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APPENDIX I
IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Richard W. Como, :
Petitioner :
v. :
: :
Public School Employees' : No. 43 C.D. 2022
Retirement Board, : Submitted:
Respondent : August 19, 2022

BEFORE: HONORABLE RENEE COHN JUBELIRER,
President Judge

HONORABLE ANNE E. COVEY, Judge

HONORABLE LORI A. DUMAS, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY

JUDGE COVEY FILED: January 6, 2023

Richard W. Como (Como) petitions this Court for review of the Public School Employees' Retirement Board's (Board) December 28, 2021 order granting the Public School Employees' Retirement System's (PSERS) Motion for Summary Judgment (Motion), and denying Como's appeal from his pension forfeiture pursuant to the Public Employee Pension Forfeiture Act (Forfeiture Act).¹ Essentially, the issue before this

¹ Act of July 8, 1978, P.L. 752, as amended, 43 P.S. §§ 1311-1315. Because the Forfeiture Act directs that all benefits be forfeited, Como also was no longer eligible for coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant.

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Court is whether the Board erred by granting PSERS' Motion.² After review, this Court affirms.

Background

Como was enrolled in PSERS as a public school employee from September 1969 to June 1983, when he retired and began receiving retirement benefits. When Como returned to public school service in June 1986, his retirement benefits ceased, his annuity was frozen, and he was reenrolled in PSERS pursuant to the Public School Employees' Retirement Code (Retirement Code).³ Como remained in public school service in various capacities in two school districts and was eventually appointed Coatesville Area School District (Coatesville) superintendent from 2005 until he

² Como presents five issues in his Statement of Questions Involved: (1) whether the Board erred by holding that Como's *entire* pension shall be forfeited due to criminal conduct he committed after a break in his public employment; (2) whether Como's due process rights were violated because the Board did not afford him a hearing on the issue of whether his superintendent appointment was a break from his past school employment; (3) whether Sections 2 and 3 of the Forfeiture Act, 43 P.S. §§ 1312-1313, are unconstitutional under the Fourteenth Amendment to the United States (U.S.) Constitution; (4) whether Sections 2 and 3 of the Forfeiture Act result in excessive fines under the Eighth Amendment to the U.S. Constitution and article 1, section 13 of the Pennsylvania Constitution; (5) whether the forfeiture of his pension earned from 1969 to 2005 violated the impairment of contracts provisions in Article I, Section 10 of the U.S. Constitution and article 1, section 17 of the Pennsylvania Constitution. *See* Como Br. at 4-8. Because these issues are subsumed in the issue as phrased by this Court, they will be addressed accordingly.

³ 24 Pa.C.S. §§ 8101-8547.

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resigned in September 2013. Como filed a retirement application in October 2013, and began receiving monthly benefits effective November 30, 2013.

In December 2014, Chester County detectives filed a police criminal complaint against Como in the Chester County Common Pleas Court, charging him with numerous crimes he committed in 2012 and 2013, in his capacity as Coatesville superintendent. *See Reproduced Record (R.R.) at 204a-234a.*⁴ On January 16, 2018, the Chester County District Attorney filed an amended information against Como. *See R.R. at 235a-242a.* On January 26, 2018, a jury found Como guilty of, *inter alia*, two felony counts for theft by failure to make required disposition of funds received, in violation of Section 3927(a) of the Crimes Code, 18 Pa.C.S. § 3927(a), and two felony counts relating to criminal attempt to commit theft by failure to make required disposition of funds, in violation of Sections 901 and 3927(a) of the Crimes Code, 18 Pa.C.S. §§ 901a, 3927(a), which are forfeitable offenses under the Forfeiture Act.⁵ *See R.R. at 134a-139a.* On March 16, 2018, Como was sentenced to a prison term followed by probation

⁴ Pennsylvania Rule of Appellate Procedure (Rule) 2173 specifies: “[T]he pages of . . . the reproduced record . . . shall be numbered separately in Arabic figures . . . thus 1, 2, 3, etc., followed in the reproduced record by a small a, thus 1a, 2a, 3a, etc.” Pa.R.A.P. 2173. Como’s Reproduced Record page numbers do not fully comply with Rule 2173. This Court will refer to them herein as Rule 2173 requires.

⁵ Como was also found guilty of 12 additional counts of crimes that were not forfeitable under the Forfeiture Act when he committed them.

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and ordered to repay funds and pay restitution.⁶ See R.R. at 140a-147a.

At the time Como committed his criminal offenses, Section 3 of the Forfeiture Act declared, in pertinent part:⁷

- (a) Notwithstanding any other provision of law, **no public official or public employee**^[8] **... shall be entitled to receive any retirement or other benefit or payment of any kind** except a return of the contribution paid into any pension fund without interest, **if such public official or public employee is convicted [of] ... any crime related to public office or public employment.**
- (b) **The benefits shall be forfeited ... upon initial conviction** and no payment or

⁶ Como appealed to the Pennsylvania Superior Court, which upheld his conviction on November 23, 2020. *See Commonwealth v. Como* (Pa. Super. No. 1687 EDA 2018, filed Nov. 23, 2020), On September 14, 2021, the Pennsylvania Supreme Court denied Como's petition for allowance of appeal. *See id., appeal denied*, 263 A.3d 242 (Pa. 2021).

⁷ By Section 5 of the Act of March 28, 2019, P.L. 1, the General Assembly amended Section 3 of the Forfeiture Act. Because the amendment was effective March 28, 2019, this Court quotes the pre-amendment language.

⁸ Section 2 of the Forfeiture Act defines *public employee* to include “[a]ny person who is elected or appointed to any public office or employment[,]” including “all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision.” 43 P.S. § 1312. The parties do not dispute that Como was a public employee when he committed the forfeitable crimes.

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partial payment shall be made during the pendency of an appeal. . . .

(c) Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of this [Forfeiture Act].

43 P.S. § 1313 (emphasis added).

Section 2 of the Forfeiture Act⁹ defined *crimes related to public office or public employment* to include

[a]ny of the criminal offenses as set forth in the following provisions of [the Crimes Code] or other enumerated statute when committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime:

....

Section 3927 [of the Crimes Code] (relating to theft by failure to make required disposition of funds received) when the criminal

⁹ By Section 5 of the Act of March 28, 2019, P.L. 1, the General Assembly expanded the list of forfeitable crimes in Section 2 of the Forfeiture Act to include all Pennsylvania crimes classified as felonies or punishable by an imprisonment term exceeding five years, and all federal crimes and crimes of other states that are substantially similar. The amendment applies to crimes committed after the March 28, 2019 effective date. Because Como committed his crimes before that effective date, his appeal was addressed under the prior law.

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culpability reaches the level of a misdemeanor of the first degree or higher.

43 P.S. § 1312 (emphasis added). Although crimes of attempt under Section 901 of the Crimes Code are not specifically listed among the forfeitable offenses in Section 2 of the Forfeiture Act, this Court has held that “any public official or public employee who is convicted of attempting . . . to commit any of the criminal offenses enumerated in the [Forfeiture] Act is subject to pension forfeiture under the [Forfeiture] Act.” *Lu-
zerne Cnty. Ret. Bd. v. Seacrist*, 988 A.2d 785, 789 (Pa
Cmwlth. 2010).

By March 21, 2018 letter, PSERS notified Como that because his convictions were forfeitable offenses, PSERS terminated his retirement benefits effective March 16, 2018. *See* R.R. at 45a-46a. On April 11, 2018, Como filed an appeal with PSERS’ Executive Staff Review Committee (ESRC), arguing that since he worked for more than one public school employer, he changed job classifications, he had breaks in employment, and his misconduct occurred only during a portion of his employment, he should only be required to forfeit a portion of his pension. *See* R.R. at 48a-53a. Como further asserted that forfeiture of his entire pension under the circumstances was unconstitutional, and that PSERS should not render a decision until he exhausted his criminal appeals. *See id.*

By June 18, 2018 letter, PSERS informed Como that since he forfeited his retirement benefits under the Forfeiture Act, he was also no longer eligible for

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coverage through PSERS’ Health Options Program (HOP). *See R.R. at 54a-55a.* On June 29, 2018, Como appealed from the health coverage denial, making the same claims he asserted in his April 11, 2018 appeal and requesting reinstatement of his medical benefits. *See R.R. at 56a-57a.*

By April 26, 2019 letter, ESRC denied Como’s appeals, explaining that his right to PSERS retirement benefits was subject to the Forfeiture Act, which mandates that all benefits payable to a public employee must be forfeited if the employee is convicted of a crime related to public office or public employment enumerated in the Forfeiture Act. *See R.R. at 64a-67a.* On May 14, 2019, Como appealed from ESRC’s determination to the Board, again reiterating the arguments he made to ESRC. *See R.R. at 68a-71a.* On May 21, 2019, PSERS filed an answer to Como’s appeal. *See R.R. at 116a-125a.*

On May 10, 2021, PSERS filed the Motion with the Board, arguing that there are no disputed material facts, and PSERS is entitled to judgment in its favor as a matter of law. *See R.R. at 78a-96a.* On June 3, 2021, Como opposed PSERS’ Motion and requested a hearing, asserting that the question of whether his superintendent appointment was a break in employment was a disputed fact. *See R.R. at 97a-115a.* Como further argued that PSERS was not entitled to judgment in its favor as a matter of law where the Board lacked the authority to rule on the Forfeiture Act’s constitutionality, and PSERS violated his due process rights by taking all of his pension when there were breaks in his

public school employment and his misconduct occurred only when he was superintendent. *See id.*

By July 15, 2021 order, the Board designated Hearing Examiner Michael T. Foerster, Esquire (Hearing Examiner) to make a recommendation regarding the Motion. After the parties filed proposed findings of fact and conclusions of law, on September 20, 2021, the Hearing Examiner issued an Opinion and Recommendation (Recommendation), proposing that the Board grant PSERS' Motion and dismiss Como's appeal because the Forfeiture Act mandated that Como forfeit his entire pension, and because the Board lacked the authority to rule on the Forfeiture Act's constitutionality.¹⁰ *See R.R. at 23a-45a* The parties were given 30 days to file briefs on exceptions to the Hearing Examiner's Recommendation.

On October 13, 2021, Como filed a Brief on Exceptions (Exceptions) and a hearing request. *See R.R. at 148a-166a.* In lieu of a formal brief, PSERS filed a letter brief in response to Como's Exceptions stating therein that the Exceptions raised issues PSERS already addressed in the Motion. *See R.R. at 166a-168a* Without argument, by decision mailed on December 28, 2021, the Board adopted the Hearing Examiner's

¹⁰ The Hearing Examiner also concluded that the Board lacked the authority to delay its determination pending Como's appeals. However, because Como's appeals were no longer pending as of September 14, 2021, that portion of the Recommendation was moot.

