



PSERB Resolution 2024-66

Re: Account of Ellen Wright, Docket No. 2020-05

October 25, 2024

RESOLVED, that, in the matter of Ellen Wright, Docket No. 2020-05, the Public School Employees' Retirement Board accepts the recommendation of the Benefits and Appeals Committee and adopts the attached Opinion and Order of the Board and dismisses Claimant's appeal with prejudice.

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

IN RE: ACCOUNT OF ELLEN WRIGHT
DOCKET NO. 2020-05
CLAIM OF ELLEN WRIGHT

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the record of this proceeding, including the Proposed Opinion and Recommendation of the Hearing Examiner, Claimant's Exceptions and Brief in Support Thereof, and the Public School Employees' Retirement System's ("PSERS") Brief Opposing Exceptions.

Claimant, Ellen Wright, requests to have settlement payments associated with future school years for which she had agreed not to work, i.e., the 2017-2018 through 2020-2021 school years, be considered as retirement-covered compensation. In the alternate, she asks that the Board conclude that she is eligible to have this "front pay," as she characterizes it, credited to her retirement account pursuant to a waiver of adjustment, as set forth in Section 8303.1 of the Public School Employees' Retirement Code ("Retirement Code").

On October 27, 2023, the Hearing Examiner submitted his proposed Opinion and Recommendation ("HEO"). He recommends that Claimant's appeal be denied and the decision of PSERS' Executive Staff Review Committee ("ESRC") be affirmed. After review and consideration of the record, including the parties' briefs, the exceptions, and the HEO, the Board generally finds appropriate the Hearing Examiner's proposed History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation. In light of the number of exceptions to be addressed and the modifications that this Board is making to the HEO, however, we believe it is more appropriate to issue our own Opinion and Order. Accordingly, the Board hereby issues the following:

HISTORY

This matter is before the Board on an appeal filed by Claimant. On February 14, 2020, Claimant appealed from a decision of the ESRC dated January 17, 2020 (“ESRC denial letter”) that (1) denied Claimant’s request to have settlement payments associated with future school years for which she had agreed not to work, i.e., the 2017-2018 through 2020-2021 school years, be considered as retirement-covered compensation, and (2) denied her request for a waiver of adjustment. On March 5, 2020, PSERS filed its Answer to Claimant’s appeal.

By letter dated November 16, 2021, former Board Secretary Glen R. Grell appointed Michael T. Foerster, Esq. as hearing examiner for Claimant’s administrative appeal. The letter was addressed to Hearing Examiner Foerster, and Claimant and PSERS’ counsel received a copy. The letter explained, among other things, that the requested administrative hearing would be conducted pursuant to 1 Pa. Code § 31.1, et seq., of the General Rules of Administrative Practice and Procedure (“GRAPP”), 22 Pa. Code §§ 201.1-201.12 of the Board’s duly promulgated rules and regulations, and 2 Pa.C.S. § 501, et seq., of the Administrative Agency Law.

By letter dated November 16, 2021, the Board’s Appeal Docket Clerk notified Claimant that the administrative hearing had been scheduled for January 26, 2022, at PSERS’ Harrisburg office. Subsequently, Claimant requested multiple, uncontested continuances. By letter dated January 26, 2022, the hearing was rescheduled for April 13, 2022. By letter dated October 5, 2022, the hearing was rescheduled for January 10, 2023. By letter dated February 8, 2023, the hearing was rescheduled for April 20, 2023. The hearing was held on April 20, 2023.¹ Claimant attended the hearing, without legal counsel, and represented herself. Counsel Dwight A. Decker, Jr., Esq. represented PSERS. Claimant testified, presented documentary evidence, and was afforded the opportunity to cross-examine PSERS’ witness and assert evidentiary objections. With a sponsoring witness, PSERS presented its case through

¹ To the extent that Claimant’s exception number 7 corrects the Hearing Examiner’s misstatement of the date the hearing was held, the Board notes that the hearing was held on April 20, 2023, not February 13, 2022. (No. 7, Claimant’s Exceptions, p. 12).

documentary evidence. At the close of the hearing, the parties elected to file post-hearing briefs. The evidentiary record was closed and the transcript was filed, on May 17, 2023.²

On May 23, 2023, the Hearing Examiner issued an Order establishing a briefing schedule. By Order dated June 21, 2023, the Hearing Examiner granted Claimant's uncontested request and extended the deadline for her to file her post-hearing brief to July 24, 2023. By Order dated July 24, 2023, the Hearing Examiner granted Claimant's uncontested second request and further extended the deadline for her to file her post-hearing brief to August 23, 2023. Claimant filed her post-hearing brief on August 23, 2023. PSERS timely filed its brief on September 22, 2023, and Claimant filed her reply brief on October 23, 2023, after an uncontested extension.³

On October 27, 2023, the Hearing Examiner submitted the HEO. Pursuant to GRAPP, which this Board adopted, a claimant may except to a hearing examiner's proposed report within 30 days after service of the proposed report. See 22 Pa. Code § 201.11(d); 1 Pa. Code §§ 35.211, 35.213. Claimant's exceptions to the HEO were due on or before November 27, 2023, and PSERS' response to any exceptions was due on or before December 18, 2023. By Order dated November 17, 2023, the Board granted Claimant's uncontested request to extend her deadline to file her exceptions to December 18, 2023. Claimant filed Claimant's Exceptions and Brief in Support Thereof

² After the conclusion of a hearing, the submission of additional evidence by any party is prohibited absent a petition to reopen the proceeding with proof that the facts claimed to constitute the grounds for the reopening include material changes of fact or law that occurred since the conclusion of the hearing. 1 Pa. Code § 35.231. Accordingly, to the extent Claimant's exception number 7 challenges the closing of the record on May 17, 2023, it is denied. (No. 7, Claimant's Exceptions, p. 12). The evidentiary record properly closed with the filing of the hearing transcript. *Id.* Notably, the Hearing Examiner reminded Claimant that the hearing was her last time to enter evidence into the record. See (N.T. 111).

³ By Order dated October 3, 2023, the Hearing Examiner granted Claimant's request and extended the deadline for her to file her reply brief to October 20, 2023. To the extent that Claimant's exception number 7 takes issue with the Hearing Examiner failing to note the filing of Claimant's reply brief in his History section, the filing of Claimant's reply brief is noted. (No. 7, Claimant's Exceptions, p. 12).

on December 18, 2023, and PSERS' timely filed its Brief Opposing Exceptions on January 5, 2024. Consequently, the matter is now before the Board for final determination.

CLAIMANT'S AMENDED EXCEPTIONS

On May 28, 2024, which was approximately five months after exceptions were due and filed, Claimant filed amended exceptions. On June 13, 2024, PSERS objected to Claimant's amended exceptions, *inter alia*, as untimely. As a preliminary matter, this Board sustains PSERS' objection. Claimant's amended exceptions are late and, accordingly, they will not be considered.

