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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2673-23T2

JENNIFER KACKOS,

CIVIL ACTION

Petitioner-Appellant,

ON APPEAL FROM THE BOARD  
OF TRUSTEES OF THE  
TEACHERS PENSION AND  
ANNUITY FUND

v.

BOARD OF TRUSTEES OF THE  
TEACHERS PENSION AND  
ANNUITY FUND,

Defendant-Respondent.

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BRIEF AND APPENDIX  
FOR  
APPELLANT JENNIFER KACKOS  
**SUBMITTED DECEMBER 10, 2024**

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BARBARA E. RIEFBERG, ESQUIRE  
**SHIMBERG & FRIEL, P.C.**  
1415 East Route 70, Suite 103  
Cherry Hill, NJ 08034  
(856) 857-0700  
[briefberg@shimberglaw.com](mailto:briefberg@shimberglaw.com)

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### **PRELIMINARY STATEMENT**

Appellant, Jennifer Kackos, has a long history of employment in public schools in New Jersey. She was initially employed in the Middletown School District in 1998. She attained tenure and was enrolled in the Teachers' Pension and Annuity Fund. This was prior to the enactment of the law that changed TPAF membership into various "tiers."

In 2015, the Appellant became employed in the Monmouth Regional High School District as a Learning Disabilities Teacher. At the end of that school year, her position was eliminated due to budgetary restrictions. She was out of work due to an injury she sustained while in the course of her employment. Unfortunately, she did not obtain another position until the fall of 2018. By then, her Tier 1 account had lapsed because of 2 years of inactivity. She was re-enrolled as a Tier 5 member. Her efforts to maintain her original Tier 1 account resulted in this appeal.

### **PROCEDURAL HISTORY**

Once the Appellant realized she had two (2) separate TPAF accounts, a request was made to the Division of Pensions to have the two (2) accounts merged into her original Tier 1 account (Pa 4). By letter dated September 25, 2023, the Enrollment Section of the Division of Pensions and Benefits denied the request (Pa 7). A letter dated October 12, 2023, was submitted by counsel for the Appellant requesting a hearing before the TPAF Board of Trustees (Pa 8).

At its meeting on December 7, 2023, the Board of Trustees of TPAF considered the matter and maintained its denial of the Appellant's request to maintain her Tier 1 membership status (Pa 17). The Appellant appealed that denial by letter dated January



11, 2024 (Pa 21). The Appellant requested reconsideration of the Board's decision as well as a hearing (Pa 21).

TPAF considered the matter at its meeting on March 7, 2024. It denied Appellant's request to maintain her Tier 1 membership and denied the request for an administrative hearing. A Final Administrative Determination was issued on April 5, 2024 (Pa 24).

A timely appeal was submitted to the Appellate Division on May 8, 2024.

### **STATEMENT OF FACTS**

Appellant, Jennifer Kackos, was enrolled in the Teachers' Pension and Annuity Fund ("TPAF") as a result of her employment as a Teacher with the Middletown Township Board of Education in 1998 (Pa 25). She remained continuously employed in that school district until 2001. From September 2001 until January 2007, she was employed in the Ocean County Vocational-Technical School District as a Learning Coordinator/Transition Counselor. She maintained her TPAF enrollment. From January 2007 until July 2015, she was employed in the Manasquan School District as a Special Education Teacher and her TPAF membership continued (Pa 25).

On July 1, 2015, Appellant became employed in the Monmouth Regional School District as a Learning Disabilities Teacher. Pension contributions continued through June 30, 2016 (Pa 25). By letter dated April 6, 2016, Appellant was notified that in accordance with N.J.S.A. 18A:27-10, she was not going to be re-hired for the 2016-2017 school year (Pa 25). Her position had been eliminated. In fact, Appellant was out on Workers' Compensation leave from July 1, 2016, through June 15, 2017 (Pa 23). Pension

contributions were not paid to TPAF while she was out on her Workers' Compensation leave because her position had been eliminated.

