

AUG 17 2010

Mail Date: _____

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

IN RE: ACCOUNT OF ROBERT A. CARR
DOCKET NO. 2009-01
CLAIM OF ROBERT A. CARR

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 Decision and Order of the Hearing Examiner in the above-referenced matter. We note that none of the parties filed Exceptions to the Proposed Decision and Order of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's Background, Proposed Findings of Fact, Proposed Conclusions of Law, Discussion, and Recommendation. Accordingly, we hereby adopt them as our own, with one small exception. For clarification purposes, we change the word "election" in Finding of Fact No. 9 to "elected term."

IT IS HEREBY ORDERED that Claimant's request for membership in PSERS as a result of his work as an elected tax collector for the New Hope-Solebury School District is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: **AUG 17 2010**

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF ROBERT A. CARR
DOCKET NO. 2009-01
CLAIM OF ROBERT A. CARR

BEFORE: Lynne M. Mountz, Esquire
Hearing Examiner

HEARING DATE: October 21, 2009

APPEARANCES: For the Public School Employees' Retirement System:
Jennifer A. Mills, Esquire

For Robert A. Carr:
Charles L. Herring, Esquire

PROPOSED DECISION AND ORDER

Background

Robert A. Carr (Claimant) appealed the decision of the Public School Employees' Retirement System (PSERS) denying his request to include his earnings received as tax collector for the New Hope-Solebury School District as retirement covered compensation.

An administrative hearing was convened regarding Claimant's appeal on October 21, 2009. Both parties appeared at the hearing and were represented by counsel. Claimant was represented by Attorney Charles L. Herring. PSERS was represented by Attorney Jennifer A. Mills. The Parties submitted a Stipulation of Facts as a joint exhibit which has been made part of the record. Additionally, the Parties were provided full opportunity to examine and cross-examine witnesses, introduce documentary evidence and file post-hearing briefs.

Claimant and PSERS timely filed post-hearing briefs in this matter.

Based upon the testimony and evidence presented at the hearing and all matters of record, the Hearing Examiner enters the following:

PROPOSED FINDINGS OF FACT

1. Claimant was enrolled in PSERS by virtue of his employment with the Central Bucks School District (CBSD) on November 30, 2004. (Joint Exhibit A, ¶1).
2. Claimant has earned 1.00 service credit for each school year with PSERS beginning with the 2005-2006 school year through to the present for his service with the CBSD. (Joint Exhibit A, ¶2).
3. Claimant is the elected tax collector for Solebury Township, the New Hope-Solebury School District (School District), and Bucks County. (Joint Exhibit A, ¶3).
4. Because the previous tax collector for the taxing districts, Alice Betts, resigned in June of 2005, Claimant was appointed tax collector by Solebury Township for the time period of July 1, 2005 through December 31, 2005. (Joint Exhibit A, ¶4).
5. Claimant was subsequently elected as tax collector for the three taxing districts effective January of 2006. (Joint Exhibit A, ¶5).
6. As a result of his position as an elected tax collector, Claimant collects the school taxes for the School District. (Joint Exhibit A, ¶6).
7. Claimant is seeking a determination that he is a "school employee" and thus eligible for membership in PSERS as a result of his work as an elected tax collector for the School District in collecting real estate taxes. (Joint Exhibit A, ¶7).

8. PSERS denied Claimant's request for membership because it considered his duties as a tax collector as not meeting the definition of "school employee" but rather supports the position that Claimant is an independent contractor. (Joint Exhibit A, ¶18).
9. The School District Board of Directors sets the compensation paid to the tax collector for each election as required by state law which remains in effect during that elected term. (Joint Exhibit A, ¶19).
10. Claimant is paid a fixed amount by the School District for collection of school taxes. (Joint Exhibit A, ¶10).
11. Claimant receives his compensation in twenty-six bi-weekly payments from the School District, which is done via a regular payroll with federal, state, and local taxes; Social Security; and Medicare withheld, and at the year-end he receives a W-2 from the School District. (N.T. 7-8; Joint Exhibit A, ¶11; Claimant Exhibits 1-3).
12. The School District issues a W-2 for Claimant based upon a determination by the Internal Revenue Service that tax collectors are deemed employees for federal tax purposes. (N.T. 9-10; Joint Exhibit A, ¶12; Claimant Exhibits 4-6).
13. Claimant receives additional remuneration for collection efforts from the School District as required by state law, which is currently set at \$6.25 per collected installment payment. (Joint Exhibit A, ¶13).
14. Claimant's compensation is set independently by each taxing district. (Joint Exhibit A, ¶14).

