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

IN RE: ACCOUNT OF CATHY E. ROBERTSON
DOCKET NO. 2014-10
CLAIM OF CATHY E. ROBERTSON

OPINION AND ORDER OF THE BOARD

Cathy E. Robertson ("Claimant") was employed as the Business Manager for the Greater Johnstown Career and Technology Center ("GJCTC") for approximately 11 years. Claimant submitted an "Application for Retirement" with the Public School Employees' Retirement System ("PSERS") on November 7, 2008, indicating an anticipated retirement date of January 30, 2009. On December 11, 2008, Claimant entered into a Business/Administrative Services Support Contract ("Contract") with GJCTC, effective February 4, 2009, to perform 13 services transferred from the 38 job duties and responsibilities she performed as Business Manager.

Claimant and GJCTC contend that the principal issue before the Board is whether Claimant's return to service in February 2009, under the facts of this case, was that of an independent contractor. PSERS, however, posits that Claimant never experienced a bona fide break in service on January 30, 2009, and, therefore, never became an annuitant. Because Claimant never stopped working, PSERS asserts that the claim that she returned to service as an independent contractor/annuitant is moot, thereby precluding the imposition of such an analysis.

The Hearing Examiner agreed with PSERS that Claimant never became an annuitant because she did not terminate from school service and recommended that Claimant's appeal be denied. In determining whether a member has a "date of termination of service" as contemplated in the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. §8101 et seq., the Hearing Examiner relied on PSERS' analysis of whether there was a prearrangement to return to employment prior to Claimant's effective date of termination, whether sufficient time had passed between Claimant's date of termination and her return to service, and whether Claimant had continued to provide the same or related services she had provided prior to the date of her termination.

Claimant and GJCTC excepted to the Hearing Examiner's Proposed Opinion and Recommendation, arguing that PSERS improperly applied a 90-day presumption set forth in Business Rule MBR-2011-10.4, "Definition of Break in Service." This rule defines a "break in service" as a "termination of service," which, in turn, is interpreted by PSERS to mean the following:

- a. PSERS has adopted a "90 day presumption rule" as it relates to a break in service, i.e., PSERS will presume a break in service if there is an employer termination and the employee does not return to school service for 90 days.
- b. A break in service could be established for a termination of service less than 90 days if the member
 - began subsequent employment with a reporting entity that offers only another approved retirement program (e.g., charter schools, community colleges, etc.); or
 - did not have a pre-arrangement or the appearance of a prearrangement for return to employment.

Claimant and GJCTC argue that the Business Rule constitutes an unpromulgated regulation that should not be applied to the instant matter. Rather, Claimant and GJCTC maintain that the independent contractor analysis set forth in *Zimmerman v. Public School Employees' Retirement Board*, 522 A.2d 43 (Pa. 1987), controls.

The Board has carefully and independently reviewed the entire record of this proceeding, including the Proposed Opinion and Recommendation of the Hearing Examiner, Claimant's Brief on Exceptions to the Opinion of the Hearing Examiner, GJCTC's Brief on Exceptions to the Opinion of the Hearing Examiner and PSERS' Brief Opposing Exceptions and hereby issues the following:

FINDINGS OF FACT¹

1. Claimant first became a member of PSERS on July 25, 1970, by virtue of her service with the GJCTC, a regional vocational and technical school which provides part-time vocational and technical education services to students and adults for seven (7) regional school districts within Cambria County and Somerset County, Pennsylvania. (N.T. 12, 70, 84-85, 137-140).

2. Claimant became the Administrative Assistant of Fiscal Operations for GJCTC in 1989, and subsequently became the GJCTC Business Manager for approximately eleven (11) years. (N.T. 13-15, 139).

3. As Business Manager, Claimant worked 260 days per school year, or approximately 40 hours per week as a salaried employee earning approximately \$39.00 per hour. (N.T. 30-31, 48, 91).

¹ Many of these findings are generally adopted or adapted from those findings recommended by the Hearing Examiner.

4. John Augustine, II, became the Administrative Director of GJCTC in July 2006. (N.T. 137, 167).

5. Claimant attended a retirement exit counseling session on November 7, 2008, at which she was advised, in part, that working for a PSERS employer after retirement will cause her pension to be frozen except under an emergency or shortage or when performing extracurricular activity. (Exhibit 1; N.T. 14, 101-102).

6. Claimant signed a "Retirement Exit Counseling Checklist" which confirmed her attendance at the November 7, 2008, exit counseling session. (Exhibit 1; N.T. 101).

7. Claimant submitted a PSRS-8 "Application for Retirement" to PSERS on November 7, 2008, through which she identified her anticipated date of retirement as January 30, 2009. (Exhibit 2; N.T. 14-15, 103).

8. At the time she signed the "Application for Retirement" and "Retirement Exit Counseling Checklist" on November 7, 2008, Claimant had not intended to provide services to GJCTC as an independent contractor, and had not been a party to any discussions about doing so with GJCTC personnel. (N.T. 14-15, 24-25, 103-105, 169, 171, 172-173).

9. During discussions with Mr. Augustine in January 2008, Claimant had alluded to tentatively retiring in 2009, so as to secure post-retirement health care benefits. (N.T. 140).

10. Claimant formally notified the Chairman of the GJCTC Joint Operating Committee, Alan Tresnicky, and Mr. Augustine, of her January 30, 2009, retirement date after she had already submitted the "Application for Retirement" and "Retirement Exit Counseling Checklist" on November 7, 2008. (N.T. 140, 168-169).

11. Claimant's anticipated retirement date was to occur during the middle of the school year for which she was expected to work 260 days. (N.T. 91).

12. Upon being formally informed of Claimant's pending retirement, effective January 30, 2009, Mr. Augustine consulted with Mr. Tresnicky and Chief School Administrator, Dr. DiBartola, regarding Claimant's retirement and how to staff her job responsibilities. (N.T. 142-143, 171-172).

13. Neither Mr. Augustine nor Mr. Tresnicky had approached Claimant about providing services to GJCTC following the effective date of her retirement until after Claimant had already submitted the "Application for Retirement" and "Retirement Exit Counseling Checklist" to PSERS. (N.T. 140-143, 172-174).

14. Upon being informed of Claimant's pending retirement, effective January 30, 2009, GJCTC decided to outsource Claimant's position of Business Manager, perform a reorganization, and attempt to retain Claimant's services as an independent contractor. (N.T. 152-153, 172-173).

15. As part of GJCTC's reorganization, GJCTC eliminated Claimant's position of Business Manager and the position of Senior Bookkeeper held by Melissa McCall, and created a new position titled Administrative Assistant of Fiscal Operations to be filled by Ms. McCall. (28, 91-92, 95-96, 152-153).

16. Ms. McCall's job responsibilities as Administrative Assistant of Fiscal Operations entailed performing all of her previous duties as Senior Bookkeeper in addition to assuming nearly all of Claimant's former duties as Business Manager. (N.T. 96-97, 153).

17. After determining the need to consolidate the positions of Senior Bookkeeper and Business Manager, GJCTC identified the need for someone to assist the business office until the new Administrative Assistant of Fiscal Operations was sufficiently trained. (N.T. 142-144, 156, 173-174).

18. Claimant was identified as the preferred candidate to train Ms. McCall based upon Claimant's institutional knowledge. (N.T. 142-143, 154-155, 175-176).

19. Mr. Tresnicky and Mr. Augustine made multiple attempts to convince Claimant to not retire or, alternatively, to provide services to GJCTC in the form of advising and/or assisting Ms. McCall as an independent contractor. (N.T. 144, 154-155, 169-171, 174).

20. Claimant initially declined to serve as an independent contractor. (N.T. 15, 24, 169, 171, 174).

21. On or about December 8, 2008, after consulting with her husband, Claimant agreed to provide services to GJCTC to begin after her effective date of retirement. (N.T. 24, 27, 171).

22. Claimant informed GJCTC that she did not want to work many hours, did not want to be tied down to coming into the building for work, and that she wanted to work her own hours because she anticipated performing much of her work at night. (N.T. 24-25, 27, 35).

23. Claimant drafted the Contract into which she entered with GJCTC on December 11, 2008. (Exhibit 6b; Exhibit 6c; N.T. 156-157).

24. The Contract became effective February 4, 2009, and identified thirteen (13) services to be performed by Claimant. (Exhibit 6c; N.T. 29).

25. GJCTC did not advertise or search for candidates to replace Claimant as Business Manager or for candidates to enter into a Business/Administrative Services Support Contract. (N.T. 152-153, 175-176).

26. Prior to Claimant's effective date of retirement, i.e., January 30, 2009, Mr. Augustine was Claimant's immediate supervisor and Claimant's place of business was located in an office at GJCTC. (Exhibit 6d; N.T. 39-40).

27. Claimant's job description accurately set forth Claimant's duties and responsibilities as Business Manager at GJCTC. (Exhibit 6d; N.T. 41-42).

28. Pursuant to the Contract, Claimant's responsibilities primarily shifted from being responsible for all day-to-day operations, assigning work, and ensuring work was completed as Business Manager, to assisting the business office in an advisory capacity. (N.T. 154).

29. Subsequent to January 30, 2009, Claimant continued to perform some of the thirty-eight (38) duties and responsibilities she had previously performed as Business Manager. (Exhibit 6d, ¶¶ 16, 31-32, 34; N.T. 43-67).

30. Claimant continued to be "responsible for calculating the school board membership every three years" under the Contract for which she was responsible as Business Manager. (Exhibit 6d; N.T. 63-64).

31. Claimant calculated the school board membership by performing a financial calculation involving each of the seven (7) participating school districts to determine how many members from each school district would be on the GJCTC Joint Operating Committee. (N.T. 64).

32. Claimant continued to be “Responsible to attend all meetings which deal[t] with fiscal matters and monthly board meetings” under the Contract for which she was responsible as Business Manager. (Exhibit 6d; N.T. 65).

33. Claimant attended approximately ten (10) Board meetings per year, took the minutes of the meetings, and attended approximately four (4) fiscal meetings per year when fulfilling the requirement of “attend[ing] all meetings which deal[t]with fiscal matters and monthly board meetings” as Business Manager and under the Contract. (Exhibit 6d; N.T. 65).

34. Claimant continued to be “Responsible for the recording of meeting minutes, in the absence of the Joint Operating Committee Recording Secretary, when requested to do so” as Business Manager and under the Contract. (Exhibit 6d; N.T. 66).

35. Claimant continued to perform “Any other duties as assigned by the Administrative Director” as Business Manager and under the Contract. (Exhibit 6d; N.T. 67).

36. Subsequent to January 30, 2009, Claimant did not perform any aspect of twenty-five (25) of the thirty-eight (38) duties and responsibilities she had as Business Manager. (Exhibit 6d, ¶¶ 2, 3, 7-15, 18-19, 21-27, 29, 33, 35-37; N.T. 43-67).

37. Subsequent to January 30, 2009, Claimant continued to partially perform some of the duties she had previously performed as Business Manager. (Exhibit 6d, ¶¶ 1, 4-6, 17, 20, 28, 38; N.T. 43-67).