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Recommendation and denied Como's appeal.¹¹ R.R. at 20a-22a. On January 20, 2022, Como appealed to this Court. *See* R.R. at 5a-18a.

Discussion

Initially, Section 201.6(b) of the Board's Regulations authorizes PSERS or Como to file a motion for summary judgment with the Board that conforms with the Pennsylvania Rules of Civil Procedure. *See* 22 Pa. Code § 201.6(b). The purpose of the summary judgment process is to avoid an unnecessary trial/hearing. *See Woodford v. Ins. Dep't*, 243 A.3d 60 (Pa. 2020). Thus, “[s]ummary judgment is only appropriate when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party establishes that he is entitled to judgment as a matter of law.” *Allen v. Pub. Sch. Emps. Ret. Bd.*, 848 A.2d 1031, 1033 n.7 (Pa. Cmwlth. 2004). “Our scope of review of an order granting or denying a motion for summary judgment is limited to determining whether . . . the Board, committed an error of law or abused its discretion.” *Mento v. Pub. Sch. Emps.' Ret. Sys.*, 72 A.3d 809, 812 n.3 (Pa. Cmwlth. 2013) (quoting *Allen*, 848 A.2d at 1033 n.7).

¹¹ However, the Board modified the Hearing Examiner's Recommendation to “change [Como's] conviction date from January 26, 2018, the date he was found guilty, to March 16, 2018, the date [Como] was sentenced.” R.R. at 21a.

Entitlement to Judgment as a Matter of Law

Como argued in his appeals to PSERS and the Board, and now this Court, that he should only have to forfeit the benefits he earned while employed as Coatesville's superintendent from 2005 to 2013, because he validly earned his pension during the years he was a teacher, coach, athletic director, assistant principal, and principal from 1969 to 2005, without misconduct, and losing his pension now that he is 76 years old and his only other source of income is social security, "would leave him penniless and is extremely unfair[.]" Como Br. at 22. In addition, Como asserted the following constitutional violations: Sections 2 and 3 of the Forfeiture Act violate the excessive punishment prohibitions in the Eighth Amendment to the U.S. Constitution, U. S. CONST. amend VIII, and article I, section 13 of the Pennsylvania Constitution, PA. CONST. art. I, § 13; Sections 2 and 3 of the Forfeiture Act violate the impairment of contracts provisions in Article I, Section 10 of the U.S. Constitution, U.S. CONST. art. I, § 10, and article I, section 17 of the Pennsylvania Constitution, PA. CONST. art. I, § 17; and the Board violated the due process provisions of the Fourteenth Amendment to the U.S. Constitution (Fourteenth Amendment), U.S. CONST. amend XIV, by resolving this issue on the Motion without a hearing.

In the Motion, PSERS claimed that it was entitled to judgment in its favor because Como forfeited his entire pension upon his conviction on the forfeitable offenses as a matter of law, and PSERS lacks authority to grant partial forfeiture. PSERS also recognized that

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it lacks authority to determine the Forfeiture Act's constitutionality.¹²

“The purpose of the [Forfeiture] Act is to deter criminal conduct in public employment by causing a forfeiture of pension benefits to which a public official or public employee would otherwise be entitled.” *Seacrist*, 988 A.2d at 787. Accordingly, “[the Forfeiture Act] leaves no discretion to any administrative agency once the triggering conviction or guilty plea occurs.” *Gierschick v. State Emps.’ Ret. Bd.*, 733 A.2d 29, 33 (Pa. Cmwlth. 1999).¹³ Moreover, in *Public School Employees’ Retirement Board v. Matthews*, 806 A.2d 971 (Pa. Cmwlth. 2002), this Court observed that “[the Forfeiture Act] contains no requirement that the pension benefits that are forfeited be necessarily connected to the public employment related to [the] crime the public employee committed.” *Id.* at 975.

¹² “[T]he determination of the [facial] constitutionality of enabling legislation is not a function of the administrative agencies thus enabled.” *Lehman v. Pa. State Police*, 839 A.2d 265, 275 (Pa. 2003) (quoting *Borough of Green Tree v. Bd. of Prop. Assessments*, 328 A.2d 819, 825 (Pa. 1974)).

¹³ “The retirement provisions in the [State Employees’ Retirement Code, 71 Pa.C.S. §§ 5101-5958,] are sufficiently similar to those in the Retirement Code that cases involving PSERS . . . may be relied upon when analyzing cases under [the State Employees’ Retirement System,]” *Weaver v. State Emps.’ Ret. Bd.*, 129 A.3d 585, 593 n.4 (Pa. Cmwlth. 2015), and vice versa. See *Trakes v. Pa. Sch. Emps.’ Ret. Sys.*, 768 A.2d 357 (Pa. Cmwlth. 2001).

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In *Shiomas v. State Employees' Retirement Board*, 626 A.2d 158 (Pa 1993), the Pennsylvania Supreme Court explained:

As a reasonable condition of public employment, the employee reaffirms his [or her] commitment to perform his [or her] job with honesty and integrity every time he or she begins a new term of office, receives a promotion or appointment, or experiences a change in job classification; regardless of whether such public employment is on a full or part-time basis. **With each appointment there is a renewal of the agreement to perform the term of public service without violating [the Forfeiture Act]; an agreement which encompasses all that has gone before.** Thus, whether or not a public employee's right to receive retirement benefits has vested, or he or she is in actual receipt of benefits, all previous accumulated rights to receive such benefits are subject to forfeiture by and through the "renewed" agreement which is formed each time a person chooses to become a "public official" as defined by [Section 2 of the Forfeiture Act].

Id. at 162-63 (emphasis added).

Como asserts that *Shiomas* was wrongly decided, and is distinguishable from the instant matter on the basis that the public employee in *Shiomas* was always employed in the same position without a break in public service. *See* Como Br. at 31. However, in *Apgar v. State Employees' Retirement System*, 655 A.2d 185 (Pa.

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Cmwlth. 1994), this Court reached a similar conclusion in a case involving a public employee who had breaks in service, was promoted, and changed job classifications. Relying on *Shiomas*, the *Apgar* Court stated:

In 1978 the Legislature enacted [the Forfeiture Act].^[14] In so doing, the legislative branch of this Commonwealth, speaking for the citizens of the Commonwealth, established that certain types of conduct would not be rewarded. Because criminal conduct committed in the course of one's employment is a violation of the trust the people of the Commonwealth place in their employees, such conduct shall not be sanctioned. [See Section 1 of the Forfeiture Act,] 43 P.S. § 1311 . . . **[W]e do not find any language in [the Forfeiture Act]**

¹⁴ Como's argument that the Forfeiture Act was adopted "some nine years after [] Como began employment[,]" Como Br. at 26, so it does not apply to his employment that preceded its enactment, lacks merit. This Court has concluded that a public employee

would still be subject to the terms of [the Forfeiture Act] by virtue of his subsequent acceptance of new positions of public employment. [Section 3(c) of the Forfeiture Act] provides that "[e]ach time a . . . public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of [the Forfeiture Act].” 43 P.S. § 1313(c).

Thiel v. State Emps.’ Ret. Bd. (Pa. Cmwlth. No. 740 C.D. 2021, filed Oct. 19, 2022), slip op. at 12. Unreported decisions of this Court issued after January 15, 2008, may be cited as persuasive authority pursuant to Section 414(a) of this Court’s Internal Operating Procedures. 210 Pa. Code § 69.414(a). *Thiel* is cited herein for its persuasive value.

requiring or even suggesting that the [Board] has the power to decline to enforce the proscriptions of [the Forfeiture Act]. We therefore find the Board did not have authority to act in a discretionary fashion and not impose the sanctions as dictated by [the Forfeiture Act].

Id. at 189 (emphasis added).

The Forfeiture Act does not authorize PSERS or the Board to modify its full pension forfeiture mandate, and Como offers no valid legal basis on which this Court may interpret the Forfeiture Act in any other manner. To achieve the result Como suggests would require the General Assembly to amend the Forfeiture Act. Although the General Assembly amended the Forfeiture Act as recently as 2019, it did not authorize partial forfeitures based on equitable or other considerations. Unless and until the General Assembly sees fit to make such a change, under the Forfeiture Act, a public employee forfeits his full pension upon conviction for forfeitable offenses. *See* 43 P.S. § 1313.

Concerning Como's constitutional argument that Sections 2 and 3 of the Forfeiture Act violate the excessive punishment prohibitions in the Eighth Amendment to the U.S. Constitution, or article I, section 13 of the Pennsylvania Constitution,

[this Court] rejected an identical argument in *Scarantino v. Public School Employees' Retirement Board*, 68 A.3d 375 (Pa. Cmwlth. 2013). There, we held that pension forfeiture under [the Forfeiture Act] does not implicate the

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excessive fines clause because that clause only applies to fines imposed as punishment for a crime. *Id.* at 384-85. Rather than a punitive fine, [a Forfeiture Act] forfeiture is a civil consequence of “a breach of the contract between [the public employee] and . . . [P]SERS.” *Id.* at 385; *see also* 43 P.S. § 1313(b) (providing that conviction for [a] crime related to public employment “shall be deemed . . . a breach of a public officer’s or public employee’s contract with his employer”). We reaffirmed this holding in *Miller [v. State Emps.’ Ret. Sys.]*, 137 A.3d [674,] 680-81 [(Pa. Cmwlth. 2016)], and see no reason to depart from it today. Therefore, we affirm the Board’s rejection of [Como’s] excessive fines argument.

Thiel v. State Emps.’ Ret. Bd. (Pa. Cmwlth. No. 740 C.D. 2021, filed Oct. 19, 2022), slip op. at 13.

Further, the *Shiomos* Court ruled that Sections 2 and 3 of the Forfeiture Act do not violate the impairment of contracts prohibitions in Article I, Section 10 of the U.S. Constitution, and article I, section 17 of the Pennsylvania Constitution,¹⁵ stating:

¹⁵ Como argues in his Reply Brief that, if the Forfeiture Act is incorporated into every new contract or contract renewal, then contract rules must apply and, under contract law, liquidated damages must have some relationship to actual damages, and unreasonably large liquidated damages (like the value of his pension from 1969 to 2005) are unenforceable as a matter of public policy. *See* Como Reply Br. at 3, 11, 15. However, because Como failed to raise that issue in his Exceptions, it is waived. *See* Section 201.1 of the Board’s Regulations, 22 Pa. Code § 201.1 (the General Rules of Administrative Practice and Procedure (GRAPP) apply

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It is neither unconscionable nor unreasonable to require honesty and integrity during an employee's tenure in public service. Nor is it violative of the Pennsylvania Constitution to provide that at every new term of employment a public official or employee renews and amends his or her pension contract to include the new public service and to place at risk that which may have already been earned. Such is the nature of the public employment agreement.

Shiomos, 626 A.2d at 163.

