

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA STATE
EDUCATION ASSOCIATION
Petitioner,

v.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD
Respondent.

No.: _____
ORIGINAL JURISDICTION

NOTICE TO PLEAD

TO: PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
213 North Front Street
Harrisburg, PA 17101
(717)232-7536

AVISO PARA ALEGAR

TO: PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta ascantar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

Lleve esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

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Dated: June 17, 2021

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**PETITION FOR REVIEW IN THE NATURE OF
A COMPLAINT SEEKING DECLARATORY RELIEF
AND A WRIT OF MANDAMUS**

PRELIMINARY STATEMENT

It is often said that a Commonwealth agency is a creation of the General Assembly and has only those powers that have been specifically delegated to it. The General Assembly created the Respondent Public School Employees' Retirement Board ("the PSERS Board") to implement the provisions of the Public School Employees' Retirement Code ("the Code"), 24 Pa. C.S. § 8101 *et seq.* In an effort to ensure the continued financial soundness of the retirement fund entrusted to the stewardship of the PSERS Board, the General Assembly amended the Code in the

summer of 2019 by adding Section 8327.1 -- *Nonparticipating employer withdrawal liability*.¹ The new section addresses the adverse financial impact to the Pennsylvania Public School Employee Retirement System (“System”) when an employer withdraws all or part of its workforce from the System. When that happens, the unfunded liability attributed to those former System members, rightfully due from the employer who is withdrawing them, is left behind to be paid by those who remain in the System. Section 8327.1 establishes a formula for calculating the liability of an employer withdrawing employees from the System, and directs the PSERS Board to calculate and collect the amount due from the withdrawing employer. Notwithstanding the statutory directive, and the departure and threatened departure of employees from the System since the September 3, 2019 effective date of Section 8327.1, the PSERS Board has not implemented the law. Instead, in clear contravention of the requirements of Section 8327.1, on March 5, 2021, nineteen months after the effective date, the PSERS Board adopted Resolution 2021-08, declaring that **“no action will be taken by PSERS regarding withdrawal liability as it pertains to outsourcing until further policy is approved by the PSERS Board and by legislation.”** (Exhibit A.)

This Petition for Review seeks three declarations:

(1) a declaration that the PSERS Board’s March 5, 2021 resolution was *ultra*

¹ Act of July 2, 2019, P.L. 434, No. 72, § 3, effective in 60 days [Sept. 3, 2019].

vires;

(2) a declaration that Section 8327.1 applies to the removal of public school employees from the System when district schools are converted to charter schools or school employee work is outsourced (subcontracted) to private entities; and

(3) a declaration that Section 8327.1 of the Code requires the PSERS Board to notify participating school employers that the PSERS Board will assess a withdrawal liability penalty for removing employees from the System by converting schools to charter schools or subcontracting the work of those employees to private entities.

ccThe Petition for Review also requests a writ of mandamus requiring the PSERS Board to implement Section 8327.1 of the Code as the General Assembly directed. When the General Assembly speaks, the PSERS Board has no choice but to listen and to act.

I. PARTIES

1. The Pennsylvania State Education Association (“PSEA”) is a nonprofit corporation and labor organization representing over 178,000 members,

most of whom are employees of public-school districts of the Commonwealth.

PSEA has over 1,000 affiliated local associations, most of which are certified as exclusive-bargaining representatives of employees of public school districts of the

Commonwealth.

2. Respondent Public School Employees' Retirement Board ("the PSERS Board") is Commonwealth agency. The PSERS Board is "an independent agency under the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act. (73 P.S. § 732-102)." 24 Pa. C.S. § 8501. The members of the PSERS Board stand in a fiduciary relationship to the members of the System regarding the investments and disbursements of moneys of the Pennsylvania Public School Employees' Retirement Fund. 24 Pa. C.S. §8521.

II. JURISDICTION

3. This Court has original jurisdiction over the claims asserted pursuant to Section 761(a) of the Pennsylvania Judicial Code, 42 Pa. C.S. § 761(a).

III. BACKGROUND FACTS

The General Assembly Enacts Section 8327.1

4. The General Assembly passed Act 72 of 2019, P.L. 434, on July 2, 2019. Governor Wolf signed the Act into law the same day and it became effective on September 3, 2019.

5. Section 3 of Act 72 amended the Code and is codified as Section 8327.1 of the Code, 24 Pa. C.S. § 8327.1.

6. Section 8327.1 of the Code, entitled “Nonparticipating employer withdrawal liability,” defines nonparticipating employers and requires the PSERS Board to assess and charge nonparticipating employers a withdrawal liability when they remove employees from the System based on their unfunded, accrued pension liability.