15. Claimant does not receive any fringe benefits from the School District in the form of vacation time, sick time, personal days, health insurance or life insurance. (Joint Exhibit A, ¶15).
16. The School District does not have a job description for Claimant and does not complete performance evaluations for Claimant. (Joint Exhibit A, ¶16).
17. The School District has job descriptions and completes performance evaluations for its employees. (Joint Exhibit A, ¶17).
18. The School District does not keep a personnel file for Claimant. (Joint Exhibit A, ¶18).
19. The School District keeps personnel files for its employees. (Joint Exhibit A, ¶19).
20. The School District does not provide Claimant with an office; rather Claimant's office is located at his place of residence. (Joint Exhibit A, ¶20).
21. Claimant has no written contract with the School District. (Joint Exhibit A, ¶21).
22. Claimant is required by state law to provide the School District with monthly reports, tax bills, and tax bank deposit verification due by the tenth of each month. (Joint Exhibit A, ¶22).
23. Payments that are made from tax payers of the School District are directly deposited in the School District's general fund account. (Joint Exhibit A, ¶23).
24. Gregory Hogg, the School District's Business Administrator and School Board Secretary, monitors all deposits made by Claimant into the School District's general fund account and reviews the monthly reports submitted by Claimant. (Joint Exhibit A, ¶24).
25. The School District does not require Claimant to keep any time records for the time spent on the collection of taxes for the School District. (Joint Exhibit A, ¶25).

26. The School District does not set any hours for Claimant. (N.T. 8; Joint Exhibit A, ¶26).
27. The School District's solicitor is not Claimant's solicitor. (N.T. 8; Joint Exhibit A, ¶27).
28. The School District pays Claimant's expense for postage, printing, books, blanks and forms as required by state law. (Joint Exhibit A, ¶28).
29. Claimant submits any unpaid school taxes to the Bucks County Tax Claim Bureau for collection. (Joint Exhibit A, ¶29).
30. Claimant is not part of any collective bargaining unit or unions covering the various employees of the School District. (Joint Exhibit A, ¶30).
31. The compensation that Claimant receives from the School District is not deducted directly from the taxes that he collects. (N.T. 11).
32. In order to remove Claimant from office, the School District would have to file a petition in court. (N.T. 11-12; Pa. Const. art. VI, §§ 6,7).
33. Claimant is not supervised by the School District on a daily basis. (N.T. 12).
34. Claimant is required to be covered by a surety bond to insure against loss associated with the collection of taxes; the cost of the bond is allocated among the three taxing districts. (N.T. 12; 72 P.S. §5511.4).
35. Claimant receives a W-2 at the end of the year for his services as tax collector for Bucks County and Solebury Township. (N.T. 12).
36. Claimant does not participate in the retirement plan of Bucks County or Solebury Township. (N.T. 12-13).
37. An administrative hearing regarding Claimant's appeal was held on October 21, 2009. (N.T. *passim*).

PROPOSED CONCLUSIONS OF LAW

1. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code. 24 Pa.C.S. §8101 *et seq.*
2. Claimant has only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).
3. Membership in PSERS is limited to "school employees". 24 Pa.C.S. §8301.
4. A "school employee" is any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis. 24 Pa.C.S. §8102.
5. To be eligible for PSERS membership for services rendered as a tax collector, Claimant has the burden of proving that he is a school employee of the School District and not an independent contractor. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).
6. The ten-part test to be used as a guide in determining whether an individual is an employee or an independent contractor consists of the following factors: (1) control of the manner in which the work is to be done; (2) responsibility for result only; (3) terms of the agreement between the parties; (4) the nature of the work or occupation; (5) the skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is by time or by the job; (9) whether the work is part of the regular business of the employer; and (10)

whether there exists a right to terminate the employment at any time. *Zimmerman v. Public School Employees' Retirement Board*, 522 A.2d 43, 45 (Pa. 1987).

7. The Internal Revenue Service (IRS) determined that Claimant is an employee of the School District for federal tax purposes under federal tax laws and regulations. (Claimant's Exhibits 5,6).
8. The Public School Employees' Retirement Board has the express authority to determine whether any person is a school employee within the meaning of the Retirement Code; the Board will determine whether a person is an independent contractor or a person compensated on a fee basis upon review of all the circumstances surrounding the employment of the person seeking membership. 22 Pa. Code §215.5(d)(3).
9. Claimant has not met his burden of proving that he is a "school employee" as the elected tax collector for the School District. (Findings of Fact Nos. 3-6, 9-10, 15-23, 25-27, 30, 32-33).
10. Claimant is not eligible for membership in PSERS as the elected tax collector for the School District.

