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March 11, 2024

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Re: KRESS v. TRAF BOARD OF TRUSTERS
DOCKET NO.: A-003130-22T4
AMENDED LETTER BRIEF

Dear Mr. Orlando:

Kindly accept the within as Appellant's amended letter reply
brief.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Kress relies on her original brief and appendix in this
regard.

SAMUEL J. HALPERN
ATTORNEY AT LAW

ARGUMENT

THE EQUAL PAY AND NJLAD MANDATES ARE FUNCTIONALLY NO DIFFERENT THAN THE STATUTORY SALARY MANDATE IN SPELLBACKER AND AS SUCH ARE ENTITLED TO ENFORCEMENT.

The Board attempts to distinguish this case from Spellbacker by asserting that it involved a specific statutory salary mandate. See Rb 15-16. However, the present case also contains a no less forceful mandate which addresses gender disparities.

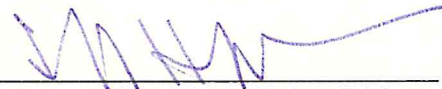
In addition, the Board suggests that Kress' settlement will disturb the actual integrity of the TPAF. But it has presented no empirical evidence that the settlement involving one member will bring about a fiscal calamity. Even if it were a concern, it is ultimately up to the Legislature to resolve the issue by requiring increased contributions from employers who enter into such settlements and not to penalize the members who are rightfully entitled to equal benefits.

Finally, the Board also asserts that the settlement herein was not across-the-board. That is true but the fact is that Kress was the only plaintiff in the litigation. Moreover, across the board settlements typically arise in collective-bargaining negotiations. Unless all female TPAF members at the KBOE chose to join Kress' litigation, it is an academic issue.

SAMUEL J. HALPERN
ATTORNEY AT LAW

CONCLUSION

For the foregoing reasons, it is again requested that the decision below be reversed and remanded for an evidentiary hearing.



SAMUEL J. HALPERN, ESQ.
Attorney for Appellant

Dated: March 11, 2024

Cc: Porter R. Strickler, D.A.G.



PHILIP D. MURPHY
Governor

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February 12, 2024

VIA eCOURTS

Joseph H. Orlando, Clerk
Superior Court of New Jersey - Appellate Division
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Trenton, NJ 08625-006

Re: Cheryl Kress v. Board of Trustees of the Teachers' Pension
& Annuity Fund
Docket No. A-003130-22T4

On Appeal from a Final Agency Decision of the Board of
Trustees of the Teachers' Pension and Annuity Fund

Letter Brief and Appendix of Respondent, Board of Trustees
of the Teachers' Pension and Annuity Fund on the Merits of
the Appeal

Dear Mr. Orlando:

Please accept this letter brief and appendix on behalf of Respondent, the
Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF).



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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Cheryl Kress enrolled in TPAF effective September 1, 1991, based on her employment as a teacher with the Union Township Board of Education. (Ra1).² On September 1, 1997, Kress transferred her employment to the Kenilworth Borough Board of Education (Kenilworth BOE), where she continued to work as a teacher. (Ra2). On April 4, 2011, Kress received an estimate of retirement benefits for a service retirement based on a final salary of \$90,726.66. (Ra3-Ra5). Approximately seven years later, on January 19, 2018, Kress received a subsequent estimate of retirement benefits for a service retirement based on a final salary of \$99,990. (Ra6-Ra8).

On or about September 20, 2019, Kress filed a complaint against the Kenilworth BOE alleging discrimination in violation of the Diane B. Allen Equal Pay Act and the New Jersey Law Against Discrimination. (Pa49-Pa56). In the complaint, Kress alleged that upon her re-hiring in 1997, unlike other male teachers, she did not receive credit from the Kenilworth BOE for her prior teaching experience. (Pa51). Kress argued that she qualified for the “MA+30”

¹ Because the procedural history and facts are closely related, they are combined to avoid repetition and for the court’s convenience.

² “Pa” refers to Kress’s appendix; “Pb” refers to her brief. “Ra” refers to the Board’s appendix.

salary scale due to her education level and teaching experience but that she was only on the “R” salary scale. (Pa51). She further asserted that from September 1998 to the time of the complaint in 2019 she has been on the “R” salary scale. (Pa51). She also alleged that for the 2012-2013 school year through the 2016-2017 school year she received an annual salary increase of a little over four percent, but that her male counterpart teachers received an average total increase of 9.1 percent during that time. (Pa51-Pa52). The male teachers cited in her complaint had final salaries ranging from \$112,265 to \$116,411. (Pa52-Pa53).

