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

IN RE: ACCOUNT OF ALICE M. HIRSCH
DOCKET NO.: 2012-01
CLAIM OF ALICE M. HIRSCH

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal requesting that Alice M. Hirsch's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact, and that PSERS is entitled to a summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on May 16, 2013, and served a copy on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§33.32, 33.35-33.36. By letter dated May 16, 2013, PSERS notified Claimant that she had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. Claimant's response, therefore, had to be filed on or before June 17, 2013. See 1 Pa.Code §§31.11, 31.12, and 33.34. Claimant did not file a response to the motion.

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

non-moving party and give him the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa.Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa.Cmwth. 1984). "Summary judgment may be entered against a party who does not respond." Pa.R.C.P. 1035.3(d).

Because Claimant did not respond and, therefore, has not identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, the Board finds that there are no disputed material facts.

The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant's final average salary should be recalculated to include the \$71,983.63 in the 2000-2001 school year, rather than the 1994-1995 school year.

FINDINGS OF FACT

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

1. Claimant was first enrolled in PSERS in 1971.
2. Claimant began employment with the Montour School District in the 1990-1991 school year.
3. Beginning in February 1994, Claimant was placed on an unpaid leave.
4. In February 1995, Claimant returned to active school employment with the Mount Lebanon School District.
5. On January 30, 2001, a hearing was held before Charles M. Means, Hearing Officer at the Pennsylvania State Education Association, wherein Claimant and the Montour School District agreed that the Montour School District would pay Claimant the

sum of \$71,983.63 and take the necessary action to make Claimant whole with respect to PSERS for contributions that she would have earned had she continued to work at Montour School District. (PSERS-1).

6. Ronald N. Watzman, Esquire, who represented Claimant during the proceedings, stated that: "The intent of the PSERS contributions is to have [Claimant] in the same position today as she would have been in had she worked at Montour for the stipulated salaries for the years in question." (PSERS-1 at p. 4.)

7. By facsimile dated April 3, 2001, PSERS was notified by the Montour School District that, as a result of litigation, the Montour School District and Claimant agreed that Claimant would receive back pay in the amount of \$71,983.63 representing salary payable for the 1994-1995 school year. (PSERS-2).

8. By letter dated July 6, 2001, PSERS provided Claimant with a breakdown of her service credit with PSERS, which listed an adjustment of 0.64 years of service credited to the 1994-1995 school year due to "information received from district 2001." (PSERS-3).

9. During Claimant's membership in PSERS, Claimant received yearly Statements of Account that showed the accumulated deductions and the amount of credited service standing to the credit of Claimant, as well as estimated retirement benefits based on an estimated final average salary.

10. Included with Claimant's Statement of Account for School Year 2004-2005 was a document entitled, "*PLEASE READ – Explanation of Statement of Account –*," which stated under the section entitled "Final Average Salary (FAS):"

- Uses the highest three school years to calculate your FAS.
- Salaries reported to PSERS are placed in the school year in which they were earned.

(PSERS-4).

11. Included with Claimant's Statement of Account for School Year 2005-2006 and Statement of Account for School Year 2006-2007 was 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.

(PSERS-5; PSERS-6).

12. On June 23, 2008, PSERS received an *Application for Retirement* from Claimant requesting to retire with an effective date of June 27, 2008. (PSERS-7).

13. PSERS advised Claimant by letter dated August 21, 2008 that her initial gross monthly retirement benefit would be \$7,530.84 with an effective date of retirement of June 29, 2008. (PSERS-8).

14. By letter dated April 15, 2010, PSERS advised Claimant that her finalized gross monthly retirement benefit was \$7,569.60 based on 36.00 years of service credit and a final average salary of \$114,201.99. (PSERS-9).

15. By letter dated April 23, 2010, Claimant requested that her final average salary be recalculated using her highest three years, which she listed as being:

2006-2007	\$114,362.10
2007-2008	\$115,549.97
2000-2001	\$156,200.78

(PSERS-10).

16. By letter dated May 12, 2010, PSERS denied Claimant's request stating in pertinent part:

The Montour School District reported an adjustment of \$71,983.63 salary in the 1st quarter, 2001 which was an award settlement. This settlement was salary that should have been paid to you beginning with the 1994-1995 school year through the 2000-2001 school year.