38. Prior to January 30, 2009, Claimant was responsible for coordinating and preparing the annual budget for GJCTC, to include timely filing of PDE 2028 General Fund Budget with the Pennsylvania Department of Education. Subsequent to January 30, 2009,

Claimant provided some data to Ms. McCall for inclusion in the budget, but she was no longer responsible for preparing and/or filing the Budget. (Exhibit 6d, ¶ 1; N.T. 43-44, 115-117).

39. Prior to January 30, 2009, Claimant was responsible for reconciling all bank accounts. Subsequent to January 30, 2009, Claimant balanced only the general funds and the capital reserve fund, but not the student activity funds. (Exhibit 6d, ¶ 4; N.T. 46-47).

40. Prior to January 30, 2009, Claimant was responsible for preparing annual salary listings in accordance with adopted policies and negotiated agreements. Subsequent to January 30, 2009, Claimant provided some data and information to GJCTC, and reviewed the information with the school, if requested. (Exhibit 6d, ¶ 5; N.T. 47-48).

41. Prior to January 30, 2009, Claimant was responsible for the preparation and processing of the payroll, bi-weekly, through a computerized payroll system, including processing of the payroll taxes, reports, voluntary payroll deductions, payroll quarterlies, and year-end W-2's and 1099 documents. Subsequent to January 30, 2009, Claimant only coded payroll. (Exhibit 6d, ¶ 6; N.T. 48-49).

42. Prior to January 30, 2009, Claimant was responsible for preparing and overseeing budget transfers. Subsequent to January 30, 2009, Claimant was no longer responsible for those tasks but, instead, only assisted Ms. McCall and the School's certified public accountant when needed by emailing or calling Ms. McCall to inform her of what needed to be transferred between accounts. (Exhibit 6d, ¶ 17; N.T. 54-55).

43. Prior to January 30, 2009, Claimant was responsible for establishing and supervising the budgeting, accounting and reporting for all funds received through grants, including preparing quarterly and close-outs reports which needed to be filed in a timely manner. Subsequent to January 30, 2009, Claimant no longer did coding for the grants, but filed quarterly reports after noting expenses. Claimant also worked with the administrators in charge of particular grants by preparing budgets. (Exhibit 6d, ¶ 20; N.T. 56-58).

44. Prior to January 30, 2009, Claimant was responsible for acting as an advisor to the Administrative Director when answering questions related to the business and financial affairs of the school. Subsequent to January 30, 2009, Claimant only provided advice to Mr. Augustine when he contacted her for historical and fiscal information from when she was the GJCTC Business Manager. (Exhibit 6d, ¶ 28; N.T. 61-62).

45. Pursuant to the effective date of the Contract, Claimant undertook duties and responsibilities for administering grants under the American Recovery and Reinvestment Act of 2009, and assisted Mr. Augustine in his new role as Secretary of the Pennsylvania Association of Career & Technical Administrators; responsibilities which had not previously existed at the time she was Business Manager. (N.T. 29-30, 134-136, 150, 154).

46. Claimant provided services to GJCTC under the Contract from February 4, 2009, through November 1, 2013. (Exhibit 6c; Exhibit 6g; Exhibit 9; Exhibit 15; N.T. 126-127).

47. Claimant was aware of the manner by which her work was to be completed based upon her prior work as Business Manager. (N.T. 107-109).

48. By letter dated February 1, 2009, PSERS informed Claimant of her initial, estimated monthly retirement benefit of \$4,147.31 based on an effective date of retirement of January 31, 2009. (Exhibit 3; N.T. 15).

49. By letter dated April 22, 2010, PSERS informed Claimant of her finalized retirement benefit of \$4,761.80 based on a termination date of January 31, 2009, 35.24 years of credited service and a final average salary of \$77,850.82. (Exhibit 4, N.T. 16).

50. By letter dated October 2, 2013, GJCTC notified PSERS that the Pennsylvania Auditor General's Office issued a finding that GJCTC failed to request PSERS' approval to employ Claimant under the Contract while she received a monthly annuity from PSERS and requested PSERS to retroactively approve her employment as an independent contractor, effective February 4, 2009. (Exhibit 6a; N.T. 25, 146-148, 181).

51. The Pennsylvania Auditor General periodically advises PSERS of audit results it believes may be related to a PSERS-related issue and/or the distribution of an annuity. (N.T. 183).

52. PSERS is not bound by determinations made by the Pennsylvania Auditor General. Instead, the Auditor General provides PSERS with its findings. PSERS, thereafter, initiates its own investigation. (N.T. 183).

53. At no time prior to the October 2, 2013, letter, did Claimant or the GJCTC notify PSERS of her 2009 employment with GJCTC. (N.T. 101-102, 148, 160-162, 182).

54. By letter dated October 31, 2013, PSERS denied GJCTC's request to approve Claimant's service as an independent contractor on the ground that Claimant did not have a bona fide break in service but, instead, maintained a "continuation of active employment" in that Claimant was performing services for GJCTC which were

“substantially similar” to the duties she performed as Business Manager. (Exhibit 7; N.T. 184).

55. By letter dated November 1, 2013, PSERS notified Claimant that it had rescinded her January 30, 2009, retirement because her post-retirement service constituted a continuation of active employment. (Exhibit 8; N.T. 190).

56. Claimant appealed from PSERS’ rescission of her retirement to the PSERS’ Executive Staff Review Committee (“ESRC”). (Exhibit 10; N.T.; Exhibit 11; N.T. 190).

57. By letter dated December 20, 2013, PSERS notified Claimant of her finalized retirement benefit of \$3,525.38 based on an effective date of retirement of November 1, 2013, 39.53 years of credited service and a final average salary of \$74,823.34. (Exhibit 12; N.T. 74)

58. By letter dated May 29, 2014, PSERS notified Claimant that the ESRC denied Claimant’s request to be considered an independent contractor for the services she rendered to GJCTC after February 4, 2009, based upon its finding that Claimant had made a prearranged agreement with GJCTC to perform similar business and administrative duties which constituted a continuation of employment rather than a bona fide break in service. The ESRC also determined that Claimant did not serve as an independent contractor under the totality of the circumstances and, therefore, continued to serve with GJCTC as a “school employee”. (Exhibit 14; N.T. 185-186, 191).

59. When conducting its analysis of Claimant’s request to approve her retention as an independent contractor, the ESRC first considered whether Claimant had a bona fide break in service by examining the circumstances surrounding her new employment relationship with GJCTC to determine whether the services rendered were a continuation

of her prior employment relationship (i.e., a bona fide break in service), rather than the creation of a true independent contractor position. (Exhibit 14; N.T. 179-181, 185-186).

60. To determine whether the services rendered by Claimant were a continuation of her prior employment relationship with GJCTC, PSERS considered whether there was a prearrangement to return to employment prior to Claimant's effective date of retirement, whether sufficient time had passed between Claimant's date of retirement and her return to service, and whether Claimant had continued to provide the same or related services she had provided prior to the date of her retirement. (Exhibit 14; N.T. 179-181, 185-186).

61. PSERS maintains Return to Service Guidelines and Clarifications for returning to service as an independent contractor, which is accessible to members and employers via PSERS' website. (Exhibit 5a; Exhibit 5b; N.T. 86-87).

62. The PSERS' Guidelines and Clarifications state, in pertinent part, as follows:

Returning to Employment as an Independent Contractor

If a member terminates employment and returns to service shortly thereafter as an "independent contractor," or as an employee of an independent entity, with essentially the same job duties as before, PSERS may view the new employment to be a continuation of the prior employment rather than an Employment Emergency or Personnel Shortage.

(Exhibit 5a; Exhibit 5b).

63. Claimant was notified of her right to appeal the ESRC's decision to the Board. (Exhibit 14)

64. Claimant filed a timely appeal and was granted an administrative hearing and an opportunity to be heard. (Transcript, passim)

DISCUSSION

Termination of Service

It is well settled that to qualify for an annuity under the Retirement Code, an annuitant must first experience a bona fide break or termination of service. See, e.g., *Baillie v. Public School Employees' Retirement Board*, 993 A.2d 993 A.2d 944, (Pa. Cmwlth. 2009); 24 Pa.C.S. § 8307(a). The Retirement Code provides as follows:

§8307. Eligibility for annuities

- (a) **Superannuation annuity.**- An active or an inactive member who attains superannuation age shall be entitled to receive a superannuation annuity upon **termination of service** and filing of a proper application.

24 Pa.C.S. § 8307(a) (emphasis added). In turn, the Retirement Code defines “date of termination of service” as:

The last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his employer or two years following the last day of service for which contributions were made, whichever is earliest.

24 Pa.C.S. § 8102.

When PSERS learned that Claimant had continued working after she had supposedly terminated service and had begun receiving an annuity, PSERS did not initially analyze whether Claimant’s relationship was that of an independent contractor or “school employee.” Rather, PSERS first undertook an analysis of whether Claimant experienced a bona fide break in service, i.e., whether she ever stopped being a “school employee” engaged in school service for GJCTC.

Claimant and GJCTC disagree with PSERS’ initial actions claiming “PSERS made a summary and sham evaluation of [Claimant’s] situation and falsely contended there was

some pre-arrangement of continued employment under caselaw inapplicable to the instant matter,” namely this Board’s determination as upheld by the Commonwealth Court in *Baillie*, 993 A.2d 944. Claimant maintains that she had terminated from service with GJCTC effective January 30, 2009, and that she later returned to provide work for GJCTC on February 4, 2009, in a capacity other than as a school employee. In particular, she asserts she was an independent contractor under the Contract.

The Hearing Examiner found that Claimant did not experience a bona fide termination in service between January 30, 2009, and February 4, 2009, under the particular facts of this case; considering such factors as whether there was a prearrangement to return to employment prior to Claimant’s effective date of termination, whether sufficient time had passed between Claimant’s date of termination and her return to service; and whether Claimant had continued to provide the same or related services she had provided prior to the date of her termination. This Board agrees.

Claimant’s position, that a member can establish an independent contractor relationship without first formally terminating the employment relationship, would enable a claimant to simply continue the employment relationship under different terms, thereby impermissibly rendering the termination requirement of 24 Pa.C.S. §8307 meaningless, in contravention of 1 Pa.C.S. § 1921(a), (b) (PSERS must construe the Retirement Code according to its plain meaning and in such a manner as to give effect to all of its provisions.)²

² The factors set forth in *Zimmerman*, 522 A.2d at 45, apply when determining whether a person is an employee or an independent contractor; not whether a person had a termination from service and is attempting to return to render service with the same

In *Baillie*, 993 A.2d 944, the Commonwealth Court held that a termination of service requires more than a formal or technical termination. See generally *Estate of Fry v. Commissioner*, 19 T.C. 461, 464 (1952), *aff'd per curiam* 205 F.2d 517 (3d Cir. 1953); *Reinhardt v. Commissioner*, 85 T.C. 511, 520 (1985).³ Here, the record shows that Claimant maintained an employment relationship with GJCTC as a school employee after the effective date of her purported termination, notwithstanding certain differences in Claimant's job responsibilities under the Contract. While Claimant's school service may have changed in scope, nevertheless, Claimant still continued to provide school service because Claimant could use the particular skill set and institutional knowledge she acquired as the former GJCTC Business Manager. GJCTC readily admitted that Claimant was the only person it considered prior to entering into the Contract with Claimant. A mere change in the scope of Claimant's services, particularly services which relate to and/or derive from Claimant's prior service, is not the equivalent of a termination of service.