On March 8, 2021, Kress submitted a letter of resignation to the Kenilworth BOE with an effective resignation date of May 1, 2021. (Pa47). Kress, the Kenilworth Education Association (“Kenilworth EA”), and the Kenilworth BOE entered into a Negotiated Settlement Agreement and General Release (the “Settlement Agreement”) to resolve the pending civil discrimination lawsuit on April 12, 2021. (Pa30-Pa46). The Settlement Agreement provided for a retroactive increase of Kress’s 2018-2019 salary from \$103,682 to \$135,765.33; a retroactive increase of Kress’s 2019-2020 salary from \$105,359 to \$137,442.33; and a retroactive increase of Kress’s 2020-2021 salary from \$106,934 to \$147,038. (Pa32-Pa33). Due to Kress’s agreed upon May 1, 2021 resignation date, only a pro-rated \$117,630.54 of her 2020-2021 salary was paid to her based on her retirement date. (Pa33). The Settlement

Agreement specifically noted that “The BOE and KEA are not responsible for any determinations made by the Division of Pension & Benefits, Teachers’ Pension and Annuity Fund” (Pa33). The Kenilworth BOE passed two resolutions, both dated April 12, 2021, in which they approved the Settlement Agreement and accepted Kress’s resignation. (Pa48; Ra9).

On April 16, 2021, Kress applied for a May 1, 2021 Service Retirement. (Ra10-Ra12). Kress received a quotation of retirement benefits on May 20, 2021, based a final salary of \$105,003.66. (Pa26). At its meeting of June 3, 2021, the Board approved Kress’s application for retirement effective May 1, 2021. (Ra13).

By letter dated August 5, 2022, Michael Kusmierczyk, the Manager for Fiscal Resources of the Division of Pensions and Benefits, advised Kress that the salary increases provided for in the Settlement Agreement were not creditable for purposes of calculating her pension benefits pursuant to N.J.A.C. 17:3-4.1. (Pa23-Pa24). Kusmierczyk explained that while the complaint alleged unequal pay going back to 1997, the Settlement Agreement provided for significant salary increases in only the last three school years of her employment, and he noted that these are the only three years used in the final salary calculation for pension purposes. (Pa23). Thus, because the settlement was made in anticipation of her agreed upon retirement and the retroactive salary

increases were made only for the last three years of her employment, such increases were determined to be “extra compensation.” (Pa23).

By letter dated September 8, 2022, Kress appealed the Division’s decision that the salary adjustments were not creditable for pension purposes. (Pa21-Pa22). Kress argued that it was only coincidental that the remedy was implemented for the last three years of her employment. (Pa21). The Board considered her appeal at its January 5, 2023 meeting and determined that pursuant to N.J.A.C. 17:3-4.1 the additional salary increases were extra compensation made primarily in anticipation of Kress’s retirement and therefore were not creditable for purposes of calculating her pension. (Pa18-Pa20). The Board concluded that it was undisputed that Kress received retroactive salary increases of approximately \$32,083 per year for only the final three years of her service, that Kress agreed to resign in anticipation of retirement effective May 1, 2021, and that she agreed to do so in exchange for her dismissal of the lawsuit. (Pa19). The Board further determined that there was no connection between the settled salary increases and her service rendered and no across-the-board adjustment for all similarly situated teachers. (Pa19-Pa20). Further, Kress’s employment lawsuit was not adjudicated and there was no court order or legal judgment that concluded she was entitled to an increase in salary as a matter of

law. (Pa11). Thereafter, the Board voted to deny Kress's request for salary credit based on the retroactive salary increases. (Pa19).

Kress appealed and the Board considered her appeal at its April 13, 2023 meeting. (Pa15-Pa17). After careful consideration, the Board denied her request for a hearing for the reasons set forth in the Board's January 9, 2023 denial letter and directed the Board Secretary to draft findings of fact and conclusions of law. (Pa15).

The Board issued its Final Administrative Determination on May 5, 2023, denying Kress's request for salary credit based upon the Settlement Agreement with the Kenilworth BOE and the Kenilworth EA. (Pa9-Pa14).

This appeal followed.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT THE SETTLEMENT AGREEMENT PROVIDED INDIVIDUAL, RETROACTIVE SALARY INCREASES THAT WERE EXTRA COMPENSATION MADE PRIMARILY IN ANTICIPATION OF RETIREMENT AND THEREFORE WERE NOT CREDITABLE FOR THE PURPOSE OF CALCULATING KRESS'S RETIREMENT BENEFITS.

