arbitration of his grievances, and a hearing was held on March 26, 2003. By Opinion and Award dated August 15, 2003, the arbitrator determined that the School district had just cause to suspend Claimant, but did not have just cause to dismiss Claimant. Claimant was awarded back pay for the period of time from December 11, 2002 through his reinstatement on September 3, 2003, and PSERS received Form PSERS-728, Reporting Unit Salary and Service Adjustment, from

the School District on September 3, 2003, requesting that PSERS adjust Claimant's retirement account to include the additional salary of \$33,021.24 in the 2002-2003 school year, and additional service of 145 days, based upon the arbitration award. Upon receipt of the PSERS Form 726 for Claimant, PSERS, in a simple accounting practice, posted the arbitration-ordered adjustment for Claimant for the 2002-2003 school year on the date it was received, September 3, 2003, which fell in the 2003-2004 school year. In the 2004-2005 school year, PSERS' technology became more sophisticated and PSERS began reporting adjustments in salary to the year that it was earned rather than to the year that it was reported by the school district. However, a salary adjustment reported prior to the 2004-2005 school year was not moved to the year in which it was earned until a member filed an application to retire and PSERS audited the account.

In its brief, PSERS argued that because the arbitration Opinion and Award states that Claimant was to be "made whole for any loss of wages and benefits . . . from December 11, 2002 through his reinstatement . . .," placing Claimant in the same economic position he would have been in had he not been terminated, that the \$33,021.24 award represents compensation that should have been paid to Claimant in the 2002-2003 school year as if he had never been terminated.

Claimant does not dispute that the \$33,021.24 arbitration award he received in 2003 was correctly credited to the 2002-2003 school year (N.T. 38), or that his final average salary as computed by PSERS is correct. Rather, Claimant focused his appeal on his request for a Waiver of Adjustment under the Retirement Code at 24 Pa. C.S. §8303.1, which states as follows:

(a) Allowance.—Upon appeal by an affected member, beneficiary or survivor annuitant, the board may waive an adjustment or any portion

of an adjustment made under section 8534(b) (relating to fraud and adjustment of errors) if in the opinion of the board or the board's designated representative:

(1) the adjustment or portion of the adjustment will cause undue hardship to the member, beneficiary or survivor annuitant;

(2) the adjustment was not the result of erroneous information supplied by the member, beneficiary or survivor annuitant;

(3) the member had no knowledge or notice of the error before adjustment was made, and the member, beneficiary or survivor annuitant took action with respect to their benefits based on erroneous information provided by the system; and

(4) the member, beneficiary or survivor annuitant had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made.

Claimant stated in his brief that he agreed with the finding by the Executive Staff Review Committee that Claimant met the first three conditions of the Waiver of Adjustment: (1) that the adjustment of the \$33,021.24 arbitration award to the 2003-2003 school year will cause undue hardship to Claimant; (2) that the adjustment is not a result of erroneous information supplied by Claimant; and (3) that Claimant had no knowledge or notice of the error before adjustment was made, and the member took action with respect to his benefits based on erroneous information provided by the system. (PSERS Exhibit 20) Claimant is challenging the Executive Staff Review Committee's finding that Claimant "had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made."

Claimant based his Final Average Salary of \$71,112.00 for purposes of his Request for Retirement Estimate (PSERS Exhibit 13) on school years 2003-2004, 2007-

2008 and 2008-2009, which were his highest three years. In determining his salary for the 2003-2004 school year, Claimant divided his contribution for that year of \$5766.34 by the contribution rate of D-6.50, both of which numbers he took from his Statement of Account for 2003-2004, and arrived at a total salary for the 2003-2004 school year of \$88,712.93. Claimant added that figure to his salary for the 2007-2008 school year and his extrapolated salary for the 2008-2009 school year² to arrive at the final average salary he reported on his Request for Retirement Estimate. (Claimant's Brief at 11-12) Claimant argued that it was entirely reasonable of him to believe that his final average salary could be higher than his salary for any school year in which he worked because the \$33,021.24 arbitration award was treated as income in the 2003 fiscal year for Federal income tax, Pennsylvania state income tax, local income tax, and Medicare purposes (Claimant's Brief at 9-10; N.T. 42-43), because his Statements of Account for all years beginning with school year 2004-2005 reported inflated final average salaries based upon allocation of the arbitration award to school year 2003-2004 (PSERS Exhibits 8, 10, 11 and 12), and because it is "not **reasonable** to expect an elementary teacher to remember all those numbers from over nine months ago, compare all the numbers, and notice the large increase in the Final Average Salary." (Claimant's Brief at 11)

First, and most importantly, Section 8102 of the Retirement Code , 24 Pa. C.S. §8102, defines the term "final average salary" as "[t]he highest average compensation received as an active member during any three **nonoverlapping** periods of 12 consecutive months" (Emphasis added.) PSERS must, by law, assign compensation to the period of time that such compensation was earned, not paid. *Abramski v. Public*

² Claimant's Request for Retirement Estimate was submitted in February 2009, prior to the end of the 2008-2009 school year. PSERS Exhibit 13.

