

207-06

PASQUALE SPITALETTA,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CALDWELL-WEST CALDWELL SCHOOL	:	
DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured social worker employed by the Board, contends that the Board violated N.J.S.A. 18A:66-1 *et seq* when it failed to deduct and forward pension contributions to the Teachers' Pension and Annuity Fund (TPAF) during the 1986-87 and 1987-88 school years. Petitioner seeks reimbursement from the Board in the amount of \$6,932.68, the difference between the amount petitioner was required to pay when he purchased service credits at the 1999 rate and the amount that should have been withheld from his pay for the period in question.

On cross-motions for summary decision and based on the outcome of a prior proceeding before the TPAF Board of Trustees, the ALJ found, *inter alia*, that: petitioner's appeal was timely filed; petitioner was wrongfully denied his status as an eligible member of the TPAF for two years; petitioner was granted the right to purchase service credits, but did so at an increased cost due to the Board's error; and petitioner's recovery of funds he was required to pay in excess of what his pension withholdings would have been in 1986-87 and 1987-88 would provide appropriate restitution to petitioner. The ALJ granted the petitioner's motion for summary judgment and ordered the Board to reimburse petitioner in the amount of \$6,932.68.

The Commissioner rejected the Initial Decision. The Commissioner found that petitioner's claim based on the Board's failure to treat him as an employee for pension purposes arises under pension law, so that its remedy lies within the jurisdiction of the TPAF Board of Trustees rather than the Commissioner of Education. The Commissioner further found that petitioner's claim of violation of a 1988 arbitration Consent Award lies within the jurisdiction of the Public Employment Relations Commission and was, additionally, filed well out of time. Finally, even assuming timely filing, the Commissioner found no proof that the Board was in any way responsible for petitioner's claimed eleven-year delay in learning about the 1988 Consent Award, so that there was no basis in equity to order the Board to compensate petitioner for the cost increase that resulted. The Commissioner dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 8, 2006

PASQUALE SPITALETTA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the parties' submissions on exception filed in accordance with N.J.A.C. 1:1-18.4.

The respondent Board of Education (Board) objects to the Administrative Law Judge's (ALJ) finding that petitioner was not aware of the Consent Award settling his 1986 grievance until 1999, contending that the ALJ unilaterally accepted petitioner's representation without taking any account of a Board certification to the contrary. (Board's Exceptions at 3-4) The Board also objects to the ALJ's finding that the petition was timely filed, contending that any claim petitioner had against the Board was settled by the 1988 Consent Award, and that if said Award – which by its own terms constituted a “full resolution” of the dispute – were not deemed enforceable, petitioner should have brought further action in a more timely fashion. (*Id.* at 5-7, 11) Most significantly, the Board objects to the ALJ's “bootstrapping” of a prior matter involving petitioner and the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) – but not the Board – onto the instant matter,

and to her concluding from her decision in the earlier matter that the Board was somehow to blame for petitioner's delay in filing his application for purchase of TPAF credit and therefore liable for his increased costs. According to the Board, not only did the ALJ apply the wrong standard by construing inferences in favor of petitioner rather than respondent in granting summary decision, she even erroneously indicated that her Initial Decision was to be filed with the Board of Trustees of TPAF rather than the Commissioner of Education. (*Id.* at 5-12)¹

In reply, petitioner counters that the ALJ appropriately decided the matter summarily in his favor based upon documents presented and the prior TPAF decision, since a court or agency "can take account of fact-finding made in complimentary proceedings," citing *Winschel v. City of Jersey City*, 96 N.J. 651, 666 (1984). (Petitioner's Exceptions at 1-2) Petitioner also reiterates that his appeal was filed within 90 days of the ruling upon which it was based, i.e., the TPAF ruling that he was an employee during the period in question for purposes of accruing pensionable service time. (*Id.* at 2) Finally, petitioner contends that the Board's violation of the 1988 Consent Award when petitioner attempted to purchase service credit in 1999 precludes it from relying on this agreement now as a basis to deny recovery to petitioner. (*Id.* at 3)

Upon careful and independent review, the Commissioner has determined to reject the Initial Decision in this matter.