“Judicial review of an agency's final decision is generally limited to a determination of whether the decision is arbitrary, capricious, or unreasonable or lacks fair support in the record.” Mattia v. Bd. of Trs., Police & Firemen's

Ret. Sys., 455 N.J. Super. 217, 221 (App. Div. 2018) (quoting Caminiti v. Bd. of Trs., 431 N.J. Super. 1, 14 (App. Div. 2013) (additional citations omitted)). “An appellate court affords a “strong presumption of reasonableness” to an administrative agency’s exercise of its statutorily delegated responsibilities.” Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep’t of Env’tl. Prot., 82 N.J. 530, 539 (1980)). The party challenging the validity of the administrative decision bears the burden of showing that it was “arbitrary, unreasonable or capricious.” Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).

The court must “defer to an agency’s technical expertise, its superior knowledge of its subject matter area, and its fact-finding role,” and is “obliged to accept all factual findings that are supported by sufficient credible evidence.” Futterman v. Bd. of Rev., Dep’t of Labor, 421 N.J. Super. 281, 287 (App. Div. 2011) (quoting Messick v. Bd. of Rev., 420 N.J. Super. 321, 325 (App. Div. 2011)). The court will only intervene in “those rare circumstances in which an agency action is clearly inconsistent with [the agency’s] statutory mission or with other State policy.” Id. at 287 (alteration in original) (quoting In re Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. from the Passaic Cnty. Manchester Reg'l High Sch. Dist., 181 N.J. 161, 176 (2004)).

Compensation which provides the basis for computing retirement benefits

within the TPAF is defined as follows:

“Compensation” means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member’s employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member’s retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year.

[N.J.S.A. 18A:66-2(d)(1).]

Examples of extra compensation, include but are not limited to:

vii. Individual retroactive salary adjustments where no sufficient justification is provided that the adjustment was granted primarily for a reason other than retirement;

viii. Individual adjustments to place a member at the maximum of his or her salary range in the final years of service where no sufficient justification is provided that the adjustment was granted primarily for a reason other than retirement;

...

xi. Retroactive increments or adjustments made at or near the end of a member’s service, unless the adjustment was the result of an across-the-board adjustment for all similarly situated personnel;

....

[N.J.A.C. 17:3-4.1(a)(1).]

Such “[e]xtra compensation shall not be considered creditable for benefits and all employee contributions made thereon shall be returned without interest.”

N.J.A.C. 17:3-4.1(c). Specifically, with respect to settlements:

If the Division determines that the pension benefit was part of the negotiations for the award or settlement, or if the award or settlement includes extra compensation as defined by the various retirement systems, the Division shall determine the compensation and/or service credit to be used to calculate the retirement allowance, and the member shall have the pension contributions for the salaries based on the award refunded without interest.

[N.J.A.C. 17:1-2.18(c).]

The New Jersey Supreme Court has addressed settlements involving retroactive salary increases that are not creditable for pension purposes. In In re Puglisi, 186 N.J. 529, 531 (2006), Puglisi was a police officer who filed a civil rights suit against his employer and entered into a settlement agreement whereby he was promoted to the rank of captain, immediately commenced a one-year terminal leave at a captain’s salary, and then agreed to retire at the end of the leave period. The Board of Trustees, Police and Firemen’s Retirement System (“PFRS”) denied him pension benefits based on the promotional captain’s salary, finding that he “was on terminal leave from the day he was promoted as captain to the date of retirement.” Id. at 532. The New Jersey Supreme Court agreed that the officer’s salary increases were not creditable,

quoting from the Appellate Division opinion, stating:

The purpose of N.J.S.A. 43:16A-1(26) and the implementing regulations is to protect the actuarial soundness of the pension fund by prohibiting the use of “ad hoc salary increases intended to increase retirement allowances without adequate compensation to the [pension] fund” in calculating pensions. Therefore, any salary increase made primarily in anticipation of retirement must be disregarded in determining the amount of a retiree’s pension, even if the increase was also designed to achieve other objectives, such as increasing the overall amount of the employee’s compensation.

.....

Although appellant’s promotion also may have served other objectives, such as settling his claims against New Brunswick, conferring him with the status of a captain and granting him higher terminal leave payments, the promotion was nonetheless made in anticipation of appellant retiring and beginning to receive a pension after receiving the one-year terminal leave provided under the settlement agreement. Therefore, the Board correctly concluded that appellant’s pension should be recalculated on the basis of a lieutenant’s salary.

[Id. at 534.]