Finally, regarding Como's due process violation argument, this Court acknowledges that "the right to due process is as equally applicable to administrative agencies as it is to judicial proceedings, where the fundamental requirements of due process are notice and opportunity to be heard in a meaningful manner." *Higgins v. Pub. Sch. Emps.' Ret. Sys.*, 736 A.2d 745, 753 (Pa. Cmwlth. 1999). Here, PSERS filed the Motion as permitted by Section 201.6(b) of the Board's Regulations. Como had the opportunity to and did file a response to the Motion. He also requested a hearing to establish that his position as Coatesville's superintendent represented a break from his previous public employment. However, the parties *agreed* that Como had breaks in

to Board proceedings); *see also* Section 35.213 of GRAPP, 1 Pa. Code § 35.213 ("Objections to any part of a proposed report which is not the subject of exceptions may not thereafter be raised . . . and shall be deemed to have been waived."); *Lebron v. Pub. Sch. Emps.' Ret. Bd.*, 245 A.3d 300 (Pa. Cmwlth. 2020) (challenges not included in exceptions are waived).

his public employment and various public employment positions.

Although Section 201.12(b) of the Board's Regulations allows a party to request oral argument with his exceptions, *see 24 Pa. Code § 201.12(b)*, “[t]he 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.” Section 201.12(a) of the Board's Regulations, *22 Pa. Code § 201.12(a)*.

Here, the Hearing Examiner made specific findings detailing Como's employment history, including all of his breaks in public employment and his appointment as Coatesville's superintendent. *See Recommendation, Findings of Fact 1-13* (R.R. at 27a-28a). The Hearing Examiner stated that “[t]he parties agree that [Como] worked for different public school employers during his career, had a break in employment, and changed job positions.” Recommendation at 15 (R.R. at 40a). The Board, which is the ultimate fact-finder, *see White v. Pub. Sch. Emps.' Ret. Bd.*, 11 A.3d 1 (Pa. Cmwlth. 2010), adopted the Hearing Examiner's findings and denied Como's hearing request, declaring: “Because [Como] does not offer any . . . contradicting material facts, . . . [t]he Board . . . does not believe that oral argument will be helpful in enabling the Board to understand and resolve the issues.” Board Op. and Order at 2 (R.R. at 21a).

Based on this Court's review, Como was afforded all necessary due process. A fact-finding hearing in this

matter would have been a futile exercise that the Motion was designed to prevent, *see Woodford*, and it would not have altered the Board's understanding of Como's position. Under such circumstances, the Board did not violate Como's Fourteenth Amendment right to due process by resolving his appeal pursuant to the Motion without a hearing.

Genuine Issue of Material Fact

In the Motion, PSERS declared that there were no outstanding issues of material fact. Como argued that there was an outstanding issue of material fact – that his superintendent appointment was a break from his past school employment.

“It is the burden of the party moving for summary judgment to prove that no genuine issue of material fact exists.” *Stimmller v. Chestnut Hill Hosp.*, 981 A.2d 145, 159 (Pa. 2009). The Board’s conclusion in this case turned upon whether Como was convicted of crimes related to his public employment as Coatesville’s superintendent. *See 43 P.S. § 1313(a)*. As stated above, the parties *agreed* on the those facts, and that Como had breaks in his public employment and various public employment positions. The Board adopted the Hearing Examiner’s findings to that effect.

In addition, “only disputes as to *material* issues of fact bar summary judgment.” *Pyeritz v. Commonwealth*, 956 A.2d 1075, 1079 (Pa. Cmwlth. 2008), *aff’d*, 32 A.3d 687 (Pa. 2011) (emphasis added). “A fact is material only if it directly affects the disposition of the

case.” *Id.* Because Como’s employment breaks and various job positions did not directly affect the disposition of this case, the Board properly concluded that “there is no dispute of material facts between the parties[,]” Board Op. and Order at 1-2 (R.R. at 20a-21a), that precluded the Board from granting PSERS’ Motion.

Conclusion

Examining the record in the light most favorable to Como as the Board was required to do, this Court holds that there was no genuine issue of material fact, and PSERS was entitled to judgment as a matter of law. *See Allen.* Accordingly, the Board’s order is affirmed.

/s/ Anne E. Covey
ANNE E. COVEY, Judge

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IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Richard W. Como, :
Petitioner :
v. :
: :
Public School Employees' :
Retirement Board, :
Respondent : No. 43 C.D. 2022

ORDER

AND NOW, this 6th day of January, 2023, the Public School Employees' Retirement Board's December 28, 2021 order is affirmed.

/s/ Anne E. Covey
ANNE E. COVEY, Judge

APPENDIX II
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Richard W. Como,	:	No. 51 MAL 2023
Petitioner	:	Petition for Allowance of
v.	:	Appeal from the Order of
Public School Employees'	:	the Commonwealth Court
Retirement Board,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 13th day of July, 2023, the Petition for Allowance of Appeal is **DENIED**.

APPENDIX III
COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

IN RE: ACCOUNT OF RICHARD W. COMO
DOCKET NO. 2019-05
CLAIM OF RICHARD W. COMO

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner, the Public School Employees' Retirement System's ("PSERS") Motion for Summary Judgment, Claimant's Response to PSERS' Motion, Claimant's Brief on Exceptions ("Exceptions"), and PSERS' Brief Opposing Exceptions.

Claimant excepts to the Hearing Examiner's proposed Opinion and Recommendation based on his factual, legal, and constitutional arguments that a hearing should be held to address breaks in employment and distinctions between his prior job positions; he should be allowed a partial retirement benefit based on work performed in job positions held prior to committing the forfeitable offenses; and the forfeiture of his entire pension is unconstitutional.¹ Claimant's

¹ Claimant notes, in his Exceptions, that one issue he previously raised in his response to PSERS' Motion, that he was appealing his criminal conviction, is no longer at issue as the

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Exceptions, however, merely reargue issues previously raised in his Response to PSERS' Motion, which the Hearing Examiner adequately addressed to the extent permissible, understanding that constitutional arguments cannot be addressed in this forum. Moreover, although Claimant argues that facts surrounding his employment history should be developed through a hearing, the Board finds that there is no dispute of material facts between the parties. As a matter of law, Claimant's breaks in employment and changes in job position, which PSERS has acknowledged, do not result in a partial forfeiture under the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315 ("Forfeiture Act").

This Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation attached hereto, and we hereby adopt them as our own, with the following modification: On page fourteen, in the final paragraph, change Claimant's conviction date from January 26, 2018, the date he was found guilty, to March 16, 2018, the date Claimant was sentenced.²

Pennsylvania Supreme Court denied his Petition for Allowance of Appeal. (Exceptions, p. 1).

² The Forfeiture Act was amended on March 28, 2019, for crimes committed on or after that date. Because Claimant committed his crimes prior to March 28, 2019, his appeal must be addressed based on the law in place at the time he committed his crimes.

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Claimant also has requested oral argument before the Board. Section 201.12 of the Board's regulations provides:

(a) 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 Claimant does not offer any new arguments, authority, or contradicting material facts, we believe that the Hearing Examiner adequately addressed Claimant's Exceptions. The Board, therefore, does not believe that oral argument will be helpful in enabling the Board to understand and resolve the issues.

IT IS HEREBY ORDERED, that Claimant's appeal from the forfeiture of his pension and eligibility under the PSERS' Health Option Program pursuant to the Forfeiture Act, is DENIED and Claimant's request for oral argument is DENIED.

PUBLIC SCHOOL
EMPLOYEES'
RETIREMENT BOARD
Dated: 12/17/21 By: /s/ Christopher SantaMaria
Christopher SantaMaria,
Chairman

APPENDIX IV
COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL
EMPLOYEES' RETIREMENT BOARD

IN RE: :
ACCOUNT OF : **DOCKET NO. 2019-05**
RICHARD W. COMO :
CLAIM OF :
RICHARD W. COMO :

NOTICE

The attached *Opinion* and *Recommendation* have been submitted to the Public School Employees' Retirement Board (Board) for its consideration. Procedure for exceptions is pursuant to 1 Pa. Code §§35.211-35.214. Specifically, any party who wishes to file exceptions to all or part of the *Opinion* and *Recommendation* to the Board shall file them in the form of a *Brief on Exceptions* within 30 days after service of a copy of this *Opinion* and *Recommendation*. 1 Pa. Code §35.211. A *Brief Opposing Exceptions* may be filed in response to a *Brief on Exceptions* within twenty (20) days of receipt of the *Brief on Exceptions*. *Id.* Exceptions and Briefs on Exceptions should be submitted to the attention of Glen R. Grell, Secretary, Public School Employees' Retirement Board, 5 North Fifth Street, Harrisburg, PA 17101, with copies to the opposing party. Failure to file a *Brief on Exceptions* within the time allowed under the General Rules of Administrative Practice and Procedure at 1 Pa. Code §§35.213 shall constitute a

waiver of all objections to the Opinion and Recommendation.

/s/ M Foerster

Michael T. Foerster
Hearing Officer

For Claimant: Samuel C. Stretton, Esquire
103 South High Street
P.O. Box 3231
West Chester, PA 19381-3231

For PSERS: Cayla B. Jakubowitz, Esquire
Public School Employees'
Retirement System
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Docket Clerk: Julie Vitale, Appeal Docket Clerk
PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD
5 North Fifth Street
Harrisburg, PA 17101

Date of mailing: 9/20/21

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

IN RE: :
ACCOUNT OF : **DOCKET NO. 2019-05**
RICHARD W. COMO :
CLAIM OF :
RICHARD W. COMO :

OPINION AND RECOMMENDATION

**Michael T. Foerster
Hearing Officer**

Submitted on Motion for Summary Judgment
Hearing Officer: **Michael T. Foerster**
For the Claimant: **Samuel C. Stretton, Esquire**
For PSERS: **Cayla B. Jakubowitz Esquire**

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Richard W. Como ("Claimant"). On May 14, 2019, through counsel, Claimant appealed a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS"), dated April, 26, 2019 ("ESRC denial letter"), that declared that Claimant's right to receive retirement benefits from PSERS had been forfeited. On May 21, 2019, through

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Assistant Counsel Cayla B. Jakubowitz, PSERS filed its *Answer* to Claimant's appeal. By letter dated June 18, 2018 ("ESRC second denial letter"), PSERS informed Claimant that, because the Forfeiture Act directs that all benefits be forfeited, he was no longer eligible for coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant. By letter received by PSERS on June 29, 2018, Claimant filed an appeal of the denial of coverage through PSERS' Health Options Program. By letter dated April 26, 2019, the ESRC denied Claimant's appeals, which resulted in the aforementioned May 14, 2019 appeal.

On May 10, 2021, Attorney Jakubowitz moved for summary judgment saying that there is no genuine issue of material fact and, specifically, that the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315, compelled forfeiture of Claimant's pension benefits. On June 3, 2021, Counsel to Claimant answered and briefed his opposition to the requested summary judgment.

