Matter of Tebbano v New York State Teachers' Retirement Sys.
2008 NY Slip Op 32191(U)
July 23, 2008
Supreme Court, Albany County
Docket Number: 0625007/2008
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
NIEL TEBBANO,

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-ST7973 Index No. 6250-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

In this CPLR article 78 proceeding, petitioner Niel Tebbano seeks review of a final determination by respondent New York State Teachers' Retirement System (TRS) which found petitioner's service commencing March 1, 2001 and ending on June 30, 2002 (hereinafter the relevant time period) was not creditable service in TRS. TRS opposes the petition, seeking its dismissal.

Petitioner is a retiree under TRS, having his application approved in 2002 and retiring that same year. At the time of his retirement, petitioner had approximately 32 years of service with TRS as either a teacher or school administrator. As relevant in this instant proceeding, from July 1, 1995 through February 28, 2001, petitioner served as the Director of Curriculum and Instruction at Mohonasen Central School District (hereinafter MCSD) and, from March 1, 2001 through June 30, 2002, he served as the Director of Operations of Project Lead the Way while at MCSD. Project Lead the Way (hereinafter, when referring to the curriculum, PLTW) is a pre-engineering and technology curriculum for middle and high school students.

With respect to his service as Director of Operations with PLTW, on January 8, 2001, the Board of Education for MCSD authorized "the Superintendent to enter into an agreement with [CVF and petitioner] to provide an administrative staff member to perform the duties as Director of Operations of Project Lead the Way" (Farnsworth Memorandum, Hewig Affirmation, Exhibit G). Thereafter, petitioner, MCSD and Charitable Ventures Foundation (CVF) – the charitable foundation funding petitioner's as Director of Operations – entered into an agreement regarding that position. The agreement provided, in part:

> "It is expressly agreed that [petitioner's] employment as Director of Operations is at the pleasure of the Board and is subject to the discretion of the School District; that the Board may discontinue this assignment at any time; that upon such discontinuation Tebbano will return to his position as Director of Curriculum, Instruction and Instructional Personnel, if such position is available, and that at such time this agreement will be null and void. Any extension of this agreement and [petitioner's] employment as Director of operations subsequent to June 30, 2002 shall be evidenced by a written agreement between the parties" (Agreement By and Between the Mohonasen Central School District, Charitable Ventures Foundation and Niel J. Tebbano [hereinafter Agreement] at ¶ 2, id., Exhibit J).

Further, the Agreement provided:

> "During the term of this assignment, [petitioner] shall be an employee of the School District. Except as otherwise provided herein, [petitioner] shall continue to receive and be entitled to compensation in the amount of $90,805 per year and certain other benefits as set forth in the collective bargaining agreement between the School District and the Mohonasen Administrators' Association . . . to which full time administrators are entitled, as specifically listed below. . . ." (id. at ¶ 3).

However, the Agreement noted that petitioner would not be entitled to certain benefits under the above-referenced collective bargaining agreement such as leave or vacation benefits. The Agreement also provided that petitioner

> "shall be granted a leave of absence from his position as Director of Curriculum, Instruction and Instructional Personnel for the School District during the term of this assignment. The time spent in this assignment shall not be counted toward his seniority or tenure in the Director of Curriculum, Instruction and instructional Personnel tenure area" (id. at ¶ 5).

Under the Agreement, CVF essentially agreed to fund petitioner's position in exchange for MCSD assigning petitioner to that position (see id. at ¶ 6). Moreover, the Agreement provided: "As a condition of this agreement, [petitioner] will submit his irrevocable letter of resignation from his employment with the School District, effective June 30, 2002. Said

resignation will be accepted by the Board at the time this agreement is approved a copy of the letter will be attached hereto" (id. at ¶ 7).

In Spring 2006, TRS commenced an investigation of petitioner's membership in TRS with respect to his work with PLTW at MCSD[1] On July 24, 2006, TRS notified petitioner of its preliminary determination regarding his retirement credit for the period March 1, 2001 to June 30, 2002, stating:

> "Specifically, [TRS] has preliminarily determined:
>
> "(1) that you are not entitled to retirement credit for claimed teaching services for [MCSD] during the period, March 1, 2001 to June 30, 2002 because you did not render teaching service for MCSD during that period and that the salary reported to the System by MCSD for such claimed service does not represent compensation earned as a teacher.
>
> "(2) that, inasmuch as your retirement benefit was calculated taking into account the foregoing service and salary, the monthly retirement benefit you have been receiving since July 1, 2002 is $397.81 more than you are legally entitled to be receiving"(Schneider Letter [dated 7-24-06], Tebbano Affidavit, Exhibit A).

