NANCY ANTONCHAK,
Petitioner,

v.

BOARD OF TRUSTEES OF TEACHER'S
PENSION AND ANNUITY FUND,
Respondent.

Decided October 3, 1980

Initial Decision

SYNOPSIS

Nancy Antonchak appealed from the decision of the Board of Trustees of the Teachers’ Pension and Annuity Fund denying her application to purchase service credit for time spent as a substitute teacher in the years immediately prior to her receiving a permanent teaching appointment. The Board based its denial on N.J.A.C. 17:3-5.4(a)3 which states that per diem, intermittent, temporary or substitute teaching service is not creditable for pension purposes.

The administrative law judge found that petitioner had rendered 374 1/2 days of substitute teaching service in the five years immediately prior to her full-time appointment and had been paid on a per diem basis for all that time as was the school district’s standard practice. The judge determined that N.J.A.C. 17:3-5.4(a)3 with its restriction of credit for per diem service was inconsistent with N.J.S.A. 18A:66-14 which contains no such restriction and states that “any person employed as a substitute immediately prior to permanent employment” shall be permitted to purchase credit for that substitute time. The judge observed that it was well-established that in exercising its rule-making power, an administrative agency may not go beyond declared statutory policy and that if there is an administrative regulation in conflict with a statute, the statute prevails. Accordingly, the administrative law judge concluded that the regulation in question was invalid and ordered that petitioner be permitted to purchase service credit for her time as a substitute teacher.

Richard A. Friedman, Esq., for Petitioner
Sharon Joyce, Deputy Attorney General for Respondent (John J. Degnan, Attorney General of New Jersey, Attorney)
MILLER, ALJ:

Nancy Antonchak appealed from a decision of the Board of Trustees of the Teachers’ Pension and Annuity Fund denying her application to purchase service rendered by her as a substitute teacher from 1970 through 1974.

Prior to the taking of testimony, the following stipulations were entered into by and between counsel:

1. Petitioner’s date of birth was February 17, 1924.
3. Petitioner was enrolled in the Teachers’ Pension and Annuity Fund (TPAF) effective January 1, 1975.
4. Petitioner’s appeal from the adverse determination of the Board of Trustees was timely.
5. On February 27, 1979, the Division of Pensions administratively denied the purchase of service requested by petitioner.
6. On April 16, 1979, the Board of Trustees approved the purchase requested by petitioner.
7. On April 25, 1979, the Board of Trustees advised petitioner that it intended to reconsider its earlier decision.
8. On May 10, 1979, the Board of Trustees advised petitioner that, at its May 10, 1979 meeting, it had reversed its earlier decision and had determined that the requested purchase could not be made.

The first person to testify was petitioner herself. She stated that she has been employed as a grammar school teacher by the Board of Education of Parsippany-Troy Hills since June 1970. She started in June of 1970 as a substitute teacher. Prior to that time, she had obtained the appropriate teaching certificate and her name was then placed on a list of substitute teachers for the Parsippany Troy Hills school system. In June 1970, she acted as a substitute teacher for a total of two days. From August 1970 through December 1970, she taught an additional four days. Her substitute teaching service from the years 1970 to 1974 inclusive consisted of the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Days</th>
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<tbody>
<tr>
<td>1970</td>
<td>6</td>
</tr>
<tr>
<td>1971</td>
<td>52</td>
</tr>
<tr>
<td>1972</td>
<td>66 1/2</td>
</tr>
<tr>
<td>1973</td>
<td>92 1/2</td>
</tr>
<tr>
<td>1974</td>
<td>157 1/2</td>
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</tbody>
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In each of the aforesaid years, she had renewed her substitute teaching
certification and continued on the list of people who were eligible for substitute teaching in the Township. In October 1974, petitioner became a “permanent substitute,” which resulted in no substantial change in her teaching duties except for an increase in her per diem salary from $21 to $25.

In 1973 she took a number of courses at Kean College in order to obtain her teaching degree and, during the period from October to December 1973, engaged in some student teaching for approximately eight weeks. During the aforesaid eight week period she did not undertake any substitute teaching.