The same is true for the retroactive salary increases Kress received on this record. (Pa31-Pa33). Any retroactive salary increases made primarily in anticipation of retirement which serve to inflate retirement benefits, even if collaterally designed to settle the employment discrimination civil lawsuit, are

not creditable for pension benefits calculation. The operative language of the statutory definitions of compensation in both the TPAF and PFRS systems are identical in all material respects. See N.J.S.A. 18A:66-2(d)(1); N.J.S.A. 43:16A-1(26)(a) (both statutes deem compensation to be base or contractual salary, paid in accordance with established salary policies of the employer, and not individual salary adjustments made primarily in anticipation of retirement or for work beyond the regular work day).

The legislative policy was discussed in Board of Trustees, Teachers' Pension & Annuity Fund v. LaTronica, 81 N.J. Super. 461, 470-71 (App. Div. 1963), where three teachers received substantial salary increases in their final years of service:

A pension fund is based upon actuarial principles incorporating known or reasonably anticipated statistics with regard to life expectancies and present and future payments into and out of the fund, to the end that all the members may be served without jeopardizing the financial soundness of the fund. In consideration of the other contributing members of the fund, the benefits of a few cannot be enhanced by ad hoc salary increases intended to increase retirement allowances without adequate compensation to the fund. Clearly the actions of the local boards and the subsequent demands of the respondents have a something-for-nothing color to them which should be deplored. The local boards could, if the action taken by them in this case were approved, defer adequate compensation to its teachers until their final year, then

catapult the teacher to a high level of compensation, and cause the Pension Fund to compensate for the local board's failure to grant increases in the past. This would permit the local board a grand gesture of farewell at little expense; it also would draw heavily on the Pension Fund without having provided sufficient compensation in prior years.

[Ibid.]

The settlement of litigation which artificially inflates salaries at or near the end of employment similarly serves to increase retirement allowances without adequate compensation to the fund. If, by merely allocating a portion or, as here, the entirety of a settlement to the last three years of salary, an employer could substantially increase an employee's pension, or a pension benefit they were not otherwise entitled to receive, the employer could improperly negotiate more favorable settlements. The employer could settle in a way that costs them significantly less by unfairly shifting the cost and responsibility for their actions at the expense of the pension system.

Here, Kress was originally paid a salary of \$103,682 for the 2018-2019 school year; \$105,359 for the 2019-2020 school year; and \$106,934 for the 2020-2021 school year. (Pa32-Pa33). Now she seeks to credit for purposes of calculating her retirement benefits, a salary of \$135,765.33 for the 2018-2019 school year; \$137,442.33 for the 2019-2020 school year; and \$147,038 for the

2020-2021 school year, i.e. a total of a \$96,250 in retroactive salary increase in order to settle the employment discrimination litigation. (Pb11). The Settlement Agreement characterizes these moneys as allocated to the salary of the 2018-2019; 2019-2020; and 2020-2021 school years only. (Pa33).

Kress cites the unpublished opinion of Coyle v. Board of Trustees, Teachers' Pension and Annuity Fund, No. A-6101-12 (App. Div. March 20, 2015), in her brief. (Pb7-Pb8). She argues that the retroactive salary increases were not made in anticipation of retirement but were instead made due to the Equal Pay Act and the NJLAD. (Pb7-Pb8). However, Kress also concedes that the “salary increases were not across-the-board” and instead “[were] a litigation settlement affecting one plaintiff.” (Pb9).

In Coyle, the court affirmed the TPAF Board’s denial of “pension credits for retroactive salary increases he received as part of a settlement of a lawsuit he filed against his employer” Coyle, slip op. at 1. Coyle’s lawsuit against his former employer was for alleged “age and disability discrimination in violation of the [NJLAD], N.J.S.A. 10:5-1 to -49.” Id. at 3. Coyle and the employer signed a settlement agreement wherein \$200,000 was to be paid to Coyle with “\$78,103 of the settlement amount as retroactive salary payments to Coyle for his last three years active on the job, specifying increases of \$25,487

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for 2001-02, \$26,138 for 2002-03, and \$26,478 for 2003-04.” Ibid. The court noted that “[t]hese last three years of active employment determine the amount of pension benefits to be awarded to Coyle.” Id. at 3-4.

A key element in Coyle was that the salary increases were not made in the “normal course of the school district’s salary decisions” but were instead made “purely in the nature of settlement payments to resolve Coyle’s lawsuit.” Id. at 9-10. Indeed, as with Kress’s retroactive salary increases, “[t]hey were not true salary increases ‘in accordance with established salary policies of the member’s employer for all employees in the same position.’ N.J.S.A. 18A:66-2(d)(1).” Id. at 10.