DISCUSSION

Claimant is a member of PSERS by virtue of his employment with the Central Bucks School District. Through this appeal he also seeks eligibility for membership in PSERS as a result of his work as an elected tax collector for the New Hope-Solebury School District.¹

Claimant testified that he spoke with an accountant about opening a 401K retirement account as a self-employed person with the money he earned as a tax collector. Claimant stated that he was advised that he couldn't do that because he received W-2s from the taxing districts. Claimant subsequently filed a Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, with the IRS. (Claimant Exhibit 4). The IRS sent a response to Gregory Hogg, Director of Business and Finance for the Solebury Township Board of Supervisors, in which it determined that Claimant was an employee for federal tax purposes. (Claimant Exhibit 5).

It is on this basis that Claimant asserts that as the elected tax collector he is an employee of the School District and thus entitled to membership in PSERS.

PSERS membership is limited by Section 8301 of the Retirement Code to "school employees." 24 Pa.C.S. §8301. The Retirement Code defines "school employee" as follows:

Any person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis.

24 Pa.C.S. §8102.

¹ Claimant is not seeking additional credited service time; he is seeking only to increase the amount of his contributions.

In *Zimmerman v. Public School Employees' Retirement Board*, 522 A.2d 43, 45 (Pa. 1987), the Pennsylvania Supreme Court identified a ten-part test as a guide to be followed in determining whether an individual is a "school employee" under the Retirement Code or an independent contractor. The factors to be considered in accordance with that test are: (1) control of the manner in which the work is to be done; (2) responsibility for result only; (3) terms of the agreement between the parties; (4) the nature of the work or occupation; (5) the skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is by time or by the job; (9) whether the work is part of the regular business of the employer; and (10) whether there exists a right to terminate the employment at any time.

The threshold issue presented in this case is whether the fact that Claimant receives a W-2 form in accordance with the IRS ruling is dispositive of a determination that he is a "school employee" in view of the analysis required in *Zimmerman*.

The Commonwealth Court applied the *Zimmerman* factors in two previous cases in which elected tax collectors sought membership in PSERS asserting that they were school employees under the Retirement Code. *Crimmins v. Public School Employees' Retirement Board*, 685 A.2d 232 (Pa. Cmwlth. 1996); *Grogan v. Public School Employees' Retirement Board*, 711 A.2d 558 (Pa. Cmwlth. 1998). In those cases, the Court determined that the claimants were independent contractors and not employees of their respective school districts. Importantly, in both cases, the claimants had federal taxes withheld from their salaries and annually received a W-2 form. While this fact was a strong indicia in favor of finding an employee-employer

relationship, the evidence to the contrary when looking at all of the *Zimmerman* factors dictated a different result.

Thus, while the receipt of a W-2 form is an important factor that must be considered in determining whether Claimant is a school employee, it is one that must be balanced against all of the evidence presented. Similarly, the determination by the IRS made pursuant to federal law and regulations regarding Claimant's employment status for federal tax purposes, may be persuasive, but it is not dispositive of the matter.

It is the Public School Employees' Retirement Board that has been granted the authority to determine whether a person is a school employee. Regulations promulgated under the Retirement Code² specifically provide:

(3) In cases of doubt, the Board will determine whether any person is a school employee within the meaning of the Retirement Code. The Board will also determine whether a person is an independent contractor or a person compensated on a fee basis upon review of all the circumstances surrounding the employment of the person seeking membership in the program.

22 Pa. Code §215.5(d)(3). Clearly, the Board must make its determination "upon review of all of the circumstances surrounding the employment of the person seeking membership in the program" and in accordance with the analysis set forth in *Zimmerman*.

In reviewing the evidence presented in this case it is obvious that, as in most cases, there are factors which indicate that Claimant is an independent contractor and others that suggest a possible employer-employee relationship. Overall, however, the facts presented

² The Retirement Code grants the Board the authority to adopt and promulgate regulations for the uniform administration of the system. 24 Pa.C.S. §8502(h). Duly promulgated regulations carry the full force and effect of law. See, *Peterson v. Commonwealth, Pennsylvania State Horse Racing Commission*, 449 A.2d 774 (Pa. Cmwlth. 1982).

support a finding that Claimant is an independent contractor and not a school employee under the Retirement Code.

