STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
BRETT A. HANDLEY,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK STATE TEACHERS'
RETIREMENT SYSTEM,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7976 Index No. 6239-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

In this CPLR article 78 proceeding, petitioner Brett A. Handley seeks review of a final determination by respondent New York State Teachers' Retirement System (TRS) which found petitioner's service for the school year July 1, 2005 through June 30, 2006 was not a creditable year of service in TRS. TRS opposes the petition, seeking its dismissal.

Petitioner is permanently certified to teach technology in the State of New York. Prior to his service at Monroe 2-Orleans Board of Cooperative Educational Services (BOCES),[1] petitioner was a Technology teacher at Brockport High School in Brockport, New York where for approximately seven years he taught Project Lead the Way (hereinafter, when referring to the curriculum, PLTW) pre-engineering and technology classes. For the last four of those years, petitioner was a PLTW Master Teacher.

In 2005, Monroe 2-Orleans BOCES (MTO) appointed petitioner as a Teacher on Special Assignment (TOSA) – Professional Development Specialist.[2] According to a service contract between Project Lead the Way, Inc. (hereinafter, when referring to the corporate entity, PLTW, Inc.), MTO and petitioner, petitioner would serve as Associate Director of Curriculum and Technology of Project Lead the Way (hereinafter "Associate Director") for a period of ten months – September 1, 2005 – June 30, 2006. That agreement provided for

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[1] "Pursuant to Education Law § 1950, BOCES provides occupational programs for students within a specified school district" (Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills, 4 NY3d 51, 56 [2004]).

[2] In his affidavit supported in support of the petition, petitioner avers that on December 13, 2006 he resigned his position with MTO in order to return to the classroom to teach PLTW engineering curricula.

the duties and responsibilities of that position, which included oversight and direction of "the activity of consultants in the development of new curriculum and the revision of existing curriculum, cognizant of time and budget" (Contract for Services at ¶ 4, Handley Affidavit, Exhibit A). Further, the agreement provided that PLTW, Inc. would provide a grant to cover, among other things, petitioner's salary as Associate Director. The agreement also provided that it could be terminated by "either party in the event of a material breach hereof by the other party," which included the unacceptable performance of the Associate Director's performance of duties as "determined in BOCES' or PLTW[, Inc.'s] sole but reasonable discretion" (id. at ¶ 8).

In Spring 2006, TRS commenced an investigation of petitioner's membership in TRS with respect to his work with PLTW.[3] On July 24, 2006, TRS notified petitioner of its preliminary determination regarding his retirement credit for the school year July 2005 through June 2006, stating: "Specifically, [TRS] has preliminarily determined that you are

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[3] 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 Ford v New York State Teachers' Retirement Sys., index No. 6240-07; 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. 6249-07; Matter of Tebbano v New York State Teacher's Retirement Sys., index No. 6250-07; Matter of White v New York State Teacher's Retirement Sys., index No. 6251-07; and Matter of Blais v New York State Teachers' Retirement Sys., index No. 6252-07.

In addition, prior to the formation of Project Lead the Way, Inc., work done on this curriculum venture was through the Charitable Venture Foundation (CVF). In this decision, only Project Lead the Way, Inc. will be referenced although CVF is referenced in some of the submissions before the Court.

not entitled to retirement credit for claimed teaching services at [MTO] during that year because you did not render teaching service at MTO" (Schneider Letter [dated 7-24-06], id., Exhibit E). TRS further explained:

> "[W]e have obtained documents and information which appears to indicate that you had been improperly reported by MTO as providing teaching service to them during the school years [sic] 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 MTO, you are employed as the Associate Director of Curriculum and Technology for PLTW. You do not work at any MTO location but work out of your home. Prior to beginning your work for PLTW[, Inc.], you did not have any relationship with MTO. You are supervised by PLTW[, Inc.] personnel and comply with PLTW[, Inc.] programmatic requirements. From all that appears to us, you were a full-time employee of PLTW[, Inc.] during the time period in question. Although PLTW[, Inc.] had apparently arranged with MTO for MTO to pay your salary and provide you with benefits as if you were an employee of MTO, you were, in fact, rendering services to PLTW[, Inc.] as a PLTW[, Inc.] employee" (id.).