7. Section 8327.1 of the Code defines a nonparticipating employer as “an employer that is determined by the board to have ceased: (1) covered operations under the System; or (2) to have an obligation to contribute under the System for all or any of the employer's school employees but continues covered operations.” 24 Pa. C.S. § 8327.1(a)(1)-(2).

8. Pursuant to Section 8327.1(a), a nonparticipating employer “is liable to the System for withdrawal liability.” 24 Pa. C.S. § 8327.1(a).

9. If the PSERS Board identifies a nonparticipating employer, Section 8327.1(b) requires the PSERS Board to: determine the date of nonparticipation; determine the amount of the withdrawal liability; notify the employer of the amount of the withdrawal liability; and collect that amount from the employer. 24 Pa. C.S. § 8327.1(b).

10. Section 8371.1(c) provides that the liability “shall be determined” as of the relevant employer’s nonparticipation date and “shall be calculated” pursuant to a formula provided in the text of the statute. 24 Pa. C.S. § 8327.1(c).

The PSERS Board Fails to Implement Section 8327.1

11. Section 8327.1 of the Code does not direct the PSERS Board to prepare reports, develop policy, or to await additional legislation from the General Assembly. Instead, it provides mandates for action that became effective September 3, 2019, 60 days after enactment.

12. Notwithstanding Section 8327.1's effective date of September 3, 2019, the PSERS Board's first action pursuant to the law, taken December 11, 2020, more than 15 months later, was to publish the following item on the "Employer News" portion of its website:

Information on Withdrawal Liability

Effective September of 2019, Act 72 of 2019 requires PSERS to calculate and collect a withdrawing employer's unfunded retirement benefit liabilities, i.e., the employer's "withdrawal liability." Prior to September 2019, when an employer terminated its participation in PSERS, for all or some of its employees, that employer's share of the [S]ystem's unfunded retirement benefit liability was re-allocated to the remaining employers. Such withdrawals, under a cost-sharing multiple employer plan like PSERS, resulted in an increased funding obligation for the remaining employers. The withdrawal liability is designed to relieve the additional funding burden on the remaining employers.

Under the [Code], an employer is deemed to withdraw from PSERS when it ceases covered operations under the [S]ystem or ceases to have an obligation to contribute under the [S]ystem for all or any of the its [sic] employees but continues covered operations. Thus, an employer will be responsible for paying a withdrawal liability when, for example, it permanently closes all operations or creates an alternate retirement plan to cover some or all new employees. The calculation and payment of the withdrawal liability differs based on

whether the employer is ceasing operations entirely or continuing participation in PSERS for some employees, but not all. For a complete withdrawal, a lump sum amount is due PSERS. For a partial withdrawal, the amount owed may be paid over time.

...

If you are considering closing a school, creating an alternate retirement plan, or in any other way limiting PSERS membership for employees, you should contact the PSERS Employer Service Center for more information.

PSERS Employer News Item, published December 12, 2020.

13. On March 5, 2021, more than 19 months after Section 8327.1 of the Code took effect, the PSERS Board adopted the following resolution:

RESOLVED that the Public School Employees' Retirement Board ("PSERS Board") directs the Public School Employees Retirement System ("PSERS") staff to perform an outreach to relevant organizations to elicit input and feedback and to research and prepare a report for the Board assessing the applicability of Section 8327.1 of the Public School Employees' Retirement Code to outsourcing scenarios prior to applying the provision of Section 8327.1 to such scenarios.

In the interim, no action will be taken by PSERS regarding withdrawal liability as it pertains to outsourcing until further policy is approved by the PSERS Board and by legislation.

See PSERS Board Resolution, Resolution 2021-08 (emphasis added) (Exhibit A).

14. To the best of Petitioner's knowledge, information, and belief, the PSERS Board has failed to apply Section 8327.1 of the Code to any public school in any situation, at any time. Likewise, the PSERS Board has not notified any participating school employer that it might incur a penalty for conversion to charter

schools or for subcontracting public school employee jobs. This is so despite Petitioner's repeated notification to PSERS that districts were considering both types of withdrawal.

PSEA Is Aggrieved by the PSERS Board's Inaction

15. PSEA has standing in its own right because it has a substantial, direct, and immediate interest in the subject matter.

16. The PSERS Board's inaction enables the conversion of public schools to charter schools without a full accounting of the cost of the conversion, which will result in PSEA losing members.