On cross-examination, petitioner stated that as a substitute teacher during the period from 1970 to 1974 she was paid by check on a bi-weekly basis. Furthermore, during the years 1971 and 1972 she taught about one day per week; in 1973 she taught an average of two to three times per week; and in 1974 she taught almost every day.

A. Steven LaBrutte, secretary to TPAF for the past seven years and employed by the Division of Pensions for the past 19 years, was called as a witness by the Board of Trustees. He stated that he was familiar with the administrative practice and procedures of both the Division of Pensions and the Board of Trustees. He outlined in detail the usual procedure for the purchase of past service by a member. Mr. LaBrutte stated that the substance of N.J.A.C. 17:3-5.4(a)(3) has been in effect since 1957, initially as a regulation of the Board of Trustees and, since 1969, as part of the New Jersey Administrative Code. He identified a regulation of the Board of Trustees which was adopted on October 10, 1957, and which reads as follows:

DEFINITION OF SUBSTITUTE AND TEMPORARY SERVICE

Only full time continuous substitute or temporary service rendered for a period of not less than one full school semester and immediately followed by permanent employment shall be purchasable for pension credit in the Fund. Day to day, intermittent or per diem substitute or temporary service shall not be purchasable for pension credit. (Effective immediately).

According to Mr. LaBrutte, in order for substitute teaching service to be purchasable, the service must be full-time and permanent, as opposed to “on call, per diem or intermittent service.” A critical factor is whether the substitute teacher is paid on a per diem basis or on a contractual basis. If the payment is made to the teacher on a per diem basis, it is not generally considered purchasable, whereas if it is payment made pursuant to contract
(either oral or written), it is purchasable. Typically, a teacher who is hired by resolution or on motion of the local Board of Education is considered a “permanent substitute,” as in the case of a teacher who begins teaching in October or November of the school year and is hired for the rest of the year. Mr. LaBrutte declared that if a teacher is “on call” or paid on a per diem basis, he is not considered a permanent substitute, regardless of how many days he has worked during the school year. He further stated that, to his knowledge, per diem substitute teachers have never been permitted to purchase service rendered on that basis. He asserted, moreover, that the mere fact that a person has a valid New Jersey teaching certificate does not suffice to render that person a permanent substitute according to the practice of the Board of Trustees, pursuant to N.J.A.C. 17:3-5.4.

On cross-examination, Mr. LaBrutte declared that in determining eligibility for purchase of substitute teaching service the Board of Trustees utilizes N.J.S.A. 18A:66-14 for general guidance but looks to N.J.A.C. 17:3-5.4 for definitional purposes. He pointed out that a substitute teacher is not enrollable in TPAF. (See, N.J.S.A. 18A:66-2(p).) He gave as an example a situation in the City of Newark where teachers who had been employed as substitutes for approximately 15 years were denied enrollment in TPAF by the Board of Trustees, which denial has recently been upheld in the courts. According to Mr. LaBrutte the philosophy underlying N.J.A.C. 17:3-5.4 is that the Fund is established for the benefit of full-time, career employees and not simply for those who teach intermittently.

In answer to questions posed by the court, Mr. LaBrutte indicated that even a person designated as a “permanent substitute” may not be eligible to purchase substitute teaching service if he has not taught a sufficient number of days during the school year. When asked where the line is drawn in terms of number of days required for eligibility, Mr. LaBrutte replied: “There is no line. . . . [I]t is a judgment question, a judgment decision.”

The final witness was Joseph Monahan, employed by the Parsippany-Troy Hills School District for the past 17 years, the last 9 as the Assistant Superintendent of Schools. One of his duties is the supervision and implementation of the program for hiring substitute teachers. Mr. Monahan declared that there is no official title or position in the school district of “permanent substitute teacher.” All substitute teachers are paid (bi-monthly) on a per diem basis. They are not under contract. The only teaching certificate required for a substitute teacher is a County substitute teaching certificate. The names of all eligible substitute teachers are placed on a list which is submitted to the Board of Education; it is from this list that substitute teachers are called to replace permanent teachers who are unable to come to school on any particular day or days. When called, a
substitute teacher is under no obligation to come into school to teach.

Mr. Monahan stated that around 1974 the policy for paying substitute teachers in the Parsippany-Troy Hills School District was changed, viz., the per diem rate of payment became variable, depending on the number of consecutive days which the substitute teacher worked as a replacement for one particular permanent teacher. At present, the rate of pay is $26 per day for the first ten consecutive days; $30 per day for the next ten consecutive days; and $45 per day for all consecutive days over 20.

Finally, according to Mr. Monahan, if it is known that a permanent teacher will be out of work for an extended period of time -- for example, on a leave of absence for maternity or child care -- a substitute teacher may be hired for the remainder of the school year. In this case, the substitute teacher is usually put under contract, receives a permanent teacher's usual rate of pay and fringe benefits, and performs all regular and usual teaching duties.

**ANALYSIS OF LAW**

The denial of petitioner's request to purchase the service rendered by her as a substitute teacher is based upon the provisions of N.J.A.C. 17:3-5.4(a)3, which reads:

> An active contributing member may purchase credit for:
> full-time and continuous substitute or temporary public school teaching service rendered in New Jersey for a period of not less than one full school semester, provided such service was immediately followed by an appointment to a regular fulltime teaching position. *Per diem or intermittent temporary or substitute service is not creditable.* [emphasis supplied]

Inasmuch as petitioner was paid for all of her substitute teaching on a “per diem” basis, both the Division of Pensions and the Board of Trustees refused to allow her to effect the purchase.

Petitioner, on the other hand, contends that N.J.S.A. 18A:66-14 applies and is controlling. This section of the Teachers' Pension and Annuity Fund Act reads:

> Any person employed temporarily as a teacher and whose temporary employment resulted, without interruption, in permanent employment or any person employed as a substitute immediately prior to permanent employment shall be permitted to make contributions covering such service on the basis of rates as provided by section 18A:66-29 and receive the same credit as if he had been a member during such service. The member must agree to make such contributions within one year after the effective date of this act or during his first year of membership in the retirement system. [emphasis supplied]
Petitioner argues that nowhere in section 14 is there an exclusion for a substitute teacher who is paid on a "per diem" basis, and, by adopting N.J.A.C. 17:3-5.4(a)3, the Board of Trustees has improperly created such an exclusion.

The resolution of this matter requires a recognition of certain fundamental principles. An administrative agency is a creature of the Legislature and can act only within the bounds of the authority delegated to it. *Elizabeth Federal Savings and Loan Association v. Howell*, 24 N.J. 488, 499 (1957). It has long been held that an administrative regulation or policy which attempts to add to the statute something which is not there can furnish no sustenance to that statute. *Kingsley v. Hawthorne Fabrics, Inc.*, 41 N.J. 529 (1964). It is also clear that an administrative rule is not necessarily valid because an agency feels it is useful. *Frigiola v. State Board of Education*, 25 N.J. Super. 75, 81 (App. Div. 1953). An administrative agency cannot modify or circumvent the legislative direction under the guide of statutory interpretation; it cannot deviate from the principle and policy of the statute. *Abelson's Inc. v. State Board of Optometrists*, 5 N.J.412, 424 (1950). In *Frigiola, supra*, the court invalidated a rule adopted by the Board of Trustees, declaring:

[T]he rule adopted by the Board constitutes an endeavor to attach a material qualification to the mandate of the statute. Such an endeavor, however wisely exerted, oversteps the boundaries of administration and trespasses upon the field of the Legislature. [emphasis supplied] *Frigiola*, 25 N.J. Super. at 81.


Pensions for public employees serve a public purpose. A primary objective in establishing them is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed. They are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service. Being remedial in character, statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited thereby. [emphasis supplied; citations omitted]

There can be no doubt, moreover, that where an administrative regulation is in conflict with a statute, the statute prevails. *See, Carrea v. State of New Jersey*, Board of Trustees, (N.J. App. Div., June 12, 1980, A-506-79) (un-

In short, if N.J.A.C. 17:3-5.4(a)3 is inconsistent with the intention of the Legislature, the regulation must fall. For the reasons which follow, I CONCLUDE that this regulation is inconsistent.

It is fair to assume that the Legislature was aware that it is not unusual for substitute teachers to be paid per diem. When it enacted N.J.S.A. 18A:66-14, the Legislature clearly intended that substitute service could be purchased, provided only that such service was rendered "immediately prior to" permanent appointment. To exclude substitute teaching service because the teacher was paid per diem, was not under contract, or did not work a certain number of consecutive days, is inconsistent with the legislative purpose as well as with the principle of liberal construction. Suppose, for example, that a substitute teacher renders 180 days of teaching service in the school year 1979-1980, but is paid per diem. The teacher then receives a permanent teaching position for the school year 1980-1981. Would it be fair, reasonable or consistent with legislative intent to preclude him from purchasing the 180 days of service solely because he was paid per diem?

To take another case, suppose a substitute teacher works 179 consecutive days beginning in early September 1979, but is not called on the last day of school in June of 1980; she is, however, offered a position as a regular teacher under contract beginning in September 1980. Would it be reasonable to declare that she could not purchase the 179 days of substitute teaching service rendered in the prior school year because she did not work the 180th day, and therefore her substitute service was not rendered "immediately prior" to her permanent employment.

I suggest that it would be both fair and practical to allow a permanently employed teacher to purchase all days of substitute service rendered by him (or her) in a school year or consecutive school years immediately before permanent appointment. For example, if a teacher were hired as a substitute for 10 days in 1971, 100 days in 1972, no days in 1973, and 50 days in 1974, and if that teacher then received a regular teaching appointment in 1975, the teacher should be permitted to purchase the 50 days of substitute service rendered in 1974, but not the 110 days rendered in 1971 and 1972 because there was a one year hiatus in 1973, i.e., the 110 days were not “immediately prior to” that teacher’s permanent employment.

To use the phrase of the Supreme Court in the case of Geller v. Department of the Treasury, supra, “under all the circumstances, the basis for a just result” in the instant matter would be to allow petitioner to purchase -- in accordance with the rates established by N.J.S.A. 18A:66-29 -- all of the days she worked as a substitute teacher from June 1970 until December 31, 1974, translated into school years or a fraction thereof and based on the assumption that each school year is comprised of 180 days. In this case, petitioner worked a total of 374 1/2 days, which equals 2 school years plus 14 1/2 days or, roughly, 2 years and 1/2 of a month.

This result would cause no harm to the Fund because petitioner would be required to purchase this service at appropriate rates. There is not a “something-for-nothing” color to petitioner’s request. Cf., Board of Trustees v. LaTronica, 81 N.J. Super. 461, 470 (App. Div. 1963). This result would also be far more reasonable and consistent with the legislative intent than the narrow and restrictive requirements established by N.J.A.C. 17:3-5.4(a)3.

I make the following FINDINGS OF FACT:

1. Stipulations numbered 1 to 8, inclusive, as though set forth in full.
3. The total days of substitute teaching service rendered by petitioner during the aforesaid period of time was 374 and 1/2.
4. Petitioner was paid on a per diem basis for all of the substitute teaching service she rendered, receiving $21 per day until the fall of 1974 and $25 per day thereafter.
5. During the period from 1970 to present, all substitute teachers in the Township of Parsippany-Troy Hills have been paid on a per diem basis.

I CONCLUDE that N.J.A.C. 17:3-5.4(a)3 is inconsistent with N.J.S.A. 18A:66-14 and, as applied by the Board of Trustees, must be considered invalid. I further CONCLUDE that petitioner is eligible to purchase the 374
and 1/2 days of substitute teaching service rendered by her in accordance with the rates established by N.J.S.A. 18A:66-29.

Accordingly, it is hereby **ORDERED** that petitioner's application to purchase the 374 and 1/2 days (2 years, 1/2 month) of substitute teaching service be granted.

After reviewing this Initial Decision, the Board of Trustees, Teachers' Pension and Annuity Fund on December 30, 1980, issued the following Final Decision:

Having reviewed the Initial Decision and any exceptions or replies submitted, I hereby adopt the decision of the administrative law judge in the above-captioned case as the Final Decision.