STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
DIANA JENSEN-DOOLING,

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-ST7975; Index No. 6249-07

Appearances: James R. Sander, General Counsel
New York State United Teachers
Attorney for Petitioner
800 Troy-Schenectady Road
Latham, New York 12210
(James D. Bilik, Esq., of Counsel)

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Robert W. Kinsey,
Assistant Attorney General, of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

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

Petitioner is permanently certified to teach, inter alia, Special Education for Kindergarten through the twelfth grade. In 1974, petitioner began her employment with the Monroe 2-Orleans Board of Cooperative Educational Services (BOCES).[1] At the same time, petitioner became a member of TRS. Since 1976, the Monroe 2-Orleans BOCES (hereinafter "MTO") employed petitioner as a Teacher on Special Assignment (TOSA) – Professional Development Specialist.

In 2002, while still at MTO, petitioner began working with a curriculum developed by Project Lead the Way, Inc (hereinafter, when referring to the corporate entity, PLTW, Inc.). – a New York not-for-profit corporation.[2] Project Lead the Way (hereinafter, when referring to the curriculum, PLTW) is a pre-engineering and technology curriculum for middle and high school students. As of the date of this proceeding, petitioner continues to

---

[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] 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 will be referenced although CVF is referenced in some of the submissions before the Court.

work with PLTW at MTO. The petition describes petitioner's assignment as follows: "In her present TOSA – Professional Development position, the Petitioner performs teacher training and curricula development in the pre-engineering technology curriculum which has been licensed by PLTW to MTO" (Petition at ¶ 14). The funding for petitioners assignment came from PLTW, Inc., with petitioner describing it as a grant.

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 preliminary determination regarding her retirement credit for 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 services at MTO" (Schneider Letter [dated 7-24-06], id., Exhibit A). 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 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. . . .
>
> "The PLTW website identifies you as the PLTW State Leader for New York

---

[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 Phillips v New York State Teachers' Retirement Sys., index No. 6241-07; 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.

> State. Schools in New York are advised to contact you if they are interested in PLTW programs. Numerous schools throughout New York are listed as part of the 'PLTW Network in New York.' You are identified as the 'Regional Coordinator for New York' and your e-mail address is provided for them to contact you. Another page on the PLTW website advises schools to contact the PLTW State Leader for the most accurate statement of the costs to the school of participating in PLTW programs. Although PLTW had apparently arranged with MTO for MTO to pay your salary and provide you with benefits as if you were working as an employee of MTO, it appears you have, in fact, been rendering services to PLTW[, Inc.] as a PLTW[, Inc.] employee" (id.).

Further, TRS noted that PLTW, Inc. "is not an employer which participates in the system. Nor could it be, as it is not a public school district, SUNY campus or community college" (id.). TRS asserted:

> "The mere fact that MTO apparently acquiesced in this arrangement under which your service for PLTW[, Inc.] was reported as teaching service at MTO cannot control the determination in your case. The System is not only governed by statute but it is also a fiduciary for all its members and retirees. No agreement by a participating employer, such as MTO to confer retirement benefits upon an individual member who is not rendering service for a public employer can bind the System in regard to the crediting of member service" (id.).

Alternatively, TRS concluded 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.). TRS invited petitioner to submit information to refute this preliminary finding.

On April 13, 2007, TRS determined that "there is substantial evidence that [petitioner] rendered service to PLTW[, Inc.], not Monroe 2-Orleans BOCES at PLTW[, Inc.'s] expense during [the relevant period] and is, therefore, not entitled to any retirement credit in the

System for purported teaching service as reported by MTO during that time period" (Schneider Letter [dated 4-13-07], id., Exhibit B). The determination further provided:

> "On the other hand, 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 2005-2006 school year. Mere conclusory assertions that [petitioner] was doing so will not suffice. The fact that MTO allowed itself to be enlisted in PLTW[, Inc.'s] effort to have [petitioner] placed on a public payroll while working for PLTW[, Inc.] at its 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 MTO's payroll at PLTW[, Inc.'s] expense while employed as PLTW's New York State Leader a 'teacher' within the meaning of Education Law § 501 (4) during the time period in question" (id.).

Attached to that determination was TRS's investigation report regarding petitioner and others, concluding, inter alia, that petitioner worked for PLTW, Inc. and was not entitled to creditable service in TRS for the relevant period.