TRS further explained, in part:

> "[W]e have obtained documents and information which appears to indicate that you had been improperly reported by MCSD as providing teaching service to MCSD during the school years in question. The documents and information appear to indicate that, during the relevant time period, you were, in fact,

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[1] 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 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 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.

working for a not-for-profit corporation named Project Lead the Way, Inc. . . ." (id.).[2]

That letter further noted the Agreement. In addition, the letter noted:

> "We understand that, since your retirement on July 1, 2002, you have continued to serve as an employee of PLTW[, Inc.]. So far as we can determine, the only difference in your situation immediately subsequent to retirement from your situation immediately prior to retirement is that MCSD no longer held you out as a purported employee of MCSD and no longer paid you any salary or provided you any MCSD benefits. The timing of your retirement on July 1, 2002 seems best explained by the fact that your 55th birthday occurred in June, 2002, thereby making you eligible to retire from the System" (id.).

Alternatively, TRS noted that "even assuming your service for PLTW[, Inc.] were also considered service for MCSD, that service does not appear to constitute teaching service creditable in the System" (id.). In addition, TRS determined that it would suspend petitioner's retirement benefits until such time as it had recouped all overpayments to petitioner, which it calculated to be $379.81 per month over a period of 48 months and, after that, reduce his monthly benefit by $379.81 per month.

In response, petitioner, through counsel, informed TRS, inter alia that its preliminary determination was incorrect. Counsel further noted, inter alia:

> "Before entering into the written Agreement, a copy of which is provided herewith, [petitioner] consulted with the then Superintendent of [MCSD] and with [TRS] about the appropriateness of the Agreement and the PLTW work. He was advised that it was common practice and that as long as [MCSD] was compensating him directly with appropriate Board of Education approval for

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[2] Hereinafter in this decision, "PLTW, Inc." will be used to refer to the corporate entity Project Lead the Way, Inc.

work , it was acceptable to the New York State Teachers' Retirement System. [Petitioner] relied on this representation by [TRS] in entering into the written Agreement with the School District and [CVF]" (Latin Letter [dated 8-30-06], id., Exhibit B).

In a letter dated September 15, 2006, TRS noted that there is substantial evidence to support its preliminary finding that petitioner has been overpaid $379.81 since his retirement on July 1, 2002. TRS noted:

"We have carefully reviewed your letter and find that [petitioner] has not disputed the following:

- That, in January 2001, [petitioner] sought a leave of absence from [MCSD], his then employer in order to become the Director of Operations for Project Lead the Way.
- That, on January 8, 2002, the MCSD Board of Education approved that leave of absence for the period, March 1, 2001 to June 30, 2002.
- That, pursuant to an agreement among MCSD, [CVF] and [petitioner], in return for [petitioner's] service as the Director of Operations of PLTW, CVF funded the salary and other benefits which were received by [petitioner] from MCSD during the period, March 1, 2001 to June 30, 2002.
- That, during the period, March 1, 2001 to June 30, 2002, [petitioner], in fact, served as Director of Operations of PLTW.
- That, as part of the arrangement amount MCSD, CVF and [petitioner], [petitioner] resigned from his position as MCSD Director of Curriculum, Instruction and Instructional Personnel, effective June 30, 200.
- That, following his retirement from the System on July 1, 2002, he has continued to serve as the PLTW Director of Operations" (Schneider Letter [dated 9-15-06], id., Exhibit D).

TRS also explained that it

"is not bound by how a participating employer may portray a given relationship [referring to the Agreement] but is entitled to look at the substance of the relationship, as part of its fiduciary duty to protect all the members and retirees of the System, all participating employers and the public generally. In this case, there appears to be no dispute that [petitioner] was on leave of absence from MCSD to work for PLTW[, Inc.] as the PLTW Director of Operations and that his compensation was funded by CVF, not MCSD" (id.).

Moreover, TRS disputed that it agreed to this arrangement, noting:

"Assuming [petitioner] contacted [TRS], [TRS] would not have advised him that public school teachers and administrators could receive retirement credit for working for a private entity even if a school district were to agree to an arrangement under which the school district would continue to regard him as an employee and provide his salary and benefits subject to reimbursement by the private entity. Putting a private employee on a public payroll and reporting that employee as a paid public employee to the System is not permitted under law" (id.).

Thereafter, petitioner submitted an affidavit to TRS, detailing his work with MCSD during the relevant time period. In that affidavit, petitioner averred:

"[MSCD] began its involvement in Project Lead the Way in 1997, as one of the school sites working with Hudson Valley Community College. In November, 2000, the District was asked if it would like to participate in a grant to increase its involvement in the implementation of the program. I was asked to spearhead these efforts, which would have meant a re-assignment of my duties from Director of Curriculum and Instruction to the implementation of the program.

"Before accepting re-assignment of my duties in 2001, I consulted with Mrs. Farnsworth, the then Superintendent of [MSCD], and inquired as to the appropriateness of the re-assignment. I was assured by Mrs. Farnsworth that assigning teachers and administrators to special projects, including grant funded projects, was common practice. I was aware of colleagues in other districts who have pursued similar projects through the Teachers Center or local universities.