The court in Coyle distinguished the matter from In re Snellbaker, 414 N.J. Super. 26 (2010), because the salary adjustments in Snellbaker were made to bring the city into compliance with the specific statutory salary increases provided for by the statute, the “salary increases were identical to the raises Snellbaker’s subordinates had received during the same period” and it “did not involve an ‘individual salary adjustment’ unconnected to the overall salary structure of the employing agency.” Id. at 14 (quoting Snellbaker, 414 N.J. Super. at 40).

Kress’s settlement, on this record, provided an ad hoc individual salary

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increase that was not based on required specific statutory salary increases or on across-the-board salary adjustments in accordance employer's established salary policies. There was no legal requirement as in Snellbaker, which would have required Kress to receive these retroactive salary adjustments. Kress was also an individual employee who was treated differently from "established salary policies of the member's employer for all employees in the same position." N.J.S.A. 18A:66-2(d)(1). She received discretionary retroactive salary increases that were made in order to resolve civil employment litigation. Here, contrary to Kress's arguments (Pb7-8), the facts of her case are like those in Coyle and Puglisi and unlike the facts of Snellbaker.

Additionally, the civil complaint states that "[u]pon her re-hiring in 1997, and unlike other male teachers, she did not receive appropriate credit from the Board for her prior teaching experience outside Kenilworth Board of Education." (Pa51). The complaint asserts that Kress should have been on the "MA+30" salary scale since September 1998. (Pa51). The complaint then alleges that from the 2012-2013 school year through the 2016-2017 school year Kress received smaller salary increases than her similarly situated male counterparts. (Pa51). This she asserted "demonstrate[d] a pattern of discrimination which began in 1997 and ha[d] persisted until the present date."

(Pa53).

Although the discrimination was alleged to have occurred from 1997 onwards, the Settlement Agreement suspiciously places all of the retroactive salary increases only in the last three years of her employment of 2018-2019, 2019-2020, and 2020-2021. (Pa51-Pa52). Crucially, it is the last three years of active employment that determine the final average salary upon which the pension benefits paid to Kress will be calculated. See N.J.S.A. 18A:66-2(f)(1) (defining “final compensation”). Thus, adequate employee and employer pension contributions for these significantly inflated salaries were not made to the pension fund.

In reviewing the retroactive salary increases the Board utilized its expertise and knowledge in its specialized field. Francois v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 415 N.J. Super. 335 (App. Div. 2010). In administering the pension fund the Board must act in accordance with its fiduciary duty to protect the financial integrity of the fund. Mount v. Trs. of Pub. Emps.’ Ret. Sys., 133 N.J. Super. 72, 86 (App. Div. 1975). Allowing the retroactive salary payments to inflate Kress’s pension benefits without adequate funding through prior contributions “place[s] a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for

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such benefits.” Smith v. State Dept. of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 215 (App. Div. 2007).

Kress released her discrimination claims and, in exchange, the settlement agreement provided \$100,000 (\$96,250 after attorney fees) from the Kenilworth BOE and the Kenilworth EA to her and an increased annual pension benefit improperly inflated by \$26,201.64. (Pa10); N.J.S.A. 18A-66-2(f)(1). This attempted to transfer a large portion of the settlement cost to the pension system (TPAF), a non-party to the employment litigation. This presents the classic situation where an employee (Kress) and an employer (Kenilworth BOE), who are engaged in an employment dispute, use the pension system (TPAF) as a means to supplement their settlement in order to resolve their litigation. By allocating a substantial portion of the settlement to the salary for the last three years of employment, the school district and Kress obtained a more favorable settlement at the expense of the TPAF. The Board found that rather than distributing the salaries equally during the years she alleged she was illegally underpaid the settlement agreement only increased Kress’s salary for the final three years of service. (Pa10). The Board concluded that because there was no direct connection between the settled salary increases and the service rendered, nor were there across the board salary increases, the payment of the additional

salary was extra compensation offered as an inducement to leave employment with the Kenilworth BOE. (Pa11).

Kress's argument that the TPAF Board erred in denying her request for a hearing is also misplaced. (Pb10). Kress argues that "how and when Kress acquired knowledge of the salary disparities as well as the KBOE's efforts to obfuscate the facts" are in dispute. (Pb10). However, an evidentiary hearing is "mandated only when the proposed administrative action is based on disputed adjudicatory facts." In re Farmer's Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 618 (App. Div. 1992).

