

**BEFORE THE BOARD OF TRUSTEES
TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS**

In the Matter of:

Libertyville CHSD 128,

Petitioner.

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**RECOMMENDED DECISION BY THE CLAIMS HEARING COMMITTEE
IN THE ADMINISTRATIVE REVIEW OF LIBERTYVILLE CHSD 128**

I. Introduction.

Pursuant to 80 Ill. Admin. Code 1650.640(e), an administrative review hearing was held on May 28, 2014 in Springfield, Illinois, to consider the appeal of Petitioner Libertyville CHSD 128 (the "District"), challenging the staff determination that member Lester Perry's contract with Community High School District No. 128, executed on May 29, 2007 (the "2007 Contract"), removed Perry's prior contract, executed on April 26, 2004 (the "2004 Contract") from its previously exempt status under 40 ILCS 5/16-158(g). Because the TRS staff determined that the 2007 Contract caused a loss of exemption, TRS assessed the District a contribution amount of \$96,175.76, pursuant to 40 ILCS 5/16-158(f).

The TRS Board of Trustees ("Board"), the trier of fact in this matter as provided in TRS Rule 1650.620 (80 Ill. Admin. Code § 1650.620), was represented at the hearing by its Claims Hearing Committee comprised of the following Board members: Sonia Walwyn, Chairperson, Mark Bailey, and Cynthia O'Neill. Mr. Ralph Loewenstein served as the Presiding Hearing Officer. By agreement of the Parties, the administrative review was presented to the Board solely on the agreed record. The District was represented by Mr. James A. Petrungaro of Scariano, Himes and Petrarca, Chtd. TRS was represented by Mr. Martin G. Durkin and Ms. Trisha M. Rich of Holland & Knight, LLP.

After reviewing the briefs and exhibits submitted by the Parties, it is the determination of the Claims Hearing Committee that the District's actions, along with the 2007 Contract, caused a loss of exemption under Section 1650.482(b) of the Illinois Administrative Code, and that therefore, TRS was required to assess the contribution to the District.

II. Relevant Rules and Statutes.

In this case, the Claims Hearing Committee and the Board must apply the following rules and statutes:

40 ILCS 5/16-158(f):

If the amount of a teacher's salary for any school year used to determine final average salary exceeds the member's annual full-time salary rate with the same employer for the previous school year by more than 6%, the teacher's employer shall pay to the System, in addition to all other payments required under this Section and in accordance with guidelines established by the System, the present value of the increase in benefits resulting from the portion of the increase in salary that is in excess of 6%. This present value shall be computed by the System on the basis of the actuarial assumptions and tables used in the most recent actuarial valuation of the System that is available at the time of the computation. If a teacher's salary for the 2005-2006 school year is used to determine final average salary under this subsection (f), then the changes made to this subsection (f) by Public Act 94-1057 shall apply in calculating whether the increase in his or her salary is in excess of 6%. For the purposes of this Section, change in employment under Section 10-21.12 of the School Code on or after June 1, 2005 shall constitute a change in employer. The System may require the employer to provide any pertinent information or documentation. The changes made to this subsection (f) by this amendatory Act of the 94th General Assembly apply without regard to whether the teacher was in service on or after its effective date.

Whenever it determines that a payment is or may be required under this subsection, the System shall calculate the amount of the payment and bill the employer for that amount. The bill shall specify the calculations used to determine the amount due. If the employer disputes the amount of the bill, it may, within 30 days after receipt of the bill, apply to the System in writing for a recalculation. The application must specify in detail the grounds of the dispute and, if the employer asserts that the calculation is subject to subsection (g) or (h) of this Section, must include an affidavit setting forth and attesting to all facts within the employer's knowledge that are pertinent to the applicability of that subsection. Upon receiving a timely application for recalculation, the System shall review the application and, if appropriate, recalculate the amount due.