Claimant argues that amended exceptions are permitted under Section 33.41 of GRAPP that states: "An amendment to a submittal may be tendered for filing any time and shall be deemed filed as of the date of tender unless the agency shall otherwise order." 1 Pa. Code § 33.41. Claimant reads Section 33.41 to support the proposition that she can file an amendment to any document, regardless of the deadline for the original filing. (Claimant's Response to PSERS' Objection to Claimant's Amended Exceptions and Brief in Support Thereof, ¶ 1). Section 33.41, however, is a procedural provision that only provides direction as to the date that an amendment is deemed filed. See 1 Pa. Code § 33.41. The substantive provisions of GRAPP detailing which amendments are permissible relate to an application, complaint, petition, or other pleading, not to a brief on exceptions. See 1 Pa. Code §§ 35.48, 35.49, 35.50.

With respect to the filing of exceptions, specifically, Section 201.11 of the Board's regulations provide that they are to be filed in accordance with Sections 35.211 and 35.212 of GRAPP. See 22 Pa. Code § 201.11(d). The provisions in GRAPP dictate a 30-day deadline for a claimant to file exceptions and provide that "[n]o further response will be entertained *unless the agency head, with or without motion, so orders.*" 1 Pa. Code § 35.211 (emphasis added). GRAPP also directs that "[o]bjections to any part of [a] proposed report which is not the subject of exceptions may not thereafter be raised[.]" 1 Pa. Code § 35.213. Because Claimant's amended exceptions were untimely tendered for filing, without leave of this Board, they will not be considered. See

1 Pa. Code §§ 35.211, 35.213; 22 Pa. Code § 201.11(d); *Earth Share v. Office of Admin.*, 660 A.2d 138, 141 (Pa. Cmwlth. 1995).

CLAIMANT'S TIMELY FILED EXCEPTIONS

Claimant raises seven exceptions in her filing of December 18, 2023, challenging various proposed findings and conclusions in the HEO. The Board has reviewed the exceptions and concludes that they do not alter the outcome of this matter. Claimant's exceptions numbered 1, 2, 4, 5, 6, and 7 largely re-raise the arguments from her brief and are addressed more fully below. Regarding exception number 3, Claimant alleges that she was denied due process and a right to petition the government. In bringing these constitutional allegations, Claimant primarily argues that she was not provided with detailed information about the appeal process and that the Board's procedures differ from those used by other agencies. (No. 3, Claimant's Exceptions, pp. 6-9).

Preliminarily, the record, including Claimant's evidence, reflects that Claimant was represented by legal counsel in her initial discussions with PSERS as far back as 2019 and, with respect to these proceedings particularly, from January 6, 2022 until October 12, 2022, when her legal counsel withdrew their representation of Claimant. (N.T. 59-60; CL-27;⁴ Board Record (January 6, 2022 Notice of Appearance; Board Record (October 12, 2022 Withdrawal of Appearance)). Claimant, thus, presumably could have directed questions to her counsel as to process and procedure to the extent they existed at those times.⁵ The record also reflects that Claimant was provided with information regarding the appeal process, throughout the proceedings; that the information was available to her in the law; and that she educated herself on the

⁴ Although Claimant's Exhibit CL-27 may not be relied upon to form the basis of a finding of fact because it is objected to hearsay, this Board may nonetheless refer to it for its effect on the listener, i.e., that Claimant was represented by counsel on April 2, 2019. See *Walker v. Unemployment Compensation Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

⁵ Pursuant to GRAPP, a claimant may represent themselves before the Board. The Claimant has the choice of retaining their own counsel or proceeding *pro se*. See 1 Pa. Code §§ 31.21, 31.22; see *also* Board Record (Appeal Docket Clerk Letter dated November 16, 2021).

process. Indeed, Claimant was informed that the proceedings were conducted pursuant to the Board's Regulations, GRAPP, and the Administrative Agency Law. (See, e.g., Board Record (November 16, 2021 Hearing Examiner Appointment Letter)). She also was informed of deadlines and the opportunity to present evidence at the administrative hearing. (See, e.g., Board Record (November 16, 2021 Hearing Notice)). Claimant, as shown by the filing of her nonadjudicatory benefit appeal with the ESRC and this adjudicatory benefit appeal, was aware of and availed herself of the process for a government review of the determination at issue here. She has actively participated in the proceedings, including requesting and receiving numerous extensions for multiple filings, testifying, offering evidence, filing briefs and exceptions, requesting oral argument, and responding to filings. (Board Record). Claimant's assertion of ignorance of the law or lack of information as to the process, therefore, is not credible.

Claimant alleges that she was at a disadvantage because she "was not automatically provided with a docket showing what both the hearing examiner and PSERS's counsel knew." (No. 3, Claimant's Exceptions, p. 7). The "docket" or "Board record," however, is the compilation of the documents filed with the Board and served in this case, i.e., the documents Claimant filed and the documents served upon her. Accordingly, Claimant was provided with all the documents that comprise the "docket" in this matter.

Claimant also takes issue with the references to the "docket" in the HEO and in PSERS' brief, in the proposed findings of fact. This Board has reviewed the proposed findings of fact, and finds that all citations are to admitted exhibits, filings, or notes of testimony (i.e., the transcript) that were presented by or available to Claimant. Notably, there is only one citation to the "Board Record" in the HEO, in proposed Finding of Fact 18, and it cites to Claimant's own *Appeal and Request for Administrative Hearing*. For the proposed Finding of Fact 24, the HEO cites to the "docket" generally, which are the filings that Claimant either submitted or received. Consequently, this Board concludes that these allegations are without merit, factually, and do not support a claim for lack of due process.

Claimant notes that she was not sent this Board's "Oral Argument Policy," but in the same paragraph she admits to having reviewed it. Of note, Section 201.12 of the Board's regulations also addresses oral argument before this Board, which was referenced in the Hearing Examiner appointment letter dated November 16, 2021. (Board Record (November 16, 2021 Hearing Examiner Appointment Letter)). Regardless, as demonstrated by her actions, Claimant was aware she could request oral argument with this Board and, in fact, did so. (Relief Requested, Claimant's Exceptions, p.13). Again, there is no lack of due process.

Claimant alleges it was a violation of due process for her administrative hearing to be conducted under GRAPP rather than the procedures promulgated by the Pennsylvania Human Relations Commission. (No. 3, Claimant's Exceptions, p. 9). Initially, GRAPP is the accepted practice and procedure that governs all agencies of the Commonwealth, unless otherwise provided by law. 1 Pa. Code § 31.1(a). GRAPP is not specific to the Board. Regardless, Claimant's preference for another government agency's procedures does not establish a violation of due process. Likewise, Claimant's citation to the Department of State's website listing hearing examiners' preferences for Department of State proceedings, which are not relevant here, does not establish a lack of due process. Notably, Claimant fails to cite any provision of law that would have required PSERS or this Board to provide her with more detailed information than it did and she fails to provide any example of how this alleged lack of notice impacted her appeal. She appears to be challenging the processes because she has not been successful, not because there is a lack of due process.