With respect to the first factor from *Zimmerman*, it is concluded that Claimant generally controls the manner in which the work is to be completed.³ The School District does not provide Claimant with a job description. It does not supervise him on a daily basis or provide him with a performance evaluation. By contrast, the School District does have job descriptions and does complete performance evaluations for its employees. The School District does not set any hours of work for Claimant, nor does it require him to keep time records.

The second factor is whether Claimant is responsible for results only. The facts relevant to this factor suggest that he is. As the elected tax collector it is Claimant's responsibility to collect taxes for the School District. Although the School District's Business Administrator monitors the deposits made by Claimant into the general fund account and reviews his monthly reports for accuracy, the School District does not dictate the manner in which Claimant collects the taxes. The School District is concerned only that the taxes are collected and properly handled.

With respect to the third factor, the fact that federal taxes are withheld from Claimant's salary and a W-2 is issued to him suggests that Claimant is a "school employee." Contrary to this conclusion, however, are a number of relevant facts: Claimant is elected to his position; he is not hired by the School District; he cannot be terminated by the School District; he does not have a written contract with the School District; he does not have a job description; he is not

³ While the Court in *Zimmerman* stated that no single factor is dispositive and that each case must be determined on its own facts, the Commonwealth Court has recognized that "the right to control the manner in which the work is accomplished is the most persuasive indication of the presence or absence of the employer/employee relationship. *Southland Cable Co. v. Workmen's Compensation Appeal Board*, 598 A.2d 329, 331 (Pa. Cmwlth. 1991).

supervised by the School District on a daily basis; he is not required to maintain an office at the School District and performs his duties in an office in his home; he does not receive a performance evaluation; he does not receive any of the fringe benefits which the School District provides to its employees; he is not covered by any of the bargaining units in the School District; and, the School District's solicitor is not Claimant's solicitor.

Turning to the next three factors under the *Zimmerman* analysis, the facts support a finding that Claimant is an independent contractor. Claimant is not hired by the School District. He is elected to collect the School District's taxes. As stated before, the School District does not provide Claimant with a job description nor supervise his work. Claimant's duties as a tax collector are distinct from the regular business of the School District which is to educate children.

The seventh factor requires a determination regarding which party supplies the tools. There is no question that the School District pays Claimant's expense for postage, printing, books, blanks and forms as required by state law. The School District does not, however, provide Claimant with an office. Claimant maintains an office in his home.

Regarding the eighth factor, it appears that Claimant is paid by the job and not by the time. His responsibility is to collect taxes for the School District and he is paid for the same. Claimant does not maintain time records and the School District does not set his hours.

With respect to the ninth factor, the benefit to the School District in receiving tax revenue is obvious. The School District, however, is not in the business of collecting taxes. The School District's primary business is to educate children.

Finally, with respect to the tenth factor, it is clear that the School District can neither hire nor fire Claimant. Claimant, as an elected tax collector, can only be removed from office in accordance with the Pennsylvania Constitution. Pa. Const. art. VI, §§6,7; *In re Petition to Recall Reese*, 665 A.2d 1162 (Pa. 1995). The Commonwealth Court noted in *Grogan* that the fact that the school district did not have the authority to discharge the claimant was inconsistent with the notion that the claimant was an employee of the school district. *Grogan*, 711 A.2d at 562-563.

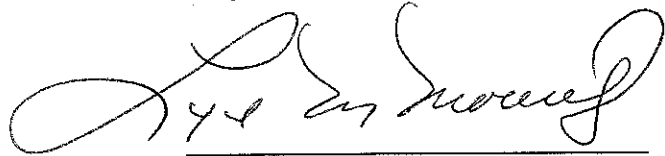
In applying the factors set forth in *Zimmerman* to the evidence of record, it is concluded that Claimant is an independent contractor and not a "school employee" under the Retirement Code. Accordingly, Claimant has failed to meet his burden of proving facts necessary to sustain his claim that he is entitled to membership in PSERS by virtue of his position as the elected tax collector for the School District.

The following recommendation is entered:

RECOMMENDATION

It is recommended that the Public School Employees' Retirement Board issue an Order denying the appeal of Robert A. Carr and his request for membership in PSERS as a result of his work as an elected tax collector for the New Hope-Solebury School District.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lynne M. Mountz". The signature is written in black ink and is positioned above a horizontal line.

Lynne M. Mountz, Esquire
Hearing Examiner

Dated: *May 11, 2010*

Harrisburg, Pennsylvania