

**Matter of Ford v New York State Teachers'  
Retirement Sys.**

2008 NY Slip Op 32175(U)

July 23, 2008

Supreme Court, Albany County

Docket Number: 0624007/2008

Judge: George B. Ceresia

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In this CPLR article 78 proceeding, petitioner Kenneth M. Ford seeks review of a final determination by respondent New York State Teachers' Retirement System (TRS) which found petitioner's service for three school years commencing on July 1, 1998 and ending on June 30, 2001 (hereinafter the relevant time period) not creditable service in TRS. TRS opposes the petition, seeking its dismissal.

Petitioner, a certified teacher, held a position at the Waterville Central School District (hereinafter Waterville) from July 1, 1998 through June 30, 2001. Prior to that, he served as a high school principal at the Sauquoit Central School District and has served as either a teacher or administrator his entire adult working life. Petitioner was also an associate professor at the SUNY College of Technology where he taught robotics and provided in-service training for faculty members. Currently, petitioner is employed by Oneida-Herkimer Board of Cooperative Educational Services as the Director of the Information and Technology Center.

While at Waterville, petitioner served as the Director of Curriculum and Training of Project Lead the Way. He was appointed to this position by Waterville's Superintendent of Schools. In the appointment letter dated June 9, 1998, the Superintendent noted the position was funded by a grant from Charitable Ventures Foundation (CVF), which eventually funded Project Lead the Way, Inc. (hereinafter, when referring to the corporate entity, PLTW, Inc.) – a not-for-profit corporation. PLTW Project Lead the Way (hereinafter, when referring to the program based curriculum, PLTW) is a pre-engineering and technology curriculum for

middle and high school students.<sup>1</sup> According to the petition, Waterville “was one of the first school districts in the State of New York to offer the PLTW pre-engineering and technology curricula” (Petition at ¶ 9).

Waterville and CVF entered into an agreement, which was effective September 1, 1998. In part, the agreement provided that Waterville would implement the PLTW program by the 2003-2004 school year and would

“serve as a PLTW Program model for other school districts. In conjunction with this objective, [Waterville] will make its Program available for observation and inspection by other school districts and will exchange information concerning the program with other school districts, particularly other PLTW school districts” (Contractual Agreement at ¶ 1, Hewig Affirmation, Exhibit J).

Petitioner was not a signatory to this agreement, which was strictly between the CVF and Waterville.

In Spring 2006, TRS commenced an investigation of petitioner’s membership in TRS with respect to his work with PLTW at Waterville.<sup>2</sup> On July 24, 2006, TRS notified petitioner of its preliminary determination regarding his retirement credit for school years

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<sup>1</sup> Apparently, PLTW arose from a perceived need to prepare more students for possible engineering careers (or careers in other related technical fields) as a shortage of such professionals is anticipated.

<sup>2</sup> TRS also investigated six other TRS members. CPLR article 78 proceedings seeking review of TRS’s determinations regarding those individuals were also before this Court and have been decided today. They are as follows: Matter of Handley v New York State Teachers’ Retirement Sys., index No. 6239-07; ; Matter of Phillips v New York State Teachers’ Retirement Sys., index No. 6241-07; Matter of Jensen-Dooling v New York State Teachers’ Retirement Sys., index No. 6249-7; Matter of Tebbano v New York State Teachers’ Retirement Sys., index No. 6250-07; Matter of White v New York State Teachers’ Retirement Sys., index No. 6251-07; and Matter of Blais v New York State Teachers’ Retirement Sys., index No. 6252-07.

July 1998 through June 2001, stating: “Specifically, [TRS] has preliminarily determined that you are not entitled to retirement credit for claimed teaching services at [Waterville] during those years because you did not render teaching service at [Waterville]” (Schneider Letter [dated 7-24-06], Ford Affidavit, Exhibit A). TRS further explained:

“[W]e have obtained documents and information which appear to indicate that you had been improperly reported by [Waterville] as providing teaching service to them during the school years in question. The documents and information appear to indicate that, during the relevant time period, you were, in fact, working for a not-for-profit corporation named Project Lead the Way, Inc. . . .” (id.).