The Board "determine[s] whether to grant an administrative hearing based upon the standards for a contested case hearing set forth in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 17:4-1.7(b). If the appeal "involves solely a question of law, the Board may retain the matter and issue a final administrative determination" N.J.A.C. 17:4-1.7(e).

Neither how nor when Kress learned of the salary disparities, nor the purported obfuscation of facts by Kenilworth BOE are material facts that would affect the determination made by the Board. When and how Kress decided that she was allegedly being discriminated against by her former employer, or that

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she “might well have litigated her claims earlier” are not material facts as they are irrelevant to the Board’s determination. The Settlement Agreement indisputably places the salary increases only for the last three years of her employment despite her claim that the alleged discriminatory action began in 1997, and it includes an agreed upon her May 1, 2021 retirement. (Pa32-Pa33; Pa51-Pa53). All of the foregoing led the Board to reasonably conclude that the retroactive salary increases were extra compensation made primarily in anticipation of retirement and thus not creditable. (Pa11-Pa13).

CONCLUSION

For these reasons, the Board’s decision denying Kress’s application to include the salary increases to determine her pension retirement benefits should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

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Janet Greenberg Cohen
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Of Counsel

cc: Samuel J. Halpern, Esq.

CHERYL KRESS,

Appellant,

vs.

**BOARD OF TRUSTEES OF THE
TEACHERS' PENSION &
ANNUITY FUND,**

Respondent.

**SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION**

DOCKET NUMBER A-003130-22

Civil Action

**ON APPEAL FROM
Final Administrative Determination
Of the Board of Trustees of the
Teachers' Pension & Annuity Fund,
Agency no. TPAF 1-10-18614**

**BRIEF AND APPENDIX
ON BEHALF OF APPELLANT**

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on the Brief

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Cheryl Kress (hereinafter sometimes “Kress” or “Appellant”) was born on May 11, 1951 and at all relevant times was a schoolteacher for the Kenilworth Board of Education (hereinafter sometimes “KBOE”) (Aa25²). She was initially enrolled in the Teachers’ Pension and Annuity Fund (“TPAF”) as of September 1, 1991 based on her employment with the Union Township Board of Education (Aa9-14). On September 1, 1997 she transferred to the KBOE (Aa9-14).

On September 20, 2019, Kress filed a two-count complaint in the Union County Superior Court against KBOE asserting violations of the Diane R. Allen Equal Pay Act, N.J.S.A. 10:5-12(t) as well as with the New Jersey Law Against Discrimination (“NJLAD”), N.J.S.A. 10:5-1 to 42 (Aa49-56). The complaint alleged that since her hiring in 1997 she did not receive the same pay increases received by her male colleagues despite the fact that she met the MA-30 criteria for same, standing for a master’s degree and 30 academic credits subsequent to her degree (Aa49-56). The pay differentials between Kress and her male colleagues approximated 30% of her salary in the final three years of her employment (Aa49-56). As of the date of Kress’ retirement effective May 1, 2021, she had accrued nearly 42 years of overall pensionable service with the TPAF (Aa26-27).

¹ These sections are intertwined and are accordingly combined.

² Aa__ as combined hereinafter designated, refers to documents from Appellant’s Appendix.

On April 12, 2021, the parties settled Kress' litigation in the overall amount of \$100,000.00 (Aa30-46).³ The settlement agreement allocated retroactive pay increases in the amount of \$32,083.33 for each of the final three years of Kress' teaching service plus \$3,750 for plaintiff's attorney's fees (Aa30-46). The third-party defendant Kenilworth Education Association ("KEA") contributed \$15,000.00 to the overall settlement (Aa30-46). Kress was paid her salary through April 30, 2021 on which date she resigned her employment (Aa30-46). On May 1, 2021, Kress filed her application for service retirement with the TPAF (Aa10).

On August 5, 2022, Michael Kusmierczyk, a fiscal resources manager in the Division of Pensions and Benefits, issued a report in response to Kress' inquiry regarding her settlement agreement with the KBOE (Aa23-24). Kusmierczyk analyzed the agreement in accordance with N.J.A.C. 17:3-4.1 and determined that the salary increases paid over the final three years of Kress' employment were not creditable because they were individual increases granted primarily in anticipation of retirement and were not awarded as across-the-board to similarly-situated personnel (Aa23-24). In short, Kusmierczyk concluded that there was no justification for the inclusion of the salary increases as part of Kress' final compensation (Aa23-24).

