State of New Jersey

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Acting Director

May 3, 2018

Sent via email to [redacted]

Beth L. Finkelstein
Attorney at Law
[redacted]

RE: Elizabeth Nastus
[redacted]

Dear Ms. Finkelstein:

The Board of Trustees of the Teachers' Pension and Annuity Fund (Board) has reviewed the Initial Decision (ID) of the Honorable Susan M. Scarola, Administrative Law Judge (the ALJ), dated February 2, 2018[1], in the above-captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, the exceptions filed by DAG Danielle Schimmel, dated March 2, 2018[2], and the reply to exceptions filed by Beth L. Finkelstein, Esq., dated March 20, 2018[3], on behalf of the petitioner, Elizabeth Nastus (Nastus).

At its meeting of April 5, 2018, the TPAF Board voted to adopt the ALJ's findings of fact with modifications, but voted to reject the ALJ's Conclusions of Law that the additional "salary" paid to Nastus under the shared services agreements and the merit increases she received are creditable compensation for pension purposes. At its May 3, 2018 meeting, having reviewed the aforementioned documents and after considering the personal statements presented by both you and DAG Schimmel, the Board approved the Findings of Fact and Conclusions of Law as outlined below.

[1] The Board requested and was granted an extension of time to issue its final decision until May 3, 2018.
[2] An extension of time was requested and granted to file exceptions.
[3] An extension of time was requested and granted to file reply to exceptions.

FINDINGS OF FACT

The Board finds that the ALJ incorrectly determined as fact that "Under [the Clinton contract], the Clinton Board of Education (Clinton) shared [Nastus'] services as superintendent with the Lebanon Borough Board of Education (Lebanon) under [an] 'Interlocal Services Agreement for Shared Administrative Services.'" Initial Decision at 2. However, the Board noted that pursuant to the language in Nastus's contract, the shared services were optional. Nastus's contract addendum with Clinton for July 1, 2007 through June 30, 2008, entered into on June 25, 2007, states, in Article I:

> Employment
> A. [Clinton] hereby agrees to employ [Nastus] as Superintendent of Schools for the period of February 1, 2003, and concluding June 30, 2008, at an annual salary as follows:
>
> 1. 3.0% increase over existing salary of $161,155. New base salary would be $165,990 for 2007-2008 effective July 1, 2007.
> 2. $2,000.00 yearly salary contribution to an annuity.
> 3. $1,000 yearly salary incentive of employee's choice or annuity
> 4. $4,500 salary incentive as described in Article I section C of this agreement.
>
> B. The aforesaid salaries shall be paid and appropriately pro-rated, in equal installments, in accordance with the policies of [Clinton] concerning the payment of professional staff members.
>
> C. As part of the salaries set forth herein, [Clinton] and [Nastus], within one month from the date [Clinton] establishes goals for each of the school years covered by this agreement, agrees to negotiate specific performance based accomplishments and related compensation for attaining same with the total amount annually to be paid to [Nastus] not exceeding $4,500. [Nastus] shall have the option of receiving the additional compensation in salary or directing payment to a designated annuity.
>
> D. In addition to the salaries set forth herein, [Clinton] may assign to [Nastus] the shared Superintendent of Schools duties as contracted for with the Lebanon Borough Board of Education. Should the said duties be assigned to [Nastus], she will be paid annually a salary of $17,236 or an amount to be agreed to by the parties based upon the number of hours required to be pro-rated for the period commencing with the effective date of employment through June 30, 2008.
>
> [Exhibit A, Statement of Undisputed Material Facts.]

Article II of the contract addendum sets forth Nastus's duties, "[t]o faithfully perform the duties of Superintendent of Schools for [Clinton]." Ibid.

Thereafter, Clinton entered into an "Interlocal Services Agreement for Shared Administrative Services 2007/2008" with Lebanon. [Exhibit D, Statement of Undisputed Material Facts.] Clinton and Lebanon agreed that Clinton would provide, in relevant part, a chief school administrator and Lebanon would "pay Clinton a fee of $84,488 for payment of the 2007/2008 Administrative services." Ibid.