That letter further provided:

“According to information supplied by [Waterville], you were first employed as the PLTW Director of Curriculum Development on June 8, 1998. A memo from [Waterville] to you dated June 9, 1998 advised you of your appointment and stated that ‘this position will be funded through [CVF]’ which we understand is affiliated with PLTW. [Waterville] has advised that you ‘telecommuted’, working out of your home, that you were supervised by PLTW personnel, specifically Neil Tebbano, PLTW Vice President of Operations, that your duties were assigned in accordance with PLTW programmatic requirements to development [sic] and implement the PLTW program, and that you worked under yearly contracts entered into between [Waterville] and PLTW or an affiliate of PLTW” (id.).

Alternatively, TRS noted that, “even assuming your service for PLTW could also [be] considered service for [Waterville], that service does not appear to constitute teaching service creditable in the System” (id.).

In response, petitioner, through counsel, informed TRS, inter alia:

“Kenneth Ford was employed as ‘Project Lead the Way’ Director of Curriculum and Training by [Waterville] and, he worked for [Waterville], as more fully explained in the Questionnaire submitted to you by [Waterville].

Although Mr. Ford maintained an office in his home, he used [Waterville] facilities routinely for meetings, workshops, training sessions and planning sessions. He was, at all times, an administrator and teacher for [Waterville]" (Latin Letter [dated 8-30-06], Petition, Exhibit A).

On April 13, 2007, despite the above-quoted letter and material submitted by counsel, TRS finally "determined that [petitioner] was working on the business of Charitable Venture Foundations and/or Project Lead the Way in its unincorporated and/or incorporated form during the [relevant time period]" and, thus, is not entitled to credit in TRS for that time (Schneider Letter [dated 4-13-07], Hewig Affirmation, Exhibit P). Further, TRS noted that

"no evidence has been provided which might document that [petitioner] was performing any public service, let alone, teaching service, within the meaning of Education Law § 501 (19) during the school years in question. Mere conclusory assertions that [petitioner] was doing so will not suffice. The fact that [Waterville] allowed itself to be enlisted in an effort to have [petitioner] placed on a public payroll while working for CVF and/or PLTW[, Inc.] at their expense and reported by a public employer participating in the System as rendering teaching service to that employer does not establish any basis whatever for providing [petitioner] with retirement credit for that period. Nor does the fact that [petitioner] was paid on [Waterville's] payroll while employed as PLTW Director of Curriculum make him a 'teacher' within the meaning of Education Law § 501 (4) during the time period in question" (*id.*).

The final determination provided that it would take effect on May 14, 2007, inviting petitioner to provide further information to TRS if desired.

In an attached investigative report, TRS noted:

"The growing operations of PLTW[, Inc.] required the recruitment of additional personnel to run the PLTW[, Inc.] operations. Prior to July 1, 1998, [petitioner] was a teacher at Sauquoit Valley Central School District. In July, 1998, [petitioner] began working for PLTW as its Director of Curriculum Development. Beginning at that time, [petitioner] was also reported to [TRS] as teaching at [Waterville]. . . . Though no contract document has been

produced, it is reasonable to believe that CVF and [Waterville] entered [into an agreement with petitioner similar to agreements with other districts, PLTW, Inc. and purported district employees]" ("Report on the Investigation of System Members and Retirees Found Working for Charitable Venture Foundation and/or Project Lead the Way While Reported As Providing Teaching Service for Participated Employers in the System," Petition, Exhibit B).

In response to further correspondence from petitioner's counsel, TRS rejected, inter alia, petitioner's argument that payment by Waterville rendered it petitioner's employer, noting that evidence showed that CVF provided the funding for the salary. Furthermore, TRS maintained its position that petitioner was an employee of CVF/PLTW, Inc. and, alternatively, that he did not provide creditable service as a teacher, adjourning the effective date of its determination to June 29, 2007.