As discussed below, Claimant did not return to service with GJCTC in an entirely different capacity from that in which she previously worked as Business Manager.

Instead, the duties and responsibilities performed by Claimant under the Contract merely modified the scope of duties she performed as Business Manager. This fact, when

employer. Indeed, the factors highlighted in *Zimmerman* do not include whether any prior employee/employer relationship was formally terminated.

³ Similarly, in *Fry*, 19 T.C. at 464, the United States Tax Court held that a separation from service requires that an "employee sever his connection with his employer." In *Fry*, an employee of the Company received his retirement pension from the Company's private trust but still continued to receive his regular salary and perform some work for the Company. *Id.* at 462. The Court acknowledged that Fry performed less and less work for the Company as time passed; "however, the probative value of these facts had been weakened, if not displaced altogether, by the fact that [Fry] continued to draw his regular salary . . . from the . . . Company." *Id.* at 464. The Court held that Fry had not actually retired or separated from the service of the Company.

considered in conjunction with the parties having entered into the Contract prior to Claimant's effective date of retirement and the mere passage of two work days between the effective date of her retirement and the start of her work under the Contract, is not sufficiently meaningful to have effectively terminated Claimant's prior service.

1. There was a prearrangement to return to employment prior to Claimant's effective date of retirement.

It is uncontested that Claimant and GJCTC entered into the Contract on December 11, 2008, prior to the effective date of Claimant's termination and retirement, i.e., January 30, 2009. We recognize that the Contract was neither contemplated, nor discussed with GJCTC personnel, prior to Claimant filing her "Application for Retirement" on November 7, 2008. Nonetheless, the Contract was "pre-arranged" in relation to the effective date of Claimant's purported termination. A school employee, who is under the expectation to serve through the school year as a 260-day employee, cannot retire in the middle of the school year, return four days/two work days later performing similar services *and* experience a bona fide termination, particularly when GJCTC made no effort to recruit a replacement.

Notably, GJCTC did not consider hiring anyone to replace Claimant and did not advertise her position after learning of her pending retirement. Instead, the record unequivocally shows that GJCTC immediately approached Claimant asking her to return to train her replacement and continue to render the same duties but in a lesser degree. Such inaction by GJCTC to hire someone other than Claimant supports the conclusion that the parties did not truly sever the employee/employer relationship and, instead, effectuated a prearrangement for Claimant to continue rendering school service.

Though the record shows that Claimant repeatedly refused efforts by GJCTC to retain her services after her termination/retirement, the record equally demonstrates that the parties ultimately entered into the Contract with the expectation that Claimant would continue to render similar duties. The fact that Claimant eventually acquiesced to GJCTC's repeated requests to provide administrative services following the date of her retirement, essentially negated the effect of her prior refusals for the purpose of evaluating whether Claimant had, in fact, terminated her employment relationship with GJCTC under the Retirement Code. Instead, the nature of Claimant's actual, ongoing relationship with GJCTC, before and after January 30, 2009, is controlling.

Moreover, the fact that GJCTC and Claimant entered into the Contract with the expectation that Claimant would serve as an independent contractor does not serve to create an actual, bona fide termination of service required under the Retirement Code. The Board is not bound to recognize the Contract as a bona fide termination of service simply because Claimant and GJCTC entered into it.

2. Claimant continued to provide the same or related services she had provided prior to the date of her retirement.

In this case, most of Claimant's responsibilities under the Contract were the same type of duties she had as Business Manager at GJCTC. A mere reduction or modification in the services provided, or the manner by which those services were provided, does not equate to a termination of service. Claimant's position as Business Manager consisted of thirty-eight (38) separate duties and responsibilities for which she retained some under the Contract.

Claimant continued to be “responsible for calculating the school board membership every three years” under the Contract for which she was also responsible as Business Manager. In that capacity, Claimant calculated the school board membership by performing a financial calculation involving each of the seven (7) participating school districts to determine how many members from each school district would be on the GJCTC Joint Operating Committee. Claimant also continued to be “Responsible to attend all meetings which deal[t]with fiscal matters and monthly board meetings” under the Contract for which she was also responsible as Business Manager. Claimant attended approximately ten (10) Board meetings per year, took the minutes of the meetings, and attended approximately four (4) fiscal meetings per year in fulfilling the requirement of “attend[ing] all meetings which deal[t] with fiscal matters and monthly board meetings” as Business Manager and under the Contract. Claimant also continued to be “Responsible for the recording of meeting minutes, in the absence of the Joint Operating Committee Recording Secretary, when requested to do so” as Business Manager and under the Contract. Claimant similarly continued to perform “Any other duties as assigned by the Administrative Director” under the Contract, as she had done as Business Manager.

With respect to other duties and responsibilities Claimant had as Business Manager, Claimant continued to provide some services related to those duties after she began working under the Contract. For example, Claimant was responsible for coordinating and preparing the annual budget for GJCTC, to include timely filing of PDE 2028 General Fund Budget with the Pennsylvania Department of Education. Subsequent to January 30, 2009, Claimant’s involvement was limited to providing some data to Ms. McCall as Administrative Assistant of Fiscal Operations for inclusion in the budget. Under

the Contract, Claimant was no longer responsible for preparing and/or filing the Budget. Prior to January 30, 2009, Claimant was responsible for reconciling all bank accounts. Under the Contract, Claimant balanced only the general funds and the capital reserve fund, but not the student activity funds. Prior to January 30, 2009, Claimant was also responsible for preparing annual salary listings in accordance with adopted policies and negotiated agreements. Subsequent to January 30, 2009, however, Claimant only provided some data and information to GJCTC, and reviewed the information with the school, if requested. As Business Manager, Claimant was responsible for preparing and processing the bi-weekly payroll through a computerized payroll system, including processing the payroll taxes, reports, voluntary payroll deductions, payroll quarterlies, and year-end W-2's and 1099's. Under the Contract, Claimant only coded payroll. Prior to January 30, 2009, Claimant was also responsible for preparing and overseeing budget transfers. After January 30, 2009, Claimant was no longer responsible for those tasks but, instead, assisted Ms. McCall and the School's certified public accountant when needed by emailing or calling Ms. McCall to inform her of what needed to be transferred between accounts. As Business Manager, Claimant was responsible for establishing and supervising the budgeting, accounting and reporting for all funds received through grants, including preparing quarterlies and close-outs reports being filed in a timely manner. After January 30, 2009, Claimant no longer did coding for the grants, but did file quarterly reports after noting expenses. Claimant also worked with the administrators in charge of particular grants by preparing budgets. Prior to January 30, 2009, Claimant was responsible for acting as an advisor to the Administrative Director on all questions relating to the business and financial affairs of the school. Subsequent to January 30, 2009,

Claimant continued to provide advice to Mr. Augustine, but only when he contacted her for fiscal information.

Although the record also shows that Claimant undertook a few new duties and responsibilities under the Contract, nevertheless, such duties did not exist when she was Business Manager. Specifically, Claimant became responsible for administering grants under the American Recovery and Reinvestment Act of 2009. Claimant additionally assisted Mr. Augustine in his new role as Secretary of the Pennsylvania Association of Career & Technical Administrators. Once again, however, Claimant's undertaking of new responsibilities under the Contract did not act to sever Claimant's ongoing employment relationship with GJCTC, which continued after January 30, 2009. Although Claimant's duties under the Contract primarily shifted from being responsible for all day-to-day operations, assigning work, and ensuring the work was completed, to assisting the business office in an advisory capacity, her later responsibilities still constituted school service and a continuation of her prior service.

3. Sufficient time did not pass between Claimant's reported date of termination and her return to service.

In *Baillie*, 993 A.2d 944, the Commonwealth Court agreed with this Board that the claimant did not have a break in service based upon the lack of any interruption in the claimant's work schedule. As noted above, the determination of whether a bona fide break in service has occurred is "fact specific" and "dependent on the facts specific to the individual request." (N.T. 200-201).⁴ In that regard, the passage of four days/ two work

⁴ Beginning in at least July 1, 2004, PSERS employed a 90-day policy wherein PSERS presumes a bona fide break in service if a former employee returns to service after a period of 90 days. See PSERS MBR-2011-10.4 (Exhibit 17). PSERS' institution of a 90-

days must be evaluated under the totality of the circumstances so as to make the passing of the two work days substantively meaningful if the requirement for an actual termination of service under the Retirement Code is to have any practical significance.

The record shows a lapse of four calendar days (two work days) between the date of Claimant's purported termination as Business Manager and the date she began her new position under the Contract. Such a minimal passage of time, in unto itself, simply cannot serve to have severed Claimant's employment relationship with GJCTC, particularly when considering the continuing nature of Claimant's involvement with the GJCTC following her termination, the fact that Claimant "retired" in the middle of the academic school year, and given that the parties entered into the Contract to continue her services on December 11, 2008.

Based upon the totality of circumstances, the Board finds that Claimant did not experience a bona fide termination of school service, effective January 30, 2009. The Board concludes that under the facts of this case, Claimant's retirement on January 31, 2009, was a nullity. It was a paper retirement in form only. Claimant must, therefore, pay for her additional service credit through October 31, 2013, and repay, by way of a cash payment or an actuarial debt, the annuity amounts she was incorrectly paid during that time period.

day presumption is not an attempt to promulgate a substantive and/or additional requirement not contemplated by the Retirement Code, as Claimant and Intervener argue. Rather, such business rule provides a guideline of *when* PSERS should request additional information regarding the circumstances of a member's termination. PSERS and this Board would breach its most fundamental duty to only make disbursements of fund money that are required by the Retirement Code if it allowed a member to receive an annuity without first truly terminating service. Ignoring such clear mandate, as Claimant and Intervener suggest, would allow employers and members to manipulate the system and jeopardize the solvency of the fund.