By letter dated July 15, 2021, the Board's Secretary, Glen R. Oren, appointed the undersigned to act as Hearing Officer to issue a proposed opinion and recommendation regarding PSERS' Motion for Summary Judgment ("MSJ").

FINDINGS OF FACT

1. Claimant was first enrolled in the Public School Employees' Retirement System ("PSERS") in

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September 1969 by virtue of his employment with the Upper Merion School District (“Upper Merlon”). PSERS Memorandum of Facts ¶ 1, admitted.¹

2. In June 1983, Claimant terminated service with Upper Merion. PSERS Memorandum of Facts ¶ 2, admitted.

3. On June 27, 1983, PSERS received Claimant’s first *Application for Retirement* in which he elected the Maximum Single Life Annuity and requested a withdrawal of his total contributions and interest. PSERS Memorandum of Facts ¶ 3, admitted; PSERS-1 attached to Motion.

4. PSERS processed Claimant’s first *Application for Retirement*, and he began receiving a monthly retirement benefit, effective July 31, 1983. PSERS Memorandum of Facts ¶ 4, admitted.

5. Claimant returned to public school service for the Coatesville Area School District (“Coatesville”) in June 1986, was reenrolled in PSERS, his retirement benefit with PSERS stopped, and his annuity was frozen per the Public School Employees’ Retirement Code. *See generally* 24 Pa. C.S. §8346(a). PSERS Memorandum of Facts ¶ 5, admitted.

¹ PSERS has made its allegations in its *Memorandum of Facts* which covered the PSERS *Motion for Summary Judgment*. Claimant has responded with an *Answer*. This pleading back-and-forth is vetted in the Discussion section.

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6. In approximately December 1987, Claimant left his employment with Coatesville. PSERS Memorandum of Facts ¶ 6, admitted.

7. From December 1987 until approximately June 1988, Claimant worked for Upper Merion, PSERS Memorandum of Facts ¶ 7, admitted.

8. Thereafter, in August 1988, Claimant returned to work with Coatesville as an assistant principal. PSERS Memorandum of Facts ¶ 8, admitted.

9. Claimant, in 2005, became Superintendent of Coatesville, which employment terminated on September 2, 2013, PSERS Memorandum of Facts ¶ 9, clarified by Answer to same.

10. From September 1969 to June 1983 and June 1986 to September 2013, Claimant accrued service credit with PSERS as an active school employee. PSERS Memorandum of Facts ¶ 10, admitted.

11. On October 30, 2013, PSERS received Claimant's second *Application for Retirement* in which he elected the Maximum Single Life Annuity and requested a withdrawal of his total contributions and interest. PSERS Memorandum of Facts ¶ 11, admitted; PSERS-2 attached to Motion.

12. PSERS processed Claimant's second *Application for Retirement* and, by letter dated November 4, 2013, informed Claimant of his finalized retirement benefit. PSERS Memorandum of Facts ¶ 12, admitted; PSERS-3 attached to Motion.

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13. Effective November 30, 2013, Claimant began receiving a monthly annuity from PSERS that was calculated using the service credit he earned prior to his first retirement and the credit he earned thereafter; he also received a lump-sum rollover of his total contributions and interest. PSERS Memorandum of Facts ¶ 13, admitted; PSERS-3 attached to Motion.

14. In December 2014, a Police Criminal Complaint was filed against Claimant in the Court of Common Pleas of Chester County, alleging that, as Superintendent of Coatesville, Claimant, *inter alia*, illegally diverted funds, and attempted to divert additional funds, from Coatesville and the Coatesville Student Council between the fall of 2012 and the summer of 2013 to purchase commemorative non-championship rings for Coatesville's football team and certain other individuals. PSERS Memorandum of Facts 1114, admitted; PSERS-4 attached to Motion.

15. On January 16, 2018, the Commonwealth submitted an *Amended Information*. PSERS Memorandum of Facts ¶ 15, admitted; PSERS-5 attached to Motion.

16. On January 26, 2018, following a trial by jury, Claimant was found guilty of two felony counts of 18 Pa. C.S. § 3927(a) (counts 2 and 6 relating to theft by failure to make required disposition of funds received); the amount identified for count 2 was \$4,137.75; the amount identified for count 6 was \$6,931.50; Claimant was also found guilty of two felony counts of 18 Pa. C.S. §§ 901 and 3927(a) (counts 11 and 12 relating to

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criminal attempt to commit theft by failure to make required disposition of funds); the amounts identified were, respectively, \$5,913.50 and \$15,000.00. PSERS Memorandum of Facts ¶ 16, admitted; PSERS-6 attached to Motion; PSERS-4 & 5 attached to Motion.

17. The criminal offenses were committed in Claimant's capacity as the Superintendent for Coatesville and were committed through his public office as a school employee. PSERS Memorandum of Facts ¶ 17, admitted.

18. Criminal charges also were brought against Claimant, alleging that, between 2009 and 2013, as Superintendent of Coatesville, Claimant manipulated the sale of his personal electric generator to the district, arranged to have his son hired with the district, and submitted inaccurate expense reimbursement requests. PSERS Memorandum of Facts ¶ 18, admitted; PSERS-4 & 5 attached to Motion.

19. On January 26, 2018, Claimant was found guilty of twelve additional counts, which were not covered by the Forfeiture Act at the time Claimant committed the crimes; Claimant was found not guilty of the remaining four counts against him. PSERS Memorandum of Facts 1119, admitted; PSERS6 attached to Motion.

20. On March 16, 2018, Claimant was sentenced; for all crimes, forfeitable and otherwise, Claimant was sentenced to serve 3 to 23 months in prison followed by a period of probation; he was also ordered to repay the \$6,931.50 and \$4,137.75 as a fine and restitution,

respectively. PSERS Memorandum of Facts ¶ 20, admitted; Sentencing Sheet from the Court of Common Pleas of Chester County and the Docket Sheet, *Commonwealth of Pennsylvania v. Richard Wallace Como*, CP-15-CR-0000780-2015, PSERS 7 and 8.

21. By letter dated March 21, 2018, PSERS informed Claimant that due to his conviction for the forfeitable offenses of 18 Pa. C.S. § 3927 and 18 Pa. C.S. §§ 901 and 3927, his PSERS pension benefits had been forfeited under the Forfeiture Act and the retirement benefits he was receiving would be terminated effective March 16, 2018, PSERS Memorandum of Facts ¶ 21, admitted; PSERS 9.

22. By letter received April 11, 2018, Claimant filed an appeal with the PSERS Executive Staff Review Committee (“ESRC”); Claimant asserted:

- a. only a portion of his pension should be forfeitable because:
 - i. that his misconduct only occurred during a portion aids employment,
 - ii. he worked for more than one public school employer,
 - iii. he changed job classifications,
 - iv. he had breaks in employment
- b. Claimant also contended that the forfeiture of his pension was unconstitutional; and,

- c. finally, he asserted that he was appealing the criminal conviction.

PSERS Memorandum of Facts ¶ 22, admitted; PSERS 10.

23. Claimant admitted that misconduct occurred during his tenure as Superintendent. Answer ¶22.

24. By letter dated June 18, 2018, PSERS informed Claimant that, because the Forfeiture Act directs that all benefits be forfeited, he was no longer eligible for coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant. PSERS Memorandum of Facts ¶ 23, admitted; PSERS 11.

25. PSERS notified Claimant that his coverage would be terminated effective June 30, 2018. PSERS Memorandum of Facts ¶ 23, admitted; PSERS 11.

26. By letter received by PSERS on June 29, 2018, Claimant filed an appeal of the denial of coverage through PSERS' Health Options Program, in which he reiterated his averments set forth in his appeal received April 11, 2018, and requested that his medical benefits be reinstated. PSERS Memorandum of Facts ¶ 24, admitted; PSERS 12.

27. By letter dated April 26, 2019, the ESRC denied Claimant's appeals, explaining that the right of a person to receive retirement benefits from PSERS is subject to the Forfeiture Act, which states that all benefits payable to a public employee must be forfeited if the employee is convicted of a crime related to public

office or public employment enumerated in the Forfeiture Act; accordingly, the denial letter states that, by law, Claimant's right to receive any benefits from PSERS was forfeited as of the date of his sentencing. PSERS Memorandum of Facts ¶ 25, admitted; PSERS 13.

28. On May 14, 2019, Claimant filed an Appeal and Request for Administrative Hearing, to Wit Claimant maintains his arguments presented to the ERSC and requests that the board reverse the forfeiture. PSERS Memorandum of Facts 126, admitted; PSERS 14.

29. On May 21, 2019, PSERS filed its Answer. PSERS Memorandum of Facts 127, admitted; PSERS 15.

30. Claimant appealed his criminal judgment to the Pennsylvania Superior Court, and by unpublished decision dated November 23, 2020, the Superior Court affirmed the judgment against Claimant in part, and reversed in part. PSERS Memorandum of Facts ¶ 28, admitted; PSERS 16.

31. As it relates to the forfeitable offenses of counts 2, 6, 11, and 12, third degree felony counts 18 Pa. C.S. § 3927(a) and 18 Pa. C.S. §§ 901 and 3927(a), the Superior Court sustained Claimant's conviction as to all four counts. PSERS Memorandum of Facts ¶ 29, admitted; PSERS 16.

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32. The criminal matter is presently in the Pennsylvania Supreme Court on a *Petition for Allocatur*. Answer ¶ 28.

33. An administrative hearing is not scheduled in this matter. PSERS Memorandum of Facts ¶30.

34. On May 10, 2021, PSERS Attorney Cayla B. Jakubowitz moved for summary judgment saying that there is no genuine issue of material fact and, specifically, that the Public Employee Pension Forfeiture Act, 43 P.S. §§ 1311-1315, compelled forfeiture of Claimant's pension benefits. Docket Entries.

35. On June 3, 2021, Counsel to Claimant answered and briefed his opposition to the requested summary judgment. Docket Entries.

36. By letter dated July 15, 2021, the Board's Secretary, Glen R. Grell, appointed the undersigned to act as Hearing Officer to issue a proposed opinion and recommendation regarding PSERS' MSJ. Docket Entries.

CONCLUSIONS OF LAW

1. The rights of P SERS members are derived solely from the provisions of the Public School Employees' Retirement Code, 24 Pa. C.S. § 8101 *et seq.* ("Retirement Code"). *See Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

2. The Board's authority to grant or deny Claimant's request is limited to the provisions of the

Retirement Cod; and the Board has no authority to grant Claimant rights beyond those specifically set forth in the law. *See Forman, supra; Bittenbender v. State Employees' Retirement Board*,² 622 A.2d 403 (Pa. Cmwlth. 1992).

3. The General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et seq.* apply to the activities of and proceedings before PSERS and the Board, except as otherwise provided in the Board's rules and regulations. 22 Pa. Code §201.1.