School Employes' Retirement Board, 655 A.2d 207 (Pa. Cmwlth. 1986) To combine Claimant's arbitration award of \$33,021.24 for back pay from December 11, 2002 through the end of the 2002-2003 school year with his salary for the 2003-2004 school year, as Claimant now requests, would be to create an overlapping period of the 2003-2004 school year with part of the 2002-2003 school year. This is impermissible under the Retirement Code, and the Board lacks authority to grant Claimant's request.

Furthermore, although Claimant contends that he relied to his detriment upon the normal retirement estimates provided to him by PSERS in making his decision to retire, these retirement estimates were based upon the final average salary and the anticipated date of retirement *as reported by the Claimant*. Claimant's Statement of Account for the school year 2003-2004 did not provide an estimated final average salary or a benefit estimate, and notified Claimant to contact his PSERS regional office if he would like a benefit estimate. Claimant admitted he never did so. Moreover, the February 16, 2005 Early Retirement Estimate requested by Claimant in a then-active divorce matter put him on notice that his estimated final average salary was considerably lower than that reported on his Statements of Account. (PSERS Exhibit 8) Thus, Claimant was twice put on notice that the figures appearing on the subsequent Statements of Account were questionable. This calls into serious question whether Claimant actually did meet the requirements of the third prong for the waiver of adjustment, that Claimant had no knowledge or notice of the error before adjustment was made and that Claimant took action with respect to his benefits based upon erroneous information provided by the system. The erroneous information was provided not by the "system" but by Claimant himself, after notice that the numbers he relied upon were inaccurate.

In response to Claimant's argument that he should be granted a waiver because he had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made, PSERS argued that the waiver of adjustment section at 24 Pa. C.S. §8303.1 refers only to any adjustment mandated by the Retirement Act at 24 Pa. C.S. §8534(b), which provides as follows:

Should any *change or mistake in records* result in any member, beneficiary, or survivor annuitant receiving from the system more or less than he would have been entitled to receive had the records been correct, then regardless of the intentional or unintentional nature of the error and upon the discovery of such error, the board shall correct the error and so far as practicable *shall adjust the payments* which may be made for and to such person in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid. (Emphasis added.)

PSERS argued that a member's "records" as referred to in §8534(b) refers only to the routine business records regarding salary, accumulated deductions and service credit earned by members that are directly involved in the calculation of their retirement benefits. As PSERS stated, "It is these records that determine the benefit and that PSERS is obligated to correct so that the member receives no more and no less than what the Retirement Code provides." (PSERS brief at ¶ 18) Any erroneous information referenced in §8303.1(a) must therefore be limited to salary, accumulated deductions and service credit. A member's estimated final average salary is not part of a member's record, but is a service provided to the member with the "explicit understanding that it is only an estimate, and that the estimated benefit calculated using the estimated final average salary has not been formally audited and certified." (PSERS brief at ¶ 18) Since there was no mistake in PSERS' records regarding Claimant's salary, accumulated deductions and service credit, the Board has no discretion to waive adjustment of Claimant's arbitration award from the 2003-2004 school year to the 2002-2003 school

year, since waiving that adjustment would “lead to liability for far greater benefits than the General Assembly intended and for which it has provided no funding mechanism.” (PSERS brief at ¶ 19) PSERS’ arguments are compelling. It would be unfair to hold PSERS to a final average salary in excess of the salary Claimant earned in any given school year. Claimant should not be allowed to receive a windfall based upon a final average salary of Claimant’s own estimation, especially given he was put on notice on two occasions that the figures upon which he based his estimated final average salary were questionable. There is simply no evidence that PSERS provided erroneous information with respect to Claimant’s final average salary. Any information and estimates provided to Claimant in his yearly Statements of Account were provided only as a service to Claimant, and were subject to final audit and review. It was not reasonable for Claimant to claim benefits premised on an self-estimated final average salary that exceeded his actual yearly salary for all years during which he was employed by the School District.

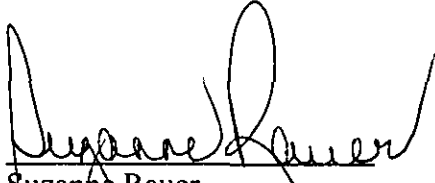
Claimant has the burden of proof in this proceeding. Claimant has failed to proffer sufficient evidence to support his appeal. Accordingly, the following recommendation will be made to the Board:

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: :
Account of Bruce E. George :
Claim of Bruce E. George : Docket No. 2011-25
:

RECOMMENDATION

AND NOW, this 16th day of May, 2013, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Examiner for the Public School Employees' Retirement System recommends that Claimant's request to recalculate his final average salary be **DENIED**.


Suzanne Rauer
Hearing Examiner

Dated: May 16, 2013