The employer contributions required under this subsection (f) may be paid in the form of a lump sum within 90 days after receipt of the bill. If the employer contributions are not paid within 90 days after receipt of the bill,

then interest will be charged at a rate equal to the System's annual actuarially assumed rate of return on investment compounded annually from the 91st day after receipt of the bill. Payments must be concluded within 3 years after the employer's receipt of the bill.

40 ILCS 5/16-158(g):

When assessing payment for any amount due under subsection (f), the System shall exclude salary increases paid to teachers under contracts or collective bargaining agreements entered into, or amended, or renewed before June 1, 2005.

80 Ill. Admin. Code 1650.482:

A contract or collective bargaining agreement shall lose its exemption from employer contributions under 40 ILCS 5/16-128(d-10) and/or 16-158(f) upon the following:

- a) An increase in an existing salary or sick leave retirement incentive or the addition of a new salary or sick leave retirement incentive.
- b) A renegotiated increase in salary (excluding employer payment of the .40% of salary toward the cost of the early retirement without discount option under 40 ILCS 5/16-152(a)(4)) or sick leave unless specifically provided for in a salary reopener provision in the contract or collective bargaining agreement or as permitted in Section 1650.483(c).

III. Issue to be Decided.

The issue to be decided is whether TRS correctly determined that the District's decision to extend Perry's employment for an additional two years, while paying him the retirement incentive payments during the 2007-08 and 2008-09 school years, was a renegotiated increase in salary that caused the 2004 Contract to lose its exempt status.

IV. Facts.

On April 26, 2004, the District entered into the 2004 Contract with Lester Perry. The 2004 Contract was a five-year, performance based contract, which was exempt pursuant to 40 ILCS 5/16-158(g). The 2004 Contract had a term of July 1, 2004, through and including June 30, 2009.

The 2004 Contract included the following language:

3. **COMPENSATION** - For the 2004-2005 Contract Year, in consideration of the annual compensation of One Hundred Six Thousand Six Hundred Twenty Three Dollars(\$106,623) and increased by four percent (4%) over the previous years salary for each of the 2005-2006, 2006-2007, 2007-2008 and 2008-2009 contract years . . .

16. **RETIREMENT** - Provided [Perry] has at least ten (10) consecutive years of full-time service in the District and gives [the Board of Education] irrevocable written notice prior to May 1 of his intent to retire on the June 30th of the following year after notice is given, [Perry] shall be entitled to the following benefits. [The Board of Education] will provide a twenty percent (20%) increase in [Perry's] salary (Sec. 3, Compensation) in the penultimate year of employment. Such increase is inclusive of any regularly scheduled increase approved by [the Board of Education] for [Perry].

In the final year of employment, [Perry] shall receive an additional increase of twenty percent (20%) over his previous year's salary. Such increase is inclusive of any regularly scheduled increase approved by [the Board of Education] for [Perry]. If determined to be in the best interests of the District, the Superintendent may approve additional compensation for unused vacation days in [Perry's] final year of employment.

2004 Contract, §§ 3, 16.

On May 24, 2007, Perry notified the District of his intent to retire on June 30, 2009. Based on this notice, the District paid Perry a 20% salary increase during each of the 2007-08 and the 2008-09 school years. However, Perry did not retire on June 30, 2009. Instead, on May 29, 2007, Perry and the District entered into the 2007 Contract. The 2007 Contract was for the term of July 1, 2009 through June 30, 2011. Perry ultimately retired on June 30, 2011.

The District's decision to pay the retirement incentive payments in 2007-08 and 2008-09, while concurrently extending Perry's employment, substantially increased Perry's retirement benefits. If Perry had retired on June 30, 2009, pursuant to the 2004 Contract and his original notice of intent to retire, Perry would have received \$8,568.91 in monthly retirement benefits. As a result of entering into the 2007 Contract and retiring instead on June 30, 2011, Perry receives monthly retirement benefits of \$9,918.18. The Parties agree that the Perry receives more in retirement benefits now than he would have received if he had retired pursuant on June 30, 2009, pursuant to the 2004 Contract.