Although the determination noted that it would take effect on May 14, 2007, subsequent correspondence from TRS adjourned that date to June 29, 2007. In that subsequent correspondence, TRS further explained that submissions to TRS by petitioner:

> "provides additional substantial evidence that [petitioner] was working on the business of PLTW[, Inc.] during the time in question. The documentation reflects that [petitioner's] position was considered at 'TOSA.' . . .The substance of that assignment was to work as 'PLTW New York State Director.' They reflect her working on the business of PLTW[, Inc.] as described in the System's previous letters with respect to her and the contemporaneous documentation attached thereto, including documents from PLTW's own website describing her function as PLTW New York State Leader" (Schneider Letter [dated 5-23-07], id., Exhibit C).

Petitioner commenced this proceeding for review of TRS's final determination denying her service credit in TRS during the relevant time period. Petitioner argues that the determination should be annulled as it is arbitrary and capricious, and contrary to law since she was legally employed by MTO as a teacher. Further, petitioner maintains that TRS should be estopped from denying her credit in TRS during the relevant time period.

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

[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.

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 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 ¶ 45). This characterization, however, lacks a rational basis in the record.

The record before TRS and now this Court shows that MTO and PLTW, Inc. entered into an agreement by which MTO and PLTW, Inc. acknowledged that they "desire[d] to work together and with others to support the Project Lead the Way® program" (Services Agreement, Hewig Affirmation, Exhibit H). Further, under that agreement – to which petitioner was not a party – MTO agreed to maintain and staff a New York State Leadership Office for PLTW. As evidenced 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]

---

[5] Petitioner 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, Inc. but also the collaborative relationship

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. For instance, the record shows that for the years constituting the relevant period of time in this matter, the Board of Education for BOCES MTO annually approved petitioner's appointment as a TOSA (cf Matter of Roesch v Board of Educ. for the Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 259 AD2d 900, 902 [3d Dept 1999]). In addition, the record shows that MTO supervised and evaluated petitioner's job performance, which concerned the implementation of the PLTW curriculum at MTO and on a state-wide networking basis. For example, in a sworn response to a TRS investigative questionnaire, MTO noted:

> "[Petitioner's] work is supervised by [MTO]. Her terms and conditions of employment are governed by the teacher's contract of which she is a member. Her tools, schedule, supplies and equipment, etc. are furnished by BOCES. She has been employed as a special education teacher at BOCES since 1974. In 2001, [MTO] offered her the opportunity to work with PLTW. She adheres to all [MTO] policies and procedures" (Employment Questionnaire at ¶ 36, Hewig Affirmation, Exhibit J).

In its responses, MTO also noted: "[MTO] retains complete control over [petitioner] and

---

between PLTW, Inc. 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 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]).

would address any issues including disciplinary issues. If Project Lead the Way asked she be removed from her role she would retain bumping rights for another teaching position" (id. at ¶ 37). Further, the record establishes that MTO paid petitioner and that she worked on a set schedule at MTO's site and had to gain MTO's approval for any work absences (see generally Bynog, 1 NY3d at 198-199). Thus, the record suggest that MTO 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 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 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 director, which is applicable to the petitioner's role at MTO since she has and is currently directing the implementation and use of PLTW at 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 directing the PLTW for MTO. As explained by MTO: "[Petitioner] provides instruction directly to school counselors on how to identify appropriate students eligible for Project Lead the Way curriculum. She

coordinates instruction of classroom teachers to implement the curriculum to students" (Employment Questionnaire at ¶ 7, Hewig Affirmation, Exhibit J). 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 Diana Jensen-Dooling sworn to August 7, 2007, with accompanying Exhibits A-J;
4. Affidavit of Richard C. Liebich sworn to August 7, 2007, with accompanying Exhibits A-J;
5. Answer verified January 16, 2008;
6. Affirmation of Wayne Schneider affirmed January 9, 2008, with accompanying Exhibits A-G;
7. Affirmation of Rosemarie C. Hewig. Esq., affirmed January 9, 2008, with accompanying Exhibits A-U;
8. Affidavit of Walter Evans sworn to January 8, 2008, with accompanying Exhibits A-C;
9. Affidavit of Pamela W. Kissel sworn to January 11, 2008, with accompanying Exhibits A-L;
10. [Sur] Reply Affirmation of Rosemarie C. Hewig, Esq., affirmed February 13, 2008, with accompanying Exhibits A-F.