

Mail Date: DEC 18 2007

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

IN RE: ACCOUNT OF GORDON B. RIPKEY
DOCKET NO. 2006-30
CLAIM OF GORDON B. RIPKEY

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Opinion of the Hearing Examiner in the above-referenced matter. We note that neither party filed Exceptions to the Opinion and Recommendation of the Hearing Examiner. The Board finds appropriate the Hearing Examiner's Findings of Fact, Discussion, Conclusions of Law, and Recommendation. Accordingly, we hereby adopt the Hearing Examiners' Opinion as our own.

IT IS HEREBY ORDERED that Claimant's requests to include the compensation received for "years of service" and the \$10,000 "retirement salary adjustment" as retirement-covered compensation are DENIED; Claimant's request to include the compensation received for two Act 93 salary adjustments as retirement-covered compensation is GRANTED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: DEC 13 2007

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

LEGAL OFFICE AUG 27 2007

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF GORDON B. RIPKEY :
CLAIM OF GORDON B. RIPKEY :

: DOCKET NO. 2006-30

: Michael L. Bangs
: Hearing Examiner
: 429 South 18th Street
: Camp Hill, PA 17011

: April 18, 2007

: Jennifer A. Mills, Esquire
: Counsel for PSERS

: Steven R. Serfass, Esquire
: Counsel for Claimant

OPINION OF THE HEARING EXAMINER

Findings of Fact

1. Gordon B. Ripkey ("Claimant") became a member of the Public School Employees' Retirement System ("PSERS") in September 1962, by virtue of his employment at a teacher with the Lehigh Area School District ("Lehigh"). (N.T. 6)

2. Claimant began as Assistant Principal at Lehigh in January of 1969. (N.T. 6)

3. Claimant became Principal of Lehigh in the summer of 1972, remaining so employed until he retired in 1995. (N.T. 6)

4. While Claimant did not have a separate employment contract with Lehigh, he was part of the Act 93. (N.T. 46)

5. In 1989, while serving as Principal of Lehigh, Claimant was designated responsibility for the design and implementation of a new school building. (N.T. 8-11, 55)

6. While Claimant believed that this additional responsibility was outside of the scope of his duties as Principal, he did not enter into a separate contract for compensation for the work he performed in regard to the new building. (N.T. 54-55)

7. During its pendency, which included design and implementation and the beginning of construction in 1992, the building project significantly increased the hours per week that Claimant worked. (N.T. 52)

8. Claimant was covered by Lehighton's Act 93 Agreement, which affected the compensation and retirement of administrators and other employees of Lehighton. (N.T. 46; PSERS Exhibit 3)

9. Lehighton's Act 93 Agreement provided, in part "Administrators who submit their letters of resignation for Retirement during their last year of service, but prior to May 31st of their Retirement year, shall receive \$35.00 per year of service in the Lehighton Area School District only. They shall receive the appropriate payment in lump sum in June, in accordance with the retirement guidelines set forth in the Public School Employees Retirement System." (PSERS Exhibit 3)

10. Lehighton's Act 93 Agreement also provided that "For the 1994-95 school year, each administrator shall receive an increase equal to five (5%) percent of the Act 93 salaries paid in the preceding year, less monies deducted for anyone on leave or sabbatical, divided by the number of administrators, principals, and instructional supervisors. In the 1995-96 school year, the administrators shall receive another five (5%) percent increase calculated in the same manner." (PSERS Exhibit 3)

11. Finally, Lehighton's Act 93 Agreement provided that "Administrators and Supervisors of Lehighton who, two years prior to their retirement inform the Board in writing of their intent to retire, shall have the option of negotiating salary and fringe benefits on an individual basis. (PSERS Exhibit 3)

12. The Act 93 Agreement established Claimant's salary for the 1993-94 school year at \$68,306.00. (PSERS Exhibit 3)

13. By undated letter, Claimant informed the Lehighton Area School Board of his intention to retire in "about two years" and included his request to discuss his salary and fringe benefits. (N.T. 32; PSERS Exhibit 1)

14. Following his request, Claimant had a meeting with Lehighton's Superintendent Dr. Ball, business manager Mr. Marcinko, and school board president Mr. Harleman. (N.T. 32-33)

15. On June 13, 1994, Claimant, Mr. Harleman, and Mr. Marcinko all signed a "Final Compensation Package" for Claimant, dated May 19, 1994. (PSERS Exhibit 2)