4. The Board's rules and regulations provide that either party, PSERS or a claimant, may file a motion for summary judgment with the Board and that such a motion must conform with Pa. R.C.P. Nos. 1035.1 through 1035.5.

5. Claimant ultimately bears the burden of proof in this proceeding. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 751 A.2d 194 (Pa. 2000); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).

6. The Public Employee Pension Forfeiture Act, Act of July 8, 1978, P.L. 752, No. 140, as amended

² 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. Employees' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

March 28, 2019, P.L. 1, No. 143, P.S. §§1311 through 1315 (“Forfeiture Act”), in pertinent part, as follows:

Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is found guilty of a crime related to public office or public employment or pleads guilty or nolo contendere to any crime related to public office or public employment.

43 P.S. §1313(a).

7. The purpose of a summary judgment motion is to avoid a useless trial. *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 902 (Pa. 1989).

8. Summary judgment is appropriate only in those cases where the record, in the form of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, clearly demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Yount v. Pa. Dep’t of Corr.*, 966 A.2d 1115, 1118 (Pa. 2009), citing *P.J.S. v. Pa. State Ethics Commission*, 723 A.2d 174, 176 (Pa. 1999); see also *Kelly by Kelly v. Ickes*, 629 A.2d 1002, 1004 (Pa. Super. 1993).

9. In deciding a motion for summary judgment, the Board must examine the record in the light most favorable to the non-moving party and accept as true all well-pleaded facts in the non-moving party's pleadings, as well as give the non-moving party the benefit of all reasonable inferences drawn from those pleadings. *Kelly by Kelly*, 629 A.2d at 1004, citing *Dibble v. Security of America Life Ins.*, 404 Pa. Super. 205, 590 A.2d 352 (1991); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 395 Pa. Super. 456, 577 A.2d 631 (1990).

10. A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the adjudicator. *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938, 940 (Pa. Super. 1998).

11. Examined in a light most favorable to the Claimant, and giving Claimant all benefits of reasonable inferences drawn from the pleadings and attachments thereto, it is clear that no issue of material fact exists and that PSERS is entitled to a judgment as a matter of law. Findings of Fact Nos. 1 – 36.

12. Claimant was afforded notice and an opportunity to be heard and participated vigorously in this appeal. Findings of Fact Nos. 22 – 28, 34 – 36; Docket entries.

DISCUSSION

Presenting for the Board are PSERS' *Motion for Summary Judgment* and Claimant's opposition to the same. In this case, analysis will focus on the various documents presenting especially the System's *Memorandum of Facts* and Claimant's *Answer* thereto. PSERS made its allegations in its *Memorandum of Facts*; Claimant in his *Answer* had to admit or deny given the procedural status of the matter. Review of the documents, and indeed the specific allegations/answers, shows that there is little dispute about the overarching facts. Specific paragraph answers shows that there are often restatements of all or parts of the allegations without any explicit denial. These will be construed as admissions. Sometimes there is commentary to only one portion of the PSERS allegation of fact without comment on other portions within that PSERS allegation. That which was not addressed by Claimant was thus admitted. Where there was disagreement, the finding (here in this document) paired down the PSERS allegation to what was not disputed by Claimant.

Regarding Motions for Summary Judgment, PSERS regulations state: "(b) *Summary judgment*. The System or the claimant may file a motion for summary judgment directly with the Board. The motion must conform to Pa. R.C.P. Nos. 1035.1-1035.5." 22 Pa. Code §201.6(b). Our Rules of Civil Procedure state, at the rules cited just above, that a party may file for summary judgment, which is essentially a tool of judicial efficiency. If the matter has been vetted, issues are

clear, and one party is entitled to a judgment then trial, or hearing in a case such as this, would be unnecessary. The moving party files its motion for summary judgment and then opposing party must respond. The Ivies state further:

Rule 1035.3. Response. Judgment for Failure to Respond.

(a) . . . the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying:

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.

....

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Pa. R.C.P. No. 1035.3. This framework is critical to deciding the motion. Once the System's attorney called the question, Claimant was obligated (1) to point to some issue of fact that would affect the outcome,³ or (2) to point to some inadequacy in PSERS' case.⁴

The sole issue for the Board is whether either of the above arguments should preclude the PSERS motion for summary judgment. Is there some issue of fact or some inadequacy in the PSERS case? Summary judgment is appropriate when there is no genuine issue of material fact. *See Pa. R.C.P. No. 1035.2.* In determining whether the party moving for summary judgment (i.e., PSERS) has met its burden, the Board must examine the record in the light most favorable to the non-moving party (i.e., Claimant), giving such non-moving party the benefit of all reasonable inferences. *See Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), aff'd, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *See El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984).

Here, we are presented with a motion and a response that largely agree on the facts. Claimant started

³ As stated in Pa. R.C.P. No. 1035.3 at (a)(1) there must be some evidence in the record that controverts evidence that the moving party (PSERS) asserted evidence or questions the credibility of a witness or witnesses.

⁴ Or Claimant, per (a)(2), must point to something that is missing from the System's case, e.g., some evidence necessary for the moving party to prevail that is not in the record.

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working in Pennsylvania public education, and thus became a contributing member to PSERS, in 1969. There he worked until 1983 when he left to become a football coach as Duke University. When he left, he opted to retire from the System and chose a Maximum Life Annuity. That proved to be a short career detour, instead of an exit, as Claimant returned to Southeastern Pennsylvania and to public education in 1986. Claimant reenrolled in PSERS, his retirement benefit with PSERS stopped, and his annuity was frozen per the Public School Employees' Retirement Code. Through the intervening years, Claimant shuffled school districts and rose on the job ladder. In fact, Claimant rose to the title of Superintendent. Throughout, Claimant was a contributing member of PSERS.

In 2013, PSERS again received an application for retirement benefit. Unfortunately, this appears to have been secondary allegations of criminal wrong-doing. In 2014, authorities filed an Information against Claimant. In 2018, authorities filed an Amended Information against Claimant. On January 26, 2018, following a trial by jury, Claimant was found guilty of two felony counts of 18 Pa. C.S. § 3927(a) (counts 2 and 6 relating to theft by failure to make required disposition of funds received); the amount identified for count 2 was \$4,137.75; the amount identified for count 6 was \$6,931.50; Claimant was also found guilty of two felony counts of 18 Pa. C.S. §§ 901 and 3927(a) (counts 11 and 12 relating to criminal attempt to commit theft by failure to make required disposition of funds); the

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amounts identified were, respectively, \$5,913.50 and \$15,000.00.

Claimant was sentenced and 5 days later PSERS sent notification that Claimant's conviction, of forfeitable offenses, resulted in the forfeiture of his pension benefits. Claimant appealed that determination.⁵ Claimant's appeal states that his misconduct only occurred during a portion of his employment and that he worked for more than one public school employer. During those terms of employment he changed job classifications and even had breaks in employment. From that Claimant argues that only a portion of his pension should be forfeitable, Claimant also contends that the forfeiture of his pension was unconstitutional. Finally, he argues that he is appealing the criminal conviction and this should forestall any enforcement. These arguments will be discussed *in seriatem*.

The Forfeiture Act, 43 P.S. §§ 1311-1315, directs that no public employee shall be entitled to receive any retirement or other payment or benefit of any kind, if such public employee is convicted of crimes related to public office or employment. 43 P.S. § 1313(a). The definition of "crimes related to public office or public employment" identifies the state crime of theft by failure to make required disposition of funds received, 18 Pa. C.S. § 3927, "when the criminal culpability reaches the

⁵ PSERS also determined, and sent notice of its determination, that Claimant lost any right to health benefit through the System as well. Claimant appealed This decision as well. As they are the same issues on the same facts, both determinations and appeals will be handled as one in this document.

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level of a misdemeanor of the first degree or higher” and “when committed by a public employee through his public office or position or when his public employment places him in a position to commit the crime.”⁶ 43 P.S. § 1312.⁷ The Forfeiture Act also covers criminal attempt to commit a forfeitable offense, 18 Pa. C.S. § 901. *See Luzerne County Ret. Bd v. Seacrist*, 988 A.2d 785, 788 (Pa. Cmwlth. 2010).

Once a triggering conviction occurs, the Forfeiture Act leaves no discretion to PSERS (or any administrative agency). *See* 43 P.S. § 1313(b); *Gierschick v. State Employees’ Ret. Bd.*, 733 A.2d 29, 33 (Pa. Cmwlth. 1999). “Indeed, the Board does not have the authority to reinstate Claimant’s pension benefits for equitable or other considerations.” *Account of Carol L. Hollern*, Docket No. 2019-06, at *6 (PSERB Oct. 20, 2020) (citing *Apgar v. State Employees’ Ret. Sys.*, 665 A.2d 185, 189 (Pa. Cmwlth. 1994) and *Account of Jacqueline*

⁶ The Forfeiture Act defines a “public employee” to include “all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision. For the purposes of this act such persons are deemed to be engaged in public employment,” 43 P.S. § 1312.

⁷ As indicated in the Memorandum of Facts, on March 28, 2019, through Act 1, the Legislature amended the Forfeiture Act and expanded the list of forfeitable crimes to all Pennsylvania crimes classified as felonies or punishable by a term of imprisonment exceeding five years, and all federal crimes and crimes of another state that are “substantially the same.” Pursuant to the enabling provision of the legislation, Act 1 applies to crimes related to public employment that are committed on or after the enactment date, March 28, 2019. Because Claimant committed his crimes prior to March 28, 2019, his appeal must be addressed based on the law in place at the time he committed his crimes.

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Ruchinski, Docket No. 2018-06, at *8 (PSERB Aug. 16, 2019)).⁸

To apply, on January 26, 2018, Claimant was convicted in the Court of Common Pleas of Chester County of two felony counts of 18 Pa. C.S. §3927(a) (relating to theft by failure to make required disposition of funds received) and two felony counts of 18 Pa. C.S. §§ 901 and 3927(a)(relating to criminal attempt to commit theft by failure to make required disposition of funds). *See* PSERS-4 through PSERS-8. Claimant committed the crimes in his capacity as Superintendent of the Coatesville Area School District (“Coatesville”) between 2012 and 2013. *See* PSERS-4 and 5. As a result of his conviction, by letter dated March 21, 2018, PSERS informed Claimant that his PSERS pension benefits had been forfeited under the Forfeiture Act and that the retirement benefits he was receiving would be terminated effective March 16, 2018. *See* PSERS-9. By letter dated June 18, 2018, PSERS informed Claimant that he also was no longer eligible for coverage through PSERS’ Health Options Program, which was available to him only through his status as a PSERS annuitant. *See* PSERS-11. The following will address Claimant’s various arguments.

Misconduct only occurred during one portion and one employer of Claimant’s employment.

Claimant first enrolled as a member of PSERS in September 1969 by virtue of his employment with the

⁸ Board adjudications are available at www.psers.pa.gov.

