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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0251-21

LORRAINE M. HARWELIK,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, TEACHERS' PENSION and ANNUITY FUND,

Respondent-Respondent.

Submitted December 12, 2022 – Decided February 13, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Board of Trustees of the Teachers' Pension and Annuity Fund, Department of the Treasury.

Bergman & Barrett, attorneys for appellant (Michael T. Barrett, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Jeffrey Padgett, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Lorraine Harwelik appeals from the August 17, 2021 final agency decision of the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) denying her request for continued participation as a TPAF member under her expired TPAF Tier 1 account. The Board's denial was predicated upon its interpretation of two statutes governing TPAF membership: N.J.S.A. 18A:66-7(a), which provides that "[m]embership of any person shall cease . . . if, except as provided in [N.J.S.A.] 18A:66-8, [the member] shall discontinue . . . service for more than two consecutive years," and N.J.S.A. 18A:66-8(a), which states that "[i]f a teacher . . . has been discontinued from service without personal fault[,] . . . the teacher's membership may continue . . . if the member returns to service within a period of [ten] years from the date of discontinuance from service." We affirm.

We glean these facts from the record. In January 2006, Harwelik began employment as a teacher with the Classical Academy Charter School (CACS) in Clifton, thereby establishing membership in the TPAF. While a teacher at CACS, Harwelik maintained a Tier 1 TPAF account. In May 2008, she received notice from the school's principal that her teaching contract would not be renewed for the following school year (2008-2009). At that time, Harwelik had

only accrued thirty-six months of service credits in her TPAF account. Contributions to Harwelik's Tier 1 account stopped after June 30, 2008.

In March 2010, the Division of Pensions and Benefits (Division) notified Harwelik and CACS that Harwelik's Tier 1 account was scheduled to expire on September 30, 2010, due to two years of inactivity. See N.J.S.A. 18A:66-7 ("The pension fund shall send written notice in care of the last employer of a member at least [sixty] days in advance of the date on which [the member's] inactive membership shall expire . . . ."). Upon receiving the notice, the principal of CACS completed and returned an Employer Certification stating the reason for Harwelik's separation from CACS. According to the Board's subsequent fact findings, the certification stated that Harwelik had resigned her position at CACS.[1] Although the Board "noted [Harwelik] provided an Account Expiration Status-Employer Certification indicating that [she had been] laid off" as an exhibit to her administrative appeal, it found "no record in . . . Harwelik's membership files which indicate[d] she [had been] 'laid-off.'"

Harwelik's account expired as scheduled on September 30, 2010. She was unable to secure TPAF-eligible employment until 2014, when she signed a

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[1] On appeal, Harwelik asserts that this certification was "never before seen, authorized or signed by [her]," and that it was error for the Board to rely on it.

teaching contract with the Elizabeth Board of Education (EBOE). In March 2014, Harwelik submitted a Report of Transfer/Multiple Enrollment Form to the Division, seeking to transfer her Tier 1 account to her TPAF membership associated with her EBOE employment. The Division rejected the form and notified the EBOE and Harwelik that it could not be processed because the Tier 1 account had expired. Subsequently, on October 6, 2014, the EBOE submitted an enrollment application on Harwelik's behalf, and Harwelik was later enrolled as a new TPAF member in a Tier 5 TPAF account.

In July 2015, Harwelik's former principal at CACS submitted a letter to the Division to explain the circumstances of Harwelik's separation from employment at CACS. He explained that "[t]he reason for [Harwelik's] termination was the school management's decision, in assessing its more immediate instructional needs, not to renew [Harwelik's] employment contract." He elaborated that "Harwelik's separation from [CACS] . . . was her employer's decision, not her decision." In a letter dated July 28, 2015, a Division representative "advised [Harwelik] that based on the documentation provided, her employment contract was not renewed for the 2008-2009 school year -- [she was] not laid off or abolished from her position." After the CACS principal submitted a duplicate of his letter directly to the Division representative, the

representative sent Harwelik another letter reiterating that the principal's letter "indicated that [Harwelik's] contract was not renewed." As such, the Division's policy of denying "extensions beyond two years of inactivity for members whose contracts were not renewed" remained fully applicable, and "[t]herefore, [Harwelik's] Tier 1 [a]ccount expired on September 30, 201[0]."

After receiving another request for a review of the Division's determination, on October 23, 2015, the Division once again informed Harwelik that "after two years of inactivity in the TPAF, her Tier 1 [a]ccount expired pursuant to N.J.S.A. 18A:66-7." Additionally, the Division stated that "[u]nder the provisions of N.J.S.A. 18A:66-8, a non-renewal of a teaching contract cannot extend the expiration of membership beyond two years." The Division directed Harwelik to file an appeal with the Board if she wished to challenge the determination.

