STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
TERESA PHILLIPS,

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-ST7974 Index No. 6241-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

In this CPLR article 78 proceeding, petitioner Teresa Phillips seeks review of a final determination by respondent New York State Teachers' Retirement System (TRS) which found petitioner's service for the period of July 1, 2002 through June 30, 2006 was not creditable service in TRS. TRS opposes the petition, seeking its dismissal.

Petitioner is a certified to teach by the State of New York. She has held the position[1] of Teacher on Special Assignment (TOSA) – Professional Development Specialist with Monroe 2-Orleans Board of Cooperative Educational Services (BOCES).[2] Prior to that position, petitioner was a tenured technology teacher, teaching Project Lead the Way (hereinafter, when referring to the curriculum, PLTW) pre-engineering and technology courses. During the time petitioner served at Monroe 2-Orleans BOCES (hereinafter MTO), she worked as the Associate for Curriculum and Training of PLTW for school years 2002-2004 and as the Director of Master Teachers of PLTW for school year 2005-2006.

These positions were governed by a Contract for Services signed by Project Lead the Way, Inc. (hereinafter, when referring to the corporate entity, PLTW, Inc.), MTO and petitioner. Those agreements provided for the duties and responsibilities of those positions. For instance, as the Associate for Curriculum and Training, petitioner was responsible for "[c]onducting ongoing training in New York State and other regions as assigned by PLTW"

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[1] At the end of the 2007 school year, Monroe 2-Orleans Board of Cooperative Educational Services terminated petitioner.

[2] "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]).

(Contract for Services at ¶ 4 [dated 6-20-02], Phillips Affidavit, Exhibit D). She was also responsible for, inter alia, "[s]erving as a master teacher at the PLTW summer institute or such other institutes as may reasonably be scheduled by PLTW" (id.). As the Director of Master Teachers, petitioner's responsibilities included, inter alia, "[c]oordinating the application, review and selection processes for Master Teachers in New York State and other regions as assigned by PLTW, in each of the PLTW courses" (Contract for Services at ¶ 4 [dated 6-29-06], id.). She was also responsible for "[c]oordinating the planning for the professional development of Master Teachers, new and veteran" (id.). All the agreements provided that PLTW, Inc. would provide a grant to cover, among other things, petitioner's salary. The agreements also provided that they could be terminated by "either party in the event of a material breach hereof by the other party," which included petitioner's unacceptable performance in the performance of duties as "determined in BOCES' or PLTW's sole but reasonable discretion" (id. at ¶ 8).

In Spring 2006, TRS commenced an investigation of petitioner's membership in TRS with respect to her work with PLTW.[3] On July 24, 2006, TRS notified petitioner of its

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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 Handley v New York State Teachers' Retirement Sys., index No. 6239-07; Matter of Ford v New York State Teachers' Retirement Sys., index No. 6240-07; Matter of Jensen-Dooling v New York State Teachers' Retirement Sys., index No. 6249-07; Matter of Tebbano v New York State Teachers' 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

preliminary determination regarding her retirement credits for the school years July 2002 through June 2006, stating: "Specifically, [TRS] has preliminarily determined that you are not entitled to retirement credit for claimed teaching services at [MTO] during those years because you did not render teaching service at MTO" (Schneider Letter [dated 7-24-06], id., Exhibit B). 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 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 Director of Master Teachers 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 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.).

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curriculum venture was through the Charitable Venture Foundation (CVF). In this decision, only Project Lead the Way will be referenced although CVF is referenced in some of the submissions before the Court.

In response, petitioner, through counsel, informed TRS:

> "Teresa Phillips teaches the "Project Lead the Way" program to secondary school teachers. . . . [As the Associate Director of Curriculum and Professional Development, her] primary duties were to develop, schedule and conduct teacher professional development in the PLTW pre-engineering curriculum. . . . Ms. Phillip's job was to teach the teachers.
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> "[As the Director of Master Teachers,] Ms. Phillips oversees the professional development and scheduling for more than 200 PLTW Master Teachers and University Professors. . . . Ms. Phillips continues to teach teachers. When Ms. Phillips is not teaching teachers, she is supervising teachers. By contract, [MTO] trains teachers in the Project Lead the Way program. Project Lead the Way, Inc., supplies materials and curriculum, but does not train or supervise teacher training in the PLTW curricula. The fact that someone is a PLTW teacher does not mean they 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, 2002-June 30, 2003, July 1, 2003-June, 2004, July 1, 2004-June 30, 2005 and July 1, 2005-June 30, 2006 school years" and, thus, is not entitled to credit in TRS for those years (Schneider Letter [dated 4-13-07], id., Exhibit B). That determination also noted that petitioner had presented "[m]ere conclusory assertions" without supplying any facts to support them (id.). The final determination provided that it would take effect on May 14, 2007, inviting petitioner to provide further information to TRS if desired. TRS attached an investigative report to the determination in which it noted that petitioner worked under PLTW, Inc.'s direction and supervision.

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 she 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 her credit for teaching services during the 2002-2006 school years (hereinafter the relevant time period). In this proceeding, petitioner first argues that she was at all relevant times MTO's employee, noting that her 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 contends that the doctrine of estoppel is applicable here to protect her 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 she had received credit for such 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 her 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.[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 [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

[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.

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 [sic] so that [petitioner] can receive retirement credit for her service to that private entity" (Hewig Affirmation at ¶ 54). 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, Phillips Affidavit, Exhibit D). 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, id. , Exhibit A). 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.

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. In the record, 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. [Petitioner] is a telecommuter" (id. at ¶ 36). Thus, petitioner working from home is not inconsistent with other employees at MTO. Further, MTO paid petitioner and provided her benefits similar to other MTO employees (see Matter of Siepierski v New York

State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007]; Education Law § 502 [3]). As petitioner persuasively argues, her partial supervision by PLTW, Inc. was necessary since PLTW, Inc.'s staff had the necessary familiarity with all aspects of the program. However, MTO also maintained control of petitioner's activities, rendering MTO status as petitioner's employer – especially where, as discussed above, both MTO did have supervisory and termination authority, which could be viewed as sufficient control over petitioner's services (see Matter of Wald, 23 AD3d at 820-821). Thus, the record suggests that MTO may have had a good faith basis founded in the law to consider petitioner its employee even though a contrary conclusion 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 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 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 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 and a director, which is applicable to the petitioner's role at MTO since she was developing a program used at MTO for its students at the direction of MTO and she was directing the work of other teachers involved in that program (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 and directing the work of others. In addition, the

record shows that petitioner also taught classes to PLTW teachers. 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 Teresa Phillips sworn to August 7, 2007, with accompanying Exhibits A-H;
4. Affidavit of Teresa Phillips sworn to August 17, 2007, with accompanying Exhibits A-B;
5. Richard C. Liebich sworn to August 7, 2007, with accompanying Exhibits A-J;
6. Answer verified January 15, 2008;
7. Affidavit of Walter Evans sworn to January 10, 2008, with accompanying Exhibits A-C;
8. Affirmation of Wayne Schneider, Esq., affirmed January 9, 2008, with accompanying Exhibits A-G;
9. Affirmation of Rosemarie C. Hewig, Esq., affirmed January 9, 2008, with accompanying Exhibits A-W;
10. Reply Affidavit of Thomas D. Latin, Esq., sworn to February 15, 2008, with accompanying Exhibits A-C.