"Throughout the period March 1, 2001 through June 30, 2002, I was an employee of [MSCD] and was paid by [MSCD]. During this time, the district

> was transitioning to a new superintendent. Accordingly, in addition to my activities under the Project Lead the Way grant, I was required by the district to perform other activities more akin to those I performed while Director of Curriculum and Instruction . . ." (Tebbano Affidavit at ¶¶ 3-5, id., Exhibit F).

Petitioner also averred that the additional activities he performed, listed in detail in the affidavit, were performed "at the direction of" MSCD, for which he did not receive additional compensation since he was a district employee (see id. at ¶ 6). In addition, petitioner averred:

> "In November 2001, prior to my retirement, I met with representatives from TRS to go over my retirement options. I was open regarding my assignment in connection with the Project Lead the Way program, and was advised that this work qualified for years of service in TRS because I was an appointed school administrator on special assignment and was paid by the district" (id. at ¶ 7).

On April 13, 2007, despite the above-discussed submissions, TRS finally "determined there is substantial evidence that [petitioner] rendered service to CVF and/or PLTW[, Inc.], not [MSCD], during the period March 1, 2000 through June 30, 2002 and that [petitioner] is, therefore, not entitled to any retirement credit in [TRS] for purported teaching service as reported by MCSD during that time period" (Schneider Letter [dated 4-13-07], Hewig Affirmation, Exhibit V). The final determination provided that it would take effect on May 14, 2007, inviting petitioner to provide further information to TRS if desired. TRS also attached its investigative report to this determination (see "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 MSCD 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 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 an employee of MSCD, noting that his salary and benefits were paid by it. 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, as here, 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 MCSD after he had received credit for such service and had begun receiving benefits. 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 MCSD's employee without considering whether MCSD, 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 either pension benefits have begun to be paid or 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.[3] 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

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[3] 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 MCSD had a good faith basis for concluding its relationship with petitioner as one of employer and employee is understanding the collaborative relationship between MCSD and PLTW, Inc. TRS has taken the view that the arrangement between MCSD 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 his service to that private entity" (Hewig Affirmation at ¶ 66). This characterization, however, lacks a rational basis in the record. For instance, the former Superintendent of Schools responded to a TRS

questionnaire that petitioner "was working to aide [MSCD] with the implementation of Project Lead the Way services in schools at [MSCD" (Employment Questionnaire at ¶ 35, id., Exhibit O). Further, MSCD willing entered into this arrangement with PLTW, Inc. As demonstrated by the above-discussed evidence, MSCD and PLTW, Inc. worked in collaboration , in part, for the benefit of MSCD. To suggest otherwise, as TRS has in this proceeding, simply ignores the record in this matter.[4]

MCSD offered petitioner employment in the context of its collaborative relationship with PLTW, Inc. Accordingly, the issue in this proceeding is whether MCSD had a good-faith basis to consider petitioner its employee in the context of the collaboration between MCSD and PLTW, Inc. For instance, MSCD paid petitioner and provided him benefits (see Matter of Siepierski v New York State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007]; Education Law § 501 [3]). In addition, the Board of Education approved petitioner's assignment as the Director of Operations of Project Lead the Way and the Superintendent had supervisory responsibility for this position. Thus, the record suggests that MCSD arguably 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

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[4] 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, Inc. and MCSD and the concomitant funding given by PLTW, Inc. 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]).

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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 MCSD. 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 and concomitant benefits was launched after benefits had been paid 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 MCSD 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 director, which is applicable to the petitioner's role at MSCD since he directed the operations of PLTW while at MSCD (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 MSCD as defined in Education Law § 501 (19) by directing further development of PLTW. The record also indicates that petitioner provided continuing educational instruction to other PLTW teachers as part of his work at MSCD. 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).

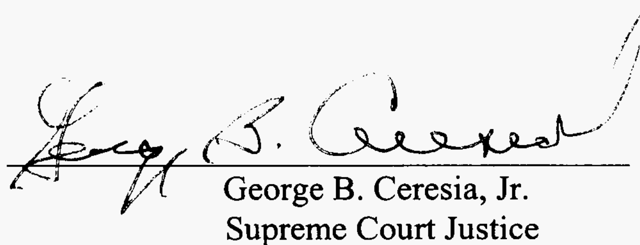
Otherwise, the Court has considered the parties' remaining contentions and finds them either lacking in merit or unnecessary to consider given this Court's decision. Accordingly, it is

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 Niel Tebbano sworn to August 7, 2007, with accompanying Exhibits A-F;
4. Richard C. Liebich sworn to August 7, 2007, with accompanying Exhibits A-J;
5. Answer verified January 1`5, 2008;
6. Affidavit of Kenneth R. Kasper sworn to January 8, 2008, with accompanying Exhibit A;
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-DD;
9. Reply Affidavit of Thomas D. Latin, Esq., sworn to February 15, 2008, with accompanying Exhibit A.