16. The Final Compensation Package provided for Claimant to receive:

Accumulated Sick Days	\$8,840.00
Years of Service	1,225.00
Vacation Days	7,863.00
Retirement Salary Adjustment	10,000.00
Act 93 Agreement Salary	
Salary Adjustments 94-95	2,703.91
Salary Adjustments 95-96	2,839.10

(PSERS Exhibit 2)

17. The Final Compensation Package totaled the above calculated salary adjustment to be \$33,471.01, and divided it over a three-year period so that Claimant's annual salary was \$79,463.00 for the years 1993-94, 1994-95, and 1995-96. (PSERS Exhibit 2)

18. The \$10,000.00 Retirement Salary Adjustment was provided in order to compensate Claimant for his duties and service to Lehighton which were "above and beyond regular assumed duties," but was not compensation solely for the work that he did with the new school construction. (N.T. 72, 75)

19. The \$2,703.91 salary adjustment for 1994-95, and the \$2,839.10 salary adjustment for 1995-96 were in line with the customary salary scale for Lehighton Administrators, regardless of whether or not such administrators were retiring. (N.T. 71; PSERS Exhibit 3)

20. Claimant was entitled to the 1994-95 and 1995-96 salary adjustments pursuant to the Act 93 Agreement in place at Lehighton. (N.T. 71)

21. Claimant's reported salary for each fiscal year showed regular and consistent increases from the 1988-89 school year (\$50,342.02) up until and inclusive of the reported salary for the fiscal year of 1992-93, which showed a salary of \$65,956.02. (PSERS Exhibit 6)

22. Claimant's reported salary for the 1993-1994 school year was \$81,039.22. (PSERS Exhibit 6)

23. Claimant's reported salary for the 1994-1995 school year was \$79,921.45. (PSERS Exhibit 6)

24. Claimant's reported salary for the 1995-1996 school year was \$19,038.48. (PSERS Exhibit 6)

25. A significant spike in the Claimant's reported salary for the 1993-94 school year as compared to his previous history caused PSERS to question why there was the significant increase in the salary. (N.T. 83-85; PSERS Exhibit 7A and 7B)

26. The Final Compensation Package specified that Claimant's final day of employment was to be "a mutually agreed upon date after August 15, 1995." (PSERS Exhibit 2)

27. Claimant's last day of employment with Lehighon District was on August 11, 1995, and he retired effective August 12, 1995. (N.T. 80)

28. On April 7, 1995, Claimant filed his Application for Retirement with PPSERS. (PSERS Exhibit 5)

29. On or about November 13, 1995 a representative from PPSERS spoke to someone at Lehighon about the increase in Claimant's salary for the 1993-94 school year, and was told that it was not a bonus or incentive for retiring, but that the money was retroactive for the 1993-94 school year. (N.T. 85; PSERS Exhibits 7A, 7B)

30. On December 7, 1995, PPSERS sent Claimant a letter entitled "Recomputation of Your Retirement," which is sent to members of PSERS notifying them of their finalized retirement benefits. (N.T. 86; PSERS Exhibit 8)

31. The December 7, 1995 letter calculated Claimant's final average salary to be \$76,066.00. (N.T. 86; PSERS Exhibit 8)

32. On August 3, 2005, PPSERS received a letter from the Department of Auditor General requesting that PPSERS investigate the computation of Claimant's final average salary. (N.T. 86-87; PSERS Exhibit 9)

33. On August 31, 2005, PPSERS sent a letter to Claimant indicating that it was removing the entire \$33,471.01 received by Claimant as a result of the Final Compensation Package from his final average salary, due to its determination that this amount was “non-covered retirement compensation.” (N.T. 87; PSERS Exhibit 10)

34. By a letter dated November 13, 2006, the PPSERS Executive Staff Review Committee denied Claimant’s request that the amounts included in the Final Compensation Package (minus the unused vacation and sick days) be retirement-covered compensation. (N.T. 88-89; PSERS Exhibit 12)

35. Claimant filed a Request for Administrative Hearing on the above issue, and the hearing was held before Independent Hearing Examiner Michael L. Bangs, Esquire on April 18, 2007.