Petitioner then commenced this proceeding for review of TRS's determination to deny him credit in TRS for his service during the relevant time period. In this proceeding, petitioner first argues that he was at all relevant times Waterville's employee, noting that his salary and benefits were paid by Waterville. Thus, petitioner maintains that TRS' determination concluding otherwise is arbitrary and capricious and lacks a rational basis. Second, petitioner contends that TRS arbitrarily, capriciously and irrationally determined petitioner's duties during the relevant time period did not constitute teaching service creditable in TRS. Finally, petitioner contends that the doctrine of estoppel is applicable here to protect his creditable retirement service.

First, the Court agrees with TRS that petitioner's reliance on the doctrine of equitable estoppel is unavailing. As the Court of Appeals has held on several occasions, that doctrine

“is not available against a governmental agency in the exercise of its governmental function” (Matter of Daleview Nursing Home v Axelrod, 62 NY2d 30, 33 [1984]; see Collins v Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 361, 372-373 [1984]). As that Court explained in Matter of Galanthay v New York State Teachers’ Retirement System: “Under section 525 of the Education Law the retirement board is mandated to correct any errors in the computation of benefit entitlement on the part of the members of the system” (50 NY2d 984, 986 [1980]). Therefore, the Court of Appeals concluded that, given this statutory responsibility coupled with public policy, “[t]he doctrine of estoppel will not reach so far as to hold an individual eligible for vested retirement where by statute, he clearly does not qualify for such eligibility” even where the benefit has already begun to be paid (id. at 986-987 [quoted case omitted]; see also Matter of Schwartz v McCall, 300 AD2d 887, 889 [3d Dept 2002]).

Although TRS has authority under the Education Law and associated case law to correct errors in computing benefits, it may neither exercise such authority in an arbitrary and capricious nor irrational manner (see generally Matter of Pell v Board of Education, 34 NY2d 222, 231 [1974]; Matter of Kirmayer v State of NY Civ. Serv. Commn., 42 AD3d 848, 850 [3d Dept 2007], lv dismissed 9 NY2d 955). Here, TRS has exercised its authority in both an arbitrary and capricious and irrational manner.

In this instance, TRS launched an investigation into petitioner’s service at Waterville after petitioner had been credited with service there. While the investigation was proper, the

Court takes issue with how TRS viewed the results of that investigation and its ultimate determination in this matter. Essentially, TRS took a de novo approach in determining whether petitioner was Waterville’s employee without considering whether Waterville, in the first instance, had a good faith basis for concluding that petitioner was its employee when it reported his service to TRS. The Court holds today that, after conducting an investigation where service credit has already been granted, TRS should first consider whether an educational entity had a good faith basis for concluding that a teacher/professional is that entity’s employee. If such a basis existed – whether or not a contrary conclusion could also be reached – TRS should accept that designation without substituting its judgment for that of the educational entity. If, however, such a basis does not exist, TRS is not bound by the educational entity’s conclusion.<sup>3</sup> This is especially significant given that “[f]ull-time teachers are required to participate” in the retirement system (Matter of Scanlan v Buffalo Public School Sys., 90 NY2d 662, 667 [1997], citing Education Law § 503) and, an educational entity must, therefore, make a contemporaneous determination as to a professional educator’s employment status at the beginning of such service.

Here, arguably the record suggests that such a good-faith basis may have existed. As settled case law regarding what constitutes an employer-employee relationship holds: “Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the

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<sup>3</sup> As the parties acknowledge, in this given factual circumstances, no case law exists that is specifically on point to address the issues raised in this proceeding.