Due Process

Claimant asserts that she was denied due process because PSERS rescinded her retirement and withheld further payments prior to holding an evidentiary hearing. Such a claim, however, has been expressly rejected by the Commonwealth Court. See, e.g., *Hairston-Brown v. Public School Employees' Retirement Board*, 78 A.3d 720, 731 (Pa. Cmwlth. 2013); *Wyland v. Public School Employees' Retirement Board*, 669 A.2d 1098 (Pa. Cmwlth. 1996); *Hoerner v. Public School Employees' Retirement Board*, 655 A.2d 207, 213-214 (Pa. Cmwlth. 1995), *rev'd on other grounds*, 684 A.2d 112 (Pa.1996). As recognized by the Commonwealth Court, an evidentiary hearing prior to October 31, 2013, was not required for due process purposes because the initial determinations in this case were the result of staff functions by PSERS' retirement processes and, therefore, were subject to further, final review. *Id.* The decision in *Hairston-Brown* is controlling. In that case, the Court stated:

[Claimant] could, and did, appeal the initial determination of [her] retirement benefits to PSERS' appeal committee and, ultimately, to the [B]oard. [She] filed a brief and a reply brief prior to the hearing before the hearing examiner, attended the hearing and presented evidence, and filed exceptions to the hearing examiner's determination with the [B]oard. As [Claimant] was given notice and a hearing prior to the final determination of [her] retirement benefits, and there exists no authority for a hearing in connection with PSERS' initial review, this claim is meritless.

Hairston-Brown, 78 A.3d at 731(citing *Wyland*, 669 A.2d at 1104).

CONCLUSIONS OF LAW

1. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
2. A preponderance of the evidence is the correct burden of proof to be applied in this administrative action. *Lansberry, Inc. v. Pennsylvania Public Utility Commission*,

578 A. 2d 600, 602 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A. 2d 678, 681-82 (Pa. Cmwlth. 2005).

3. A preponderance of the evidence is “such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence.”

Sigafoos v. Pennsylvania Board of Probation and Parole, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986); *A.B. v. Slippery Rock Area School District*, 906 A. 2d 674 (Pa. Cmwlth. 2006).

4. PSERS is a creature of statute and derives its authority from the provisions of the Retirement Code. 24 Pa.C.S. §8101 et. seq.

5. The authority of the Board to grant or deny Claimant’s request is limited to the provisions of the Retirement Code; the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Burnis v. State Employees’ Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees’ Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

6. The Retirement Code defines an “annuitant” as “[a]ny member on or after the effective date of retirement until his annuity is terminated.” 24 Pa. C.S. §8102.

7. An active or an inactive member who attains superannuation age shall be entitled to receive a superannuation annuity upon termination of service and filing of a proper application. 24 Pa. C.S. §8307.

8. “Date of termination of service” is defined in the Retirement Code as:

The last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his

resignation or the date his employment is formally discontinued by his employer or two years following the last day of service for which contributions were made, whichever is earliest. 24 Pa.C.S. § 8102.

9. School service is “service rendered as a school employee.” 24 Pa. C.S. §8102.

10. A “school employee” is defined under the Retirement Code to mean a person “engaged in work relating to a public school. . . for which work he is receiving regular remuneration as an . . . employee. . . excluding, however, any independent contractor. ” 24 Pa. C.S. §8102.

11. Claimant has failed in her burden of showing that she experienced a bona fide termination of service prior to February 4, 2009.

12. Claimant was served with all pleadings, Orders and Notices filed of record in this matter, and participated in the hearing with the assistance of legal counsel. (Official Notice-Board records; N.T. 4-230).

13. Claimant was provided appropriate due process in this matter.

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

IN RE: ACCOUNT OF CATHY E. ROBERTSON
DOCKET NO. 2014-10
CLAIM OF CATHY E. ROBERTSON

ORDER

Based on the foregoing, the Board finds that Claimant did not formally terminate her service with GJCTC on January 30, 2009. Accordingly,

IT IS HEREBY ORDERED that Claimant's and GJCTC's exceptions are DENIED and Claimant's request to deem her an independent contractor after February 4, 2009, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 6, 2015

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

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COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

PSERB
EXECUTIVE OFFICE

In Re: :
Account of Cathy Robertson : Docket No. 2014-10
Claim of Cathy Robertson :

OPINION AND RECOMMENDATION

Date of Hearing: February 25, 2015
Hearing Officer: Marc A. Moyer, Esquire
For Claimant: Brian P. Litzinger, Esquire
For Greater Johnstown
Area Vocational Technical
School: Gary L. Costlow, Esquire
For PSERS: Jennifer Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board on appeal filed by Cathy Robertson ("Claimant") from a March 27, 2014 determination by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request to be considered an independent contractor for her post-retirement employment by her previous public school employer. By letter dated May 29, 2014, the ESRC notified Claimant of its decision to deny Claimant's request on the ground that prior to the date of her termination from employment and date of retirement in January, 2009, Claimant had entered into a Business /Administrative Services Support Contract with her employer, the Greater Johnstown Career and Technology Center (hereinafter "GJCTC"), on December 11, 2008, for the provision of business and administrative support. Because of the prearrangement to perform duties for GJCTC after her retirement which were substantially similar to the duties she performed while being an active contributing employee of GJCTC, PSERS considered her work under the contract to be a continuation of active public school employment. Accordingly, PSERS rescinded Claimant's January 31, 2009 retirement and seeks the repayment of the \$388,001.21 paid to Claimant between January 31, 2009 and October, 2013; purchase service credit in the amount of \$13,584.65; 2013 IRS withholdings in the amount of \$4,811.00; and post-October, 2013 benefit payments.

Claimant timely appealed from the ESRC's determination on June 30, 2014, and requested an administrative hearing. PSERS filed an Answer with New Matter on July 21, 2014. By Order dated November 5, 2014, GJCTC was granted permission to intervene in this matter. A formal administrative hearing was, thereafter, held on February 25, 2015, before Hearing Officer Marc A. Moyer, Esquire.

Claimant participated in the hearing, was assisted by legal counsel, and testified on her own behalf. GJCTC presented the testimony of its Administrative Director, John Augustine, II, and the

testimony of the Chairman of the GJCTC Joint Operating Committee, Alan Tresnicky, on Claimant's behalf. The parties jointly stipulated to the admission of fourteen (14) Exhibits (Exhibits 1 through 14) into evidence. An additional three (3) Exhibits were admitted into evidence by the Hearing Officer at the hearing. PSERS presented its case through the testimony of PSERS Retirement Administrator, Troy W. Peechatka.

By Order dated March 2, 2015, the Hearing Officer directed that the record remain open for the limited purpose of receiving documents from PSERS no later than March 31, 2015, pertaining to its financial calculations related to Claimant's claim. The Order, thereafter, provided Claimant and GJCTC seven (7) days to file a Statement of Objections setting forth their basis for any objections to the PSERS' calculations. PSERS submitted its post-hearing calculations on March 20, 2015.

By letter dated March 30, 2015, Claimant's counsel objected to the PSERS submission on the ground that it failed to adequately describe the basis for PSERS' calculations. Claimant, therefore, requested that the record remain open for the purpose of providing the parties sufficient time to exchange additional information pertaining to PSERS' calculations. By letter dated April 1, 2015, PSERS did not oppose the Hearing Officer providing additional time for Claimant to inquire into the basis for PSERS' calculations, during which PSERS agreed to make its staff members available to Claimant for that purpose. On April 6, 2015, the Hearing Officer issued an Order which provided Claimant until March 20, 2015 to seek clarification from PSERS regarding the calculations set forth in its March 20, 2015 evidentiary submission. The April 6, 2015 Order further directed the parties to submit their post-hearing briefs no later than June 1, 2015, and their reply briefs no later than June 15, 2015.

PSERS filed its Post-Hearing Brief on June 1, 2015. GJCTC filed Proposed Findings of Fact and Conclusions of Law on that same date. Claimant purports to have filed an electronic copy of her Post-

Hearing Brief prior to close of business on June 1, 2015. However, according to Claimant's counsel, the Brief was not received by PSERS until after the close of business on June 1, 2015 due to "some problem or outage" experienced at Claimant's counsel's law office or at PSERS. Claimant's Post-Hearing Brief was, therefore, officially entered onto the docket on June 2, 2015. All parties filed Reply Briefs on June 15, 2015.

PSERS filed an Objection to Claimant's Post-Hearing Brief on the ground that it was untimely filed. Because PSERS offered no evidence that it has been prejudiced by the late filing of Claimant's Post-Hearing Brief, the Hearing Officer overruled PSERS' Objection by Order dated July 8, 2015. On July 8, 2015, the Hearing Examiner also entered an Order which accepted into evidence PSERS' calculations, submitted on March 20, 2015. The record in this matter closed with the filing of Notes of Testimony ("N.T.") on March 10, 2015, and the filing of the Reply Briefs on June 15, 2015. This matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant first became a member of PSERS on July 25, 1970 by virtue of her service with the Greater Johnstown Career and Technology Center ("GJCTC")(N.T. 12, 70).
2. GJCTC is a regional vocational and technical school which provides part-time vocational and technical education services to students and adults for seven (7) regional school districts within Cambria County and Somerset County, Pennsylvania. (N.T. 84-85, 137-140).
3. GJCTC is not an independent school district and, therefore, has no independent taxing authority or other means to increase its funding. Instead, GJCTC is a regional institution supported by public school districts. (N.T. 138).

4. Claimant became the Administrative Assistant of Fiscal Operations for GJCTC in 1989, and subsequently became the GJCTC Business Manager for approximately eleven (11) years. (N.T. 13-15, 139).
5. As GJCTC Business Manager, Claimant worked 260 days per school year, or approximately 40 hours per week as a salaried employee earning approximately \$39.00 per hour. (N.T. 30-31, 48, 91).
6. John Augustine, II became the Administrative Director of GJCTC in July, 2006. (N.T. 137, 167).
7. Claimant submitted a PSRS-8 "Application for Retirement", to PSERS on November 7, 2008, through which she identified her anticipated date of retirement as January 30, 2009. (Exhibit 2; N.T. 14-15, 103).
8. Claimant attended a retirement exit counseling session on November 7, 2008, at which she was advised, in part, that working for a PSERS employer will cause her pension to be frozen except under an emergency or shortage or when performing extracurricular activity. (Exhibit 1; N.T. 14, 101-102).
9. Claimant signed a "Retirement Exit Counseling Checklist" which confirmed her attendance at the November 7, 2008 exit counseling session. (Exhibit 1; N.T. 101).
10. The Retirement Exit Counseling Checklist made no mention about providing services to a PSERS employer as an independent contractor, and did not require Claimant to notify PSERS in the event she provided services to a PSERS employer as an independent contractor following the effective date of her retirement. (Exhibit 1: N.T. 101-103).

11. At the time she signed the "Application for Retirement" and "Retirement Exit Counseling Checklist" on November 7, 2008, Claimant had not intended to provide services to GJCTC as an independent contractor, and had not been a party to any discussions about doing so with GJCTC personnel as of that date. (N.T. 14-15, 24-25, 103-105, 169, 171, 172-173).
12. During discussions with John Augustine, II in January, 2008, Claimant had alluded to tentatively retiring in 2009, so as to secure post-retirement health care benefits. (N.T. 140).
13. Claimant formally notified the Chairman of the GJCTC Joint Operating Committee, Alan Tresnicky, and John Augustine, II, of her January 30, 2009 retirement date after she had already submitted the "Application for Retirement" and "Retirement Exit Counseling Checklist" on November 7, 2008. (N.T. 140, 168-169).
14. Claimant's anticipated retirement date was to occur during the middle of the school year for which she was expected to work 260 days. (N.T. 91).
15. Upon being informed of Claimant's pending retirement, effective January 30, 2009, John Augustine, II consulted with Alan Tresnicky and Chief School Administrator, Dr. DiBartola, regarding Claimant's retirement and how to staff her job responsibilities. (N.T. 142-143, 171-172).
16. Neither John Augustine, II, nor Alan Tresnicky, had approached Claimant about providing services to GJCTC following the effective date of her retirement until after Claimant had already submitted the "Application for Retirement" and "Retirement Exit Counseling Checklist" on November 7, 2008. (N.T. 140-143, 172-174).