Claimant avers that PSERS' counsel asked her, at one point, whether she was going to quit. She also believes that there are problematic images from a movie in one of PSERS' publications. PSERS' counsel, in response, strongly disagrees with Claimant's characterization of their conversation and her speculation regarding the publication. Although it is unclear how these arguments relate to the legal issues before this Board, that is irrelevant. This evidence – both that of Claimant and PSERS – was not presented at the administrative hearing for consideration and is not admissible now. It, therefore, will not be considered.

Claimant's complaint about not being able to verbally present her case to the ESRC also does not support relief. The appeal before the ESRC was a nonadjudicatory benefit appeal from which Claimant appealed and was afforded an opportunity to present her case, in full, to this Board. The Commonwealth Court has previously concluded, on multiple occasions, that this Board's appeal process affords adequate due process:

Our *Wyland [v. Public School Employees' Retirement Board]*, 669 A.2d 1098 (Pa. Cmwlth. 1996)] decision is controlling here, wherein we 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 . . . prior to the hearing before the [H]earing [E]xaminer, attended the hearing and presented evidence, and filed exceptions to the [H]earing [E]xaminer'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.

Id. at 1101. Accordingly, Claimant's procedural and substantive due process rights were not violated. *Robertson v. Pub. Sch. Emps.' Ret. Sys.*, 162 A.3d 569, 575-576 (Pa. Cmwlth. 2017), *appeal denied*, 174 A.3d 1022 (Pa. 2017) (quoting *Hairston-Brown v. Pub. Sch. Emps.' Ret. Bd.*, 78 A.3d 720, 731 (Pa. Cmwlth. 2013), *appeal denied*, 87 A.3d 817 (Pa. 2014)) (emphasis added). This Board thus finds that Claimant was afforded due process and exception number 3 is denied.

CLAIMANT'S REQUEST FOR ORAL ARGUMENT

Claimant requests oral argument. (Requested Relief, Claimant's Exceptions, p.13). Section 201.12 of the Board's regulations provide that oral argument is at the Board's discretion:

The right to oral argument is discretionary with the Board and will be granted to the extent the Board believes it will be helpful in enabling the Board to acquire an understanding of and to resolve the issues. When oral argument is granted, the Secretary of the Board will schedule the argument for the next available Board meeting.

22 Pa. Code § 201.12(a). Because the Board does not believe that oral argument is necessary to help the Board to understand and resolve the issues presented herein, Claimant's request for oral argument is denied.

FINDINGS OF FACT

Preliminarily, Claimant's first exception challenges the Hearing Examiner's use of PSERS' proposed findings of fact in his Proposed Opinion and Recommendation. (No. 1, Claimant's Exceptions, pp. 2-3). The Board has carefully and independently reviewed the record of this proceeding. The substantive facts are, largely, undisputed. Claimant appears to take issue with the exclusion of the argument and references to hearsay contained in her proposed findings of fact. Properly objected to hearsay cannot form the basis of a finding of fact. See *Walker*, 367 A.2d at 370. Consequently, Claimant's exception number 1 is denied and the Board, based upon its independent review of the record, finds as follows:

1. Claimant was first enrolled in PSERS by virtue of her employment with Pittsburgh School District ("PSD") on July 1, 1988. (Notes of Testimony ("N.T.") 122).

2. During the 2015-2016 school year, Claimant worked the first three months of the school year before being suspended with pay on November 14, 2015. (N.T. 86).

3. On January 25, 2016, Claimant's suspension was converted to a suspension without pay. (N.T. 86).

4. Claimant filed an employment dispute against PSD challenging, among other things, the suspensions and alleging age discrimination. (N.T. 86-87; PSERS-1; CL-5).

5. Claimant settled her employment disputes with PSD by *Settlement and Release Agreement* ("Agreement") that was signed by Claimant on October 24, 2017 and ratified by the PSD Board of School Directors on October 25, 2017. (N.T. 87; PSERS-1; CL-5).

6. The Agreement stated, in relevant part, as follows:

FIRST: In exchange for, and in consideration of, Wright's execution of this Agreement, the School District shall:

- A. Withdraw the January and August 10, 2016 Statement of Charges against Wright and remove these from Wright's personnel file, in accordance with Section 1130 of the Public School Code;
- B. Pay Wright back pay for the final four (4) days of the first semester of 2015-2016 and the second semester of the 2015-2016 school year and for the 2016-2017 school year, including any retroactive pay raises she would have received under the CBA;
- C. For the 2017-2018 school year, continue Wright's employment with full pay while not requiring that Wright report to the School District;
- D. For the 2018-2019 school year, approve Wright's leave of absence with full pay and utilization of her accumulated sick days;
- E. For the 2019-2020 school year, continue Wright's employment with full pay for the first semester while not requiring that Wright report to the School District, and approve leave without pay for the second semester;
- F. For the 2020-21 school year, approve Wright's leave of absence with full pay and utilization of her accumulated sick days for the first semester and Wright's leave of absence without pay for the second semester;
- G. Make the standard pension contributions commensurate with all of her pay, including any backpay, as specified in this First Section of the Agreement to Public School Employees' Retirement System (PSERS);
- H. Provide to Wright the wages and benefits of employment enjoyed by other School District teachers of equal seniority and credentials through the end of the school year 2020-2021;
- I. Pay its share of Wright's medical benefits until she reaches age 65 in accordance with the applicable CBA; and
- J. Approve Wright's irrevocable letter of resignation and retirement to be submitted no later than seven (7) business days after the last school day for staff of the 2020-21 school year.

Pension payments to PSERS described in (G) above shall be made by the School District on Wright's behalf in the amounts and at the times

and in the manner as required by the applicable CBA and normal custom and practice in connection with the payments described in (B)-(F).

Wright acknowledges that the consideration provided are benefits that are in dispute and she would not be receiving or entitled to had the Parties not settled her claims and entered into this agreement and, further, that this Agreement and the consideration provided by the School District is in full satisfaction and accord of all disputed claims, for all types of damages and relief, whether economic or non-economic, including emotional or psychological injury, wages, compensation or benefits (including but not limited to pension, healthcare or other benefits, except as provided herein), compensatory or consequential damages, punitive damages and attorneys' fees, expenses, costs, and all forms of legal or equitable relief.

(PSERS-1; CL-5).

7. Claimant was represented by counsel in the negotiation and execution of the Agreement between Claimant and PSD. (PSERS-1; CL-5; N.T. 59-60).

8. Claimant used estimates from 2015 and 2016 and an online retirement calculator to craft the Agreement, in an attempt to avoid early retirement penalties. (N.T. 55-57).

9. Following execution of the Agreement, Claimant did not return to work for PSD but PSD continued to issue payments to Claimant. (N.T. 89-92; PSERS-1; CL-5; PSERS-5).

10. In accordance with the Agreement, Claimant submitted an irrevocable letter of resignation to PSD. (N.T. 94).

11. PSERS was not provided with the terms of the Agreement prior to its execution. (N.T. 126).

12. After its execution, PSD submitted the Agreement to PSERS for review. (N.T. 123-26).

13. PSERS reviewed the Agreement and notified PSD, on October 10, 2018, that payments to Claimant after the 2016-2017 school year, pursuant to paragraphs C through F of the Agreement, were not eligible for retirement credit. (N.T. 124; PSERS-

2; CL-14).