results” (Matter of O’Brien v Spitzer, 7 NY3d 239, 242 [2006]; see Matter of Salamanca Nursing Home, Inc. [Roberts], 68 NY2d 901, 902-903 [1986]; Matter of Mydland [North Shore Equestrian Ctr. – Sweeney], 221 AD2d 747, 748 [3d Dept 1995]; Matter of Clorfeine [New York Open Ctr. – Hudacs], 187 AD2d 840, 840 [3d Dept 1992] [noting that, where a professional relationship exists, the issue is whether there is sufficient control over the services of the professional]; see also Santiago v Spinuzza, 48 AD3d 1257, 1258 [4<sup>th</sup> Dept 2008]). “Factors relevant to the determination [of whether such a relationship exists] include the right to control the alleged’s employee’s work, the method of payment, the right of discharge and the furnishing of equipment” (Matter of Wald v Avalon Partners, Inc., 23 AD3d 820, 820-821 [3d Dept 2005]). Further, “[n]o one factor is determinative, but control over means is the more important factor to be considered” (Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516, 520 [1985]). Moreover, “[f]actors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer’s payroll and (5) was on a fixed schedule” (Bynog v Cipriani Group, Inc., 1 NY3d 193, 198-199 [2003]).

In applying these legal principles here, essential in considering whether Waterville had a good faith basis for concluding its relationship with petitioner as one of employer and employee is understanding the collaborative relationship between Waterville and CVF/PLTW, Inc. TRS has taken the view that the arrangement between Waterville and

CVF/PLTW, Inc. was nothing “more than a gambit to funnel [petitioner’s] salary from a private entity through a school district so that [petitioner] can receive retirement credit for his service to that private entity” (Hewig Affirmation at ¶ 46). This characterization, however, lacks a rational basis in the record.

The record before TRS and now this Court shows that Waterville and CVF entered into an agreement by which Waterville sought to implement PLTW in its district – a program that was still in development. To help in that implementation, CVF – a charitable foundation promoting, in part, educational initiatives – undertook financing for petitioner’s position in the form of a grant. Waterville agreed to this arrangement to allow it to implement PLTW for the benefit of its students and teachers. Clearly evident from the agreement between Waterville and CVF is that Waterville had certain responsibilities to provide certain materials to its teachers to implement PLTW. For example, while CVF would pay for certain training of teachers, Waterville paid for travel, stipends and certain equipment – such as laptop computers for PLTW teachers in the district. Moreover, the agreement provided:

“The School District agrees to participate, through its Superintendent, on the PLTW Leadership Team. The PLTW Leadership Team is comprised of the Superintendents from all PLTW school districts in a state or region and selected representatives from college/university and industry. The purpose of this team is to provide strategic leadership and support to PLTW school districts in the state or region” (Contractual Agreement at ¶ 4, Hewig Affirmation, Exhibit J).

Further, Waterville and CVF also agreed that Waterville would form a “Partnership Team” comprised of “technology community advisors” chosen by Waterville and “school personnel”

involved in PLTW “to provide strategic leadership and support to PLTW school districts in the state or region” (id. at ¶ 3).

Also in the record are Waterville’s sworn responses to TRS’s investigative questionnaire. While those responses more specifically addressed petitioner’s relationship with Waterville, it also speaks to the collaborative relationship between Waterville and CVF. For instance, Waterville noted that “[e]ducational institutions commonly have community outreach and special collaborative programs” and suggested that this collaborative relationship would lead to students obtaining higher level engineering technology skills (Employment Questionnaire at ¶ 7, Hewig Affirmation, Exhibit I). Waterville also explained that

“[e]ducational agencies that collaborate with PLTW[, Inc.] do so in order to improve the quality of education provided to students and enhance professional development opportunities for teachers, an objective shared by PLTW[, Inc.] and [Waterville], and the collaborative relationship between the parties is an outgrowth of this shared educational mission. These collaborative relationships are beneficial not only to PLTW[, Inc.], but to all the District’s students and teachers who participate in the program” (id.).