17. Upon being informed of Claimant's pending retirement, effective January 30, 2009, GJCTC decided to outsource Claimant's position of Business Manager, perform a reorganization, and attempt to retain Claimant's services as an independent contractor. (N.T. 152-153, 172-173).
18. As part of GJCTC's reorganization, GJCTC eliminated Claimant's position of Business Manager and the position of Senior Bookkeeper held by Melissa McCall, and created a new position titled Administrative Assistant of Fiscal Operations to be filled by Ms. McCall. (28, 91-92, 95-96, 152-153).
19. Ms. McCall's job responsibilities as Administrative Assistant of Fiscal Operations entailed performing all of her previous duties as Senior Bookkeeper in addition to assuming nearly all of Claimant's former duties as Business Manager. (N.T. 96-97, 153).
20. After determining the need to consolidate the positions of Senior Bookkeeper and Business Manager, GJCTC identified the need for someone to assist the business office until the new Administrative Assistant of Fiscal Operations was sufficiently trained. (N.T. 142-144, 156, 173-174).
21. Claimant was identified as the preferred candidate to train Ms. McCall based upon Claimant's institutional knowledge. (N.T. 142-143, 154-155, 175-176).
22. Alan Tresnicky and John Augustine, II made multiple attempts to convince Claimant to not retire or, alternatively, to provide services to GJCTC in the form of advising and/or assisting Ms. McCall as an independent contractor. (N.T. 144, 154-155, 169-171, 174).
23. Claimant initially declined to serve as an independent contractor but, instead, intended to retire. (N.T. 15, 24, 169, 171, 174).

24. GJCTC did not advertise or search for candidates to replace Claimant as Business Manager. (N.T. 152-153, 175-176)
25. On or about December 8, 2008, after consulting with her husband, Claimant eventually agreed to provide services to GJCTC as an independent contractor to begin after her effective date of retirement. (N.T. 24, 27, 171).
26. Claimant informed GJCTC that she did not want to work many hours as an independent contractor, did not want to be tied down to coming into the building for work, and that she wanted to work her own hours because she anticipated performing much of her work at night. (N.T. 24-25, 27, 35).
27. Claimant drafted the Business/Administrative Services Support Contract into which she entered with GJCTC on December 11, 2008. (Exhibit 6b; Exhibit 6c; N.T. 156-157).
28. The Business/Administrative Services Support Contract became effective February 4, 2009, and identified thirteen (13) services to be performed by Claimant under the contract. (Exhibit 6c; N.T. 29).
29. Prior to Claimant's effective date of retirement, January 30, 2009, John Augustine, II was Claimant's immediate supervisor and Claimant's place of business was located in an office at GJCTC. (Exhibit 6d; N.T. 39-40).
30. Claimant's job description accurately set forth Claimant's duties and responsibilities as Business Manager at GJCTC. (Exhibit 6d; N.T. 41-42).
31. Pursuant to the Business/Administrative Services Support Contract, Claimant's responsibilities primarily shifted from being responsible for all day-to-day operations,

assigning work, and ensuring work was completed as Business Manager, to assisting the business office in an advisory capacity. (N.T. 154).

32. Subsequent to January 30, 2009, Claimant continued to perform four (4) of the thirty-eight (38) duties and responsibilities she had previously performed as Business Manager. (Exhibit 6d, ¶¶ 16, 31-32, 34; N.T. 43-67).

33. Claimant continued to be “responsible for calculating the school board membership every three years” under the Business/Administrative Services Support Contract for which she was responsible as Business Manager. (Exhibit 6d; N.T. 63-64).

34. Claimant calculated the school board membership by performing a financial calculation involving each of the seven (7) participating school districts in order to determine how many members from each school district would be on the GJCTC Joint Operating Committee. (N.T. 64).

35. Claimant continued to be “Responsible to attend all meetings which deal[t]with fiscal matters and monthly board meetings” under the Business/Administrative Services Support Contract for which she was responsible as Business Manager. (Exhibit 6d; N.T. 65).

36. Claimant attended approximately ten (10) Board meetings per year, took the minutes of the meetings, and attended approximately four (4) fiscal meetings per year when fulfilling the requirement of “attend[ing] all meetings which deal[t]with fiscal matters and monthly board meetings” as Business Manager and under the Business/Administrative Services Support Contract. (Exhibit 6d; N.T. 65).

37. Claimant continued to be “Responsible for the recording of meeting minutes, in the absence of the Joint Operating Committee Recording Secretary, when requested to do

so” as Business Manager and under the Business/Administrative Services Support Contract. (Exhibit 6d; N.T. 66).

38. Claimant continued to perform “Any other duties as assigned by the Administrative Director” as Business Manager and under the Business/Administrative Services Support Contract. (Exhibit 6d; N.T. 67).

39. Subsequent to January 30, 2009, Claimant did not perform any aspect of twenty-five (25) of the thirty-eight (38) duties and responsibilities she had as Business Manager. (Exhibit 6d, ¶¶ 2, 3, 7-15, 18-19, 21-27, 29, 33, 35-37; N.T. 43-67).

40. Subsequent to January 30, 2009, Claimant continued to partially perform some of the duties she had previously performed as Business Manager. (Exhibit 6d, ¶¶ 1, 4-6, 17, 20, 28, 38; N.T. 43-67).

41. Prior to January 30, 2009, Claimant was responsible for coordinating and preparing the annual budget for GJCTC, to include timely filing of PDE 2028 General Fund Budget with the Pennsylvania Department of Education. Subsequent to January 30, 2009, Claimant provided some data to Ms. McCall for inclusion in the budget, but she was no longer responsible for preparing and/or filing the Budget. (Exhibit 6d, ¶ 1; N.T. 43-44, 115-117).

42. Prior to January 30, 2009, Claimant was responsible for reconciling all bank accounts. Subsequent to January 30, 2009, Claimant balanced only the general funds and the capital reserve fund, but not the student activity funds. (Exhibit 6d, ¶ 4; N.T. 46-47).

43. Prior to January 30, 2009, Claimant was responsible for preparing annual salary listings in accordance with adopted policies and negotiated agreements. Subsequent to

January 30, 2009, Claimant provided some data and information to GJCTC, and reviewed the information with the school, if requested. (Exhibit 6d, ¶ 5; N.T. 47-48).

44. Prior to January 30, 2009, Claimant was responsible for the preparation and processing of the payroll, bi-weekly, through a computerized payroll system, including processing of the payroll taxes, reports, voluntary payroll deductions, payroll quarterlies, and year-end W-2's and 1099 documents. Subsequent to January 30, 2009, Claimant only coded payroll. (Exhibit 6d, ¶ 6; N.T. 48-49).

45. Prior to January 30, 2009, Claimant was responsible for preparing and overseeing budget transfers. Subsequent to January 30, 2009, Claimant was no longer responsible for those tasks but, instead, only assisted Ms. McCall and the School's certified public accountant when needed by emailing or calling Ms. McCall to inform her of what needed to be transferred between accounts. (Exhibit 6d, ¶ 17; N.T. 54-55).

46. Prior to January 30, 2009, Claimant was responsible for establishing and supervising the budgeting, accounting and reporting for all funds received through grants, including preparing quarterly and close-outs reports which needed to be filed in a timely manner. Subsequent to January 30, 2009, Claimant no longer did coding for the grants, but filed quarterly reports after noting expenses. Claimant also worked with the administrators in charge of particular grants by preparing budgets. (Exhibit 6d, ¶ 20; N.T. 56-58).

47. Prior to January 30, 2009, Claimant was responsible for acting as an advisor to the Administrative Director when answering questions related to the business and financial affairs of the school. Subsequent to January 30, 2009, Claimant only provided advice to

Mr. Augustine when he contacted her for historical and fiscal information from when she was the GJCTC Business Manager. (Exhibit 6d, ¶ 28; N.T. 61-62).

48. Pursuant to the effective date of the Business/Administrative Services Support Contract, Claimant undertook duties and responsibilities for administering grants under the American Recovery and Reinvestment Act of 2009, and assisted Mr. Augustine in his new role as Secretary of the Pennsylvania Association of Career & Technical Administrators; responsibilities which had not previously existed at the time she was Business Manager. (N.T. 29-30, 134-136, 150, 154).

49. Claimant provided services to GJCTC under the Business/Administrative Services Support Contract from February 4, 2009 through November 1, 2013. (Exhibit 6c; Exhibit 6g; Exhibit 9; Exhibit 15; N.T. 126-127).

50. The Business/Administrative Services Support Contract contained no termination date or provisions relating to indemnification, confidentiality or liability. (Exhibit 6c; N.T. 117-118).

51. Either party to the Business/Administrative Services Support Contract was permitted to unilaterally terminate the Contract upon providing the other party sixty (60) days notice. (Exhibit 6c).

52. Claimant earned \$35 an hour, did not receive any fringe benefits, did not receive reimbursement for expenses or travel, and used her own computer and supplies to perform work under the Business/Administrative Services Support Contract. (Exhibit 6c; N.T. 30, 32-33, 110, 145-146).

53. Claimant did not receive a salary and was not paid on a set schedule under the Business/Administrative Services Support Contract. Instead, Claimant submitted invoices

for payment to GJCTC approximately every two weeks. (Exhibit 6g; Exhibit 15; N.T. 36-39, 70-71, 111, 132-133).

54. Claimant's invoices identified the work she performed and the total number of hours she worked. (N.T. 36-37, 157-158).

55. Mr. Augustine reviewed and approved Claimant's invoices based upon the number of hours of work represented on the invoices and his understanding of the amount of time each task historically took to complete. (N.T. 157-159).

56. Claimant's pay under the Business/Administrative Services Support Contract was less than the financial remuneration she received as Business Manager at GJCTC. (N.T. 31).

57. Claimant received bi-weekly payments which were reflected on W-2 Forms when she worked as Business Manager. (N.T. 30-31).

58. Claimant's compensation under the Business/Administrative Services Support Contract was reflected on 1099 Forms, and not on W-2 Forms. (Exhibit 6c; N.T. 30).

59. GJCTC did not deduct payroll taxes from Claimant's compensation during the pendency of the Business/Administrative Services Support Contract as it had done when Claimant was Business Manager. (Exhibit 6c; N.T. 30-34).