Upper Merion School District. From then and there, Claimant came and went. Upon his return he moved between school districts and always up the figurative ladder. The parties agree that Claimant worked for different public school employers during his career, had a break in employment, and changed job positions.

Claimant indisputably committed the forfeitable offenses while he was the Superintendent of Coatesville. Findings of Fact Nos. 20 & 23. He asks that he, however, forfeit only a portion of his retirement benefit. Specifically, he asks that he only forfeit either (1) the benefits he earned during his time as Coatesville's Superintendent; or (2) the benefits he earned during his full employment with Coatesville. Claimant posits that, upon taking employment as Superintendent with Coatesville, he was in an entirely new job classification, and as such, he avers that there was no renewal of his employment contract for purposes of forfeiture. Further, he maintains that he engaged in misconduct only for a specific period of time and, thus, his entire benefit should not be forfeited. Alternatively, Claimant contends that the benefits he accrued while employed for Upper Merion should not be forfeited, as this service was distinct from his employment with Coatesville.

Section 1313(a) of the Forfeiture Act requires the forfeiture of Claimant's entire pension, including his coverage through PSERS' Health Options Program, which was available to him only through his status as a PSERS annuitant:

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Notwithstanding any other provision. of law, no public official or public employee, nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

43 P.S. §1313(a); *see Shiomas v. State Employees' Ret. Bd.*, 533 Pa. 588, 626 A.2d 158, 162 (1993) (quoting 43 P.S. § 1313(a)). Indeed, the Pennsylvania Supreme Court has previously rejected the argument that a pension may be forfeited only in part:

As a reasonable condition of public employment, the employee reaffirms his commitment to perform his job with honesty and integrity every time he or she begins a new term of office, receives a promotion or appointment, or experiences a change in job classification; regardless of whether such public employment is on a full or part-time basis. With each appointment there is a renewal of the agreement to perform the term of public service without violating [the Forfeiture Act]; an agreement which encompasses all that has gone before. Thus, whether or not a public employee's right to receive retirement benefits has vested, or he or she is in actual receipt of benefits, all previous accumulated rights to receive such benefits are

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subject to forfeiture by And through the “renewed” agreement which is formed each time a person chooses to become a “public official” as defined by [Section 1312].

Shiomas at 596, 626 A.2d at 162 (emphasis added).

The fact that Claimant held different positions over the years, with different employers, does not change the outcome. At most, the changes in contract solidify the outcome as Claimant accepted and adopted the terms of the Forfeiture Act with each change. *See* 43 P.S. § 1313(c), Nor does the fact that Claimant completed some of his service without disciplinary misconduct allow for a different result. *See Public Sch. Employes' Ret. Bd v. Matthews*, 806 A.2d 971 (Pa. Cmwlth. 2002). The Commonwealth Court's decision in Matthews is instructive. In *Matthews*, the Court addressed whether a public employee must forfeit retirement benefits that inured to her by virtue of one position of public employment when she committed her crime while employed in a different position of public employment. Matthews became a PSERS member by virtue of her employment as a cafeteria worker with the Tussey Mountain School District. *Id.* at 972. Simultaneously, Matthews worked for the district as a tax collector, although she was not a member of PSERS in that capacity. *Id.* Matthews, in her position as tax collector, pled guilty to a forfeitable offense. *Id.* Our Commonwealth Court held that, although Matthews committed the crime in her position as a tax collector, her pension with PSERS as a cafeteria worker was forfeited. *Id.* at 974-75, The Court noted that the

Forfeiture Act “contains no requirement that the pension benefits that are forfeited be necessarily connected to the public employment related to [the] crime.” *Id.* at 975.

Here, there is no dispute that Claimant’s job classification changed multiple times during his career and, at a minimum, changed when he became Superintendent with Coatesville in 2005. (PSERS-10); 43 P.S. § 1313(c). In each instance, as a matter of law, Claimant renewed his agreement to perform his term of public service without violating the Forfeiture Act: “Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes job classification, there is a termination and renewal of the contract for purpose of this act.” 43 P. S. §1313(c); *see* Apgar, 655 A.2d at 188. With each change in contract, he agreed that his entire pension would be forfeited if he committed “any crime related to public office or public employment” 43 P.S. § 1313(a). Thus, as a matter of law, Claimant’s entire pension has been forfeited.

Claim that the pension forfeiture is unconstitutional

Claimant contends that the forfeiture of his pension benefits is excessive and violates his due process rights in violation of the Eighth and Fourteenth Amendments to the United States Constitution, is an impairment of contracts in violation of Article 1, Section 10 of the United States Constitution and Article I, Section 17 of the Pennsylvania Constitution, and infringes on a liberty interest in his pension.

It should be noted that, “[a] statute is presumed constitutional, and the burden of proving otherwise is heavy.” *Morris v. Pub. Sch. Employes’ Ret. Sys.*, 538 A.2d 1385, 1389 (Pa. Cmwlth 1988), *appeal denied*, 557 A.2d 345 (Pa. 1989). Further this Board has recognized that the determination of a statute’s constitutionality is not within its bailiwick. *Account of Ross A. Scarantino*, Docket No. 200914, at *15 (PSERB Dec. 13, 2011). That said, the Forfeiture Act has repeatedly been held to be constitutional.⁹

⁹ Our Supreme Court has dismissed the argument that a forfeiture such as this is unconstitutional:

It is neither unconscionable nor unreasonable to require honesty and integrity during an employee’s tenure in public service. Nor is it violative of the Pennsylvania Constitution to provide that at every new term of employment a public official or employee renews and amends his or her pension contract to include the new public service and to place at risk that which may have already been earned. Such is the nature of the public employment agreement.

Shiomos at 596, 626 A.2d at 163; *see also Account of Carol L. Holtern*, Docket No. 2019-06, at *7; *Account of Dennis L. Bruno*, Docket No. 2011-15, at *17-18 (PSERB May 1, 2013). Rather, a forfeiture is the result of Claimant having breached his pension contract. *See Scarantino v. Pub. Sch. Employees’ Ret. Bd.*, 68 A.3d 375, 384-85 (Pa. Cmwlth. 2013). Indeed, a condition precedent for eligibility to receive pension benefits is that an employee cannot have been convicted of a forfeitable offense. *See id.* (*citing Commonwealth v. Abraham*, 58 A.3d 42, 49 (Pa. 2012)). Moreover, the Forfeiture Act does not serve as an unconstitutional impairment of contract because each time Claimant accepted a new job position, he assented to the terms of the Forfeiture Act. *See Shiomos* at 596, 626 A.2d at 162; *see also Apgar*, 665 A.2d at 188. Our Commonwealth Court has held that the Forfeiture Act does not violate the Pennsylvania or United States Constitutions as an

Conviction is still on appeal

Claimant maintains that he cannot lose his pension at this time, as he has appealed his criminal conviction. Specifically, he asserts that there should be no determination of forfeiture until there has been a final review of his appeals through the Pennsylvania Superior Court and Pennsylvania Supreme Court. Preliminarily, the Superior Court has addressed Claimant's appeal and has affirmed the judgment of sentence as to theft by failure to make required disposition of funds, 18 Pa. C.S. §3927 (Counts 2 and 6), and attempt to commit theft by failure to make required disposition of funds, 18 Pa. C.S. §§ 901 and 3927 (Counts 11 and 12). *Commonwealth v. Como*, No. 1687 EDA 2018, 2020 Pa. Super. Unpub. LEXIS 3666 (Pa. Super. Nov. 23, 2020), attached to the PSERS brief as PSERS-16. Regardless, the Board does not have the authority to delay a forfeiture determination. See 43 P.S. § 1313(b) (benefits are reinstated only upon a verdict of not guilty or proof that the indictment or criminal information finally dismissed). If circumstances should change in the future, Claimant may notify PSERS at that time and the facts can be reviewed.

excessive fine because the forfeiture of a pension is not a fine imposed for the conviction of an offense. *Scarantino, supra*. Finally, any due process challenge to the criminal proceedings would need to be addressed in that forum. Claimant is receiving due process rights before the Board through this appeal, and Claimant has articulated no legal support for an undefined liberty interest in his pension. Accordingly, the forfeiture of Claimant's pension was not unconstitutional.

Conclusion

Considering the Findings of Fact, Conclusions of Law, and Discussion there appear to be no genuine issues of material fact and it, further, it appears that PSERS is entitled to a judgment as a matter of law. Consequently, the following recommendation is made:

* * *

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

IN RE: :
ACCOUNT OF : **DOCKET NO. 2019-05**
RICHARD W. COMO :
CLAIM OF :
RICHARD W. COMO :

RECOMMENDATION

AND NOW, this 17th day of September, 2021, upon consideration of the foregoing findings of Fact, Conclusions of Law, and Discussion, the Hearing Officer for the Public School Employees' Retirement Board recommends that the Board:

- (1) **GRANT PSERS' Motion for Summary Judgment;** and,

(2) **DISMISS** Claimant's administrative appeal.

/s/ M Foerster
Michael T. Foerster
Hearing Officer

For Claimant: Samuel C. Stretton, Esquire
103 South High Street
P.O. Box 3231
West Chester, PA 19381-3231

For PSERS: Cayla B. Jakubowitz, Esquire
Public School Employees'
Retirement System
5 North Fifth Street
Harrisburg, PA 17101

Docket Clerk: Julie Vitale, Appeal Docket Clerk
PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD
5 North Fifth Street
Harrisburg, PA 17101

Date of mailing: 9/20/21

APPENDIX V

EFM

JANUARY 16, 2018

AMENDED INFORMATION

IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTER

COMMONWEALTH
OF PENNSYLVANIA
VS.

CRIMINAL ACTION
NO. CR-0780-2015
OTN: T 599858-0

RICHARD WALLACE COMO
DEFENDANT

The-District Attorney of Chester County, by this INFORMATION charges:

FIRST COUNT:

THEFT BY UNLAWFUL TAKING OR DISPOSITION

That on or about JANUARY 1, 2069 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did unlawfully take, or exercise unlawful control over, movable property of another with intent to deprive him thereof.

Value: \$4137.75

Citation: 18 Pa. C.S.A., Section 392.1(a).

Grading: F-3

SECOND COUNT:

THEFT BY DECEPTION

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did intentionally obtain or withhold property of another by deception by

(1) creating or reinforcing a false impression, including false impressions as to law, value, intention or other state of mind.

Value: \$4,137.75

Citation: 18 Pa. C.S.A. Section 3922(a)(1).

Grading: F-3

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

CLERK OF COURT NOTES:

WAIVER OF FORMAL ARRAIGNMENT

AND NOW, this _____ day of _____,
_____, the defendant waives formal arraignment and pleads Not Guilty.

Attorney for the Defendant

Defendant

ARRAIGNMENT

AND NOW, this _____ day of _____,
_____ the defendant hereby acknowledges that
he/she has been formally arraigned and is aware of the
charges against him/her.