14. PSERS also determined that the payments to Claimant for the 2015-2016 and 2016-2017 school years were creditable as back pay but did not fully credit them to Claimant because PSD had not reported the payments for the 2016-2017 school to PSERS. (N.T. 124, 128-29; PSERS-3; CL-29; PSERS-5).

15. PSERS did not delay a determination regarding the Agreement; it reviewed the Agreement in the normal order of PSERS' operations. (N.T. 142)

16. PSD continued to report Claimant to PSERS as an active employee and reported salary and service for Claimant through the 2019-2020 school year. (PSERS-5).

17. When Claimant received her PSERS Statement of Account for the school year ending in 2018, she contacted PSD because she noticed that her "forward pay" was reported but her "back pay" was not. (N.T. 49, 59, 88).

18. PSD informed Claimant that her forward pay was not retirement-covered compensation. (N.T. 59).

19. By letter dated April 2, 2019, Claimant, through legal counsel, contacted PSERS' Office of Chief Counsel and indicated, *inter alia*, that Claimant believed there were reporting errors in her statements of account as far back as the 2015-2016 school year. (N.T. 59-60; CL-27).

20. By letter dated April 29, 2019, PSERS notified Claimant that: (a) her account could be credited with full salary and service for the 2015-2016 school year; (b) PSERS could not recognize any settlement amount as retirement-covered compensation for the 2016-2017 year, at the time, because it had not been reported by PSD; and (c) the settlement payments associated with the 2017-2018 through 2020-2021 school years were not eligible for credit with PSERS because the payments were for future periods of time and are not retirement-covered compensation. The letter included information on how to appeal the determination. (N.T. 128-29; PSERS-3; CL-29).

21. Claimant, through counsel, appealed PSERS' April 29, 2019 determination that the future pay provided for in the settlement agreement was not retirement-covered compensation to the PSERS Executive Staff Review Committee ("ESRC"). (N.T. 95).

22. On January 7, 2020, PSERS requested PSD to correct its reporting related to Claimant for school years 2017-2018 through 2019-2020 to remove the service reported during that time because Claimant was no longer working for PSD. (PSERS-5).

23. By letter dated January 17, 2020, the ESRC denied Claimant's nonadjudicatory appeal, explaining that settlement payments for future salary that are not tied to any service are not "compensation," and it denied Claimant's request for a waiver of adjustment. The letter included information on how to appeal the determination, and it included the form that could be used for an appeal. (PSERS-4; CL-43).

24. Claimant appealed the ESRC's determination by filing an *Appeal and Request for Administrative Hearing (Appeal)* with the Board on February 14, 2020. (N.T. 96; Board Record).

25. PSD later reported Claimant's back pay for the 2016-2017 school year to PSERS, but it refused to make the appropriate changes to remove Claimant's future pay; accordingly, PSERS made the corrections on behalf of PSD. (N.T. 129-31; PSERS-5; CL-17; PSERS-6; CL-36).

26. On April 8, 2020, PSERS notified Claimant that the adjustments to her account were complete and her contributions associated with the 2017-2018 through 2020-2021 school years were returned to PSD so that they could be returned to Claimant. (N.T. 131-33; PSERS-6; CL-36).

27. By letter dated February 1, 2021, PSERS notified Claimant that she would reach superannuation in June 2021 and be eligible for an unreduced retirement benefit. (N.T. 96-97; PSERS-7).

28. On August 27, 2021, Claimant submitted her *Application for Retirement* to PSERS. (N.T. 98; PSERS-8).

29. By letter dated September 14, 2021, PSERS notified Claimant that it finalized the processing of her retirement benefit and provided Claimant with the details of her monthly annuity payments that would begin in September 2021. (N.T. 98-99; PSERS-9).

30. On September 27, 2022, a hearing was held on this matter before Hearing Examiner, Michael T. Foerster, Esq. (N.T. *passim*; Board Record).

31. Claimant was present for her hearing, represented herself, and had the opportunity to be heard, present evidence on her own behalf, cross-examine the witness, make a closing statement for the record, and file a post-hearing brief in support of her appeal. (N.T. *passim*; Board Record).

CONCLUSIONS OF LAW

1. Claimant was afforded notice and an opportunity to be heard in connection with her appeal. (Findings of Fact (“F.O.F.”) 23-24, 29-31).

2. Claimant has the burden of proving the facts she alleges in support of her claim. See *Wingert v. State Emps.’ Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991); *Frantz v. State Emps. Ret. Bd.*, 560 A.2d 284, 285 (Pa. Cmwlth. 1989).⁶

3. The preponderance of evidence standard is the correct burden of proof to be applied in this administrative action. See *Lansberry, Inc. v. Pennsylvania Pub. Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff’s Education and Training Bd.*, 885 A.2d 678, 681-82 (Pa. Cmwlth. 2005).

4. The preponderance of evidence standard is “such proof as leads the fact-

⁶ Cases interpreting provisions of the State Employees’ Retirement Code “are equally applicable in deciding issues arising under similar or identical provisions” of the Retirement Code. *Krill v. Pub. Sch. Emps.’ Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Sigafoos v. Pennsylvania Bd. of Probation and Parole*, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

5. PSERS is a creature of statute, and PSERS’ members have only those rights recognized by the Public School Employees’ Retirement Code, 24 Pa.C.S. § 8101 et seq. (“Retirement Code”), and none beyond. See *Burris v. State Emps.’ Ret. Bd.*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Emps.’ Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992).

6. The Retirement Code defines “compensation” as remuneration that is “received as a school employee” and excludes, among other payments, “severance payments”:

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

24 Pa.C.S. § 8102; see also 22 Pa. Code § 211.2(b).

7. The Retirement Code directs that only remuneration “received as an active member” is to be considered in calculating a member’s “final average salary.” 24 Pa.C.S. § 8102; see also 22 Pa. Code § 211.2(b).

8. The Retirement Code defines “active member,” in pertinent part, as a “school employee for whom pickup contributions are being made to the fund,” and defines “school employee” as a “person engaged in work relating to a public school[.]” 24 Pa.C.S. § 8102; see also 22 Pa. Code § 211.2(b).

9. Payments received by an individual not to work are not payments received by a “school employee” or an “active employee” and are not creditable as “compensation” under the Retirement Code.

10. The Retirement Code defines “severance payments,” to include “any additional compensation contingent upon retirement[.]” 24 Pa.C.S. § 8102.