Appellant was notified in March 2018 that her TPAF membership account expired effective June 30, 2018, since two (2) years had lapsed with no pension contributions being made on her behalf (Pa 31). Appellant obtained employment with the Neptune Board of Education effective October 1, 2018. That Board of Education submitted a Report of Transfer on behalf of the Appellant (Pa 1). The transfer request was denied. Her account was deemed inactive, and she was then enrolled in the TPAF with a new Tier 5 Membership on October 1, 2018. She was thus deprived of the benefits attached to her prior Tier 1 membership.

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW**

Administrative agency action will be set aside by the Court only where it is arbitrary, capricious, or unreasonable. *In re Warren*, 117 N.J. 295, 296 (1989). Judicial review under this standard addresses: **[1]** whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; **[2]** whether the record contains substantial evidence to support the findings on which the agency bases its action; and **[3]** whether, in applying the legislative policy to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *Allstars Auto. Grp. Inc. v. NJ Motor Vehicle Comm.*, 234 NJ 150, 157 (2018) (quoting *In re Stallworth*, 208 NJ 182, 194 (2011)).

Generally, the Appellate Division's review of an administrative agency determination is limited. In re Carter, 191 NJ 474, 482 (2007). The Appellate Court will sustain a final agency decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Russo v. Bd. Of Trs., Police and Firemen's Ret. Sys., 206 NJ 14, 27 (2011) (quoting In re Herrmann, 192 NJ 19, 27-28 (2007)).

Under that standard, the Appellate Court's scope of review is guided by three major inquiries: (1) whether the agency's decision confirms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; (3) whether in applying the law to the facts, the administrative "agency clearly erred in reaching" its conclusion. In re Stallworth, 208 NJ 182, 194 (2011) (quoting Carter, 191 NJ at 482-83). Although the Appellate Court may reach a different decision, the court cannot simply substitute its judgment for the agency's decision. Id.; see also Clowes v. Terminix Int'l, Inc., 109 NJ 575, 587-88 (1988).

Thus, while limited, the standard of review of an agency decision by this Court is by no means perfunctory. Rather, as recognized by this Court in **613 Corporation v. State, Division of State Lottery**, 210 **NJ Super.** 485, 495 (App. Div. 1986).

[t]he appellate tribunal must, however, make more than a perfunctory review; if there exists in the reviewing mind a definite conviction that the determination below went so wide of the mark that a mistake must have been made, the record can be appraised as if the matter were being decided at its inception. **Mayflower Securities**, 64 **NJ** [85,] 93 [(1973)]; **State v. Johnson**, 42 **NJ** 146, 161-162 (1964). **This sense of "wrongness" arises in several ways, among which are the lack of inherently-credible supporting evidence, the**

**obvious overlooking or undervaluation of crucial evidence or a clearly unjust result.** (Emphasis supplied).

See also **Fairweather v. PERS**, 373 **NJ Super.** 288, 295 (App. Div. 2004), wherein this Court, in reversing PERS' denial of accidental disability retirement benefits to a State employee, explained that:

[o]ur review of the Board's denial of accidental disability pension benefits to petitioner, however, is not "simply a *pro forma* exercise in which [we] rubber stamp findings that are not supported by the evidence". **Chou v. Rutgers**, 283 **NJ Super.** 524, 539, 662 **A.2d** 986, 993 (App. Div. 1995), **certify. Denied**, 145 **NJ** 374, 678 **A.2d** 714 (1996).

It is well-settled law in the State of New Jersey that pensions for public employees serve a public purpose and that statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited by them. See **Steinman v. NJ Department of Treasury, Division of Pensions, Teachers' Pension and Annuity Fund**, 116 **NJ** 564, 572 (1989) (quoting **Geller v. Department of the Treasury of New Jersey**, 53 **NJ** 591, 597-98 (1969)).