PSERS could not use \$156,200.78 in your final average salary because it contained the settlement salary that did not belong in that year. The salary was distributed to the correct years before your benefit was processed.

(PSERS-11)

17. Claimant appealed the decision to the PSERS' Executive Staff Review Committee ("ESRC") by facsimile on June 10, 2010. (PSERS-12).

18. On January 2, 2012, the ESRC denied Claimant's request to recalculate her final average salary using a salary of \$156,200.78 for the 2000-2001 school year. The ESRC explained that, because the \$71,983.63 was for wages earned during the 1994-1995 school year, PSERS is required to assign compensation for purposes of retirement to the period of time that such compensation was earned, not paid. (PSERS-13).

19. Claimant filed an appeal and request for an administrative hearing on February 21, 2012 requesting that the Public School Employees' Retirement Board ("Board") include, as part of her final average salary, the lump sum payment of \$71,983.63 in the school year it was received, i.e. 2000-2001, rather than the school year it was earned, i.e. 1994-1995. (PSERS-14).

20. On March 7, 2012, PSERS filed its Answer to Claimant's appeal and request for an administrative hearing. (PSERS-15).

21. On May 16, 2013, PSERS filed its Motion for Summary Judgment.

22. Claimant did not file a response to PSERS' Motion for Summary Judgment.

23. This matter is ripe for Board adjudication.

DISCUSSION

The facts of this case are undisputed. As a result of litigation, the Montour School District agreed to pay Claimant \$71,983.63 representing salary payable for the 1994-1995 school year. (See PSERS-2 and -14) The record of the hearing held on January 30, 2001 evidences that the sum of \$71,983.63 was intended to make Claimant whole with respect to her employment had she continued to work at the Montour School District. (PSERS-1 at p. 4 stating: "The intent of the PSERS contributions is to have [Claimant] in the same position today as she would have been in had she worked at Montour for the stipulated salaries for the years in question.") The \$71,983.63, therefore, represents compensation that should have been paid to Claimant in the 1994-1995 school year as if she continued working for Montour School District. Furthermore, Claimant was credited with 0.64 of a year of school service in the 1994-1995 school year as a result of the salary of \$71,983.63 she received. (PSERS-3).

The Public School Employees' Retirement Code, 24 Pa.C.S. §8101 et seq., ("Retirement Code"), provides that, at retirement, a member who is eligible to receive an annuity shall receive a benefit based on the applicable class multiplier multiplied by the member's final average salary multiplied by the total number of years and fractional part of a year of credited service of a member. See 24 Pa.C.S. §8102 (definitions of "class of service multiplier" and "standard single life annuity") and §8342(a). When calculating a member's final average salary, therefore, PSERS must do so consistent with the statutory definition of "final average salary." Under Section 8102 of the Retirement Code, "final average salary" is defined in pertinent part as:

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). Although the Retirement Code does not specifically provide for the crediting of damage awards as compensation, the regulations duly promulgated by this Board define "final average salary" in pertinent part as:

The highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months. . . . *For final average salary purposes, retirement-covered compensation is credited in the school year in which it is earned, not paid.* Retirement-covered compensation is not recognized for any period of creditable nonschool service purchased by a member.

22 Pa. Code § 211.2. (emphasis added) This regulatory definition is consistent with the Board's longtime interpretation of the Retirement Code's definition of "final average salary" to mean that the amounts actually received pursuant to a court order upholding a member's contractual rights for a specified period of time should be credited in the year when the amount was earned, not when it was received.¹ *See generally, Abramski v. Public School Employees' Retirement System*, 512 A.2d 106 (Pa. Cmwlth. 1986). The rationale for this approach is that the non-breaching party should be made whole again, but should not be given a windfall. *Id.* at 108.