The Board voted to modify the ID to include the contractual language as set forth above regarding the Clinton contracts and shared services agreements because the language of the agreements controls this matter.

The Board also modifies the ALJ's factual finding regarding the Delaware Valley Regional High School Board of Education Contract. According to the ALJ, "On October 25, 2010, the Delaware Contract was amended to reflect a superintendent-sharing agreement between Delaware Valley (Delaware) and the Frenchtown Board of Education (Frenchtown)." Initial Decision at 2. In fact, Nastus's contract states:

> Term
> [Delaware] hereby employs, and [Nastus] hereby accepts employment as the Superintendent of Schools for the period beginning on or about July 1, 2008 and ending July 1, 2012
>
> 1. Compensation
>
> a. [Delaware] shall pay as compensation to [Nastus] a prorated salary at the annual rate of One Hundred Seventy-Five Thousand Dollars ($175,000) for the period beginning on or about July 1, 2008 and ending June 30, 2009.
>
> b. On July 1, 2009 and July 1 of each subsequent year of this Employment Agreement, [Delaware] will grant [Nastus] a minimum of a three percent (3%) increase to her base salary.
>
> c. In addition, [Nastus] will be entitled to up to a two percent (2%) merit increase on her base salary based on [her] progress toward achieving the district goals and objectives and the performance evaluation described in Article 6 below. These performance based salary increases shall be granted on or before July 1 of each contract year.
>
> ....
>
> 4. Duties
> In consideration of the employment, salary and fringe benefits established hereby, [Nastus] hereby agrees to the following:

> a. To faithfully perform the duties of Superintendent of Schools for [Delaware] and to serve as chief school administrator. . . . The specific job description adopted by [Delaware], applicable to the position of Superintendent of Schools, is incorporated by reference into this agreement.
>
> [Exhibit B, Statement of Undisputed Material Facts.]

Thereafter, Delaware entered into a shared services agreement with Frenchtown for the Superintendent of Schools. [Exhibit E, Statement of Undisputed Material Facts.] The agreement provided that Nastus would "provide up to twelve (12) hours per month in the performance of her duties" under the agreement. Ibid. Further, Frenchtown agreed to pay Delaware "an annual prorated sum of Twenty Thousand Dollars ($20,000) for the services of the superintendent for the period beginning November 1, 2010 and ending June 30, 2011." Ibid.

On October 25, 2010, Delaware approved a resolution to enter into an addendum agreement with Nastus to pay her "an additional annual prorated salary for the period beginning November 1, 2010 and ending July 1, 2011 of Ten Thousand Dollars ($10,000) for the additional duties she performs pursuant to the Shared Services Agreement." [Exhibit C, Statement of Undisputed Material Facts.] Regardless of any termination of the shared services agreement by either district, Nastus's annual salary will be at least the salary set forth in her contract. Ibid. An "Addendum to the Employment Agreement" between Nastus and Delaware was then signed, with terms mirroring those in the resolution. Ibid. Accordingly, the Board modified the ID to incorporate the details about the Delaware contracts and shared services agreements because the language of these agreements controls this matter

CONCLUSIONS OF LAW

Initially, the Board voted to reject the ALJ's conclusion that the "salary" paid to Nastus under the shared services agreements is creditable compensation. The Board found that the ALJ did not properly frame the issue as set forth by the Board. The ALJ asked whether "salary earned under a shared-services agreement [is] creditable compensation, because such service as a superintendent is not temporary?," Initial Decision at 4. However, the Board has never asserted that Nastus's

employment as superintendent with Clinton and Delaware was temporary. Clearly, it was not. She had a full-time contract for that employment. The issue here is whether the payments made under the shared services agreements during the limited, temporary time Nastus had additional, optional, simultaneous duties for another employer is creditable. The Board finds it was not.