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

In response, petitioner, through counsel, informed TRS:

> "In his present position, Brett Handley has worked with . . . PLTW Master Teachers in preparing a new PLTW Introduction to Engineering Design ('IED') curriculum. As you are aware, 'Project Lead the Way' is a registered mark from a comprehensive program of science-based educational curricula and technology curricula, which is used in secondary schools and colleges throughout the State of New York. In his present position Mr. Handley has

> helped develop a new IED curriculum in association with a number of PLTW Master Teachers. These Master Teachers are employed by various school districts, not by Project Lead the Way, Inc.
>
> "Brett Handley is presently working on developing a New Computer Integrated Manufacturing ('CIM') curriculum. This curriculum will be developed while working with other PLTW Master Teachers. None of these Master Teachers are employed by Project Lead the Way, Inc." (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 there is substantial evidence that [petitioner] rendered service to PLTW[, Inc.], not Monroe 2-Orleans BOCES . . ., during the July 1, 2005-June 30, 2006 school year" and, thus, is not entitled to credit in TRS for that year" (Schneider Letter [dated 4-13-07], id., Exhibit B). 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:

> "Handley was employed as a purported employee of MTO under an agreement between PLTW[, Inc.] and MTO dated August 25, 2005. . . . Handley is to report to PLTW Director of Curriculum and PLTW Director of Technology. 'All services will be performed in accordance with the standards of PLTW, which may be changed from time to time in PLTW[, Inc.'s] discretion.' PLTW[, Inc.] would provide a grant of $76,921.12 to MTO to cover Handley's salary of $58,334 and fringe benefits and administrative fees in the amount of $18,587.12. PLTW[, Inc.] agreed to cover all of Handley's approved expenses, including travel and lodging, professional dues and fees, attendance at professional meetings on national, state and local levels, and home office expenses" ("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," id.).

In response to further correspondence from petitioner's counsel, TRS rejected, inter alia, petitioner's argument that payment by MTO rendered it petitioner's employer, noting that evidence showed that PLTW, Inc. provided the funding for the salary. Furthermore, TRS maintained its position that petitioner was an employee of 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 for his service during the 2005-2006 school year (hereinafter the relevant time period). In this proceeding, petitioner first argues that he was at all relevant times MTO's employee, noting that his salary and benefits were paid by MTO. 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 argues 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 MTO after petitioner received credit for his service. 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 MTO's employee without considering whether MTO, 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 given, 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.[4] 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 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

[4] 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.

[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 [4th 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 MTO had a good faith basis for concluding its relationship with petitioner as one of employer and employee is understanding the collaborative relationship between MTO and PLTW, Inc. TRS has taken the view that the arrangement between MTO and 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 ¶ 47). This characterization, however, lacks a rational basis in the

record.

The record before TRS and now this Court shows that MTO, PLTW, Inc. and petitioner entered into an agreement in which PLTW, Inc. and MTO acknowledged their "desire to work jointly and with others to support school districts through the Program [PLTW]" (Contract for Service, Handley Affidavit, Exhibit A). In a sworn response to TRS's investigative questionnaire, MTO further explained that the role petitioner as a curriculum writer was part of the collaborative relationship between PLTW, Inc. (see Employment Questionnaire at ¶ 24 b, Hewig Affirmation, Exhibit G). Further, contrary to TRS's stance, clearly, MTO benefitted, as well as PLTW, Inc., from petitioner's work on the PLTW curriculum in that MTO has implemented the PLTW curriculum and any improvements and expansions of it allowed MTO to offer better services to the school districts it serves (see Matter of Vestal Empls. Assn. v Public Empl. Relations Bd., 94 NY2d 409, 413-414 [2000] [noting the underlying purpose of BOCES is "to provide added services in order to make it possible for districts to provide a variety of services"]). As demonstrated by the above-discussed evidence before TRS and the Court, MTO and PLTW, Inc. worked in collaboration, in part, for the benefit of MTO. To suggest otherwise simply ignores the record in this matter.[5]

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[5] 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 between PLTW and MTO and the concomitant funding given MTO. 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

MTO offered petitioner employment in the context of its collaborative relationship with PLTW, Inc. Accordingly, the issue in this proceeding is whether MTO had a good-faith basis to consider petitioner its employee in the context of the collaboration between MTO and PLTW, Inc. As MTO explained: "A BOCES exists as a cooperative to service school districts. In that vein one of the BOCES role is to provide itinerant related services. Itinerant employees do not work out of an office location at BOCES, instead they essentially telecommute. Mr. Handley is a telecommuter" (id. at ¶ 36). Thus, petitioner working from his home is not unusual in the BOCES system. Besides, petitioner was required to give 100% of his time to developing new curriculum for PLTW in conjunction with others for the benefit of MTO. Further, MTO retained supervisory control over petitioner in that it could terminate his services. Moreover, MTO paid petitioner and provided for his benefits – the same benefits received by other MTO employees (see Matter of Siepierski v New York State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007]; Education Law § 501 [3]). Thus, the record suggests that MTO arguably may have had a good faith basis founded in the law 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

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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]).

employee of MTO. Accordingly, by failing to so consider whether that 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 was 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 MTO 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 MTO since he was developing a program used at MTO for its students at the direction of MTO (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 MTO as defined in Education Law § 501 (19) by developing PLTW at MTO. 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 23, 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 Brett A. Handley sworn to August 10, 2007, with accompanying Exhibits A-E;
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-S.