In *Abramski*, a wrongfully terminated football coach received back pay in a breach of contract suit. *Id.* at 107. In computing the coach's final average salary, PSERS credited the back pay to the school year during which the money would have been earned if the contract had not been breached rather than the year the money was received. *Id.* The coach appealed, arguing that the award should have been credited to the year in which the money was actually paid. *Id.* The court upheld PSERS' decision to constructively assign the damage award to the year in which the compensation would have been earned. *Id.* at 108. The court further concluded that, pursuant to Sections 8102 and 8302(a) of the Retirement Code, service credit and compensation are tied together and one cannot be awarded without the other. *Id.* at 107-108. *See also, Joll v. State Employees' Retirement Board*, 632 A.2d 638 (Pa. Cmwlth. 1993) (holding that the "constructive receipt principle" set forth in *Abramski* applied to back pay awarded in a reinstatement arbitration award, and therefore, the amount paid to the employee should

¹ An administrative agency's interpretation of its own regulations is controlling unless the interpretation is plainly erroneous or inconsistent with either the regulation or the statute under which it is promulgated. *Clark v. Commonwealth, Department of Public Welfare*, 546 A.2d 1277 (Pa. Cmwlth. 1988).

be treated as if it was received when the employee should have originally received it.)² See also, *Miller v. State Employees' Retirement System*, 626 A.2d 679 (Pa. Cmwlth. 1993) (holding that the Board was not estopped from placing retroactive salary payments made pursuant to grievance arbitration awards to period when they would have been earned but for the violation of contract rights, thus correctly calculating final average salary.) Accordingly, for purposes of pension calculation, compensation received is inexorably tied to when it was due to be paid, not when it was actually paid.

Claimant's sole argument in support of her contention that the \$71,983.63 should be credited in the 2000-2001 school year is that the 2000-2001 school year is when she received the back pay. (PSERS-14) The Board rejects this argument. The Board's duly promulgated regulations are clear that retirement covered compensation must be credited in the school year it is earned, not paid. Because regulations properly enacted under the Commonwealth Documents Law have the force and effect of law, Claimant, by law, is not entitled to the relief she requests. *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 712 A.2d 741, 743 (Pa. 1998).

Moreover, Claimant knew that the \$71,983.63 was for salary earned in the 1994-1995 school year. (See PSERS-1, -2, -3, and -14) Claimant was also aware that PSERS would place such back pay to the school year it was earned, i.e. the 1994-1995 school year. (PSERS-4, -5, and -6) Each Statement of Account beginning with the 2004-2005 school year stated that salaries are to be placed in the school year in which it was earned, not paid. Claimant also received the July 6, 2001 letter from PSERS notifying her that she was credited with 0.64 of a year of credited service for the 1994-1995 school year as a result of information received in 2001. (PSERS-3).

² Although *Joll* construes portions of the State Employees' Retirement Code, rather than the Retirement Code at issue here, the courts have relied on interpretations of a provision in the one statute to interpret a provision that is substantially similar to a provision in the other. See *Cook v. Public School Employees' Retirement Board*, 507 A.2d 911 (Pa. Cmwlth. 1986).

CONCLUSION

Because there are no disputed issues of relevant fact, the Board may address the legal arguments of the parties without the need for an administrative hearing to determine the facts. As a matter of law, Claimant's appeal does not contain any facts, which, if proven, would form a basis for the conclusion that the \$71,983.63 should be credited to the 2000-2001 school year. Rather, the law is clear that, for retirement purposes, compensation must be credited to the year it was earned, not paid. While a member is entitled to a liberal construction of the Retirement Code, Claimant has only those rights created by the retirement statutes and none beyond. See *generally*, *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), *allocatur denied*, 668 A.2d 1139 (Pa. 1996).

PSERS, therefore, correctly calculated Claimant's annuity in accordance with the statutory formula expressed in the Retirement Code by placing the \$71,983.63 in the year it was earned, not received. To credit the \$71,983.63 in the year Claimant received it would artificially inflate Claimant's final average salary resulting in a higher retirement benefit than Claimant is otherwise entitled to receive.

For the above stated reasons, the \$71,983.63 must be credited to the 1994-1995 school year. Accordingly, PSERS' Motion for Summary Judgment is GRANTED and Claimant's Appeal and Request for Administrative Hearing is DENIED.

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF ALICE M. HIRSCH
DOCKET NO.: 2012-01
CLAIM OF ALICE M. HIRSCH

ORDER

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

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa.Code §201.6(b), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request to recalculate her final average salary to include the \$71,983.63 in the 2000-2001 school year.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: August 7, 2013

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