60. Claimant did not maintain a business office at GJCTC but, instead worked from her home with the exception of picking-up or dropping-off materials at GJCTC and/or periodically consulting with Mr. Augustine. (N.T. 31-32, 109, 146).

61. Claimant did not work on a pre-established schedule and was not required to work a minimum or maximum number of hours per week under the Business/Administrative Services Support Contract. Instead, Claimant established her own schedule and the

number of hours she worked, and generally worked in the evening, until midnight or until 2:00 a.m. (N.T. 35, 83-84, 111-115, 129-130, 145-146).

62. Claimant's work schedule varied, and she worked approximately 1,000 hours per school year, or approximately 20 hours per week, under the Business/Administrative Services Support Contract. (Exhibit 6g; N.T. 35-36, 97).

63. Claimant rendered business/administrative support services exclusively to GJCTC during the pendency of the Business/Administrative Services Support Contract. (N.T. 93-94).

64. The Business/Administrative Services Support Contract did not preclude Claimant from providing business/administrative support services to other entities. (N.T. 146).

65. Claimant did not receive any performance evaluations while working under the Business/Administrative Services Support Contract. (N.T. 107, 146).

66. Claimant did not report to, and was not under the direction of anyone at GJCTC during the pendency of the Business/Administrative Services Support Contract. (N.T. 83, 106).

67. Claimant rarely communicated with her prior Supervisor during the pendency of the Business/Administrative Services Support Contract, except when he contacted her for answers to questions or when he requested a service under the Contract. (N.T. 106, 150).

68. GJCTC did not impose particular standards upon Claimant's work product during the pendency of the Business/Administrative Services Support Contract. Instead, Claimant was aware of the manner by which her work was to be completed based upon her prior work as Business Manager. (N.T. 107-109).

69. Claimant was not required by GJCTC to maintain any licenses or credentials while working under the Business/Administrative Services Support Contract. (N.T. 123).

70. Claimant did not maintain or preserve GJCTC business records while providing services under the Business/Administrative Services Support Contract. (N.T. 121).

71. By letter dated October 2, 2013, GJCTC notified PSERS that the Pennsylvania Auditor General's Office issued a finding that GJCTC failed to request PSERS' approval to employ Claimant under the Business/Administrative Services Support Contract while she received a monthly annuity from PSERS and requested PSERS to retroactively approve her employment as an independent contractor, effective February 4, 2009. (Exhibit 6a; N.T. 25, 146-148, 181).

72. The Pennsylvania Attorney General periodically advises PSERS of audit results it believes may be related to a PSERS-related issue and/or the distribution of an annuity. (N.T. 183).

73. PSERS is not bound by determinations made by the Pennsylvania Auditor General. Instead, the Auditor General provides PSERS with its findings. PSERS, thereafter, initiates its own investigation. (N.T. 183).

74. By letter dated October 31, 2013, PSERS denied GJCTC's request to approve Claimant's service as an independent contractor on the ground that Claimant did not have a bona fide break in service but, instead, maintained a "continuation of active employment" in that Claimant was performing services for GJCTC which were "substantially similar" to the duties she performed as Business Manager. (Exhibit 7; N.T. 184).

75. By letter dated November 1, 2013, PSERS notified Claimant that it had rescinded her January 30, 2009 retirement because her post-retirement service constituted a continuation of active employment. (Exhibit 8; N.T. 190).
76. Claimant appealed from PSERS' rescission of her retirement to the PSERS' Executive Staff Review Committee ("ESRC"). (Exhibit 10; N.T.; Exhibit 11; N.T. 190).
77. By letter dated May 29, 2014, PSERS notified Claimant that the ESRC denied Claimant's request to be considered an independent contractor for the services she rendered to GJCTC after February 4, 2009, based upon its finding that Claimant had made a prearranged agreement with GJCTC to perform similar business and administrative duties which constituted a continuation of employment rather than a bona fide break in service. The ESRC also determined that Claimant did not serve as an independent contractor under the totality of the circumstances and, therefore, continued to serve with GJCTC as a "school employee". (Exhibit 14; N.T. 185-186, 191).
78. When conducting its analysis of Claimant's request to approve her retention as an independent contractor, the ESRC first considered whether Claimant had a bona fide break in service by examining the circumstances surrounding her new employment relationship with GJCTC in order to determine whether the services rendered were a continuation of her prior employment relationship (*i.e.*, a bona fide break in service), rather than the creation of a true independent contractor position. (Exhibit 14; N.T. 179-181, 185-186).
79. When conducting its analysis of Claimant's request to approve her retention as an independent contractor, the ESRC also considered whether Claimant qualified as an

independent contractor under Pennsylvania law, rather than a school “employee”.

(Exhibit 14). See also, 22 Pa.Code § 215.5 (d)(3).

80. To determine whether the services rendered by Claimant were a continuation of her prior employment relationship with GJCTC, rather than being provided as an independent contractor, PSERS first considered whether there was a bona fide break in service by examining whether there was a prearrangement to return to employment prior to Claimant’s effective date of retirement, whether sufficient time had passed between Claimant’s date of retirement and her return to service, and whether Claimant had continued to provide the same or related services she had provided prior to the date of her retirement. (Exhibit 14; N.T. 179-181, 185-186).

81. PSERS maintains Return to service Guidelines and Clarifications for returning to service as an independent contractor which are accessible to members and employers via PSERS’ website. (Exhibit 5a; Exhibit 5b; N.T. 86-87).

82. The PSERS’ Guidelines and Clarifications state, in pertinent part, as follows:

Returning to Employment as an Independent Contractor

If a member terminates employment and returns to service shortly thereafter as an “independent contractor, “ or as an employee of an independent entity, with essentially the same job duties as before, PSERS may view the new employment to be a continuation of the prior employment rather than an Employment Emergency or Personnel Shortage.

An exception will be considered if the service is provided on a temporary basis through a legitimate third-party...or if the person is working in a position that was an employment position but has been legally reclassified as an independent contractor position (for example, if bus drivers for a school district are outsourced, and the company that is now handling bus transportation hires the individuals previously employed by the school district).

(Exhibit 5a; Exhibit 5b).

83. The PSERS' Guidelines and Clarifications identify the following factors to be considered when determining whether a member may be considered to be an independent contractor:

- a) If a member is doing different work than they did while active;
- b) Is paid under a form 1099 with a separate written contract;
- c) Receives no fringe benefits;
- d) Sets his/her own hours;
- e) Does not receive a performance evaluation by the district or school;
- f) Supplies his/her own materials;
- g) Has an office outside the school grounds; and
- h) Has the ability to perform the same service for other schools.

(Exhibit 5a; Exhibit 5b).

84. Neither The Public School Employees' Retirement Code, nor PSERS' Regulations define the term "independent contractor". (24 Pa. C.S. §8101 *et. seq.*; 22 Pa.Code § 201 *et.seq.*; N.T. 196-197).

85. Claimant was notified of her right to appeal the Committee's decision to the Board. (PSERS' Exhibit 22)

86. Claimant filed a timely appeal and was granted an administrative hearing and an opportunity to be heard. (Transcript, *passim*)

CONCLUSIONS OF LAW

1. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
2. A preponderance of the evidence is the correct burden of proof to be applied in this administrative action. *Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A. 2d 678, 681-82 (Pa. Cmwlth. 2005).
3. A preponderance of the evidence is "such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence." *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986); *A.B. v. Slippery Rock Area School District*, 906 A. 2d 674 (Pa. Cmwlth. 2006).
4. PSERS is a creature of statute and derives its authority from the provisions of the Retirement Code. 24 Pa.C.S.A. §§8101 *et. seq.*
5. The authority of the Board to grant or deny Claimant's request is limited to the provisions of the Retirement Code; the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).
6. The Retirement Code defines an "annuitant" as "[a]ny member on or after the effective date of retirement until his annuity is terminated." 24 Pa. C.S.A. §8102.

7. An active or an inactive member who attains superannuation age shall be entitled to receive a superannuation annuity upon termination of service and filing of a proper application. 24 Pa. C.S.A. §8307.

8. School service is “service rendered as a school employee.” 24 Pa. C.S. §8102.

9. A school employee is defined under the Retirement Code to mean a person “engaged in work relating to a public school. . . for which work he is receiving regular remuneration as an . . . employee. . . excluding, however, any independent contractor.” 24 Pa. C.S.A. §8102.

10. Claimant has failed in her burden of showing that she experienced a bona fide termination of service prior to February 4, 2009. (Findings of Fact, Nos. 12-70).

11. Claimant was served with all pleadings, Orders and Notices filed of record in this matter, and participated in the hearing with the assistance of legal counsel. (Official Notice-Board records; N.T. 4-230).

12. Claimant was provided appropriate due process in this matter. (Findings of Fact, Nos. 74-77, 85-86).

DISCUSSION

This matter involves an appeal from a March 27, 2014 decision by the PSERS’ Executive Staff Review Committee to deny Claimant’s request to be considered an independent contractor for her post-retirement employer, GJCTC. Claimant does not dispute that she continued to perform business and administrative support services to GJCTC after she retired as the Business Manager for GJCTC, effective January 30, 2009. Rather, Claimant asserts that following a brief break in service, she began to provide administrative support services to GJCTC on February 4, 2009, as an independent contractor. By contrast, PSERS contends that Claimant did not experience a bona fide break in service from GJCTC

and, therefore, did not legitimately become an annuitant under the Retirement Code, effective January 30, 2009. PSERS alternatively asserts that Claimant did not return to service as an independent contractor but, instead, remained a GJCTC employee under the Retirement Code until she ceased employment with GJCTC on November 1, 2013. Claimant asks the Board to enter an Order which reinstates her 2009 retirement date, fully restores her PSERS retirement benefits and fully reimburses her for her lost benefits. Conversely, PSERS contends that the rescission of Claimant's 2009 retirement resulted in Claimant owing PSERS \$388,001.21 in overpaid annuity payments; \$13,584.65 in purchase service credit; and \$4,811.00 in 2013 IRS withholdings made after February 4, 2009.

As the party appealing from the determination of the PSERS Executive Review Committee decision, Claimant bears the burden of establishing that she is entitled to the retirement benefits she seeks under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. § 8101 *et. seq.* *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). The degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. A litigant must satisfy its burden of proof with evidence that is substantial and legally credible, not with mere "suspicion" or by only a "scintilla" of evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990). A litigant's burden of proof before administrative tribunals is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *Id. at* 601-602.

Statutory/Regulatory Framework

It is well established that a retiree's right to benefits under the Retirement Code is strictly limited to those specifically set forth by the Code. *See, Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706

(Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992). Moreover, PSERS is required to 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.A. § 1921(a),(b). Pertinent to Claimant's claim, the Retirement Code provides as follows:

§8307. Eligibility for annuities

- (a) **Superannuation annuity.**- An active or an inactive member who attains superannuation age shall be entitled to receive a superannuation annuity upon **termination of service** and filing of a proper application.

§8346. Termination of annuities.