An agency's interpretation of a statute or case law is subject to *de novo* review. **Russo v. Bd. Of Trs., Police & Fireman's Ret. Sys.**, 206 NJ 14, 27 (2011) (citing **Toll Bros., Inc. v. Twp. Of W. Windsor**, 173 NJ 502, 549 (2022)). An appellate court is "in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue." **Mayflower Sec. Co. v. Bureau of Sec.**, 64 NJ 85, 93 (1973). Thus, in reviewing an agency's decision, the appellate court also examines whether the agency erred in applying the law to the facts. **Twp. Pharmacy v. Div. of Med. Assistance & Health Svcs.** 432 NJ. Super. 273, 283-84 (2013) (citing **In re Stallworth**, 208 NJ 182, 194 (2011)). If review of the record shows that the agency's finding is clearly mistaken, the decision is

not entitled to judicial deference. See H.K. v. Dept. of Human Servs., 184 NJ 367, 386 (2005).

The lack of deference is particularly so when “that interpretation is inaccurate or contrary to legislative objectives.” G.S. Dep’t of Human Servs., Div. of Youth & Family Servs., 157 NJ 161, 170 (1999). The legislative objective with regard to the pension system is “remedial in character” and “should be literally construed and administered in favor of the persons to be benefited thereby.” Geller v. Dept. of Treas. 53 NJ 591, 597-98 (1969).

**II. DUE TO THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT, THE TPAF BOARD ERRED IN DENYING APPELLANT A PLENARY HEARING (Raised Below: Pa 21)**

There is a genuine dispute of material facts in this case. Therefore, it meets the definition of a contested case set forth at N.J.A.C. 1:1-2.1, which defines the term “contested case” as follows:

“Contested case” means an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues

affecting entire industries or large, undefined classes of people.

Furthermore, N.J.S.A. 52:14B-2(b) defines “contested case” as a dispute “in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined.”

In this case, the Appellant lost the right to have the benefit of a Tier 1 membership status in TPAF. It is beyond dispute that the Tier 5 benefits are much less favorable to TPAF members.

Appellant was denied the opportunity to establish that the conditions set forth in N.J.S.A. 18A:66-8 were met. This would have allowed her Tier 1 account to remain active for 10 years. Instead the TPAF Board, without a hearing, used the more limited 2 year time frame set forth in N.J.S.A. 18A:66-7 to her substantial detriment.

**III. THE TPAF BOARD OF TRUSTEES ACTED ARBITRARILY AND CAPRICIOUSLY IN ITS INTERPRETATION OF NJSA 18A:66-7 AND NJSA 18A:66-8 (Raised Below: Pa 21)**

The critical issue in this appeal is whether the TPAF Board of Trustees acted arbitrarily and capriciously in denying the request of the Appellant to maintain her Tier 1 membership status without the benefit of a plenary hearing.

The record reflects that the last contribution to the Appellant’s TPAF Tier 1 membership account was on June 30, 2016 (Pa 31). This was after her contract with the Monmouth Regional High School District was not renewed because the position had been eliminated (Pa 25). The Appellant had been continuously contributing to the Tier 1 account since 1998 (Pa 25).

The Appellant did not become employed again until October 1, 2018, when she commenced employment with the Neptune Board of Education. For a significant portion of the time between when she stopped working for Monmouth Regional and commenced employment with the Neptune School District, the Appellant was on a Workers' Compensation leave from an incident that occurred while she was employed by Monmouth Regional (Pa 23). That precluded her from looking for employment for a significant period of time. The TPAF failed to give any consideration to this circumstance that was not the Petitioner's fault. The TPAF Board only mentioned the workers' compensation leave in noting that her prior employer was no longer obligated to pay the Appellant's pension contributions after her position was eliminated citing to James v. Board of Trustees, Pub. Emps. Ret. Sys., 323 NJ Super. 100, 111 (App. Div. 1999).

N.J.S.A. 18A:66-7(a) states:

Membership of any person shall cease:

- (a) If except as provided in section 18A:66-8, **he shall discontinue his service for more than two consecutive years;**

[emphasis added].