11. Payments made to an individual, in connection with an agreed upon resignation, are “severance payments” and are not creditable as “compensation” under the Retirement Code. *Christiana v. Pub. Sch. Emps.’ Ret. Bd.*, 669 A.2d 940, 944-45 (Pa. 1996) (citing *Dowler v. Pub. Sch. Emps.’ Ret. Bd.*, 620 A.2d 639, 642 (Pa. Cmwlth. 1993); *Watrel v. Dept. of Ed.*, 518 A.2d 1158 (Pa. 1986); *Trakes v. Pub. Sch. Emps.’ Ret. Sys.*, 768 A.2d 357, 365 (Pa. Cmwlth. 2001) (citing *Hoerner v. Pub. Sch. Emps.’ Ret. Bd.*, 684 A.2d 112, 118 (Pa. 1996)).

12. Claimant’s settlement payments associated with the 2017-2018 through 2020-2021 school years, received pursuant to her Agreement with PSD to not work and to resign, are not “compensation.” *Id.*

13. Pursuant to Section 8534(b) of the Retirement Code, the Board is required to correct errors in a member’s records upon discovery of such errors and adjust payments accordingly. 24 Pa.C.S. § 8534(b).

14. The Board may waive an adjustment that was made pursuant to Section 8534(b), if all of the following conditions are present: (a) the adjustment will cause undue hardship; (b) the adjustment was not the result of erroneous information supplied by Claimant; (c) Claimant had no knowledge or notice of the error before the adjustment was made and Claimant took action with respect to her benefits based on erroneous information provided by PSERS; and (d) Claimant had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1; see *White v. Pub. Sch. Emps.’ Ret. Bd.*, 11 A.3d 1, 13 (Pa. Cmwlth. 2010).

15. Claimant does not meet the four conditions required for a waiver of

adjustment pursuant to Section 8303.1 of the Retirement Code. (F.O.F. 1-29); 24 Pa.C.S. § 8303.1(1); 22 Pa. Code § 213.3(a).

16. Claimant has failed to proffer sufficient evidence to support her appeal. (F.O.F. 1-31).

DISCUSSION

Claimant is appealing PSERS' determination that the settlement payments she received from PSD during the 2017-2018 through 2020-2021 school years are not "compensation" under the Retirement Code.⁷ Alternatively, Claimant requests that the payments be treated as "compensation" by application of Section 8303.1 of the Retirement Code regarding "waiver of adjustment." For the reasons explained below, this Board concludes that the Hearing Examiner correctly determined that the payments agreed upon for the 2017-2018 through 2020-2021 were not "compensation," as defined by the Retirement Code, and that Claimant is not eligible for a waiver of adjustment.

It is well established that Claimant bears the burden of establishing the facts necessary to sustain her claim. See *Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991); *Frantz v. State Employees Ret. Bd.*, 560 A.2d 284, 285 (Pa. Cmwlth. 1989). Further, it is well established that PSERS is a creature of the Legislature and its members only have those rights created by the Retirement Code and none beyond. See, e.g., *Burris v. State Emps.' Ret. Bd.*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Emps.' Ret. Bd.*, 622 A.2d 403, 405 (Pa. Cmwlth. 1992); *Hughes v. Pub. Sch. Emps.' Ret. Bd.*, 662 A.2d 701, 706 (Pa. Cmwlth. 1995), *appeal denied*, 668 A.2d 1139 (Pa. 1996). While a member is entitled to a liberal construction of the Retirement Code, PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Bittenbender*, 622 A.2d at 405; *Forman v. Pub. Sch. Emps.' Ret. Bd.*, 778 A.2d 778, 779 (Pa. Cmwlth. 2001). Further,

⁷ The settlement payments that Claimant received and that constituted "back pay" for the 2015-2016 and 2016-2017 school years were credited to her account as "compensation" and are not at issue on appeal. (F.O.F. 20, 25).

statutes are read by their plain meaning and in such a manner as to give effect to all provisions. 1 Pa.C.S. § 1921(a), (b).

A. Future Pay

As explained by the Hearing Examiner, a PSERS member's right to retirement benefits is strictly limited to that authorized by the Retirement Code. See *Forman*, 778 A.2d at 780; *Burriss*, 745 A.2d at 706; *Bittenbender*, 622 A.2d at 405. Retirement benefits for PSERS' members are calculated using a statutory formula that includes the member's class multiplier, their amount of credited service, and their "final average salary." See 24 Pa.C.S. §§ 8102 (standard single life annuity), 8342 (maximum single life annuity). "Final average salary" is defined in the law as the "highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months...." 24 Pa.C.S. § 8102 (emphasis added). The Retirement Code defines "compensation" as:

...remuneration received as a school employee ... excluding any ... severance payments, any other remuneration or other emolument received by a school employee during his school service which is not based on the standard salary schedule under which he is rendering service, payments for unused sick leave or vacation leave ... or ... for the purpose of enhancing compensation as a factor in the determination of final average salary.

24 Pa.C.S. § 8102 (emphasis added); see 22 Pa. Code § 211.2. "Active member" is defined as a "school employee" for whom pickup contributions are being made to the fund, and "school employee" is defined 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...." 24 Pa.C.S. § 8102 (emphasis added). A member on a leave of absence without pay is not an active member. 22 Pa. Code § 211.2(b)(ii). Thus, as the Commonwealth Court has stated, active member status requires actual work for which compensation is paid. *Trakes v. Pub. Sch. Emps.' Ret. Sys.*, 768 A.2d 357, 365 (Pa. Cmwlth. 2001) (citing *Hoerner v. Pub. Sch. Emps.' Ret. Bd.*, 684 A.2d 112, 118 (Pa. 1996); *Watrell v. Department of Education*, 518 A.2d 1158, 1161 (Pa. 1986); see generally *Hairston-Brown v. Pub. Sch. Emps.' Ret. Bd.*, 78 A.3d 720 (Pa. Cmwlth. 2013), *appeal denied*, 87 A.3d 817 (Pa.

2014).

It is well settled that the Retirement Code's definitions of "compensation" and "final average salary" are restrictive and "reflect the Legislature's intention to preserve the actuarial integrity of the retirement fund by 'excluding from the computation of employes' final average salary all payments which may artificially inflate compensation for the purpose of enhancing retirement benefits.'" *Christiana v. Pub. Sch. Emps.' Ret. Bd.*, 669 A.2d 940, 944 (Pa. 1996) (quoting *Dowler v. Pub. Sch. Emps.' Ret. Bd.*, 620 A.2d 639, 642 (Pa. Cmwlth. 1993) and *Laurito v. Pub. Sch. Emps.' Ret. Bd.*, 606 A.2d 609, 611 (Pa. Cmwlth. 1992)). As the body charged with the Retirement Code's execution, therefore, this Board has an obligation and right to question the propriety of any payment made to a PSERS member. See *Laurito*, 606 A.2d at 611; *Perry v. State Emps.' Ret. Sys.*, 872 A.2d 273, 278 (Pa. Cmwlth. 2005) (explaining that the Board has the power to determine what benefits are due under the Retirement Code). When PSERS or the Board discovers that a member's salary was reported incorrectly, the Retirement Code mandates that the error is corrected. See 24 Pa.C.S. § 8534(b).