³ The third-party defendant, the Kenilworth Education Association ("KEA") contributed \$15,000 of said amount (Aa30-46).

On September 8, 2022, Kress appealed the Kusmierczyk decision to the TPAF Board (Aa21-22). Kress argued that the justification for the salary increases was her lawsuit against the KBOE for equal pay and discrimination violations and the settlement agreement which followed (Aa21-22).

At its meeting of January 5, 2023, the TPAF Board considered Kress' appeal (Aa18-20). The Board denied the appeal and based its decision on the determination of Kusmierczyk (Aa18-20). In her letter of February 17, 2023 Kress disagreed with the Board's decision and requested a *de novo* hearing in the Office of Administrative Law (Aa16-17).

On May 5, 2023, the TPAF Board issued its final administrative determination denying Kress' request to implement the provisions of her settlement agreement with the KBOE (Aa9-14). In so doing, the Board adopted the findings and conclusions of the report of Michael Kusmierczyk (Aa9-14). More particularly, it rejected the salary increases in the final three years of Kress' employment as having violated the provisions of N.J.A.C. 17:3-4.1 (Aa9-14). The Board stated that there was no accompanying explanation of how the increases were calculated (Aa9-14). Furthermore, the Board noted that the lawsuit was not adjudicated and lacked a court order and judgment (Aa9-14). Finally, the Board also found that the salary increases were not across-the-board and extended to other disaffected employees (Aa9-14). In its legal conclusions, the Board cited the

relevant portions of the N.J.S.A. 18A:66-2(d)(1) which defines creditable compensation as well as N.J.A.C. 17:3-4.1 (Aa9-14). As respecting Kress' request for an evidentiary hearing before the Office of Administrative Law, the Board denied same on the basis that there were no material facts in dispute (Aa9-14).

An amended notice of appeal was thereafter filed on July 10, 2023 (Aa1-4).

ARGUMENT

POINT I

THE BOARD'S FAILURE TO GIVE FULL FORCE AND EFFECT TO THE PROVISIONS OF KRESS' SETTLEMENT AGREEMENT WITH THE KENILWORTH BOARD OF EDUCATION REGARDING HER EQUAL PAY AND NJLAD LAWSUIT VIOLATED EXPRESS LEGISLATIVE POLICIES (Aa9-14; Aa18-20; Aa23-24)

In its review of the state agency determination, a court considers “(1) whether the agency’s decision offends the state or deferral Constitutions; (2) whether the agency’s action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” Bueno v. Teachers’ Pension & Annuity Fund, 422 N.J. Super. 227, 233 (App. Div. 2011) citing George Harms Constr. Co. v. N.J. Tpke. Auth., 137 N.J. 8 (1994). In the present case, the Board’s refusal to accept Kress’ settlement agreement and recognize the stipulated salary increases violated express legislative policies.

The governing statute herein is N.J.S.A. 18A:66-2(d)(1). It provides that:

“Compensation means the structural salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the

member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement. . ." (emphasis added).

The Board's implementing regulation in N.J.A.C. 17:3-4.1(a)(ii) which defines forms of extra compensation as, among other things, "pay for extra work, duty or service beyond the normal workday."

The foregoing statute and regulations were construed in the case of William Coyle vs. Board of Trustees of the Teachers' Pension and Annuity Fund, unpublished decision of the Appellate Division (2015) (Aa57-64). Mr. Coyle was a supervisor of pupil personnel between 1997 and 2001 for the Hackettstown Board of Education (hereinafter "HBOE") (Aa58). In July 2001 he was promoted to the position of Director of Pupil Personnel Services (Aa58). However, in May 2004 he went on a medical leave of absence but never returned (Aa58). During his tenure, Coyle was assigned to perform additional duties which were not specifically included in his job descriptions (Aa58). Nonetheless, the descriptions provided that Coyle was expected to honor all other reasonable requests of the school administration (Aa58-59).

While still on his medical leave, Coyle filed a lawsuit alleging discrimination based on his age and disability for having been denied compensation for the additional work (Aa59). Once Coyle turned 60 later that

year, the HBOE filed an involuntary application for Coyle's disability retirement (Aa59). Two years later his lawsuit was settled for \$200,000 (Aa59). Thereunder, he was paid retroactively between 25% and 30% of his salary for each of the final three years of employment (Aa59). In 2008 the TPAF Board approved Coyle's disability retirement but rejected the salary increases (Aa60). The case was heard by an administrative law judge who recommended approval of the salary increases (Aa60). On final review the TPAF Board reaffirmed its original denial of the salary increases (Aa60).