Chester Upland

17. PSEA has hundreds of members who are employed by the Chester Upland School District.

18. The Chester Upland School District is a district in financial recovery status pursuant to Article VI-A of the Pennsylvania Public School Code ("School Code").

19. Article VI-A of the School Code gives a district in financial recovery status the power to convert district schools to charter schools only if the conversion results in financial savings. 24 P.S. §6-642-A(a)(2)(i).

20. The Chester Upland School District and its receiver are considering three proposals for converting two selected schools to charter schools. A decision is expected to be made on which proposal to select on or around July 1, 2021.

21. The PSERS Board failed to notify the Chester Upland District that Section 8327.1 will apply in the event District schools are converted to charter schools, resulting in the furlough of District employees. As such, the Chester Upland School District cannot predict the true costs of such conversions and those costs are hidden from the District, PSEA members, decisionmakers, and the public.

22. When one of the three proposals is selected, the Chester Upland School District will furlough, terminate, or otherwise eliminate a substantial number of public school employees who are also PSEA members, resulting in a decline in PSEA membership.

PSEA's Local Affiliates are Aggrieved by the PSERS Board's Inaction.

23. PSEA also has standing to bring this action because “at least one of its members is suffering an immediate or threatened injury as a result of the challenged action.” *Americans for Fair Treatment, Inc. v. Philadelphia Fed'n of Tchrs.*, 150 A.3d 528, 533 (Pa. Cmwlth. 2016).

24. At least two PSEA local unions – the Shikellamy Education Support Professionals' Association, PSEA/NEA and the Port Allegany Education Support Professionals' Association, PSEA/NEA – are aggrieved by the PSERS Board's lack

of action on Section 8327.1 of the Code

25. Under Pennsylvania labor law, subcontracting the work of a bargaining unit is a mandatory subject of bargaining. *PLRB v. Mars Area Sch. Dist.*, 389 A.2d 1073, 1075 (Pa. 1978); *Upper Moreland Twp. Sch. Dist. v. PLRB*, 695 A.2d 904 (Pa. Cmwlth. 1997); *Morrisville Sch. Dist. v. PLRB*, 687 A.2d 5 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied*, 700 A.2d 445 (Pa. 1997).

26. The Pennsylvania Labor Relations Board and this Court have ruled that, in negotiations related to subcontracting, the employer contemplating subcontracting for economic reasons commits an unfair labor practice if it does not clearly advise the union of the projected savings associated with the subcontract and provide the union with an opportunity to prevent the subcontracting by matching those savings. *Morrisville School District v. Pennsylvania Labor Relations Board*, 687 A.2d 5, 8 (Pa. Cmwlth. 1997); *Williamsport Area Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 932 C.D. 2010, 2011 WL 2342748, at *12 (Pa. Cmwlth. May 3, 2011).

Shikellamy

27. The Shikellamy Education Support Professionals' Association, PSEA/NEA ("SESPA") is certified by the Pennsylvania Labor Relations Board to represent various non-professional employees of the Shikellamy School District in Sunbury, Pennsylvania.

28. SESPA and the Shikellamy School District have entered into a collective bargaining agreement governing the wages, hours, and working conditions of employees within the bargaining unit represented by SESPA.

29. The Shikellamy School District has proposed to subcontract 72 positions within the bargaining unit to a private company. Those positions are currently filled by employees who are members of the System. This proposal would remove 72 positions from the System, and trigger withdrawal liability under Section 8327.1 of the Code.

30. In bargaining, the Shikellamy School District has alleged that it can save approximately \$700,000 per year by contracting out the bargaining-unit work.

31. However, the Shikellamy School District has not included the withdrawal liability required by Section 8327.1 of the Code into its savings calculations.

32. The PSERS Board has failed to notify its participating school employers, including the Shikellamy School District, that Section 8327.1 will apply in the event the District subcontracts the work of the ESP bargaining unit, resulting in the furloughs of District employees. The District cannot predict the true costs of such subcontracting and those costs are hidden from the District, PSEA members, decisionmakers, and the public.

33. Due to the PSERS Board's refusal to implement Section 8327.1 of the

Code, SESPA is unable to fulfill its legal obligation to bargain over the subcontracting of these 72 positions. SESPA has no way of knowing the economic impact of the subcontracting without factoring-in the amount the Shikellamy School District will be required to pay to fund its withdrawal liability.