Claimant is not eligible for retirement credit – for salary or service – with PSERS for the 2017-2018 through 2020-2021 school years because there is no dispute that she agreed *not to work* during those school years. Indeed, pursuant to her Agreement with PSD, Claimant agreed not to report to PSD again, beginning with the 2017-2018 school year. (F.O.F. 6, 8). She then received payments to not work over the next four years. (F.O.F. 8). Claimant was, consequently, not an "active member" nor a "school employee" as a matter of law, because she was no longer "engaged in work relating to a public school." 24 Pa.C.S. § 8102; See *Trakes*, 768 A.2d at 365; *Watrei*, 518 A.2d at 1161; 24 Pa.C.S. § 8301 (limiting membership in PSERS to "school employees"). The *Trakes* and *Watrei* cases are instructive as to the active status of a member.

In *Trakes*, the Commonwealth Court addressed consolidated cases related to the question of whether employees who are off work while receiving workers' compensation are "active members." *Trakes*, 768 A.2d at 359. The Commonwealth Court concluded that "workers compensation recipients cannot earn service credit because public school employees that are not receiving compensation for actual work

performance cannot be classified as active members.” *Id.* at 363 (emphasis added) (citing 24 Pa.C.S. §§ 8102, 8307(c)). One of the *Trakes* claimants, who sought credit with PSERS, argued that she was eligible for 5.5 years of service credit because her collective bargaining agreement provided that her employer would pay her full salary and remit contributions to PSERS in exchange for her turning her workers’ compensation disability check over to the employer. *Id.* at 365. The Commonwealth Court held that she was not entitled to credit with PSERS despite her agreement with her employer, because the Retirement Code requires actual work. *Id.* at 365-66.

In *Watrei*, Dr. Watrei sought redress for what he claimed was an illegal discharge from his employment with the Department of Education. *Watrei*, 518 A.2d at 1159. The parties settled the claim by agreeing, in relevant part, that the Department of Education would provide Dr. Watrei with additional service credit with the State Employees’ Retirement System (“SERS”) for the time when he was not working, intending that he reach the ten years of service that is required to become vested with SERS. *Id.* at 1159. To that end, the Department of Education also agreed to submit additional contributions to SERS for the time when Dr. Watrei was not working. *Id.* at 1159. The Commonwealth Court referred to the State Employees’ Retirement Code’s definition, and determined that Dr. Watrei was not an “active member.” *Id.* at 1161.

It is further well settled that a PSERS member and their employer may not amend the law, including Retirement Code definitions, by agreement. *See Watrei*, 518 A.2d at 1161; *Whalen v. Pub. Sch. Emps.’ Ret. Bd.*, 265 A.3d 570, 575 (Pa. 2021). As the Commonwealth Court noted in *Watrei*, the retirement system has the sole responsibility of administering retirement benefits and an employer is without power to effect the vesting of an employee’s benefits. 518 A.2d at 1161. In *Whalen*, the Pennsylvania Supreme Court determined that PSERS “cannot be bound by characterizations of money payments made to a PSERS member pursuant to a private contractual settlement to which it was a party.” 265 A.3d at 575. The intent of the parties, the Court explained, cannot overcome the unambiguous definition of “compensation” in the Retirement Code. *See id.* at 577.

Thus, as footnoted by the Hearing Examiner and explained by the Pennsylvania

Supreme Court, calling a payment “compensation” in a settlement agreement or intending it to be “compensation,” does not make it so. (Proposed Opinion, p. 13, n. 1); *Whalen*, 265 A.3d at 575 (quoting *Houston General Ins. Co. v. Brock Constr. Co.*, 246 S.E.2d 316, 319 (Ga. 1978)). To constitute “compensation,” an employee must prove that the payments at issue were received while they were a “school employee.” 24 Pa.C.S. § 8102. Here, there is no dispute that Claimant was not a “school employee” during the relevant school years.

In addition, or alternatively, Claimant’s front pay is not “compensation” because it is a “severance payment.” See *Christiana*, 669 A.2d 944-45; 24 Pa.C.S. §§ 8102, 8301. The Retirement Code prohibits “severance payments” from being included in “compensation.” “Severance payments” are defined to include any payments for “unused vacation or sick leave and any additional compensation contingent upon retirement.” 24 Pa.C.S. § 8102. Here, PSD agreed to pay Claimant for multiple school years in exchange for her agreement not to work during those years *and* to submit her resignation. This arrangement constitutes a severance agreement, regardless of its correlation to a salary schedule, because Claimant voluntarily agreed, as part of a settlement, not to work in the future and to tender her resignation after she received payments for not working. See *Watrei*, 518 A.2d at 1160-61; *Trakes*, 768 A.2d at 363, 365-66; *Whalen*, 265 A.3d at 577; *Christiana*, 669 A.2d at 944-45. As a matter of fact, in connection with the settlement, the parties agreed that PSD would “[a]pprove Wright’s irrevocable letter of resignation and retirement to be submitted no later than seven (7) business days after the last school day for staff of the 2020-21 school year.” Thus, any payments made to her not to work were “additional payments” and “contingent upon retirement.”

Claimant, in exception number 2, cites to the cases of *Christiana v. Public School Employees’ Retirement Board* and *Hoerner v. Public School Employees’ Retirement Board*, claiming that the payments at issue here are not “severance payments,” because she agreed to accept only settlement payments that matched her salary schedule. (No. 2, Claimant’s Exceptions, pp. 4-5). Claimant’s argument does not work under the present circumstances. The question is whether a PSERS member has

received a payment, which they would not ordinarily have received, in exchange for their resignation. See 24 Pa.C.S. § 8102 (def. “severance payments”). While a member is still working, they are entitled to their standard salary. Accordingly, if an employee has agreed to resign, *but continues to work*, proof that they only received their standard salary schedule *is* proof that they did not accept an extra payment to resign (or a “severance payment”). See *Christiana*, 669 A.2d at 945; *Hoerner*, 684 A.2d at 116.

In *Christiana*, the member continued to render service. 669 A.2d at 946. It is for that reason there was no issue with him receiving his standard salary. He was owed that salary *for working*. The *additional* payments he received to resign, which were the subject of his appeal, were “severance payments.” *Id.* In *Hoerner*, which is more analogous to this situation, the member agreed to an increased salary and agreed to a release of his duties on January 6, 1988, with a future resignation of June 30, 1988, in exchange for payments for unused sick leave, personal days, and vacation days and \$75,000 in installments for the 1987-1988 school year. 684 A.2d at 114. The Pennsylvania Supreme Court concluded that the member was not entitled to any service credit with PSERS after the last day worked, i.e., January 5, 1988. See *id.* at 118. His date of resignation, which the Supreme Court deemed an “artificial date,” was notably irrelevant.⁸ *Id.* at 118. The Court explained, “an employee can only receive retirement credit for the time period where the employee actually engaged in work for the school district and received regular remuneration for that work.” *Id.* Therefore, he received no credit for the salary or service associated with the period January 6, 1988 through June 30, 1988.⁹ *With respect to the periods he did work*, the Court held that

⁸ Similarly, Claimant’s fifth exception, arguing that the Agreement’s alignment with her “normal retirement date” is material, is without merit. (No. 5, Claimant’s Exceptions, p. 11). Like *Hoerner*, Claimant’s resignation date was an artificial date with no correlation to service rendered, designed to avoid any “early retirement penalties.” (*Id.*).