Attorney for the Defendant Defendant

WAIVER OF JURY

AND NOW, this _____ day of _____,
_____ the defendant hereby acknowledges that
he/she has been formally arraigned and is aware of the
charges against him/her.

Attorney for the Defendant Defendant

Judge

WITHDRAW OF PLEA

AND NOW, this _____ day of _____,
_____ the defendant withdraws his plea en-
tered at the time of his arraignment and pleads:

Attorney for the Defendant Defendant

THIRD COUNT:

**THEFT BY FAILURE TO MAKE REQUIRED DIS-
POSITION OF FUNDS RECEIVED**

That on or about JANUARY 1, 2009 THROUGH SEP-
TEMBER 30, 2013 the defendant above named in the
County aforesaid and within the jurisdiction of this
Court, did obtain property upon agreement, or subject
to a known legal obligation, to make specified pay-
ments or other disposition, whether from such prop-
erty or its proceeds or from his own property to be
reserved in equivalent amount, and intentionally dealt
with the property obtained as his own and failed to
make the required payment or disposition.

Value: \$4,137.75

Citation: 18 Pa.C.S.A., Section 3927(a).

Grading: F-3

FOURTH COUNT:

RECEIVING STOLEN PROPERTY

That on or about JANUARY 1, 2009 THROUGH SEP-
TEMBER 30, 2013 the defendant above named, in the
County aforesaid and within the jurisdiction of this
Court, did intentionally receive, retain, or dispose of
movable property of another knowing that it had been
stolen, or believing that it had probably been stolen,
and the actor did not intend to restore the property to
the owner.

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Value: \$4,137.75

Citation: 18 Pa. C.S.A., Section 3925(a).

Grading: F-3

FIFTH COUNT:

DEALING IN PROCEEDS OF UNLAWFUL ACTIVITIES

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013, the defendant above named, in the County aforesaid, and within the jurisdiction of this Court did conduct a financial transaction under the following circumstances:

(1) With knowledge that the property involved represented the proceeds of unlawful activity; acted with the intent to promote the carrying on of unlawful activity.

(2) With knowledge that the property involved represented the proceeds of unlawful activity and knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of unlawful activity.

Citation: 18 Pa.C.S.A., Section 5111(a)(1), (2).

All of which is against-the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

SIXTH COUNT:

RESTRICTED ACTIVITIES-CONFLICT OF INTEREST

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally act in a way that no public official or public employee shall engage in conduct that constitutes a conflict of interest.

Citation 65 Pa C.S.A., Section 1103(a).

SEVENTH COUNT:

THEFT BY UNLAWFUL TAKING OR DISPOSITION

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did unlawfully take, or exercise unlawful control over, movable property of another with intent to deprive him thereof.

Value: \$6,931.50

Citation: 18 Pa. C.S.A., Section 3921(a).

Grading: F-3

EIGHTH COUNT:

THEFT BY DECEPTION

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did intentionally obtain or withhold property of another by deception by

(1) creating or reinforcing a false impression, including false impressions as to law, value, intention or other state of mind.

Value: \$6,931.50

Citation: 18 Pa. C.S.A. Section 3922(a)(1).

Grading: F-3

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

NINTH COUNT:

THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did obtain property upon agreement, or subject to a known legal obligation, to make specified

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payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, and intentionally dealt with the property obtained as his own and failed to make the required payment or disposition.

Value: \$6,931.50

Citation: 18 Pa.C.S.A., Section 3927(a).

Grading: F-3

TENTH COUNT:

RECEIVING STOLEN PROPERTY

That on or about JANUARY 1, 2009 THROUGH SEP-TEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally receive, retain, or dispose of movable property of another knowing that it had been stolen, or believing that it had probably been stolen, and the actor did not intend to restore the property to the owner.

Value: \$6,931.50

Citation: 18 Pa. C.S.A., Section 3925(a).

Grading: F-3

ELEVENTH COUNT:
DEALING IN PROCEEDS OF UNLAWFUL ACTIVITIES

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013, the defendant above named, in the County aforesaid, and within the jurisdiction of this Court did conduct a financial transaction under the following circumstances:

- (1) With knowledge that the property involved represented the proceeds of unlawful activity, acted with the intent to promote the carrying on of unlawful activity.
- (2) With knowledge that the property involved represented the proceeds of unlawful activity and knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of unlawful activity.

Citation: 18 Pa.C.S.A., Section 5111(a)(1), (2).

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

**TWELFTH COUNT:
RESTRICTED ACTIVITIES-CONFLICT OF INTEREST**

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally act in a way that no public official or public employee shall engage in conduct that constitutes a conflict of interest.

Citation 65 Pa C.S.A., Section 1103(a).

**THIRTEENTH COUNT AND FOURTEENTH COUNT:
CRIMINAL ATTEMPT TO COMMIT THEFT BY UNLAWFUL TAKING**

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid, and within the jurisdiction of this Court, with intent to commit the crime of THEFT BY UNLAWFUL TAKING, did an act which constitutes a substantial step toward the commission of that crime.

Value: \$3,118.50 and \$15,000.00

Citation: 18 Pa. C.S.A., Section 901 and 3921(a).

Grading: F-3

**FIFTEENTH COUNT AND SIXTEENTH COUNT:
CRIMINAL ATTEMPT TO COMMIT THEFT BY DECEPTION**

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant, above named, in the County aforesaid, and within the jurisdiction of this

Court, with intent to commit the crime of THEFT BY DECEPTION, did an act which constitutes a substantial step toward the commission of that crime.

Value: \$3,118.50 and \$15,000.00

Citation: 18 Pa. C.S.A., Section 901 and 3922(a)(1).

Grading: F-3

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

SEVENTEENTH COUNT AND EIGHTEENTH COUNT:
CRIMINAL ATTEMPT TO COMMIT THEFT BY
FAILURE TO MAKE REQUIRED DISPOSITION
OF FUNDS

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid, and within the jurisdiction of this Court, with intent to commit the crime of THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS, did an act which constitutes a substantial step toward the commission of that crime.

Value: \$3,118.50 and \$15,000.00

Citation: 18 Pa. C.S.A., Section 901 and 3927(a).

Grading: F-3

NINETEENTH COUNT AND TWENTIETH COUNT:
**CRIMINAL ATTEMPT TO COMMIT RECEIVING
STOLEN PROPERTY**

That on or about JANUARY 1, 2009 THROUGH SEP-
TEMBER 30, 2013 the defendant above named, in the
County aforesaid, and within the jurisdiction of this
Court, with intent to commit the crime of RECEIVING
STOLEN PROPERTY, did an act which constitutes a
substantial step toward the commission of that crime.

Value: \$3,118.50 and \$15,000.00

Citation: 18 Pa. C.S.A., Section 901 and 3925(a).

Grading: F-3

TWENTY FIRST COUNT AND TWENTY SECOND
COUNT:

**CRIMINAL ATTEMPT TO COMMIT DEALING IN
UNLAWFUL PROCEEDS**

That on or about JANUARY 1, 2009 THROUGH SEP-
TEMBER 30, 2013 the defendant above named, in the
County aforesaid, and within the jurisdiction of this
Court, with intent to commit the crime of DEALING
IN UNLAWFUL PROCEEDS, did an act which consti-
tutes a substantial step toward the commission of that
crime.

Citation: 18 Pa. C.S.A., Section 901 and 5111(a)(1), (2).

*All of which is against the Act of Assembly and the
peace and dignity of the Commonwealth of Pennsylvania.*

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

TWENTY THIRD COUNT:

THEFT BY UNLAWFUL TAKING OR DISPOSITION

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did unlawfully take, or exercise unlawful control over, movable property of another with intent to deprive him thereof.

Value: LESS THAN \$2,000.00

Citation: 18 Pa. C.S.A., Section 3921(a).

Grading: M-1

TWENTY FOURTH COUNT:

THEFT BY DECEPTION

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named in the County aforesaid and within the jurisdiction of this Court, did intentionally obtain or withhold property of another by deception by

(1) creating or reinforcing a false impression, including false impressions as to law, value, intention or other state of mind.

Value: LESS THAN \$2000.00

Citation: 18 Pa. C.S.A. Section 3922(a)(1).

Grading: M-1

TWENTY FIFTH COUNT:

RECEIVING STOLEN PROPERTY

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally receive, retain, or dispose of movable property of another knowing that it had been stolen, or believing that it had probably been stolen, and the actor did not intend to restore the property to the owner.

Value: LESS THAN \$2000.00

Citation: 18 Pa. C.S.A., Section 3925(a).

Grading: M-1

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

TWENTY SIXTH COUNT:

RESTRICTED ACTIVITIES-CONFLICT OF INTEREST (REIMBURSEMENTS)

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally act in a way that no public official or public employee shall engage in conduct that constitutes a conflict of interest.

Citation 65 Pa C.S.A., Section 1103(a).

TWENTY SEVENTH COUNT:

RESTRICTED ACTIVITIES-CONFLICT OF INTEREST (MATT COMO)

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally act in a way that no public official, or public employee shall engage in conduct that constitutes a conflict of interest.

Citation 65 Pa C.S.A., Section 1103(a).

TWENTY EIGHTH COUNT:

RESTRICTED ACTIVITIES-CONFLICT OF INTEREST (GENERATOR)

That on or about JANUARY 1, 2009 THROUGH SEPTEMBER 30, 2013 the defendant above named, in the County aforesaid and within the jurisdiction of this Court, did intentionally act in a way that no public

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official or public employee shall engage in conduct that, constitutes a conflict of interest.

Citation 65 Pa C.S.A., Section 1103(a).

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Thomas P. Hogan, Jr., Esquire
Attorney for the Commonwealth
By:

/s/ Andrea M. Cardamone, Esquire
Assistant District Attorney

APPENDIX VI

SAMUEL C. STRETTON
ATTORNEY AT LAW
103 South High Street
P.O. Box 3231
West Chester, PA 19381-3231

610-696-4243
FAX 610-696-2919

April 10, 2018

The Executive Staff Review Committee
PSERS
5 N. 5th Street
Harrisburg, PA 17101-1905

RE: Richard W. Como
Appeal of Pension Forfeiture Determination

Dear Executive Staff Review Committee:

Please be advised I represent Richard W. Como. By letter dated March 21, 2018, a copy of which is attached and marked as Exhibit "A", the Public School Employees Retirement System advised Mr. Como his pension was forfeited pursuant to the criminal convictions noted in the letter.

By this letter and on behalf of Richard W. Como, I am appealing the decision to the Executive Staff Review Committee. I am respectfully requesting a hearing on this matter, and respectfully requesting the decision dated March 21, 2018, which is attached and marked as Exhibit "A", be reversed.

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I am also including the following requested information:

1.) The Appellant is Richard W. Como. His address is 20 Cochran Drive, Coatesville, PA 19320. His telephone number is (610) 383-7137. The Appellant's social security number is 208-36-6871.