While the ALJ appropriately referenced N.J.S.A. 18A:66-2(d) and N.J.A.C. 17:3-4.1(a), Initial Decision at 4-9, the statute and regulation are incorrectly applied to Nastus's own contracts. The ALJ discounted the fact that work under the shared services agreement was for another school district, calling these duties "a permanent expansion of [Nastus's] duties under her contracts." Initial Decision at 9. Article II of Nastus's contract addendum with Clinton sets forth her duties "[t]o faithfully perform the duties of Superintendent of Schools for [Clinton]." [Exhibit A, Statement of Undisputed Material Facts.] Further, any service under the shared services agreement was optional as Nastus's contract states:

> In addition to the salaries set forth herein, [Clinton] may assign to [Nastus] the shared Superintendent of Schools duties as contracted for with the Lebanon Borough Board of Education. Should the said duties be assigned to [Nastus], she will be paid annually a salary of $17,236 or an amount to be agreed to by the parties based upon the number of hours required to be pro-rated for the period commencing with the
>
> [Ibid.]

Similarly, Nastus's contracts with Delaware sets forth her duties as:

> 5. Duties
> In consideration of the employment, salary and fringe benefits established hereby, [Nastus] hereby agrees to the following:
>
> a. To faithfully perform the duties of Superintendent of Schools for [Delaware] and to serve as chief school administrator . . . . The specific job description adopted by [Delaware E], applicable to the position of Superintendent of Schools, is incorporated by reference into this agreement.
>
> [Exhibit B, Statement of Undisputed Material Facts.]

Thereafter, Delaware entered into a shared services agreement with Frenchtown for the Superintendent of Schools, and Delaware agreed to pay Nastus "an additional annual prorated salary for the period beginning November 1, 2010 and ending July 1, 2011 of Ten Thousand Dollars

($10,000) for the additional duties she performs pursuant to the Shared Services Agreement." [Exhibit C and E, Statement of Undisputed Material Facts.]

Based on the language of her contracts, Nastus was hired as Superintendent for those districts and required to perform the duties of Superintendent for those districts. The fact that her respective employers entered into agreements for shared services with another district and gave her extra duties and extra pay for that work does not change the nature of her employment or her base salary. Further, those additional duties could be terminated at any time, which would result in a reduction in the monies paid to Nastus. Under the relevant statutory definitions, compensation is payment for services as a superintendent by the employer, in accordance with the employer's established salary policies. N.J.S.A. 18A-2(d), (e), and (p).

In Francois v. Board of Trustees, Public Employees' Retirement System, 415 N.J. Super. 335 (App. Div. 2010), Francois was a member of the Public Employees' Retirement System (PERS) employed by the Economic Development Authority (the EDA) who accepted a mobility assignment to the Port Authority. Id. at 338. He was assured by the EDA that his pension would not be affected by the mobility assignment and the EDA continued to pay his salary. Ibid. His salary during the mobility assignment, which was approximately $25,000 more than his EDA salary, was "funded by the Port Authority" and "paid" by the EDA. Id. at 341. At the end of the mobility assignment, his salary was to decrease back to his EDA salary, without any increase he "would have received" during the mobility assignment. Ibid. At retirement, the PERS Board determined that Francois's salary during the mobility assignment was not creditable. Id. at 344-45. In rejecting the PERS Board's determination, the Appellate Division ordered that Francois be credited with the salary that he would have earned at the EDA during the mobility assignment, including any applicable increases, not the increased salary he was actually paid for his time at Port Authority. Id. at 358. The Appellate Division noted that "[w]hile there is no previous New Jersey case specifically discussing the implications of a mobility assignment on the credibility of salary, it is clear that limitations must be imposed upon practices which might

artificially boost pension benefits or be inconsistent with the employer's payment of 'compensation.'" Id. at 356-57.

The contractual agreement here is comprised of a shared services agreement similar to the additional salary paid to Francois while on mobility assignment. Like Francois, Nastus cannot include payments made to her above her normal salary as Superintendent for Clinton and Delaware, for work authorized by her employer but performed for another entity, in her creditable compensation. The Board finds that doing so would be inconsistent with the payment and definition of compensation.