As demonstrated by the above-discussed evidence before TRS and the Court, Waterville and PLTW worked in collaboration for the benefit of Waterville’s students and teachers to implement an new educational program. To suggest otherwise simply ignores the record in this matter.<sup>4</sup>

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<sup>4</sup> Petitioner also submits the affidavit of Richard C. Liebich – the Chairman of the Board of Trustees of Charitable Ventures Foundation. This affidavit attempted to explain not only the historical background of PLTW but also to discuss the collaborative effort

Waterville offered petitioner employment in the context of its collaborative relationship with CVF/PLTW, Inc. Accordingly, the issue in this proceeding is whether Waterville had a good-faith basis to consider petitioner its employee in the context of the collaboration between Waterville and CVF/PLTW, Inc. For instance, as the record shows, in the relationship between Waterville and petitioner, Waterville paid petitioner and provided him benefits (see Matter of Siepierski v New York State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007]; see also Education Law § 501 [3]), with the funding coming in the form of grant from CVF to support Waterville's work on PLTW. In explaining why petitioner should be considered its employee, Waterville, in part, responded in the aforementioned investigative questionnaire:

“Because the activities of [petitioner] were subject to the ultimate control of the District and PLTW, collaboratively, he was correctly treated as an employee. As is evident from the response in the questionnaire, PLTW and the District controlled the direction, projects, and general aspects of the work performed by [petitioner]; also, [petitioner] was paid and otherwise treated as an employee and had no financial control or risk” (Employment Questionnaire at ¶ 7, Hewig Affirmation, Exhibit I at ¶ 35; see Matter of Siepierski v New York State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007]).

In addition, the Superintendent of Waterville appointed petitioner to the position. Thus, the record suggests that Waterville arguably may have had a good faith basis founded in the law

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between PLTW and Waterville and the concomitant funding given Waterville. The Court, however, cannot rely on this affidavit since it was not before the agency. As settled law holds, the scope of a court's review is limited to what was before the agency (see Matter of Newark Val. Cent. School Dist. v Public Emp. Relations Bd., 83 NY2d 315, 321 n 4 [1994]; Matter of World Buddhist Ch'An Jing Ctr., Inc. v Schoeberl, 45 AD3d 947 [3d Dept 2007]).

to consider petitioner its employee even though a contrary result could also be reached (cf Matter of Sign v Commissioner of Labor, 43 AD3d 498, 499 [3d Dept 2007]). Further, the record indicates that TRS did not consider this good faith basis when it essentially determined based on its de novo review of the circumstances that petitioner was not an employee of Waterville. Accordingly, by failing to so consider whether a good faith basis existed, TRS exercised its authority in both an arbitrary and capricious and irrational manner.

Furthermore, public policy supports this Court's holding that the educational entity's conclusion grounded in good faith must be considered by TRS. Here, the investigation into petitioner's service credit was launched after such credit had been given and well-after the school entity had previously determined petitioner to be its employee. In other words, the educational entity made a contemporaneous determination that petitioner was in its employment and TRS has conducted an after the fact investigation and, without taking into consideration the previous conclusion by the educational entity, essentially made a de novo finding. To tolerate this procedure places the educational professional in an untenable position of losing such benefits for which the educational entity had a good faith basis to offer that professional. Moreover, educational professionals would be less likely to work within collaborative relationships such as PLTW where such educational professions would be in risk of losing either valuable pension benefits or creditable service. This potentially affects an educational entity's ability to staff such positions with the most qualified educational professional. Accordingly, for this reason and the others discussed above, the

Court determines that, since, in reaching its determination, TRS failed to consider whether Waterville had a good faith basis for concluding that petitioner was its employee, that determination must be annulled and the matter remitted to TRS for such consideration.

In addition, TRS's alternative holding that petitioner failed to render creditable service as a teacher during the relevant period does not require a different result. Education Law § 501 (4) defines "teacher" as

"any regular teacher, special teacher, including any school librarian or physical training teacher, principal, vice-principal, supervisor, supervisory principal, director, superintendent, city superintendent, assistant city superintendent, district superintendent and other member of the teaching or professional staff of any class, public school, vocational school, truant reformatory school or parental school, and of any or all classes of schools within the state of New York . . . provided that no person shall be deemed a teacher within the meaning of this article who is not so employed for full time outside vacation periods. . . . In cases of doubt, the retirement board shall determine whether any person is a teacher as defined in this article" (Education Law § 501 [4]).