2.) Statement of the Facts:

A.) Richard Como had his pension forfeited, as set forth in Exhibit "A", due to the convictions of 18 Pa.C.S.A. 3927 and 18 Pa.C.S.A. 901. The forfeiture was pursuant to 43 P.S. 1312.

B.) Richard Como's entire pension for his approximately 44-45 years of service as a school employee (Assistant Principal, Principal and later Superintendent) has been forfeited.

C.) Mr. Como began his pension when he worked for the Upper Merion School District as a teacher and then Athletic Director from approximately 1969 to 1982.

D.) Mr. Como then worked for Duke University as an Assistant Football Coach in 1982 until 1986.

E.) Mr. Como then returned to the Coatesville Area School District in approximately September of 1986 and worked as a teacher for a year and a half, and later as the head football coach.

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F.) In 1987, Mr. Como returned to Upper Merion School District and worked there for six months as the Athletic Director.

G.) In 1988, he returned to the Coatesville School District and worked as an Assistant Principal at the high school for 7 or 8 years.

H.) In approximately 1995, Mr. Como became the Principal of the Coatesville High School.

I.) In the year 2005, Mr. Como gave up his civil service positions as teacher and principal and he was appointed by the Board and given a contract *as* the Superintendent of the Coatesville Area School District. He served as the Superintendent from 2005 until he resigned in the fall of 2014.

J.) As Superintendent, he had an entirely different position and was no longer civil service, and was subject to termination pursuant to his contract.

K.) Mr. Como was convicted criminally, as noted in the attached letter marked as Exhibit "A" and sentenced on or about March 16, 2018 to approximately 3 months to 23 months of incarceration. He is on bail pending an appeal, and there is an appeal being taken of his criminal convictions.

L.) Mr. Como received the letter marked as Exhibit "A" dated March 21, 2018 advising him of his entire pension forfeiture for his many years of service.

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M.) Mr. Como is appealing, by this letter, his pension forfeiture.

3.) Statement of Relief

Mr. Como is requesting that the pension forfeiture be overturned and/or the pension forfeiture be limited to only the time he served as the Superintendent since there was a complete and total break of his prior employment. Further, Mr. Como contends clearly his pension for when he worked at other schools should not be forfeited since the misconduct occurred only during the time he worked for the Coatesville School District.

4.) Complete Statement of Why the Appeal Should be Granted.

A.) Mr. Como respectfully contends that it is extremely unfair and a violation of due process to forfeit his approximately 44-45 years of pension for misconduct that did not occur until approximately 2012 and 2013 when he was the Superintendent. He contends his pension was earned for the services he performed and should not be taken away.

B.) Mr. Como contends that when he was made Superintendent, he had an entirely new job classification and there was no longer a renewal of his contact as a teacher. As a teacher, he was under civil service. As Superintendent, he served as the pleasure of the Board and had a separate contract. He was no longer under civil service. Further, his alleged misconduct only occurred when he was Superintendent. Therefore, the pension should only be forfeited from 2005 to the date

of his resignation in 2014 when he served as the Superintendent.

C.) In the alternative, Mr. Como contends that his pension should not be forfeited for the years he was a teacher, athletic director, football coach, assistant principal and principal since they were different job classifications and there was a total break in the misconduct that only occurred when he was acting as Superintendent in an entirely different job classification and category. He contends, therefore, the Board erred in forfeiting his entire pension when he should receive his pension from 1969 until he was appointed Superintendent of the Coatesville School District in 2005.

D.) In the alternative, Mr. Como further contends in the alternative that he should at least receive the pension for the approximately 12 to 13 years he worked at the Upper Merion School District. This was a different school district and a different government entity, and nothing that he did during that time period would require his pension forfeiture. That time period was between 1969 and 1982 and 1987. Further, in the second alternative, Mr. Como contends that he should at least have his pension until 1988. He worked for Upper Merion School District from 1969 until 1982, and then went to Duke University as a football coach from 1982 until 1986. From 1986 until 1987 Mr. Como was employed by the Coatesville Area School District, and then returned to Upper Merion School District in 1987. He then returned to the Coatesville Area School District in 1988 where he worked as Assistant Principal and then Principal

until 2005 when his job classification categories were entirely changed and he was made Superintendent. Mr. Como contends he at least should get his pension from 1969 up until he returned to the Coatesville Area School District finally in 1988. Mr. Como further contends that there were complete breaks in his employment, and therefore, there should not be retroactivity until 1969 because of the breaks, and further, because of the different position and different requirements as Superintendent, which was an appointed position and not civil service.

E.) Mr. Como contends that there were serious breaks in the employment so the forfeiture should not be retroactive.

F.) Mr. Como also contends that his performance from 1969 up until 2005 when he became Superintendent was excellent. There was no disciplinary misconduct as a principal, vice principal, athletic director, football coach or teacher. The pension was earned. There was no misconduct during those years. He contends that it would violate fundamental due process to take his pension and forfeit it when there was no misconduct during his time as a teacher, principal, vice principal, athletic director and football coach. He contends that the Fourteenth Amendment of the United States Constitution and related provisions of the Pennsylvania Constitution precludes taking his pension for the years he had different employment, different job categories and did nothing wrong and earned the pension.

G.) Mr. Como contends he has a liberty interest pursuant to the United States Constitution and the Pennsylvania Constitution in his pension for the years he worked when there was no misconduct.

H.) Mr. Como respectfully contends that the forfeiture of his pension was punitive and excessive and in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution and related provisions in the Pennsylvania Constitution.

I.) Mr. Como further contends that there should be no forfeiture since he is appealing his criminal conviction, and he contends that there should be no determination of forfeiture until there has been a final review of his appeals through the Pennsylvania Superior Court and the Pennsylvania Supreme Court.

J.) Mr. Como contends that the pension forfeiture statute violates Article 1, Section 10 of the United States Constitution, which precludes impairment of the obligations of contracts. Mr. Como, until 2005, had contracts with the various school districts, and part of his contract included the right to receive his earned pension. This forfeiture statute now violates those contracts and forfeits the pension that he earned pursuant to his valid contract during the time period when there was no misconduct [see Article 1, Section 10 of the United States Constitution]. Further, Mr. Como contends the forfeiture of his pension similarly violates the Pennsylvania Constitution under Article 1,

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Section 17, prohibiting any laws impairing the obligations of contracts. Mr. Como contends he had a valid contract with the school districts and earned his pension for the years where there was no misconduct at all. He contends the statute that forfeits his pension for years where there were no contracts interferes with and violates both the United States and Pennsylvania impairment of contracts provisions.

Mr. Como, therefore, appeals the pension forfeiture as set forth in Exhibit "A" and requests a hearing on these matters. It is his intent to pursue this vigorously and through the Court system if this Honorable Board does not reverse the forfeiture.

Respectfully submitted,

/s/ Samuel C. Stretton
Samuel C. Stretton, Esquire
Attorney for Appellant,
Richard W. Como
103 S. High Street
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West Chester, PA 19381
(610) 696-4243
Attorney I.D. #18491

SCS:jac
Enc.
Cc: Richard W. Como

VIA FACSIMILE (888-773-7748) & FEDERAL EXPRESS, OVERNIGHT DELIVERY

EXHIBIT A

[LOGO] **pennsylvania**
PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM

VIA CERTIFIED MAIL AND FIRST-CLASS MAIL

March 21, 2018

Richard W. Como
20 Cochran Dr.
Coatesville, PA 19320

RE: Account of Richard W. Como
Pension Forfeiture Determination

Dear Mr. Como:

The Public School Employees' Retirement System ("PSERS") has been notified that on January 26, 2018, in the Court of Common Pleas of Chester County, you were convicted of offenses that are covered by the Public Employee Pension Forfeiture Act ("Forfeiture Act"). 43 P.S. § 1311 et seq. On March 16, 2018, you were sentenced to serve three to twenty-three months in prison followed by one year of probation.

The right of a person to receive retirement benefits from PSERS is subject to forfeiture as provided by the Forfeiture Act. The Forfeiture Act states that all benefits payable to a public employee must be forfeited if the employee is convicted of or pleads guilty or no defense to a crime related to public office or public employment enumerated in the Forfeiture Act. The enumerated forfeitable offenses to which you were found

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guilty of are violations of 18 Pa.C.S. § 3927 (relating to theft by failure to make required disposition of funds received), and 18 Pa.C.S. §§ 901 and 3927 (relating to criminal attempt – theft by failure to make required disposition of funds received). The offense of theft by failure to make required disposition of funds received, 18 Pa.C.S. § 3927, is a crime covered by the Forfeiture Act, 43 P.S. § 1312, and the Commonwealth Court has held that any “public employee who is convicted of attempting or conspiring to commit any of the criminal offenses enumerated in the [Forfeiture Act] is subject to pension forfeiture[.]” *Luzerne County Ret. Bd. v. Seacrist*, 988 A.2d 785, 788 (Pa. Cmwlth. 2010).

Due to the operation of the Forfeiture Act, any right you may have accrued to receive benefits from PSERS now or in the future has been forfeited as of March 16, 2018. Because you are currently receiving a retirement benefit, payment of such benefit will be terminated effective March 16, 2018. Your monthly annuity payment for the month of March will, therefore, be stopped, and a prorated payment for March 1 through March 15 will be issued to you shortly under separate cover. You are also advised that the service and benefits that have been forfeited are ineligible for retirement coverage should you later gain public employment and qualify for membership or multiple service membership in PSERS.

The Forfeiture Act further provides that PSERS may withhold all of the contributions you made, and the statutory interest applied thereto, for the purpose of

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paying any fine imposed upon you, or for restitution of any funds misappropriated. 43 P.S. § 1313(d). You, however, have already withdrawn such funds at the time of your retirement. Consequently, you are solely responsible for any fine or restitution order.

If you wish to appeal this decision, your appeal must be addressed to the Executive Staff Review Committee (“ESRC”) and received at the offices of PSERS by April 20, 2018. See 22 Pa. Code §201.3a.

Your appeal request should be addressed to:

The Executive Staff Review Committee
PSERS
5 N. 5th Street
Harrisburg, PA 17101-1905

Your request for appeal should also contain the following information:

1. Your name, address, telephone number, and Social Security number.
2. A statement of the facts that are the basis of your appeal. (These should be set out in separate, numbered sentences.)
3. A statement of the relief you are requesting (i.e., what you want the ESRC to do).
4. A complete statement of why the ESRC should grant your request.

If you do not appeal this letter to the ESRC by April 20, 2018, the determination set forth in this letter will

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become final, and you will no longer have the right to appeal this determination. 22 Pa.Code § 201.3a(c).

Sincerely,

/s/ Troy W. Peechatka

Troy W. Peechatka

Retirement Administrator

cc: PSERS Office of Chief Counsel

Certified Mail No.: 7013 1090 0000 8362 5974