Port Allegany

34. The Port Allegany Education Support Professionals' Association, PSEA/NEA ("PAESPA") is certified by the Pennsylvania Labor Relations Board to represent various non-professional employees of the Port Allegany School District in Port Allegany, Pennsylvania.

35. PAESPA and the Port Alleghany School District have entered into a collective bargaining agreement governing the wages, hours, and working conditions of the employees in the bargaining unit represented by PAESPA.

36. Out of the approximately 47 positions contained in the bargaining unit represented by PAESPA, the Port Allegany School District has proposed to subcontract 12 positions to a private company.

37. In bargaining, the Port Allegany School District has alleged that it can save approximately \$60,000 per year by contracting out the bargaining-unit work.

38. The estimated savings will likely be much lower or disappear entirely if withdrawal liability is included in the analysis.

39. The PSERS Board has failed to notify its participating school employers, including the Port Allegheny School District, that Section 8327.1 will apply in the event the District outsources the work of the ESP bargaining unit, resulting in the furloughs of District employees.

40. Due to the PSERS Board's refusal to implement Section 8327.1 of the Code, PAESPA is unable to fulfill its legal obligation to bargain over the subcontracting of these 12 positions. PAESPA has no way of accurately knowing the economic impact of the subcontracting without factoring-in the amount the Port Allegheny School District will be required to pay to fund its withdrawal liability.

IV. CAUSES OF ACTION

COUNT I: DECLARATORY JUDGMENT

41. All preceding paragraphs are incorporated as if fully set forth herein.

42. This Court has the authority to issue declaratory relief pursuant to the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 - 7541.

43. Declaratory relief is appropriate because PSEA lacks an appropriate administrative remedy, and because PSEA requires relief from uncertainty with respect to its rights and the rights of its members.

44. The PSERS Board "is charged with the execution and application of the [...] Code." *Mento v. Pub. Sch. Employees' Ret. Sys.*, 72 A.3d 809, 813 (Pa.

Cmwlth. 2013) (citing *Panko v. Pub. Sch. Emps. Ret. Sys.*, 492 A.2d 805 (Pa. Cmwlth. 1985)). The PSERS Board “is bound to follow the intent of the General Assembly in administering the provisions of [the Code].” *Id.* (citing 1 Pa. C.S. §1921(a) and *Hughes v. PSERB*, 662 A.2d 701, 706 (Pa. Cmwlth 1995)).

45. The PSERS Board is a creation of the General Assembly and has no power to ignore duly enacted legislation.

46. Section 8327.1 of the Code uses language that is mandatory and not discretionary. It states that the PSERS Board “shall” determine the participation date, amount of liability, notify the employer, and collect the amount of the withdrawal liability. 24 Pa. C.S. § 8327.1(a)(1)-(2).

47. Resolution 2021-08 explicitly states that “**no action will be taken by PSERS regarding withdrawal liability as it pertains to outsourcing until further policy is approved by the PSERS Board and by legislation.**”

48. The PSERS Board has no authority to suspend the implementation of an existing statutory mandate until some indefinite time in the future when it may approve policy – especially when over 19 months have passed since the amendment to the Code requiring action by the PSERS Board.

49. The PSERS Board has no authority to direct the General Assembly to act or to suspend the implementation of an existing statutory mandate “until further policy is approved . . . by legislation.”

50. The PSERS Board acted *ultra vires* when it enacted Resolution 2021-08. The PSERS Board lacks the authority to refuse to implement Section 8327.1 of the Code.

WHEREFORE, PSEA requests this Court declare that PSERS Board Resolution 2021-08 was entered *ultra vires* and is a legal nullity.

COUNT II: DECLARATORY JUDGMENT

51. All preceding paragraphs are incorporated as if fully set forth herein.

52. This Court has the authority to issue declaratory relief pursuant to the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 - 7541.

53. Declaratory relief is appropriate because PSEA lacks an appropriate administrative remedy, and because PSEA requires relief from uncertainty with respect to its rights and the rights of its members.

54. A school district that converts some of its schools to charter schools falls squarely within the definition of a “nonparticipating employer” as set forth in Section 8327.1(a)(2): it has ceased to have an obligation to contribute under the System for all or any of its employees but continues covered operations.

55. Article VI-A of the School Code gives a district in financial recovery status the power to convert district schools to charter schools only if the conversion

results in financial savings. 24 P.S. §6-642-A(a)(2)(i).

56. To implement Article VI-A of the School Code, Section 8327.1 of the Code must be interpreted to require the PSERS Board to notify employers contemplating the removal of employees from the System that Section 8327.1 imposes a withdrawal liability penalty for doing so.