Further, subdivision 19 defines service, as pertinent here, as "actual teaching or supervision by the teacher during regular school hours of the day."

As a preliminary matter, TRS contends that its interpretation of provisions in article 11 of the Education Law as applied to petitioner in its determination should be given deference. The Court, however, disagrees. A Court need not give an agency's interpretation of a statute deference where, as in this instant matter, the "central statutory question . . . does not implicate 'knowledge and understanding of underlying operational practice or . . . evaluation of factual data,' which would limit the scope of . . . review" (Matter of Guido v New York State Teachers' Retirement Sys., 94 NY2d 64, 68 [1999], quoting Kurcsics v

Merchant’s Mut. Inc. Co., 49 NY2d 451, 459 [1980]; see Weingarten v Board of Trustees of the New York City Teachers’ Retirement Sys., 98 NY2d 575, 580 [2002]). Further, “[w]here the terms of a statute are clear and unambiguous, ‘the court should construe it so as to give effect to the plain meaning of the words used’” (Matter of Auerbach v Board of Educ., 86 NY2d 198, 204 [1995], quoting Patrolmen’s Benevolent Assn. v City of New York, 41 NY2d 205, 208 [1976]).

Here, petitioner’s duties fall under the definition of a teacher as applicable to TRS. A teacher, as defined in Education Law § 501 (4), includes a member of the professional staff, which is applicable to the petitioner’s role at Waterville since he was administering PLTW at Waterville (cf Matter of Auerbach, 86 NY2d at 204). Further, contrary to TRS’s determination and under the plain language of the statute, petitioner has provided service as a teacher to Waterville as defined in Education Law § 501 (19) by administrating PLTW at Waterville. The record also indicates that petitioner conducted staff training sessions and furthered the development of PLTW. Thus, to accept TRS’s interpretation of service under Education Law § 501 as applied in this proceeding would require the Court to limit the definition of a teacher to one who strictly instructs students, which was clearly not the intent of the legislature since it defined teaching in a broader way (see Matter of Auerbach, 86 NY2d at 204).

Otherwise, the Court has considered the parties’ remaining contentions and finds them either lacking in merit or unnecessary to consider given this Court’s decision. Accordingly,

it is

**ORDERED and ADJUDGED** that the petition is granted to the extent that the determination is annulled and the matter is remitted to respondent New York State Teachers' Retirement System for further proceedings not inconsistent with this Court's decision.

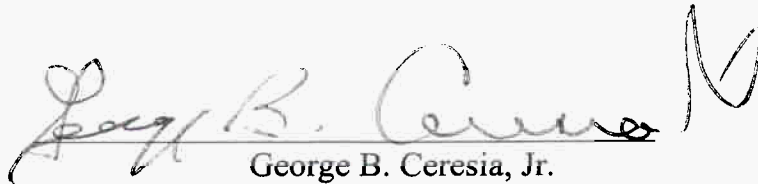
This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the petitioner who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

**ENTER**

Dated:

July <sup>23</sup> 2008

Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated August 10, 2007;
2. Petition verified August 10, 2007, with accompanying Exhibits A-D;
3. Affidavit of Kenneth M. Ford sworn to August 7, 2007, with accompanying Exhibits A-D;
4. Richard C. Liebich sworn to August 7, 2007, with accompanying Exhibits A-J;
5. Answer verified January 15, 2008;
6. Affidavit of Walter Evans sworn to January 8, 2008, with accompanying Exhibits A-B;
7. Affirmation of Wayne Schneider, Esq., affirmed January 9, 2008, with accompanying Exhibits A-G;
8. Affirmation of Rosemarie C. Hewig, Esq., affirmed January 9, 2008, with accompanying Exhibits A-V.