V. Positions of the Parties.

The District argues that the 2004 Contract retained its exempt status pursuant to 40 ILCS 5/16-158(g), and is exempt from the provisions of 40 ILCS 5/16-158(f). The District contends that the 2007 Contract was a separate and distinct employment agreement that did not affect the 2004 Contract, or its status as a grandfathered contract under 40 ILCS 5/16-158(g). The District argues that TRS's staff determination looks "outside the four corners" of the 2004 Contract in determining that Perry's final two years of employment were in 2009-10 and 2010-11, and that this analysis is unsound because TRS should consider only the parties' intent at the time of the 2004 Contract's execution.

The District argues that Perry submitted his initial notice of intent to retire without having yet executed the 2007 Contract, and that this action constitutes "*perform[ing]* as though the 2007-08 and 2008-09 years were the penultimate and final years of employment." Petitioner's Position Statement, pg. 7. The District goes on to argue that its "obligation" to pay the 20% salary increases "was not optional or voluntary" and was "an enforceable obligation negotiated in the 2004 Contract." Petitioner's Position Statement, pg. 8.

Finally, the District contends that the 2007 Contract is not an amendment to the 2004 Contract, and thus could not have been a renegotiation of salary of the 2004 Contract. The District notes that the 2004 Contract was not "extended, rolled-over or renewed," and that the 2007 Contract was substantively different than the 2004 Contract. The District contends that because of these issues, the 2004 Contract did not lose its exempt status.

TRS disagrees with the District's position, and argues that the TRS staff decision was correct and should be upheld. TRS points to the plain language of the 2004 Contract, which provided that if Perry gave the District "irrevocable written notice" of his intent to retire, Perry "shall be entitled" to the salary increases "in the penultimate year of employment" and in "the final year of employment." 2004 Contract, § 16. TRS argues that the salary incentive payments were required "only after Perry submitted an irrevocable notice of retirement, and only during Perry's final two years of employment." Respondent's Memorandum in Opposition, pg. 4.

Instead, as TRS contends, Perry collected the retirement incentives without actually retiring. TRS argues that this caused an increase in Perry's retirement benefits that functioned as a renegotiation of salary, which caused a loss of exemption. TRS points out (and the Parties agree) that because Perry received the retirement incentives in 2007-08 and 2008-09 *and* worked through June 2011, Perry now collects an additional \$1,349.27 in monthly retirement benefits.

TRS further argues that Perry did not satisfy the requirements of the 2004 Contract to receive the incentive payments, because he did not submit an irrevocable notice of intent to retire. TRS points out that Perry entered into the 2007 Contract five days after his May 24, 2007 notice, "which effectively revoked his intent to retire, as he continued working at the District without interruption." Respondent's Memorandum in Opposition, pg. 7. For these reasons, TRS argues that the 2007 Contract caused a loss of exemption, and that the TRS staff decision was correct and should be upheld.

VI. Discussion and Analysis.

As explained below, the Committee agrees with the TRS staff that the contributions were properly assessed. The Committee finds that the 2004 Contract lost its exempt status as a result of the District and Perry executing the 2007 Contract and extending Perry's employment, in conjunction with the District's payments of the salary incentives during the 2007-08 and 2008-09 school years. Effectively, the District paid Perry the salary increases (a) not during the last two years of his employment, and (b) without requiring him to retire from the District.

The Parties agree that the 2004 Contract was an exempt contract. The Parties also agree that had Perry retired on June 30, 2009, pursuant to the 2004 Contract, he would have received a monthly retirement benefit of \$8,568.91. Instead, the District extended Perry's employment, *and* paid the retirement incentives during the 2007-08 and 2008-09 school years. As a result of these changes, Perry receives a monthly retirement benefit of \$9,918.18.

Section 3 of the 2004 contract provided that Perry was entitled to 4% salary increases for the 2007-2008 and 2008-2009 school years. He was only entitled to retirement incentives under Section 16 of the contract if he met a number of conditions. First, Perry had to have completed ten consecutive years of full-time service at the District. Second, prior to May 1 of the year before the year he intended to retire, Perry had to provide an "irrevocable written notice" of his intent to retire. Third, the 2004 Contract required that Perry receive the first of the incentive payments during "the penultimate year of employment," and the second payment "in the final year of employment." 2004 Contract, § 16.