57. A school district that subcontracts work currently performed by members of the System to a private contractor, but remains in operation, falls squarely within the definition of a “nonparticipating employer” as set forth in Section 8327.1(a)(2): it has ceased to have an obligation to contribute under the System for all or any of its employees but continues covered operations.

58. Sections 1201(a)(5) and 1201(b)(3) of the Public Employee Relations Act (“PERA”), 43 P.S. §§ 1101.1201(a)(5), 1101.1201(b)(3) require public employers and exclusive bargaining representatives to negotiate in good faith.

59. In order to implement Section 1201(a)(5) and 1201(b)(3) of the PERA in the context of subcontracting, employers must provide public employee unions with the costs associated with the subcontract and provide the union with an opportunity to prevent the subcontracting by matching those savings.

60. Because application of Section 8327.1 of the Code will lead to costs, Section 8327.1 must be interpreted to require the PSERS Board to notify employers that they will incur a withdrawal liability penalty should they decide to subcontract

the work of school employees, thereby removing those school employees from the System.

61. Absent notice of withdrawal liability, employers cannot know or calculate the true cost of subcontracting and cannot negotiate in good faith.

WHEREFORE, Petitioner seeks declaratory judgment setting forth:

- That Section 8327.1 of the Code applies when participating school employers convert district schools to charter schools, resulting in removal of public school employees from the System.
- That Section 8327.1 of the Code applies when participating school employers subcontract work to private actors, resulting in removal of public school employees from the System.
- That Section 8327.1 of the Code requires the PSERS Board to notify participating school employers that the PSERS Board will assess a withdrawal liability penalty for removing employees from the System when converting schools to charter schools or when subcontracting the work of those employees to private entities.

COUNT III: MANDAMUS

62. All preceding paragraphs are incorporated as if fully set forth herein.

63. A writ of mandamus lies to compel an agency's performance of a ministerial act or a mandatory duty. *McGill v. Commonwealth Dep't of Health, Office of Drug and Alcohol Programs*, 758 A.2d 268, 270 (Pa. Cmwlth. 2000).

64. Mandamus requires: a clear legal right in the plaintiff; a corresponding duty in the defendant; and a lack of any other adequate and appropriate remedy at law. *Crozer-Chester Med. Ctr. v. Commonwealth, Dep't of Labor and Industry, Bureau of Workers' Compensation, Healthcare Services Review Division*, 22 A.3d 189, 193 (Pa. 2011).

65. The PSERS Board has a duty to implement Section 8327.1 of the Code.

66. Section 8327.1 of the Code requires the PSERS Board to notify school districts that remove employees from PSERS by conversion to charter schools or by subcontracting work to private entities that they will incur a withdrawal liability penalty.

67. Any projected "savings" derived from a conversion to a charter schools or subcontracting work to a private entity cannot be calculated without taking the withdrawal liability penalty imposed by Section 8327.1 into account.

68. PSEA and its local affiliates, who will lose members if a charter school conversion occurs, have a clear right to know whether there are any actual "savings" realized when a distressed district, like the Chester Upland School District, proposes converting schools to charter schools.

69. PSEA and its local affiliates facing subcontracting, including SESPA and PAESPA, have a clear right to know the actual cost of subcontracting, including the withdrawal liability penalty, so they can negotiate in good faith to meet or exceed any projected savings associated with subcontracting.

70. PSEA has no adequate and appropriate remedy at law.

WHEREFORE, PSEA respectfully requests this Court issue a writ of mandamus requiring the PSERS Board to implement Section 8327.1 of the Code, to notify school districts planning to remove employees from PSERS through a charter school conversion or subcontracting of the withdrawal liability penalty, and to impose and collect the withdrawal liability penalty when applicable.

KILLIAN & GEPHART, LLP

Dated: June 17, 2021

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Exhibit A

PSERB Resolution 2021-08

Re: Withdrawal Liability

March 5, 2021

RESOLVED that the Public School Employees' Retirement Board ("PSERS Board") directs the Public School Employees Retirement System ("PSERS") staff to perform an outreach to relevant organizations to elicit input and feedback and to research and prepare a report for the Board assessing the applicability of Section 8327.1 of the Public School Employees' Retirement Code to outsourcing scenarios prior to applying the provision of Section 8327.1 to such scenarios.

In the interim, no action will be taken by PSERS regarding withdrawal liability as it pertains to outsourcing until further policy is approved by the PSERS Board and by legislation.