⁹ The Supreme Court noted there was no evidence of an “approved leave of absence” for that time period. An “approved leave of absence” is a defined term in the law and requires proof of activated military service, a sabbatical leave, service as an exchange teacher, service with a collective bargaining organization, or professional study. 24 Pa.C.S. § 8102. Similarly, here, there is no evidence of an “approved leave of absence” for any of the relevant time periods.

any payments that were *in addition* to his standard salary were “severance payments.” *Id.* at 116-117.

Claimant excepts to the determination that her front pay is a severance payment, arguing that it is a permissible remedy under the Age Discrimination in Employment Act of 1967 (ADEA). (Nos. 2, 5, 7, Claimant’s Exceptions, pp. 3-5, 11-12). Although a payment may be permissible to resolve an underlying employment dispute, that does not mean it constitutes “compensation” pursuant to the Retirement Code. *Whalen*, 265 A.3d at 576-77. Indeed, the Retirement Code does not prevent an employer from making payments to an employee in connection with litigation, but it does prohibit PSERS from using payments that are “severance payments,” or that otherwise are exempted from “compensation,” to calculate a retirement benefit. *See Whalen*, 265 A.3d at 576. Importantly, the Board notes that this is not a situation where Claimant was prevented from working over the relevant period; rather, she agreed not to work moving forward and to resign, in exchange for money and to settle her dispute. As such, she also is ineligible for service credit for that time. Service and compensation, importantly, are tied together. The cases of *Whalen* and *Watre* are instructive.

In *Whalen*, Mr. Whalen and his employer similarly settled a discrimination dispute by executing a settlement agreement. 265 A.3d at 571. He alleged that he had not been adequately compensated for past work. *Id.* The parties agreed that the employer would pay Mr. Whalen a \$15,000 settlement payment as part of the terms of the settlement and they memorialized, in the agreement, that they intended it to “be income qualified for full pension credit by PSERS to be allocated to the year 2013-2014.” *Id.* at 572. The Supreme Court referred to the Retirement Code and held that the payment was not “compensation.” *Id.* at 576-77. Similarly, in *Watre*, an employee settled a dispute in which he alleged he was illegally discharged. He alleged, among other things, that he should receive full benefits for the future time when he had agreed not to work if a court could have ordered reinstatement of benefits. 518 A.2d at 1161. The Commonwealth Court rejected that argument, explaining that it overlooked two facts: “(1) there has been no adjudication that, in fact, Dr. Watre’s discharge was illegal, and

(2) the Department of Education has absolutely no authority to effect retirement credits.” *Id.* at 1162.

At bottom, Claimant was neither an “active member” nor a “school employee” during the relevant time frame and, accordingly, the payments she received are not “compensation” and cannot be used to calculate her “final average salary.” Her agreed to future pay is akin to the disallowed payments in *Watrel*, whereby the employer and employee attempted to purchase additional service credit where no service was rendered. See *Watrel*, 518 A.2d at 1162. Claimant and PSD, ostensibly, attempted to avoid the same outcome as *Watrel* by continuing to pay and report Claimant to PSERS as an active employee, despite their agreement that Claimant would no longer render school service. In this way, Claimant’s circumstance is also similar to *Trakes*, where multiple claimants sought service credit for time that they were receiving their full salary in lieu of receiving workers’ compensation but were not rendering active service. See *Trakes*, 768 A.2d at 365. As in both *Watrel* and *Trakes*, Claimant is ineligible for retirement credit – salary or service – for the period she was not working.

B. Waiver of Adjustment.

Claimant, alternatively, requests that the Board recognize the settlement payments made to her for the 2017-2018 through 2020-2021 school years as “compensation” through the application of the “waiver of adjustment” provision of the Retirement Code. (No. 6, Claimant’s Exceptions, p. 11); see 24 Pa.C.S. § 8303.1. Section 8303.1(a) of the Retirement Code provides that the Board may waive an adjustment to payments or portion thereof, if made under Section 8534(b). Section 8534(b) requires that PSERS correct errors in a member’s records upon discovery of such errors and adjust payments accordingly. 24 Pa.C.S. § 8534(b). Preliminarily, the only “adjustment” that occurred here was when the contributions that PSD continued to misreport to PSERS – based on the terms of the Agreement with Wright – were returned to PSD. (F.O.F. 26). There were no adjustments to any payments made by PSERS to Claimant. Indeed, there is no dispute that Claimant did not file her *Application for Retirement* with PSERS until August 27, 2021. (F.O.F. 28). A speculative reduction in an estimated future annuity, at a date uncertain, is not an “adjustment.” Consequently,

relief pursuant to Section 8303.1 is not available in these circumstances.

Even if Section 8303.1 was available for consideration, Claimant does not meet the requirements for a waiver of adjustment. For a waiver, a member must prove all the following conditions: (1) the adjustment or portion of the adjustment will cause undue hardship to the member; (2) the adjustment was not the result of erroneous information supplied by the member; (3) the member had no knowledge or notice of the error before the adjustment was made and the member took action with respect to their benefits based on erroneous information provided by PSERS; and (4) the member had no reasonable grounds to believe the erroneous information was incorrect before the adjustment was made. 24 Pa.C.S. § 8303.1(a); *White v. Pub. Sch. Emps.' Ret. Bd.*, 11 A.3d 1, 13 (Pa. Cmwlth. 2010) (explaining that a claimant “must satisfy all four provisions of this waiver-of-adjustment provision in order to qualify”).

For a member to prove an “undue hardship,” the member must establish that the adjustment “causes a reduction in excess of 5% of [her] monthly annuity.” 22 Pa. Code § 213.3a(a)(1) (emphasis added). It requires a precise calculation, using the member’s monthly benefit. Specifically, an adjusted benefit is determined by comparing the monthly benefit that the annuitant was receiving prior to the correction of record, with the finalized and adjusted benefit that the annuitant will receive because of the correction of record, and then determining if the change in the two monthly annuities is greater than 5%. See *id.* Accordingly, to prove an “undue hardship” under Section 213.3a(a)(1) of the Board’s regulations, the member must be an annuitant. Notably, in the *White* case, the Commonwealth Court pointed out that “General Assembly amended the [Retirement] Code in 1998 to allow the Board to waive certain *after retirement* account adjustments.” 11 A.3d at 6 (emphasis added).¹⁰ There was no “after retirement” adjustment here. (F.O.F. 18-20, 28-29; PSERS-9).

¹⁰ The Retirement Code also directs that the affected member must request the waiver within 30 days of notice of the correction. See 24 Pa.C.S. § 8303.1(b). It follows, therefore, that the application of Section 8303.1(a), including the calculation for “undue hardship,” is applied at the time the member seeks the waiver and not held to some future, unknown retirement date when the member will be eligible for an annuity.