The undisputed facts are as follows: Petitioner has been a social worker in the Board's district since 1981. In the spring of 1986, by which time he had acquired tenure, he

¹ The Board additionally objects to a number of statements in the ALJ's procedural recitations, contending that these either inaccurately or insufficiently relate what actually transpired, particularly with respect to the Board's ability to fully argue its case. (Board's Exceptions at 2, 4-5, 9, 10)

was notified by the Board that his position would be terminated at the end of the 1986 school year as the result of a reduction in force; the Board subsequently hired him as a per diem Consultant-Case Manager/Social Worker for the 1986-87 and 1987-88 school years,² during which time the Board did not withhold pension contributions from his payment because it did not consider him a salaried employee. In October 1986, the Caldwell-West Caldwell Education Association filed a grievance alleging that the Board's hiring of a consultant to fill the position of Case Manager/Social Worker violated the recognition clause of the collective bargaining agreement; a second grievance was filed in January 1987, alleging that petitioner was part of the Association's bargaining unit and subject to deduction of agency fees. The grievances were heard by an arbitrator, and were ultimately settled in 1988 via a Consent Award stating as follows:

1. Mr. P. Spitaletta's functions shall henceforth be done by bargaining unit personnel.
2. The Association will be paid the Agency Fee monies for 1987-88 amounting to \$141.10.
3. The Board will credit Mr. Spitaletta's sick leave bank for time worked in school year 1987-88 in the amount of five (5) days.
4. If the Grievant decides to seek pension credit, the Board shall provide assistance to facilitate the back credit purchase.
5. The above is in full resolution of AR-87-272. Future similar issues will be decided on a case by case basis.
6. Arbitrator Robert E. Light retains jurisdiction over interpretation and compliance of the above.

(Exhibit A, No. J-10, Certification of Mark A. Wenczel, Esq., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

² For 1986-87, petitioner received a stipend of \$200 per day for two days service per week with a maximum of 75 days per year; for 1987-88, the stipend remained the same, but the maximum number of days was reduced to 64. (Exhibit A, Nos. J-3 and J-6, Certification of Mark A. Wenczel, Esq., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

Petitioner returned to full-time employment with the district in the fall of 1988. In June 1999,³ petitioner sought to purchase pension credit for the 1986-87 and 1987-88 school years; in September 2000, his request was denied by the Division of Pensions because the service in question was characterized by the Board as that of an independent contractor rather than an employee. The Division of Pensions did not notify petitioner of his right to appeal its decision, and in the fall of 2002, petitioner sought recourse through the Board of Trustees of TPAF.⁴ On August 6, 2004, following a hearing at the OAL conducted by the same ALJ as heard the matter now before the Commissioner, the TPAF Board held that, for pension purposes, petitioner was an employee rather than an independent contractor during the 1986-87 and 1987-88 school years and that the Division of Pensions had improperly denied his request to purchase pension credit for this period. Petitioner then purchased the credit at the rate applicable in 1999 when he first applied for purchase; his cost was \$8,522.68, reflecting a difference of \$6,932.68 from what his cost would have been (\$1,590) had contributions been withheld from his pay during the period in question. On October 27, 2004, petitioner filed the present action to recover this difference from the Board.

Reviewing these facts in light of applicable law, the Commissioner can find no basis on which to grant petitioner the relief he seeks. To the extent that petitioner is claiming that the Board should have treated him as an employee for pension purposes during 1986-87

³ The parties dispute the point at which petitioner became aware of the 1988 Consent Award, with petitioner contending that he only discovered it upon assuming the presidency of the Caldwell-West Caldwell Education Association in 1999 and the Board contending that he knew or should have known about it in 1988 as evidenced by his conceded knowledge of the underlying arbitration proceeding and the plain language of the Consent Award itself, which specifically references petitioner's purchase of pension credit.