In this case, Perry received 20% salary increases rather than the 4% increase to which he was otherwise entitled under the 2004 Contract without actually retiring at the end of the 2004 Contract. These salary increases were additionally received in years other than the penultimate and final years "of employment." This constituted a renegotiated increase in salary resulting in a loss of exemption under 80 Ill. Admin. Code 1650.482(b).

Instead of retiring on June 30, 2009, Perry and the District executed the 2007 Contract. The District argues that executing the 2007 Contract following the submission of Perry's May 24, 2007 notice of intent to retire preserves the exempt status. However, this does not change the fact that Perry's notice of intent to retire was not irrevocable, as required by the 2004 Contract, and the fact that Perry did not retire.

In its brief, the District argued that it had a contractual obligation to pay the two retirement incentives to Perry. This is plainly wrong. Perry did not meet the conditions precedent to receive those payments, and the District was not required to pay them. First, Perry did not submit a timely and irrevocable notice of intent to retire. Second, under the 2004 Contract, the District was to pay the retirement incentives *only* during Perry's final two years of employment. The District did not do that. Instead, the District provided Perry with the incentive payments during two years that were not ultimately Perry's final two years of employment.

The District asks us to read additional words into the plain language of the 2004 Contract, and find that the "penultimate year of employment" and the "final year of employment" mean the penultimate year of employment and the final year of employment *under the 2004 Contract*. We cannot do that. We are also unpersuaded by the District's contention that TRS's interpretation is wrong because it reads outside the four corners of the 2004 Contract. On the contrary, TRS's staff decision relies only on (a) the requirements of the 2004 Contract, and (b) the facts of the situation. To receive the incentive payments, the District and Perry were required to abide by the 2004 Contract. They did not. Instead, they executed the 2007 Contract, which extended Perry's employment term without interruption, *and* the District then made *voluntary* retirement incentive payments, prior to Perry's final two years of employment. These actions increased Perry's retirement and salary incentives, and accordingly, constitute a renegotiated increase in salary pursuant to Section 1650.482(b). As a result, there was a loss of exemption of the 2004 Contract, which triggered the correctly-assessed contribution to the District.

In its reply brief, the District argued that this Committee could review only the staff disposition, and not other arguments made by counsel. While we find this argument unpersuasive, we also find that our present decision is consistent with TRS's staff decision.

Finally, the District argues that we should not rely on *In the Matter of Schaumburg Community Consolidated School District 54* because it is "unhelpful" and "an abuse of TRS authority." The District further contends that the Board's decision in that case was "an abuse," "unsupported by any reasonable interpretation of § 1650.482," "an unreasonable overreaching interpretation of the plain language of § 1650.482," and a "gross misappl[ication]." Petitioner's Reply Brief, pgs. 8-9. We

disagree with the District's position, and note that the District 54 decision was affirmed in its entirety upon judicial review.

VII. Conclusion.

The Claims Hearing Committee finds in favor of the staff in this matter. The District voluntarily entered into the 2007 Contract with Perry, effectively extending his employment without interruption for an additional two years. In conjunction with that decision, the District *also* voluntarily paid Perry two salary increases, that were (a) not during the final two years of his employment, as required by the 2004 Contract, and (b) not after an irrevocable notice of intent to retire, as required by the 2004 Contract. We find that the District's actions removed the 2004 Contract from its exempt status, and that accordingly, the contributions were properly assessed. The Committee recommends the Board adopt this proposed decision.

VIII. Notice of Right to File Exceptions.

Exceptions to the Claim Hearing Committee's Proposed Decision must be filed within fifteen (15) days of receipt by the Petitioner. A Final Decision will be issued by the Board of Trustees after it has considered the Claims Hearing Committee's Proposed Decision and any exceptions filed by the Petitioner.