- (a) General rule. - - If an annuitant returns to *school service* or enters or has entered State service and elects multiple service membership, any annuity payable to him under this part shall cease effective upon the date of his return to school service. . . and in the case of an annuity. . . the present value of such annuity, . . . shall be frozen as of the date such annuity ceases.

24 Pa.C.S.A. §8307(a); §8346(a)(emphasis added).

In turn, the Retirement Code defines "school service" as "service rendered as a school employee." 24 Pa.C.S.A §8102. The term "school employee" is further defined under the Retirement Code as "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.A. §8102 (emphasis added). By contrast, the Retirement Code does not define what constitutes an independent contractor. Instead, the Board's Regulations provide, in pertinent part, "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... upon review of all the circumstances surrounding the employment of the person seeking membership in the program". 22 Pa.Code § 215.5(d)(3).

Analysis-Termination of Service

It is well settled that in order to qualify for an annuity under the Retirement Code, an annuitant must first experience a bona fide break, or termination of service. See, e.g., Ballie v. Public School Employees' Retirement Board, 993 A.2d 944, 951 (Pa. Cmwlth. 2009); 24 Pa.C.S.A §8307(a). In this case, Claimant contends that she terminated from service with GJCTC effective January 30, 2009, and that she later returned to provide work for GJCTC on February 4, 2009, in a capacity other than as a school employee, in particular, as an independent contractor. Thus, a threshold issue in this case is whether Claimant experienced a termination, or break in service prior to providing services under the Business/Administrative Services Support Contract. Upon considering such factors as whether there was a prearrangement to return to employment prior to Claimant's effective date of retirement, whether sufficient time had passed between Claimant's date of retirement and her return to service, and whether Claimant had continued to provide the same or related services she had provided prior to the date of her retirement, this Hearing Officer finds that Claimant did not experience a bona fide termination in service between January 30, 2009 and February 4, 2009, under the particular facts of this case.

The record shows that Claimant continued to have an employment relationship with GJCTC after the effective date of her retirement, notwithstanding certain differences in Claimant's job responsibilities under the Business/Administrative Services Support Contract. While Claimant's school service may have changed in terms of its nature and scope under the Contract, Claimant still continued to provide school service, albeit to a different and/or to a lesser extent. Indeed, it was precisely because Claimant could use the particular skill set and institutional knowledge she acquired as the former GJCTC Business

Manager in her new role, that GJCTC retained Claimant after her retirement. For that reason, GJCTC readily admitted that Claimant was the only person it considered prior to entering into the Contract with Claimant. Such a change in the nature and scope of Claimant's services, particularly services which relate to and/or derive from Claimant's prior service is not the equivalent of a termination of service.

Notably, the Hearing Officer's finding that there was not a bona fide break in service is not intended to imply that Claimant and GJCTC colluded to defraud or otherwise perpetuate a phony retirement. On the contrary, the record shows that Claimant repeatedly refused efforts by GJCTC to retain her services after the effective date of her retirement. The record equally demonstrates that the parties ultimately entered into the Business/Administrative Services Support Contract with the expectation that Claimant would fulfill her duties under the Contract as an independent contractor.

It is uncontested that Claimant and GJCTC entered into the Business/Administrative Services Support Contract on December 11, 2008, prior to the effective date of Claimant's retirement, January 30, 2009. While the Contract was, therefore, "pre-arranged" in relation to the effective date of Claimant's retirement, the record unequivocally shows that the Contract was neither contemplated, nor discussed with GJCTC personnel, prior to Claimant filing her Application for Retirement on November 7, 2008, through which she established January 30, 2009, as her effective date of retirement. On the contrary, the uncontroverted record demonstrates that Claimant fully intended to retire as of January 30, 2009, when she completed her retirement application on November 7, 2008, and that she had no intention of returning to work for any employer, in any capacity, after that date. Indeed, it was not until Claimant was approached by Alan Tresnick and John Augustine, II on several occasions after announcing her retirement, that Claimant first considered returning to service at GJCTC in some capacity. Conversely, the record is devoid of any evidence that the parties colluded prior to Claimant's

announced retirement so as to have Claimant's retirement coincide with her return to service under the Business/Administrative Services Support Contract.

Although GJCTC did not consider hiring anyone to replace Claimant and/or did not advertise her position within the thirty (30) days after learning of her pending retirement, such inaction by GJCTC is understandable in light of Claimant's unique historical knowledge and experience and GJCTC's desire to explore the possibility of Claimant returning to service before pursuing alternative options. Such inaction by GJCTC to hire someone other than Claimant does not necessarily establish a preconceived plan between the parties to effect a phony retirement, particularly in light of the established chronology of events.

Although GJCTC and Claimant entered into the Business/Administrative Services Support Contract with the expectation that Claimant would serve as an independent contractor under the Contract, such an expectation does not serve to create an actual, bona fide termination of service required under the Retirement Code. Rather, the fact that Claimant eventually acquiesced to GJCTC's repeated requests to provide administrative services following the date of her retirement, essentially negated the effect of her prior refusals for the purpose of evaluating whether Claimant had, in fact, terminated her employment relationship with GJCTC under the Retirement Code. Instead, the nature of Claimant's actual, ongoing relationship with GJCTC, before and after January 30, 2009, is controlling.

In this case, many, but not all, of Claimant's responsibilities at GJCTC under the Business /Administrative Services Support Contract were different from those she had as Business Manager at GJCTC. However, a mere reduction or modification in the services provided, or the manner by which those services were provided, does not equate to a termination of service. Prior to her retirement, Claimant's position as Business Manager consisted of thirty-eight (38) separate duties and responsibilities for which she retained four (4) under the Business /Administrative Services Support

Contract. Claimant continued to be “responsible for calculating the school board membership every three years” under the Business/Administrative Services Support Contract for which she was also responsible as Business Manager. In that capacity, Claimant calculated the school board membership by performing a financial calculation involving each of the seven (7) participating school districts in order to determine how many members from each school district would be on the GJCTC Joint Operating Committee. Claimant also continued to be “Responsible to attend all meetings which deal[t] with fiscal matters and monthly board meetings” under the Business/Administrative Services Support Contract for which she was also responsible as Business Manager. Claimant attended approximately ten (10) Board meeting per year, took the minutes of the meetings, and attended approximately four (4) fiscal meetings per year in fulfilling the requirement of “attend[ing] all meetings which deal[t] with fiscal matters and monthly board meetings” as Business Manager and under the under the Business/Administrative Services Support Contract.

Claimant also continued to be “Responsible for the recording of meeting minutes, in the absence of the Joint Operating Committee Recording Secretary, when requested to do so” as Business Manager and under the Business/Administrative Services Support Contract. Claimant similarly continued to perform “Any other duties as assigned by the Administrative Director” under the Business /Administrative Services Support Contract, as she had done as Business Manager.

With respect to other duties and responsibilities Claimant had before her retirement, Claimant continued to provide limited services related to those duties after she began working under the Business/Administrative Services Support Contract. Prior to her retirement, for example, Claimant was responsible for coordinating and preparing the annual budget for GJCTC, to include timely filing of PDE 2028 General Fund Budget with the Pennsylvania Department of Education. Subsequent to January 30, 2009, Claimant’s involvement was limited to providing some data to Ms. McCall as

Administrative Assistant of Fiscal Operations for inclusion in the budget. Under the Business/Administrative Services Support Contract, Claimant was no longer responsible for preparing and/or filing the Budget.

Prior to January 30, 2009, Claimant was responsible for reconciling all bank accounts. After her retirement, Claimant balanced only the general funds and the capital reserve fund, but not the student activity funds. Prior to January 30, 2009, Claimant was also responsible for preparing annual salary listings in accordance with adopted policies and negotiated agreements. Subsequent to January 30, 2009, however, Claimant only provided some data and information to GJCTC, and reviewed the information with the school, if requested.

Prior to her retirement, Claimant was responsible for preparing and processing the bi-weekly payroll through a computerized payroll system, including processing the payroll taxes, reports, voluntary payroll deductions, payroll quarterlies, and year-end W-2's and 1099's. Under the Business /Administrative Services Support Contract, Claimant only coded payroll. Prior to January 30, 2009, Claimant was also responsible for preparing and overseeing budget transfers. After January 30, 2009, Claimant was no longer responsible for those tasks but, instead, only assisted Ms. McCall and the School's certified public accountant when needed by emailing or calling Ms. McCall to inform her of what needed to be transferred between accounts.

Before her retirement, Claimant was responsible for establishing and supervising the budgeting, accounting and reporting for all funds received through grants, including preparing quarterlies and close-outs reports being filed in a timely manner. After January 30, 2009, Claimant no longer did coding for the grants, but filed quarterly reports after noting expenses. Claimant also worked with the administrators in charge of particular grants by preparing budgets. Prior to January 30, 2009, Claimant was responsible for acting as an advisor to the Administrative Director on all questions relating to the

business and financial affairs of the school. Subsequent to January 30, 2009, Claimant only provided advice to Mr. Augustine when he contacted her for fiscal information. Although Claimant's duties under the Business/Administrative Services Support Contract primarily shifted from being responsible for all day-to-day operations, assigning work, and ensuring the work was completed, to assisting the business office in an advisory capacity, her later responsibilities still constituted school service.

Admittedly, Claimant did not perform, and was not responsible for any aspect of twenty-five (25) of the thirty-eight (38) tasks she had previously performed as Business Manager. The record also shows that Claimant undertook new duties and responsibilities under the Business/Administrative Services Support Contract which did not exist at the time of her retirement. Specifically, Claimant became responsible for administering grants under the American Recovery and Reinvestment Act of 2009. Claimant additionally assisted Mr. Augustine in his new role as Secretary of the Pennsylvania Association of Career & Technical Administrators. Once again however, Claimant's undertaking of new responsibilities under the Business/Administrative Services Support Contract did not act to sever Claimant's ongoing employment relationship with GJCTC, which continued after January 30, 2009.

Although the record shows the lapse of four calendar days (two work days) between the date of Claimant's retirement as Business Manager and the date she began her new position under the Business /Administrative Services Support Contract, such a minimal passage of time, in unto itself, simply cannot serve to have severed Claimant's employment relationship with GJCTC, particularly when considering the continuing nature of Claimant's involvement with the GJCTC business office following her retirement, and the fact that Claimant "retired" in the middle of the academic school year. Although PSERS currently employs a policy wherein it presumes a bona fide break in service exists whenever a former employee returns to service after a period of 90 days, the amount of time required to elapse is not

absolute.¹ Instead, the determination of whether a bona fide break in service has occurred after less than 90 days, is “fact specific” and “dependent on the facts specific to the individual request.” (N.T. 200-201). In that regard, the passage of four days/ two work days must be evaluated under the totality of the circumstances so as to make the passing of the two work days substantively meaningful if the requirement for an actual termination of service under the Retirement Code is to have any practical significance.