A member also may meet the “undue hardship” requirement if they can establish that an adjustment resulted in them losing eligibility for a benefit other than an annuity. 22 Pa. Code § 213.3a(a)(2). There is no evidence or claim here that Claimant lost out on a benefit other than an annuity.

Additionally, this Board finds that Claimant does not meet the requirements set forth in Section 8303.1(a)(3) and (a)(4). The evidence establishes that PSERS received a copy of the Agreement from PSD after its negotiation and execution. (F.O.F. 11-12). The evidence also establishes that sometime between October 10, 2018 and April 2, 2019, Claimant was informed that PSERS had reviewed the Agreement and concluded that the settlement payments associated with her “future pay” were not retirement-covered compensation. (F.O.F. 11-18). From that point forward, she had clear “knowledge or notice” that, according to PSERS, it was an error for any settlement payments for the 2017-2018 through 2020-2021 school years to be reported to PSERS as “compensation.” Further, there is no evidence establishing that PSERS provided Claimant with erroneous information. PSD’s refusal to stop misreporting the payments, as directed, does not change that fact. Any claim of purported reliance on the misreporting after that date is not credible; PSERS’ position was clear and Claimant had no reasonable grounds to believe any misreporting was correct.¹¹ Indeed, counsel for Claimant appealed PSERS’ April 29, 2019 determination. (F.O.F. 21).

Claimant, repeatedly, takes issue with the fact that PSERS issued a determination on April 29, 2019. (No. 4, Claimant’s Exceptions, pp. 10-11). A determination, however, initiates the process through which a member may appeal a PSERS’ decision. PSERS was not provided with the terms of the Agreement prior to

¹¹ Claimant, for the first time, in her brief, alleges that she and her former counsel met with a PSERS representative at PSERS’ Southwest Regional Office to discuss the terms of her agreement. Claimant’s citation to the transcript for this allegation does not provide any material support for this newly raised assertion. Indeed, a review of the transcript reveals that Claimant made no mention of such meeting during her sworn testimony, nor did she offer the testimony of her former counsel. The only testimony on this topic was the testimony of PSERS’ witness, who credibly testified that PSERS was not consulted prior to the execution of the Agreement. N.T. 126.

its execution. (F.O.F. 11). Once the Agreement was submitted to PSERS by PSD, PSERS reviewed the Agreement and issued a determination in the normal course of business. (F.O.F. 12-15). Claimant was advised of that determination by both PSD and PSERS, and her account was corrected prior to her retirement on June 3, 2021. (F.O.F. 18-20, 29; PSERS-9). There is no question here that Claimant has been, and continues to, challenge PSERS' decision that her "front pay" is not "compensation." This Board finds no error in PSERS issuing a determination, with instructions on how to appeal, when it did. (F.O.F. 18-20, 29; PSERS-3). Advising Claimant's legal counsel that PSERS would issue a determination also, was not in error.¹² Accordingly, Claimant's exception number 4 is without merit and is, consequently, denied.

Finally, Claimant has not proven that the situation here was not caused by erroneous information provided by her. See 24 Pa.C.S. § 8303.1(a)(2). The misreporting here was done pursuant to the terms of the Agreement that Claimant, who was represented by counsel, negotiated with PSD. (F.O.F. 7). The Agreement was crafted so that PSD's reporting to PSERS made it look like Claimant was continuing to work and earn service credit and receive "compensation" toward her retirement after the 2016-2017 school year. (F.O.F. 6-8 ("Pension payments to PSERS described in (G) above shall be made by the School District on [Claimant's] behalf in the amounts and at the times and in the manner as required by the applicable CBA and normal custom and practice in connection with the payments described in (B)-(F)."). Claimant knew that she was not rendering active service during the 2017-2018 through 2020-2021 school years. (F.O.F. 9). A member cannot meet the requirements of Section 8303.1(a)(2), when she has contracted to have the erroneous reporting completed. The *Watrei* case is informative.

¹² Claimant, ostensibly, takes issue with the timing of PSERS' determination under the mistaken assumption that the outcome would change if the Agreement was reworded. As explained above, however, changing the terms in the Agreement would not change the undisputed fact that she did not render service. Accordingly, providing her with additional time to renegotiate the words used to describe the settlement payments for future pay would not have changed the result. See *Whalen*, 265 A.2d at 570. To receive credit for those payments with PSERS, Claimant would have had to have worked. See 24 Pa.C.S. § 8102 (defs. "compensation," "active employee," and "school employee").

In *Watrel*, the Supreme Court found that the settlement at issue was the culmination of lengthy, sophisticated, and counselled negotiation. 518 A.2d at 1161. The Court observed that the provisions governing the retirement system are fully set forth in the law. See *id.* Therefore, the Court held that the member “must be charged with the knowledge that, when he ceased to be an ‘active member,’ he no longer was *entitled* to retirement credit... and acceptance of his contribution was not assured.” *Id.* Here, Claimant’s counseled negotiations resulted in the Agreement whereby she was paid to not work, meaning Claimant ceased to be an active member, which is in direct conflict with the Retirement Code’s requirements for accruing service.¹³

CONCLUSION

Based on the above, the facts of record support the Hearing Examiner’s conclusion that PSERS properly determined Claimant’s payments received during the 2017-2018 through 2020-2021 school years to be non-retirement covered compensation. This is not a waiver of adjustment matter where a claimant has retired, unaware of a reporting error that affected their retirement, and then later faced an adjustment to their annuity when the error was discovered. Here, Claimant and PSD crafted an Agreement whereby Claimant received both back pay and then future pay pursuant to an agreement that she did not render any further service with PSD and resign. PSD and Claimant structured the future pay or, alternatively, severance payments to make it look like “compensation” when reported to PSERS. Payments that are not received as an “active member” and “school employee” and payments that are “severance payments” are not, however, “compensation” under the Retirement Code. Regardless of Claimant and PSD’s intentions or characterizations of the payments that she received while not working during the 2017-2018 through 2020-2021 school years, they are not compensation under the law. Accordingly, Claimant’s appeal is denied.

¹³ Moreover, because Claimant was being paid to not work for PSD, she was free to find employment with another PSERS employer and continue to accrue additional retirement credit. See *Watrel*, 518 A.2d at 1162 (explaining that *Watrel* could have taken a different position with a SERS employer to earn additional retirement credit).

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

IN RE: ACCOUNT OF ELLEN WRIGHT
DOCKET NO. 2020-05
CLAIM OF ELLEN WRIGHT

OPINION AND ORDER OF THE BOARD

AND NOW, upon consideration of the record in this matter, IT IS HEREBY ORDERED:

- (1) Claimant's request for oral argument is DENIED;
- (2) Claimant's request to receive retirement credit for the settlement payments she received during the 2017-2018 through 2020-2021 school years is DENIED; and
- (3) Claimant's request for a waiver of adjustments, under the Retirement Code at 24 Pa.C.S. § 8303.1 is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: _____

By: _____
Richard Vague, Chairman