Discussion

PSERS was created by the legislature and can grant no rights beyond those contained in the Retirement Code. Hughes vs. PSERS, 622 A.2d 701 (Pa. Cmwlth. 1995); alloc. den. 668 A.2d 1139 (Pa. 1995). The Retirement Code and the applicable regulations contain restrictions on the types of compensation that may be used in calculating an employee’s final average salary. Hoerner vs. Public School Employees’ Retirement Board, 655 A.2d 207 (Pa. Cmwlth. 1995). The purpose of these restrictions is to ensure that actuarial soundness of the Retirement Fund by preventing employees from artificially inflating compensation as a means of receiving greater retirement benefits. Id.

PSERS recalculated Claimant’s final average salary by excluding \$33,471.01 which it determined to be non-covered retirement compensation. The amounts included in the

\$33,471.01 were accumulated vacation and sick days; an inclusion of a \$1,225.00 payment for thirty-five years of service; a "retirement salary adjustment" of \$10,000.00; Act 93 salary adjustments for the years 1994 and 1995 in the amount of \$2,703.91; as well as an Act 93 salary adjustment for the years 1995 and 1996 in the amount of \$2,839.10. Claimant does not argue with the removal of those amounts which represented his accumulated vacation or sick days. His appeal centers on the inclusion of the \$1,225.00 payment for his thirty-five years of service; his \$10,000.00 "retirement salary adjustment" and the two Act 93 salary adjustments for the years 1994-95 and 1995-96 in the amounts of \$2,703.91 and \$2,839.10 respectively.

The Retirement Code sets forth the following definitions:

"FINAL AVERAGE SALARY." The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months....

"COMPENSATION." Pickup contributions plus any remuneration received as a school employee excluding reimbursements for expenses incidental to employment and excluding any bonus, severance payments, any other remuneration or other emolument received by a school employee during his school service which is not based on the standard salary schedule under which he is rendering service, payments for unused sick leave or vacation leave, bonuses or other compensation for attending school seminars and conventions, payments under health and welfare plans based on hours of employment or any other payment or emolument which may be provided for in a collective bargaining agreement which may be determined by the Public School Employees' Retirement Board to be for the purpose of enhancing compensation as a factor in the determination of final average salary....

"SEVERANCE PAYMENTS." Any payments for unused vacation or sick leave and any additional compensation contingent upon retirement including payments in excess of the scheduled or customary salaries provided for members within the same governmental entity with the same educational and experience qualifications who are not terminating service.

24 Pa. C.S. § 8102.

While the question of whether or not a payment is considered a severance payment is a question of law, under the Pennsylvania Code, “all payments, other than for regular professional salary, which are part of an agreement in which a professional member agrees to terminate school service by a date certain, are prima facie severance payments.” Dowler v. Public School Employees’ Retirement Board, 153 Pa. Cmwlth. 109, 115-116, 620 A.2d 639, 643 (1993); see also, Wyland v. Public School Employees’ Retirement Board, 669 A.2d 1098, 1996 Pa. Cmwlth. LEXIS 10 (1996). This claim can only be rebutted by showing that the payment was in accord with the customary or scheduled salary scale in that particular school district for personnel with similar educational and experience backgrounds, who are *not* terminating service. Id.

Clearly, both the “Years of Service” award and the “Retirement Salary Adjustment” in Claimant’s Final Compensation Package fall within the severance payment exclusion to compensation for purposes of computing final average salary. These payments were contingent upon Claimant retiring on “a mutually agreed upon date after August 15, 1995,” and only came into being due to the meeting that Claimant’ had with the school board personnel when he mentioned, pursuant to Lehigh’s Act 93 Agreement, that he wished to retire within two years and discuss his salary and fringe benefits. Additionally, the Act 93 Agreement specifically allowed for the “Years of Service” payment for retiring employees, and thus constituted a severance payment under Pennsylvania Law. The “Retirement Salary Adjustment” is clearly contingent upon Claimant’s retiring, and thus also constitutes a severance payment under Pennsylvania law.