On December 18, 2020, through counsel, Harwelik again requested restoration of her Tier 1 account. The Division denied the request on January 11, 2021, and Harwelik filed an appeal with the Board on March 24, 2021. On May 6, 2021, the Board denied the request for restoration based on Harwelik's "submissions and the relevant documentation in the record." Harwelik

subsequently appealed the Board's May 6 decision and requested a hearing in the Office of Administrative Law.

On July 1, 2021, the Board denied Harwelik's request for a hearing on the ground that there were no "disputed questions of fact." In its final administrative determination dated August 17, 2021, the Board affirmed the denial of Harwelik's request to reinstate her Tier 1 account. In rendering its decision, the Board relied principally on the provisions of N.J.S.A. 18A:66-7 and -8. The Board determined that "[t]he non-renewal of a non-tenured teacher's annual contract" did not qualify for the exemption contained in N.J.S.A. 18A:66-8. The Board interpreted N.J.S.A. 18A:66-8's exemption as applying only to "tenured teachers." In support, the Board relied on case law approving separate treatment of teachers based on tenure status and confirming the minimal rights of non-tenured teachers. This appeal followed.

We begin our analysis with the established principle that judicial review of an administrative agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). "We recognize that agencies have 'expertise and superior knowledge . . . in their specialized fields.'" Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009) (alteration in original) (quoting In re License Issued to Zahl, 186 N.J. 341, 353 (2006)). Therefore, we will not

reverse an agency's decision "'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" J.K. v. N.J. State Parole Bd., 247 N.J. 120, 135 (2021) (quoting Saccone v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014)).

To determine whether an administrative agency action is arbitrary, capricious, or unreasonable, a reviewing court must assess:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
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> (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
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> (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting Stallworth, 208 N.J. at 194).]

"The burden of proving that an agency action is arbitrary, capricious, or unreasonable is on the challenger." Parsells v. Bd. of Educ., 472 N.J. Super. 369, 376 (App. Div. 2022).

While we will not "'substitute [our] own judgment for the agency's,'" Allstars Auto Grp., Inc., 234 N.J. at 158 (quoting Stallworth, 208 N.J. at 194),

we are not "'bound by an agency's interpretation of a statute or its determination of a strictly legal issue,' particularly when 'that interpretation is inaccurate or contrary to legislative objectives.'" Mount v. Bd. of Trs., Police & Firemen's Ret. Sys., 233 N.J. 402, 418-19 (2018) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Nevertheless, "we defer to [agency] fact[-]findings that are supported by sufficient credible evidence in the record." McClain v. Bd. of Rev., Dep't of Lab., 237 N.J. 445, 456 (2019).

On appeal, Harwelik argues that the Board "acted in an arbitrary and capricious manner" because its "interpretation" of N.J.S.A. 18A:66-7 and -8 to exclude non-tenured teachers whose contracts are not renewed for budgetary reasons is contrary to the statutes' "plain meaning," as well as to policy preferences favoring the liberal construction of pension statutes in favor of those intended to benefit from them. She further argues that the cases the Board relied on to distinguish non-tenured teachers from tenured teachers are inapposite because they speak to employment disputes rather than pension eligibility.

As previously stated, pursuant to N.J.S.A. 18A:66-7(a), "[m]embership of any person shall cease . . . if, except as provided in [N.J.S.A.] 18A:66-8, [the member] shall discontinue . . . service for more than two consecutive years."

N.J.S.A. 18A:66-8 exempts teachers who become inactive under specific circumstances, providing:

> If a teacher:
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> > (1) is dismissed by an employer by reason of reduction in number of teachers employed in the school district, institution or department when in the judgment of the employer it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization or other good cause; or becomes unemployed by reason of the creation of a regional school district or a consolidated school district; <u>or has been discontinued from service without personal fault</u> or through leave of absence granted by an employer or permitted by any law of this State; and
> >
> > (2) has not withdrawn the accumulated member's contributions from the retirement system, the teacher's membership may continue, notwithstanding any provisions of this article, if the member returns to service within a period of [ten] years from the date of discontinuance from service.
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> [N.J.S.A. 18A:66-8(a) (emphasis added).]