⁴ Petitioner also appears to have filed a grievance around this time with the respondent Board of Education, as evidenced by the Board's response – denying the grievance for untimely filing – dated December 16, 2002. (Exhibit A, Certification of Daniel Gerardi, Ph.D., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

and 1987-88, but did not:⁵ that claim is more properly raised before the TPAF Board, where the relief due petitioner appears to be addressed by a statute (*N.J.S.A.* 18A:66-6.1) providing a specific remedy for instances where an employee should have been enrolled in the pension system and making contributions to it, but was not. Application of that statute, however – and the awarding of relief under it – lies within the jurisdiction of the TPAF Board, not the Commissioner of Education.^{6 7}

To the extent that petitioner is claiming that the Board violated the above-quoted 1988 Consent Award, jurisdiction over that order – by its own terms – lies with the Public Employment Relations Commission. Even if it did not, however, petitioner clearly had knowledge of the Board’s characterization of his service for pension purposes at the latest upon his receipt of the September 8, 2000 letter from the Division of Pensions explaining the basis for denial of his purchase request, so that his October 27, 2004 petition in this matter was filed well beyond the 90 days permitted by rule. (Exhibit J, Certification of Mary J. Hamer, Attachment to Petitioner’s Brief in Reply to the Board’s Opposition to

⁵ Petitioner himself characterizes his claim against the Board – accurately, based upon the Petition of Appeal and briefs filed at the OAL – as a recovery of the increased costs he experienced “due to [the Board’s] failure to deduct pension contributions from his salary and forward them to the Division of Pensions as it should have done in the 1986-87 and 1987-88 school years.” (Petitioner’s Brief in Support of Motion for Summary Decision at 2-3) Petitioner further describes the central issue in this matter as “whether or not the Board should have taken pension contributions from the petitioner’s salary and forwarded them to the Division of Pensions during the 1986-87 and 1987-88 school years,” and argues that “[if] the petitioner was an employee rather than an independent contractor during the period in question as the decision of the [TPAF Board] holds, then respondent should have withheld pension contributions from his salary and forwarded them to the Division of Pensions.***The [TPAF Board] is the appropriate agency to decide whether or not petitioner was an employee for pension purposes rather than the Commissioner of Education. The Commissioner can and should hold that respondent acted inappropriately by not withholding petitioner’s pension contributions during the years in question but should not reconsider the decision made by the [TPAF Board].” (*Id.* at 6-8)

⁶ The Commissioner is uncertain as to why relief under this statute was neither requested nor addressed in petitioner’s proceeding before the TPAF Board.

⁷ It was for this reason that the question of Commissioner jurisdiction was identified as a threshold issue upon transmittal of the contested case to the OAL; the record does not indicate why the ALJ elected not to address the matter.

Petitioner's Motion for Summary Decision) Contrary to petitioner's assertion, he did not need to wait for the TPAF Board to determine that he was, in fact, an employee for pension purposes in order to make a claim that the Board was violating the Consent Award's provision requiring it, "if the Grievant decides to seek pension credit," to "provide assistance to facilitate the back credit purchase." (Consent Award, Term No. 4) Nor does the Commissioner find any circumstance in the record that would warrant relaxation of the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16, particularly when weighed against the rule's salutary purpose of discouraging dilatoriness and providing a measure of repose in the conduct of school affairs.

Finally, even assuming, *arguendo*, that the petition was timely filed and petitioner truly did not or could not have become aware of the 1988 Consent Award until 1999, to the extent that the additional cost of his credit purchase was occasioned by that delay, there is not a shred of evidence on record – nor, for that matter, does petitioner expressly claim – that the Board was in any way responsible for such lack of awareness. The Commissioner cannot, therefore, find any basis on which to hold the Board accountable for petitioner's loss and order it to make restitution as a matter of equity.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected in its entirety, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.⁸

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 8, 2006

Date of Mailing: June 9, 2006

⁸ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*