Further, the Board rejects the ALJ's reliance on the fact that the Legislature authorizes shared services agreements to conclude that the payments are creditable compensation, see Initial Decision at 9. The Board does not dispute that the Legislature encourages shared services. See N.J. Ass'n of Sch. Bus. Officials v. Davy, 409 N.J. Super. 467, 472-73 (App. Div. 2009). However, encouraging shared services and controlling administrative costs in school districts does not mean that the monies paid under a shared services agreement are automatically creditable compensation, as the ALJ concluded. The Davy court noted that the Legislative enactments to control spending in 2007 were chapters 53, 63, 92 and 260. Davy, 409 N.J. Super. at 475-79. Chapter 92 covered a "variety of benefits for public employees at all levels of government." Id. at 477. This included controlling pension costs by establishing the Defined Contribution Retirement Program. Id. at 487; see N.J.S.A. 43:15C-2. Further, Chapter 92 limited the definition of "compensation" in TPAF for those individuals who become members on or after July 1, 2007, to "the annual maximum wage contribution base for Social Security, pursuant to the Federal Insurance Contributions Act." N.J.S.A. 18A:66-2(d)(2). The Board thus recognizes the equally strong public policy in limiting the salaries used in the calculation of public pensions and insuring the propriety of the calculation of that pension. Permitting Nastus to receive the money under the shared services agreement does not necessarily mean it is creditable for pension purposes. Based on the structure of Nastus's contracts and the agreements for the shared services, the "salary" for Lebanon and Frenchtown was not creditable.

Next, the ALJ incorrectly stated that the "case law cited by [Nastus] makes clear that the form in which compensation is received does not determine whether such sums are creditable under N.J.S.A. 18A:66-2(d)." Initial Decision at 9. The case law referenced by the ALJ is Siri v. Board of Trustees, Teachers' Pension and Annuity Fund, 262 N.J. Super. 147 (App. Div. 1993), East Windsor Regional School District v. Board of Trustees, Teachers' Pension and Annuity Fund, No. A-3655-09T4 (App. Div. Aug. 8, 2011), and Morris Hills Regional District Education Association v. Board of Trustees, Teachers' Pension & Annuity Fund, No. A-3474-10 (App. Div. May 17, 2012). Initial Decision at 5-9. However, these cases do not stand for the general proposition that the form in which compensation is received does not matter in determining whether the sums are creditable. These cases each dealt with different types of additional duties -- department chairperson, program coordinator and content specialist -- and requirements for extra days beyond the school year. Siri, 262 N.J. Super. at 149-52; East Windsor, slip op at 1-2; Morris Hills, slip op. at 1-2.Further, in Siri and Morris Hills, there were issues of whether the TPAF regulation, N.J.A.C. 17:3-4.1, impermissibly narrowed the statute. Siri, 262 N.J. Super. at 152; Morris Hills, slip op. at 13-14.In East Windsor, the Board amended the regulation during the pendency of the case, and the stipends in that matter fit within the new regulatory criteria for inclusion in creditable compensation. slip op at 15-16. These cases actually indicate that the remuneration, its purpose, and the actual contracts need to be carefully evaluated in determining creditable compensation.

Nastus's situation is readily distinguishable from Siri, East Windsor, and Morris Hills, in that she was employed as Superintendent for Clinton and Delaware respectively and her additional duties were not for her employer but for another school district. While the ALJ noted that Nastus only received a salary from Delaware and Clinton, because they were paid by Frenchtown and Lebanon, respectively, it cannot be within Clinton's and Delaware's normal salary policies to pay an employee to work for another district. Further, it cannot be integral to the effective functioning of the school curriculum in Delaware and Clinton for Nastus to perform duties for Frenchtown and Lebanon. Finally, as the Appellate Division stated in Francois, "it is clear that limitations must be imposed upon practices

which might artificially boost pension benefits or be inconsistent with the employer's payment of 'compensation.'" 415 N.J. Super. at 356-57.

There is no dispute that Nastus was hired as Superintendent by Clinton and Delaware, paid a salary and then paid an additional "salary" for additional duties she performed for Lebanon and Frenchtown under her employer's shared services agreements. The TPAF statutes clearly require that "compensation" be payment for services as a teacher paid for by the employer. N.J.S.A. 18A:66-2(d), (e) and (p). The duly promulgated regulations clearly exclude extra pay for extra work. N.J.A.C. 17:3-4.1(a)(1)(ii) and (xix). Thus, the Board rejected the ALJ's legal conclusion that the payments made under a shared services agreement for service to another district (which were an optional addition to Nastus's contracts) are creditable for pension and death benefit purposes.