N.J.S.A. 18A:27-4.1(b) states: "A board of education shall renew the employment contract of a certificated or non-certificated . . . employee only

upon the recommendation of the chief school administrator," and "[a] non[-]tenured . . . employee who is not recommended for renewal by the chief school administrator shall be deemed non[-]renewed." In Pascack Valley Regional High School Board of Education v. Pascack Valley Regional Support Staff Association, 192 N.J. 489 (2007), the Court held that non-tenured employees "have no right to renewal of the[ir] [employment] contracts." Id. at 492. "These employees are then considered 'non[-]renewed' rather than terminated or dismissed." Id. at 493 (citing N.J.S.A. 18A:27-4.1(b)). To underscore the point, the Court distinguished between non-tenured employees who are dismissed or terminated during their contract term and those whose contracts are simply not renewed. See id. at 497-98. This distinction mirrored the Court's holdings in other cases that the term "layoff" "connotes involuntary dismissal during the term of a contract, and is not applicable to the non-renewal of a particular employee's appointment at the end of a fixed term." Camden Bd. of Educ. v. Alexander, 181 N.J. 187, 200 (2004), superseded on other grounds by N.J.S.A. 34:13A-5.3.

Because these Supreme Court cases did not concern the application of N.J.S.A. 18A:66-8(a), we look to precedent interpreting similar language in other state pension systems for guidance. In that regard, in Cologna v. Board of

Trustees, Police & Firemen's Retirement System, 430 N.J. Super. 362 (App. Div. 2013), we interpreted N.J.S.A. 43:16A-3(5), a similar provision to N.J.S.A. 18A:66-8 in the Police and Firemen's Retirement System (PFRS). Cologna, 430 N.J. Super. at 372. Like TPAF accounts, PFRS accounts are generally subject to expiration after two years of account inactivity. See N.J.S.A. 43:16A-3(3). However, N.J.S.A. 43:16A-3(5) provides an extension under the following circumstances:

> If a member . . . has been discontinued from service through no fault of [their] own . . . , [their] membership may continue, notwithstanding any provisions of this article if such member returns to service within a period of [five] years from the date of [their] discontinuance from service.
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> [(Emphasis added).]

The plaintiff in Cologna was a police officer who voluntarily resigned from his position but sought to continue his membership three years later under his police-associated PFRS account after he obtained another PFRS-eligible position. Id. at 368-69. We concluded that N.J.S.A. 43:16A-3(5) was "confined to only members who lose their public employment as the result of an employer's layoff or reduction in force, or through leave of absence in accordance with the statute." Id. at 364. We noted "the phrase 'has been discontinued' is written in the passive voice. As such, it connotes a situation in which an employer . . . took

action against an employee by discontinuing his services." Id. at 372. Furthermore, we held that "the passive term 'has been discontinued' . . . signifies that the employee in question, as the recipient of the action, has been terminated from his [or her] job as a result of the employer's own actions." Ibid. (quoting N.J.S.A. 43:16A-3(5)). Accordingly, because the plaintiff resigned voluntarily and not as a result of his former employer's actions, we concluded that he was not discontinued from service within the meaning of N.J.S.A. 43:16A-3(5). Ibid.; see also id. at 376 (acknowledging legislative history indicating that the statute "was patterned after pre-existing pension statutes," such as the TPAF, "to restrict" application "to workers who are laid off or removed by a reduction in force").

Here, Harwelik was not terminated, dismissed, or otherwise laid off as envisioned by N.J.S.A. 18A:66-8. Rather, it is undisputed that her contract expired and was not renewed. We are satisfied that the Board's interpretation of N.J.S.A. 18A:66-8 to exclude Harwelik from the statutory exemption is reasonable and consistent with legislative objectives. See Kasper v. Bd. of Trs. of the Tchrs.' Pension & Annuity Fund, 164 N.J. 564, 581 (2000) ("'To uphold an agency's construction of a statute that is silent or ambiguous with respect to the question at issue, a reviewing court need not conclude that the agency

construction was the only one it permissibly could have adopted.'" (quoting 2 Am. Jur. 2d Administrative Law § 525 (1994))).

Harwelik's reliance on the "without personal fault" language in the statute disregards the preceding language requiring the employee to "ha[ve] been discontinued from service." See N.J.S.A. 18A:66-8(a)(1). Notwithstanding the fault issue, the statutory exemption did not apply to Harwelik because she had no right to continued employment after the expiration of her contract. See Pascack Valley, 192 N.J. at 492. Therefore, she was not "discontinued from service" by the non-renewal of her contract. See Cologna, 430 N.J. Super. at 372-76. Harwelik further argues that she was laid off because her non-renewal was for budgetary reasons. She cites the Employer Certification she submitted as support. However, Harwelik's non-renewal does not constitute being "laid off" in the context of education-related employment. See Camden Bd. of Educ., 181 N.J. at 200. Harwelik also asserts the Board erroneously denied her a hearing because there were disputed material facts. On the contrary, the central issue was whether the statutory exemption applied to non-tenured teachers, such as Harwelik, whose contracts were not renewed. As a matter of law, it does not. Therefore, a fact-finding hearing was not required. See N.J.A.C. 17:3-1.7(a)(4).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION