KENNETH P. BISHOP,
Petitioner,
v.
BOARD OF TRUSTEES, TEACHERS' PENSION AND ANNUITY FUND,
Respondent.

Decided July 2, 1980

Initial Decision

SYNOPSIS

Petitioner appealed from a denial of his application for pension credit for payment received by him for service as a high school department chairman.

The administrative law judge assigned to the case determined that the question to be resolved was whether the payments made to petitioner as chairman constituted "compensation" within the meaning of N.J.S.A 18A:66-2(d). The judge found that they did not since the compensation did not take the form of salary, i.e., normally paid in regular periodic intervals in specific regular amounts and was classified as "extra compensation" in the petitioner's employment contract.

Accordingly, the administrative law judge affirmed the denial of pension credits.

Steven Cohen, Esq., for petitioner
Prudence H. Bisbee, Deputy Attorney General, for respondent
(John J Degnan, Attorney General of New Jersey, attorney)

MILLER, ALJ:

PROCEDURAL HISTORY AND TESTIMONY

Kenneth P. Bishop appeals from a decision of the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) denying his application for pension credit for monies received by him for service as Department Chairman of the Mainland Regional High School from September 1975 through June 1977.
Prior to the taking of testimony, the following stipulations were entered into by and between counsel:

1. Petitioner’s date of birth was January 19, 1915.
2. Petitioner commenced his teaching employment in New Jersey on September 1, 1956, as principal of a public school in Garfield, Bergen County, New Jersey.
3. Petitioner was enrolled in the Teachers’ Pension and Annuity Fund (TPAF) effective September 1, 1956.
5. Petitioner commenced his employment as a teacher for the Mainland Regional High School Board of Education in September 1967.
7. At its meeting of September 14, 1978, the Board of Trustees denied petitioner’s application for pension credit for monies received by him as Department Chairman.
8. Petitioner appealed from the adverse determination of the Board of Trustees by letter dated November 1, 1978.
9. On May 25, 1979, petitioner executed an application for service retirement and filed same with TPAF, but, by letter dated June 27, 1979, petitioner requested that his application be held in abeyance pending the determination of this appeal.

The first person to testify at the hearing was petitioner himself. He stated that he is currently retired (effective February 1, 1980) and receiving a monthly pension from TPAF of approximately $900.00. He first began employment with the Mainland Regional High School Board of Education (hereinafter “Board of Education” or “Employer”) as a mathematics teacher in September 1967. In the school years 1975-76 and 1976-77 he was appointed to the position of Department Chairman of the Mathematics Department. Prior to applying for this position it was petitioner’s understanding that the position was tenurable, i.e., that he would obtain tenure if he held the position continously for two years and-one day. Among the requirements for Department Chairman were the holding of a Supervisor’s Certificate issued by the State Board of Education. Petitioner stated that he held a High School Principal Certificate, a Superintendent’s Certificate, and a Mathematics Teacher’s Certificate. His compensation for acting
as Department Chairman was based upon the number of teachers in his department; in petitioner's case he was paid $1,250.00 (for supervising between 10 and 15 teachers) over and above his regular teaching salary. Petitioner's supervisory duties included supervising and rating of teachers, suggestions to teachers with respect to improving their performance, requisitioning supplies, searching for and evaluating text books, and recommending the hiring, firing and retaining of teachers. Petitioner performed his supervisory duties on a daily basis, three periods (out of a total of eight periods) being devoted to supervision, three periods being devoted to teaching, and the other periods being for lunch and preparation.

Petitioner identified the contract dated September 22, 1975, between the Board of Education and himself wherein he was employed as Chairman of the Department of Mathematics "for the term of one school year expiring June 30, 1976," and whereby he was to receive "as extra compensation" the sum of $1,250.00 payable "at the end of the school year." He stated that he did not receive any separate written contract for his service as a teacher—only a statement of salary in accordance with an established salary guide—inasmuch as he was a tenured teacher and it was not customary for teachers under tenure to sign new contracts of employment for each school year. The salary established for petitioner was $18,807.00 for the 1975-76 school year and $20,123.00 for the 1976-77 school year.

Petitioner testified that when he received the contract dated September 22, 1975, he asked the Superintendent of Schools (Robert A. Oldis) if the $1,250.00 portion of his compensation would be includable for pension purposes. Mr. Oldis thought it would not be includable but, being unsure, he suggested that petitioner see one John Gibson, Secretary to the Board of Education. Petitioner saw Mr. Gibson that day and was again advised in the negative, although Gibson stated that the Board of Education would have to make a decision on the point. In early October 1975, petitioner helped form a "Supervisor's Organization" consisting of five members (the five appointed Department Chairmen). A letter in the name of the Supervisor's Organization was then sent to the Board of Education; it was requested therein that the additional monies for Department Chairman duties be incorporated into one contract or one salary so that it would become creditable for pension purposes. Petitioner received no written response to the aforesaid letter, but he did receive a negative verbal response from one of the school administrators. In or around December 1975, the Supervisor's Organization met with the negotiating team
of the Board of Education in order to attempt to have Department Chairmen covered in a single contract. When the collective bargaining agreement was finally written, however, no provision was made for a single contract for Department Chairmen.

In March 1976, according to petitioner, the Supervisor's Organization sent a letter to the President of the Board of Education which, in pertinent part, read as follows:

The Board of Education counter proposal regarding the 1975-77 contract for Department Chairmen is accepted.

Although we would prefer one contract, we will accept a second contract for the responsibility factor involving supervision with the understanding that the Board of Education will consider N.J.S.A. 18A:66-2d (defining compensation) and N.J.S.A. 66-2p (defining teacher), and will instruct the Business Office to comply with N.J.S.A. 18:66-32 (providing pension credit for compensation received under both contracts).

Petitioner declared that the Supervisor's Organization received no written response to the aforesaid letter although, again, the members were verbally advised—by either the Superintendent of Schools or the Principal of the High School—that their counter proposal would not be accepted. In June 1976, petitioner received a lump sum payment of $1,250.00 (less taxes) pursuant to the agreement which he had made in September 1975.

In September 1976, a job description for Department Chairmen was promulgated. This job description did not change either the basic requirements or the compensation for the position, but it did provide considerably greater detail as to duties and responsibilities. Petitioner's duties during the 1976-1977 school year were identical to those which he had performed during the previous school year. During the 1976-1977 year, petitioner received the teaching portion of his salary ($20,123.00) on a semi-monthly basis and the chairmanship portion of his salary ($1,250.00) in a lump sum in June 1977.

In early September 1976, petitioner signed an agreement identical to the 1975 contract but added beneath his signature the following words: "signed with the same reservation stated with last year's contract." In early October 1976, petitioner was advised by the Superintendent of Schools that the President of the Board of Education had refused to sign his contract because of the aforementioned reservation and requested that petitioner sign a "newly typed contract" without the reservation. Petitioner declined to do so.
In May 1977, petitioner began a series of correspondence with TPAF in order to obtain a ruling as to whether Department Chairmen in the Mainland Regional High School District would be considered "teachers" and whether the compensation paid for assuming the position would be creditable for pension and insurance purposes. It was this series of correspondence which eventuated in the instant appeal.

According to petitioner, the Supervisor's Organization continued to negotiate with the Board of Education regarding the position of Department Chairman through May 1977. In early August 1977, petitioner received a letter from the Secretary of the Board of Education to the effect that the position of Department Chairman had been abolished.

On cross-examination, petitioner stated that prior to his employment at the Mainland Regional High School he was a principal of several schools in Garfield and Mahwah, and was, for a time, the Superintendent of Schools in Mahwah. He admitted that the contracts of employment which he signed for those positions were in no way similar to the contracts dated September 22, 1975 and September 2, 1976.

Petitioner conceded that when he received the $1,250.00 stipend for his departmental chairmanship in June 1976 he knew that pension deductions had not been taken but he did not advise TPAF at that time because he thought he could get the matter "straightened out" through the State Department of Education. He also admitted, based upon his previous experience, that TPAF would not accept the $1,250.00 as creditable compensation because of the form of the contracts which had been offered to him.

Also on cross-examination, petitioner compared the positions of Departmental Chairman and Departmental Coordinator, noting a number of similarities and differences. Specifically, the Departmental Coordinator position was in effect in 1967 and, with the exception of those disciplines for which Department Chairmen were appointed during the 1974-1977 period, continued in effect thereafter through 1979. Petitioner himself was a Departmental Coordinator from 1971 to 1975 and during the school years 1977-78 and 1978-79. As a Departmental Coordinator he signed an agreement similar to the 1975 and 1976 contracts and received payment for his services by way of a lump sum at the end of the year; during the 1971-1975 period his additional compensation as Departmental Coordinator was $500.00 and during the years 1977-1978 and 1978-1979 it was $650.00. No pension deductions were taken from these lump sum payments.
On redirect examination petitioner asserted that a Departmental Coordinator could not receive tenure because he had to make application for the position each year, noting that these people were still included as part of the teachers bargaining unit for the Public Employment Relation Commission purposes. It was petitioner's understanding that the two Department Chairmen who had been appointed in September 1974, had, in fact, received tenure but, when the position was abolished in 1977 their tenure rights to that position were eliminated.

The only other person to testify at the hearing was A. Steven LaBrutte, an employee of the Division of Pensions for 20 years and the Secretary to the Board of Trustees of the Teachers' Pension and Annuity Fund for the past 7 years. He stated that he has been present at a number of meetings of the Board of Trustees wherein rulings were made involving cases of creditable compensation. He outlined the development of the rules of the Board of Trustees on the subject of creditable compensation. Mr. LaBrutte noted that the original rule was adopted in 1964 and, even at that time, excluded from pension and insurance purposes "compensation extra paid in addition to regular contract salary for performing curricular activities, i.e., coaching, department head, etc. . . ." In 1970 the codified rule, N.J.A.C 17:3-29, read as follows:

Only a member's based or contractual tenurable salary shall be subject to pension and group life insurance contributions and creditable for retirement and death benefits in the Fund. The Board shall reserve the right to question any salary to determine its creditability. Where it is evident from the record that a salary reported for benefits includes extra compensation, such extra compensation shall be considered not creditable for benefits and all contributions made thereon shall be returned without interest.

Some of the forms of compensation that have been defined as extra compensation are as follows:

. . . .

(c) Additional compensation paid for performing temporary administrative or supervisory assignments such as department head, acting principal, etc. . . ." (emphasis supplied)

The latter rule was revised by the Board of Trustees on April 8, 1971, so as to eliminate the word "tenurable." The deletion of that word was made by the Board of Trustees because of certain "objections raised by the New Jersey Education Association. . . ." The pres-
ent rule of the Board of Trustees dealing with creditable salary
(N.J.A.C. 17:3-4.1) is essentially the same as the rule promulgated in
1971 except for the addition of a sub-paragraph (e) providing for
investigation by the Board of Trustees of "all claims involving an
increase in compensation of more than 15 percent over that of the
previous year. . . ."

Mr. LaBrutte then proceeded to identify and explain previous de-
cisions of the Board of Trustees on the issue of creditable salary. In
certain instances the Board of Trustees has allowed the salaries of
Department Chairmen to be creditable for pension and insurance
purposes. In other instances the Board of Trustees has ruled that the
compensation given to Departmental Chairmen is not creditable. Ac-
cording to LaBrutte, the longstanding administrative policy and prac-
tice is that compensation received for serving as Department Chair-
man will be creditable only if: (a) the total amount of compensation
is included in one contract, and (b) the employing school district has
established uniformity of treatment for all persons similarly situated.

In addition, Mr. LaBrutte identified two previous cases involving
the question of creditable compensation which had gone to formal
hearing. In both of these cases, the hearing officer had, under the
circumstances, recommended the exclusion for pension and insurance
benefits of certain monies received by way of compensation by the
petitioner; the report and recommendation of the hearing officer in
each of those cases were adopted by the Board of Trustees.

Finally, Mr. LaBrutte stated that he was not aware of any decision
of the Board of Trustees approving an arrangement for compensation
whereby the "stipend" for Department Chairman was paid in a lump
sum at the end of the school year.

*ISSUES*

The essential issue in this matter may be phrased as follows: Did
the compensation ($1,250.00 per annum) paid to petitioner for acting
as Department Chairman during the years 1975-76 and 1976-77 con-
stitute "compensation" within the meaning and intent of *N.J.S.A.*
18A:66-2(d) and therefore become creditable to petitioner for pension
and insurance purposes?

For the reasons to be expressed hereafter, I conclude that this
question must be answered in the negative.

*N.J.S.A.* 18A:66-2(d) reads as follows:
'Compensation’ means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year. (emphasis supplied)

As noted, the key word in the above statute is "salary.” The term was considered by our Supreme Court in Koribanics v. Board of Education, 48 N.J. 1, 6 (1966) which held that counsel to a Board of Education was not covered by the Veterans Tenure Act (which protects persons receiving "salary") because he received a portion of his remuneration in fees. The Court declared that “salary” applies to "monies received by a person on a fixed and continuous basis, i.e., normally paid in regular periodic intervals in specific regular amounts. This is the commonly understood meaning of the term.” (emphasis supplied)

Were the payments of $1,250.00 at the end of each school year "salary" in accordance with the above definition? I think not. The $1,250.00 was not paid in "regular periodic intervals.” Rather, it was paid in one lump sum at the end of the year.

It is also doubtful that the money was to be paid on a "fixed and continuous basis” and “in specific regular amounts.” Paragraph four of the agreements between petitioner and the Board of Education declares that petitioner's employment as Department Chairman "shall not carry with it any tenure rights to employment covered herein nor to the amount of compensation set forth herein, which rights are expressly hereby waived.” Paragraph six provides that the agreement may be terminated by either party upon thirty days notice.

Furthermore, in accordance with paragraph three of the agreements, the $1,250.00 was referred to not as "wages" or as "salary,” but as “extra compensation.” Clearly, this term was used deliberately by the Board of Education to differentiate it from "salary” and with knowledge by both the Board of Education and petitioner that the payment would not be creditably for pension and insurance purposes.

This fact is reinforced by paragraph five of the agreements which provides that the contract is for "extra services and separate and apart and in no way connected with the employment of the party of the

1The agreement dated September 22, 1975, and the agreement dated September 2, 1976, are virtually identical.
second part [petitioner] as a teacher in said school system..." See also, the memorandum dated March 31, 1976, from Superintendent of Schools Oldis to petitioner and other department chairpersons which states: "To the best of our knowledge, TP&A deductions may not be deducted from the second contract."

In short, the Board of Education deliberately and knowingly made petitioner's employment as Department Chairman separate from his usual teaching duties, intending that the $1,250.00 not be considered "salary" within the pension statute and that this money be excluded for pension credit.

By designating petitioner's remuneration as "extra compensation," moreover, the Board of Education manifested an awareness and understanding of the specific exclusionary rule—N.J.A.C. 17:3-4.1—of the Board of Trustees2 and of the long-standing interpretation of that rule by the Board of Trustees.

In pertinent part, N.J.A.C. 17:3-4.1 reads as follows:

(a) Only a member's base or contractual salary shall be subject to pension and group life insurance contributions and creditably for retirement and death benefits in the Fund.

(b) The Board shall reserve the right to question any salary to determine its creditability.

(c) Where it is evident from the record that a salary reported for benefits includes extra compensation, such extra compensation shall be considered not creditable for benefits and all contributions made thereon shall be returned without interest.

(d) Some of the forms of compensation that have been defined as extra compensation are as follows:
   1. All forms of bonus or overtime;
   2. Extra compensation paid for coaching sports;
   3. Retroactive salary adjustment or pay adjustment made within a member's final year of service, unless such adjustment was made as the result of an across-the-board pay adjustment for all personnel in the school district;

2N.J.S.A. 18A:66-56 specifically requires that the Board of Trustees "annually establish rules and regulations for the administration and transaction of its business and for the control of the funds created by this article." A strong presumption of reasonableness must be accorded to an administrative agency's exercise of its statutorily delegated responsibility. City of Newark v. Natural Resource Council, 82 N.J. 530 (1980).
4. Individual pay adjustment made within or at the conclusion of a member's final year of service;
5. Increment granted for retirement credit or in recognition of the member's forthcoming retirement or in recognition of the member's years of service in the community;
6. Lump sum terminal accumulated sick leave or vacation pay;
7. Individual adjustment made in final year to place member at maximum on salary guide;
8. Additional compensation paid for performing temporary administrative or supervisory assignments such as department head, acting or principal and the like;
9. Additional compensation paid for teaching evening, extension or summer school;
10. Additional compensation paid for performing clerical or other sundry duties;
11. Additional compensation paid for working during vacation periods. (emphasis supplied)

Petitioner's able counsel points out that in some cases the Board of Trustees has allowed pension credit for payments to department chairpersons. In each of these cases, however, the payment was incorporated into the regular teaching agreement and was specifically made a part of the teacher's salary, i.e., was made bi-weekly, bi-monthly or at some other regular and periodic intervals. In no instance, has the Board of Trustees accepted a lump sum payment made at the end of the school year in accordance with a separate contract.

For many years the Board of Trustees has had in effect a rule regulating and limiting the amount of salary subject to pension and life insurance contributions and creditable for retirement and insurance benefits. Clearly, a major purpose of the rule was to refine and interpret N.J.S.A. 18A:66-2(d), thus allowing teachers and their employers to know what forms of compensation would be subject to pension deductions and thereby be creditable for retirement and life insurance benefits. The validity of the rule was challenged and upheld in LaTronica v. Board of Trustees, 81 N.J. Super. 461 (App. Div. 1963), which also recognized the importance of maintaining and preserving the financial integrity of the pension fund.

Over the years the Board of Trustees has consistently determined that compensation to teachers acting as department chairpersons shall be creditable if, and only if, that compensation is included in the teacher's regular salary payments. It is well-established that practical

Giving due weight and respect to the long-standing practical interpretation of *N.J.S.A.* 18A:66-2(d) by the Board of Trustees, I conclude that the decision of the Board of Trustees to exclude petitioner's compensation as Department Chairman from from pension credit was correct and proper.

**FINDINGS OF FACT**

1. Stipulations numbered 1 to 9 inclusive, as though set forth in full.
2. Petitioner served as Department Chairman of the Mathematics Department of the Mainland Regional High School for the school years 1975-76 and 1976-77, receiving the sum of $1,250.00 each year thereafter.
3. The $1,250.00 payment to petitioner was made in a lump sum at the end of each school year.
4. The $1,250.00 payment to petitioner was in addition to his regular compensation as a teacher at the Mainland Regional High School, which compensation was $18,807.00 for the 1975-76 school year and $20,123.00 for the 1976-77 school year.
5. Petitioner's regular compensation as a teacher was not paid in a lump sum at the end of the school year, but rather was paid in periodic monthly or bi-monthly installments.
6. Petitioner's employer, the Mainland Regional High School Board of Education, did not intend the $1,250.00 payment to petitioner for acting as Department Chairman to be creditable for pension purposes.
7. Upon signing agreements with the Mainland Regional High School Board of Education to act as Department Chairman at the Mainland Regional High School, petitioner was aware that the $1,250.00 to be paid to him might not be creditable for pension purposes.
8. For more than ten years the Board of Trustees has consistently excluded payments made to teachers for serving as department chairpersons unless said payments were incorporated into a single contract and were paid in regular periodic installments as part of the teacher's regular salary.

CONCLUSION OF LAW

On the basis of the foregoing Findings of Fact and analysis of law, I CONCLUDE that the Board of Trustees properly excluded for pension and insurance purposes the two $1,250.00 payments made to petitioner for acting as Department Chairman because such payments were not "compensation" within the meaning of N.J.S.A. 18A:66-2(d).

After reviewing this Initial Decision the Board of Trustees, Teachers' Pension and Annuity Fund on July 15, 1980, issued the following Final Decision:

The Board of Trustees of the Teachers' Pension and Annuity Fund hereby adopts the findings of fact and conclusions of law of the administrative law judge consistent with its original determination and further adopts the recommendations contained in the administrative law judge's initial decision and incorporates the same herein by reference.