However, the increases under Act 93 in the amount of \$2,703.91 for 1994-95, and \$2,839.10 for 1995-96 should have been included in Claimant’s final average salary for

retirement purposes. Act 93 included a five percent increase in administrator salaries for all administrators inclusive of Claimant. The receipt of these increases was not dependent upon Claimant's retirement. As such, the increases were "scheduled or customary salaries provided for members within the same governmental entity with the same educational and experience qualifications who were not terminating service." 24 Pa. C. S. 8102. Moreover, it is clear that the increases that Claimant received which were consistent with those other administrators similarly situated for the 1994-95 and 1995-96 school years were not given to him in order to artificially inflate his compensation for purposes of enhancing his retirement. Simply put, he would have received those increases whether he retired or not and to disallow that additional compensation for purposes of calculating his final average salary should not occur. See Laurito vs. Public School Employees' Retirement Board, 146 Pa. Cmwlth. 514, 606 A.2d 609 (1992); Dowler v. Public School Employees' Retirement Board, 153 Pa. Cmwlth. 109-115-116, 620 A.2d 639, 643 (1993); Wyland v. Public School Employees' Retirement Board, 669 A.2d 1098, 1996 Pa. Cmwlth. LEXIS 10 (1996).

The burden of proof and persuasion is on the Claimant. Wingert v. State Employees' Retirement Board, 138 Pa. Cmwlth. 43, 589 A.2d 269 (1991). Claimant has not proven that the "years of service" payment in the amount of \$1,225.00 or the "retirement salary adjustment" in the amount of \$10,000.00 are anything but severance payments. Therefore, they should not be included in his Final Average Salary for retirement purposes. Claimant has proven that the Act 93 salary adjustments for the years 1994-95 in the amount of \$2,703.91 and the 1995-96 salary adjustment in the amount of \$2,839.10 were not severance payments but rather were customary

salary increases for similarly situated members. Consequently, those payments should be included in the calculation of his Final Average Salary for retirement purposes.

Conclusions of Law

1. PSERS is a creature of statute and derives its authority from the provisions of the State Employees' Retirement Code. 71 Pa. C.S. §§ 5101-5956.

2. Claimant has only those rights recognized by statute and none beyond. Bittenbender v. State Employees' Retirement Board, 154 Pa. Cmwlth. 11, 622 A.2d 403 (1992).

3. Claimant bears the burden of establishing those facts upon which he relies in order to prevail. Wingert v. State Employees' Retirement Board, 138 Pa. Cmwlth. 43, 589 A.2d 269 (1991).

4. Claimant's compensation in the amount of \$1,225.00 which represented payment for thirty-five years of service and his "retirement salary adjustment" of \$10,000.00 are severance payments as that term is defined under the Retirement Code and not includable in Claimant's Final Average Salary for purposes of retirement. 24 Pa. C.S. Section 8102; Dowler v. Public School Employees' Retirement Board, 153 Pa. Cmwlth. 109, 115-116, 620 A.2d 639 (1993).

5. Claimant's Act 93 salary adjustments for the year 1994-95 in the amount of \$2,703.91 and the Act 93 salary adjustment for the year 1995-96 in the amount of \$2,839.10 were not severance payments. 24 Pa. C.S. Section 8102; Dowler v. Public School Employees' Retirement Board, 153 Pa. Cmwlth. 109, 115-116, 620 A.2d 639 (1993); Wyland v. Public School Employees' Retirement Board, 669 A.2d 1098, 1996 Pa. Cmwlth. LEXIS 10 (1996).

6. Claimant has produced sufficient evidence to prove that the Act 93 salary adjustments for the years 1994-95 and 1995-96 were in accord with the customary or scheduled salary scale

for all administrators and are includable in his Final Average Salary. Wingert v. State Employees' Retirement Board, 138 Pa. Cmwlth. 43, 589 A.2d 269 (1991); Laurito vs. Public School Employees' Retirement Board, 146 Pa. Cmwlth. 514, 606 A.2d 609 (1992); Dowler v. Public School Employees' Retirement Board, 153 Pa. Cmwlth. 109-115-116, 620 A.2d 639, 643 (1993); Wyland v. Public School Employees' Retirement Board, 669 A.2d 1098, 1996 Pa. Cmwlth. LEXIS 10 (1996).

Recommendation

This Hearing Examiner recommends that Claimant's request to include the payment of \$1,225.00, received for his thirty-five years of service and the \$10,000.00 "retirement salary adjustment" as retirement covered compensation for calculation of his Final Average Salary be denied.

This Hearing Examiner recommends that Claimant's request to include the Act 93 salary adjustments for the years 1994-95 and 1995-96 in the amounts of \$2,703.91 and \$2,839.10 as retirement covered compensation for purposes of calculating his Final Average Salary be granted.

Respectfully submitted,

BY: 

MICHAEL L. BANGS
Hearing Examiner

Date: 8/29/06