On appeal, the Appellate Division affirmed the Board's final decision (Aa60-64). It relied on In re Puglisi, 186 N.J. 529 (2005) in which a police officer settled his discrimination suit. He was promoted to captain and received a higher salary. However, he was mandated to retire upon the expiration of his leave (Aa62). The Court held that the settlement payments were in anticipation of his retirement and affirmed the PFRS Board decision below. Id. at 534. The Court further relied on the holding in Board of Trustees, TPAF vs. LaTronica, 81 N.J. Super. 461, 470-471 (1963), certif. denied, 41 N.J. 874 (1964).

Coyle distinguished its holding from that in the case of In re Spellbacker, 414 N.J. Super. 26 (App. Div. 201). (Aa63) In Spellbacker, the retroactive salary increases paid as part of a settlement agreement were held to be pensionable. Spellbacker, supra at 41. Unlike his deputy chiefs, Spellbacker never received

annual salary increases between 2002 and 2006. Id. at 29-30. However, N.J.S.A. 40A:14-179 required that the police chief's salary must exceed the highest-ranking subordinate officer. The salary increases given to Spellbacker were identical to the raises given to the deputy chiefs during the same period. Id. at 32. Coyle accordingly held that the settlement agreement in Spellbacker was crafted to bring the employer into compliance with the above statute (Aa64-65). Coyle noted that:

“Our decision in Spellbacker, unlike Puglisi did not involve an ‘individual salary adjustment’ unconnected to the overall salary structure of the employing agency. Spellbacker, supra at 40. It involved a settlement intended to comply with a statutory mandate” (Aa64) (emphasis added).

So too here. In the present case, the retroactive salary payments were made in order to equalize Kress' salary with that of her male colleagues in the final three years of her employment in compliance with the Equal Pay Act and NJLAD mandates. It also fulfills the pension statutory mandate set forth in N.J.S.A. 18A:66-2(d)(1) that the compensation be “in accordance with established salary policies of the member's employer for all employees in the same position.” Like Spellbacker, the present case was not an individual adjustment in anticipation of retirement.

The Board further asserts that the case was not fully adjudicated to a final judgment. Quite obviously that was unnecessary inasmuch as the parties amicably

adjusted their differences and settled the case. As reflected in the caselaw, there are many cases which are settled for a host of reasons. The fact that they are not fully litigated does not diminish their validity. See e.g. Gere v. Louis, 209 N.J. 486, 500 (2012) holding that there is a strong public policy favoring the settlement of litigation.

The Board also maintains that because Kress' salary increases were not across-the-board in accordance with its regulations, they were impermissible. But the increases paid to Kress did not arise from a collective-bargaining settlement involving merit and cost-of-living increases. It was a litigation settlement affecting one plaintiff. So long as the settlement agreement is absent fraud or other compelling circumstances, it will be enforced. Pascaralla vs. Bruck, 190 N.J. Super. 118, 124-125 (App. Div. 1983)

The Board's arguments are clearly unpersuasive.

POINT II

**THE BOARD IMPROPERLY REJECTED KRESS'
REQUEST FOR AN EVIDENTIARY HEARING IN
THE OFFICE OF ADMINISTRATIVE LAW
BECAUSE THERE ARE MATERIAL FACTS IN
DISPUTE (Aa9-14)**

In accordance with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-9, 10-12, an evidentiary hearing is mandated when proposed administrative action is based on disputed adjudicatory facts. Matter of Farmers' Mut. Fire Assur Ass'n, of New Jersey, 256 N.J. Super 607 (App. Div. 1992). See also, Spalt v. N.J. Dept. of Environmental Protection, N.J. Super 206 (App. Div. 1989), certif. denied 122 N.J. 140.

In the present case, there exist disputed facts which warrant an evidentiary hearing in the Office of Administrative Law. These facts concern how and when Kress acquired knowledge of the salary disparities as well as the KBOE's efforts to obfuscate the facts. For example, had the facts been made known earlier on in Kress' tenure at the KBOE, she might well have litigated her claims earlier, clearly dispelling any presumption that her salary increases were in anticipation of retirement. These issues can only be resolved in the setting of an evidentiary hearing at the OAL.

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully urged that the final administrative determination below be reversed and remanded to the Office of Administrative Law for an evidentiary hearing.

Respectfully submitted,

/s/ Samuel J. Halpern
SAMUEL J. HALPERN
Attorney for Appellant
Cheryl Kress

Dated: December 6, 2023