As set forth above, Claimant did not return to service with GJCTC in an entirely different capacity from that in which she previously worked as Business Manager. Instead, the duties and responsibilities performed by Claimant under the Business/Administrative Services Support Contract merely modified the nature and scope of duties she performed as Business Manager. This fact, when considered in conjunction with the parties having entered into the Business/Administrative Services Support Contract prior to Claimant’s effective date of retirement, supports the conclusion that the mere passage of two work days between the effective date of her retirement and the start of her work under the Contract was not sufficiently meaningful to have effectively terminated Claimant’s prior service.² Instead, the nature of the duties and responsibilities Claimant continued to perform after her effective date of retirement is far more determinative. Based upon the totality of circumstances set forth above, this Hearing Officer finds that Claimant did not experience a bona fide termination of school service, effective January 30, 2009.

¹ See, PSERS MBR-2011-10.4. (Exhibit 17). Notably, MBR-2011-10 was approved on May 16, 2013, approximately four (4) years following Claimant’s effective retirement date, and is an internal policy which is not published for public use. (N.T. 201-203).

² In *Ballie v. Public School Employees’ Retirement Board*, 993 A.2d 944 (Pa. Cmwlth. 2010), the Pennsylvania Commonwealth Court found that the claimant did not have a break in service based upon the lack of any interruption in the Claimant’s work schedule. However, the Court did not provide any guidance regarding the minimum amount of time required to establish a bona fide break in service. *Ballie*, 993 A.2d at 951.

Independent Contractor Analysis

Having found that Claimant did not experience an actual termination of service from GJCTC, Claimant's status as an independent contractor is moot to the extent the Retirement Code requires an annuitant to experience a bona fide termination of service in order to be eligible for an annuity under the Code. Because this Opinion is of an advisory nature however, an analysis of whether Claimant was an independent contractor under the Business/Administrative Services Support Contract becomes necessary in the event PSERS ultimately determines that Claimant did, in fact, experience an actual termination of service.

Although the Retirement Code at 24 Pa.C.S.A. §8102 expressly excludes independent contractors from being school employees, it fails to define the term "independent contractor". Instead, PSERS' Regulations at 22 Pa.Code § 215.5(d)(3) require PSERS to determine whether a person is a school employee or an independent contractor by reviewing of all the circumstances surrounding the employment of the person seeking membership in the program. Although PSERS must liberally administer the retirement system in favor of its members, "a liberal administration of the retirement system does not permit the board to circumvent the express language of the Code. . . ." *Dowler v. Public School Employees' Retirement Board*, 620 A. 2d 639, 644 (Pa. Cmwlth. 1993). As the party claiming her entitlement to retirement benefits, Claimant bears the burden of proving that she was an independent contractor under the Business/Administrative Services Support Contract. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999). See also, *Wingert v. State Employees' Retirement Board*, 589 A/2d 269 (Pa. Cmwlth. 1991).

In the absence of a statutory or regulatory definition of "independent contractor" in the Retirement Code, factors for consideration identified by the Pennsylvania Supreme Court when determining whether a person is an independent contractor are instructive. In *Zimmerman v. Public*

School Employes' Retirement Board, 522 A.2d 43, 45 (Pa. 1987), the Pennsylvania Supreme Court identified the following factors to be considered when attempting to determine whether a person is an employee or an independent contractor: 1) Control of manner of work to be done; 2) Responsibility for result only; 3) Terms of agreement between the parties; 4) The nature of the work or occupation; 5) Skill required for performance; 7) Whether one is engaged in a distinct occupation or business; 8) Which party supplied the tools; 9) Whether payment is by the time or by the job; 10) Whether work is part of the regular business of the employer; and 11) The right to terminate the employment at any time.

Zimmerman, 522 A.2d at 45. None of the foregoing factors is dispositive of a person's status as an independent contractor in unto itself. Instead, each case must be determined on its own facts. *Shafer v. State Employes' Retirement Board*, 696 A.2d 1186, 1192 (Pa. 1997).

PSERS' Guidelines and Clarifications closely parallel the factors identified in *Zimmerman* and identify the following factors to be considered when determining whether a member may be considered to be an independent contractor: 1) Whether a member is doing different work than they did while active; 2) Whether the member is paid under a form 1099 with a separate written contract; 3) Whether the member receives fringe benefits; 4) Whether the member sets his/her own hours; 5) Whether the member receives a performance evaluation by the district or school; 6) Whether the member supplies his/her own materials; 7) Whether the member has an office outside the school grounds; and 8) Whether the member has the ability to perform the same service for other schools. In this case, the record shows that Claimant satisfied each of the criteria for being an independent contractor identified in the PSERS' Guidelines and Clarifications, in addition to satisfying many of the criteria articulated in *Zimmerman*.

When considering the control of the manner of work to be done, Pennsylvania courts have routinely found that a major characteristic of an employee relationship is that the master not only controls the results of the servant's work, but also has the right to direct the way in which the work shall

be done. *Zimmerman*, 522 A.2d at 45 (citing *Feller v. New Amsterdam Casualty Co.*, 70 A.2d 299 (Pa. 1950)). Conversely, the characteristic of an independent contractor relationship is that the person engaged in the work has exclusive control over the manner by which the work is to be done, and is responsible only for the result. *Id.*

The record in this case shows that Claimant had exclusive control over the manner by which she performed her duties under the Business/Administrative Services Support Contract and was responsible only for the results of her work. Claimant testified that she did not work on a pre-established schedule and was not required to work a minimum or maximum number of hours per week under the Business/Administrative Services Support Contract. Instead, Claimant established her own schedule and number of hours she worked, and generally worked in the evening, until midnight or until 2:00 a.m. Claimant did not receive any performance evaluations while working under the Business/Administrative Services Support Contract.

Claimant was also free to provide administrative services to parties other than GJCTC, and was not limited to providing services exclusively to GJCTC under the Contract. Moreover, Claimant did not report to, and was not under the direction of anyone at GJCTC during the pendency of the Business /Administrative Services Support Contract. On the contrary, Claimant rarely saw her former Supervisor, John Augustine, II, upon assuming her duties under the Contract, with the exception of when she picked-up or dropped-off materials, or when Mr. Augustine contacted her with a question or assigned her work under the Contract. Similarly, GJCTC did not impose particular work standards upon Claimant or her work product. Instead, Claimant presumed that any dissatisfaction with her work by GJCTC would be reflected by GJCTC no longer requesting her services.

Other elements of the record support a finding that Claimant provided services to GJCTC as an independent contractor. In terms of supplies and equipment, for example, the hearing testimony shows

that Claimant did not maintain a business office at GJCTC but, instead worked from her home with the exception of picking-up or dropping-off materials at GJCTC and/or periodically consulting with Mr. Augustine. Claimant used her own computer and printer at home, and used her own office supplies to perform her duties under the Contract. Claimant also paid for the internet services she required for her work. GJCTC did not compensate or reimburse Claimant for any of her work-related expenses or travel. Instead, Claimant deducted the expenses as unreimbursed business expenses on her tax returns. Claimant also ceased being paid a salary following her retirement but, instead, earned \$35 an hour under the terms of the Business/Administrative Services Support Contract. Claimant similarly did not receive any fringe benefits under the contract. Instead, Claimant simply continued to receive the benefits to which she was entitled independent of the Contract.

In terms of payment, Claimant was not provided a salary but, instead, submitted invoices for payment to GJCTC approximately every two weeks. Claimant's invoices identified the work she performed and the total number of hours she worked. Claimant's amount and frequency of pay under the Contract was, therefore, based exclusively upon when she submitted her invoices for payment. Although John Augustine reviewed Claimant's invoices for accuracy prior to payment, the record is devoid of any evidence that he controlled the manner by which the work reflected on the invoices was performed. Consistent with being an independent contractor, Claimant's compensation under the Business/Administrative Services Support Contract was reflected on 1099 Forms, not on W-2 Forms. Further, GJCTC did not deduct payroll taxes from Claimant's compensation during the pendency of the Business/Administrative Services Support Contract as it had done when Claimant was Business Manager.

Upon consideration of the foregoing factors under the particular facts of this case, this Hearing Officer finds that Claimant has established by a preponderance of the evidence that had she entered into

the Business/Administrative Services Support Contract with GJCTC at arm's length, without having had an ongoing employment relationship with GJCTC, she would have provided services to GJCTC as an independent contractor under the Business/Administrative Services Support Contract from February 4, 2009 through November 1, 2013.³

Due Process

Claimant asserts that she was denied due process based upon PSERS having rescinded her retirement and by withholding further payments prior to conducting a hearing. As correctly noted by PSERS in its Reply Brief, Claimant's argument that her due process rights required a pre-deprivation hearing has been expressly rejected by the Pennsylvania Commonwealth Court. *See, e.g. Hairston-Brown v. Public School Employees' Retirement Board*, 78 A.3d 720, 731 (Pa. Cmwlth. 2013); *Wyland v. Public School Employees' Retirement Board*, 669 A.2d 1098 (Pa.Cmwlth. 1996); *Hoerner v. Public School Employees' Retirement Board*, 655 A.2d 207, 213-214 (Pa.Cmwlth. 1995), *rev'd on other grounds*, 684 A.2d 112 (Pa.1996). As recognized by the Commonwealth Court, an evidentiary hearing prior to October 31, 2013 was not required for due process purposes because the initial determinations in this case were the result of staff functions by PSERS' retirement processes and, therefore, were subject to further, final review. *Id.* Instead, the decision in *Hairston-Brown* is controlling. In that case, the Court stated:

[Claimant] could, and did, appeal the initial determination of [her] retirement benefits to PSERS' appeal committee and, ultimately, to the [B]oard. [She] filed a brief and a reply brief prior to the hearing before the hearing examiner, attended the hearing and presented evidence, and filed exceptions to the hearing examiner's determination with the [B]oard. As [Claimant] was given notice and a hearing prior to the final determination

³ Taken to its logical conclusion, Claimant's position that a member need only establish an independent contractor relationship with a prior employer in order to qualify as an annuitant, without needing to first formally terminate the employment relationship, would enable a claimant to simply continue the employment relationship under different terms, thereby impermissibly rendering the termination requirement of 24 Pa. C.S. §8307 meaningless in contravention of 1 Pa.C.S.A. § 1921(a), (b) which requires PSERS to construe the Retirement Code according to its plain meaning and in such a manner as to give effect to all of its provisions.

of [her] retirement benefits, and there exists no authority for a hearing in connection with PSERS' initial review, this claim is meritless.

Hairston-Brown v. Public School Employees' Retirement Board, 78 A.3d at 731 (citing *Wyland v. Public School Employees' Retirement Board*, 669 A.2d at 1104).

For the foregoing reasons, the following Recommendation shall be issued:

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PSERB
EXECUTIVE OFFICE

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

In Re: :
Account of Cathy Robertson : **Docket No. 2014-10**
Claim of Cathy Robertson :

RECOMMENDATION

AND NOW, this **14th** day of **July, 2015**, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Claimant's appeal from the March 27, 2014 decision of the PSERS' Executive Staff Review Committee be **DENIED**.



Marc A. Moyer, Esquire
Hearing Officer

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Date of Mailing: 7/15/15