The Board also found that Nastus's contract specifically provided for two annual increases in base salary, a minimum of 3% annually and an additional up to 2% merit increase based on achieving merit based goals. [Exhibit B, Statement of Undisputed Material Facts.] The Board finds that the ALJ incorrectly concluded that these merit increases are creditable compensation, without properly taking into account the 2011 change in education regulations and the underlying purpose of that regulation. Initial Decision at 11. The 2011 Department of Education accountability regulations explicitly state that a "merit bonus shall be considered 'extra compensation' for purposes of N.J.A.C. 17:3-4.1 and shall not be cumulative." N.J.A.C. 6A:23A-3.1(e)(10)(iii). However, when this regulation was challenged, the Appellate Division noted that the regulation simply repeats what N.J.A.C. 17:3-4.1 provides . . . . '[b]onuses' are among the forms of compensation identified as 'extra compensation.'" N.J. Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 608 (App. Div. 2012). The regulation did not change the fact that the merit increase in Nastus's 2009 through 2012 contracts was, for intents and purposes. a bonus. The contract terms prior to 2012 track the definition of a merit bonus as defined in N.J.A.C. 6A:23A-3.1(e)(11)(i) in that it is based on quantitative and/or qualitative merit criteria.

The Board noted that the purpose of N.J.A.C. 6A:23A-3.1(e) was to curb excesses identified in the March 2006 report by the State of New Jersey Commission of Investigation entitled "Taxpayers

Beware: What You Don't Know Can Cost You – An Inquiry Into Questionable and Hidden Compensation for Public School Administrators" (the SCI Report), which resulted in Legislative reforms to Title 18. 43 N.J.R. 284(a). The Commissioner of Education specifically incorporated the SCI Report into the rulemaking record. Ibid. The SCI report specifically identifies "Pension Manipulation" as a "Key Finding." <http://www.state.nj.us/sci/pdf/SCIHigher EdReport.pdf> (last visited Feb. 28, 2018). This history actually indicates that TPAF was being manipulated, and does not change the fact that merit bonuses, like those Nastus received, are not currently and never were eligible to be part of her base salary.

Further, the ALJ incorrectly relied on Farrah v. Teachers' Pension and Annuity Fund, 93 N.J.A.R.2d (TYP) 69, initial decision Sept. 21, 1992, final decision Jan. 7, 1993, to conclude that the merit increases were creditable without testimony. Initial Decision at 10-11. In Farrah, the applicable Board of Education minutes referred to a "merit bonus" and based on the testimony of Farrah and three members of the Board of Education at the time, the ALJ declined to equate a merit increase with a bonus. Id. at 17. The Board's final decision states Farrah's retirement benefit will be "based on $66,000 as the base or contractual salary for the 1988-89 school year which would include the 'merit bonus' of $6,000." Id. at 1.

Based on the above-, the Board finds that merit increases are bonuses that are not creditable compensation currently and should not have been creditable compensation prior to 2012. In Nastus's case, a merit increase of up to 2% per year in addition to an annual increase of at least 3% should not be included in creditable compensation. If the two increases under the contract were both intended to be an annual increase in base salary, there would be no reason to separate a 2% merit increase from the 3% annual increase. One increase would suffice. Without testimony, as that taken in Farrah, on the purpose of the two increases, Nastus did not meet her burden to prove that the merit increases were creditable compensation.

CONCLUSION

For these reasons, the Board amplifies the factual findings and rejects the ALJ's legal conclusions. The Board concludes that the additional "salary" paid to Nastus under the shared services agreements and the merit increases she received are not creditable compensation for pension purposes.

You have the right if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days from the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

Sincerely,

Angelina Scales

Angelina Scales, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

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c. C. Chianese (ET)
DAG Danielle P. Schimmel (ET)
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