However, under N.J.S.A. 18A:66-8(a), if a teacher:

- (1) Is dismissed by an **employer by reason of reduction in number of teachers employed in the school district**, institution or department when in the judgment of the employer it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization or other good cause; or becomes unemployed by reason of the creation of a regional school district or a consolidated school district; or has been discontinued from service without personal fault or through

leave of absence granted by an employer or permitted by any law of this State; and

- (2) Has not withdrawn the accumulated member's contributions from the retirement system, the teacher's **membership may continue, notwithstanding any provisions of this article, if the member returns to service within a period of 10 years from the date of discontinuance from service.**

[emphasis added]

Rather than utilizing the 10-year extension of N.J.S.A. 18A:66-8, the TPAF used the more limited 2-year time frame set forth in N.J.S.A. 18A:66-7. The TPAF Board concluded that because the Appellant was non-tenured in the Monmouth Regional School District, when her contract was non-renewed, she had no right to continued employment. It relied upon two unreported Appellate Division cases in support of its interpretation of the relevant statutes. In Buskey v. Board of Trustees, TPAF, Appellate Div. Docket No. A-3559-19 (Pa 45), and Harwelik v. Board of Trustees, TPAF, Appellate Div. Docket No. A-0251-21 (Pa 32), similar factual scenarios were presented. In both cases, the TPAF had denied the respective employees requests to maintain their Tier 1 accounts. In both cases, the employees were denied plenary hearings and their requests to maintain Tier 1 status was denied. What makes the case at issue distinguishable is that the Appellant was on an authorized workers' compensation leave of absence for a significant period of time following the non-renewal of her contract. That directly impacted her ability to obtain a new teaching position within the two year statutory window. The TPAF Board erred in giving no consideration to that unique situation. Nor did it afford her a hearing to explore that issue in further detail.



As recently noted by the New Jersey Supreme Court in Seago v. Board of Trustees, Teachers Pension and Annuity Fund (A-9-23), pension statutes for public employees, like PERS and TPAF, “serve a public purpose” and are designed to encourage individuals “to enter and remain in public employment, and to render faithful and efficient service while so employed.” Geller v. Dep’t of Treasury, 53 NJ 591, 597 (1969). And because pension statutes are “remedial in character,” ibid., they are to “be liberally construed and administered in favor of the persons intended to be benefited thereby,” Minsavage v. Bd. Of Trs., TPAF, 240 NJ 103, 107 (2019) (quoting Steinmann v. Dep’t of Treasury, 116 NJ 564, 572 (1989)). We are therefore hesitant to allow ([f]orfeiture of earned pension rights—“a drastic penalty”—“unless that penalty has been clearly mandated by the Legislature.” Bueno v. Bd. Of Trs., TPAF, 422 NJ Super. 227, 242 (App. Div. 2011) (alteration in original) (quoting Fiola v. Dep’t of Treasury, 193 NJ Super. 340, 347-48 (App. Div. 1984)).

In Seago, the Supreme Court applied equitable principles to the Appellant’s circumstances. She had relied upon her employer to complete the application process for an inter-fund transfer between PERS and TPAF and her employer had failed to consummate the transfer in a timely manner. What is also significant about the Court’s decision in Seago is the recognition of the significant differences between the benefits awarded to Tier 1 members and Tier 5 members.

Ms. Kackos had a Tier 1 membership from her prior years of service in multiple school districts. When her contract was not renewed by the Monmouth Regional School District it was through no fault of her own. It was a budgetary decision (Pa 14). It was also through no fault of her own that her search for a new position was delayed by the

injuries she sustained while employed in the Monmouth Regional School District. By denying the Appellant the right to have a hearing, the TPAF Board never had the opportunity to consider the impact that the Appellant's injuries had on her job search. The only mention of the workers' compensation leave of absence in the TPAF Final Administrative Determination was its conclusion that the time that Ms. Kackos was on her workers' compensation leave was not "pensionable" because her contract had already been non-renewed (Pa 29).

Moreover, the TPAF Board gave no consideration to the fact that the Appellant's employment with the Neptune Board of Education commenced on October 1, 2018. This was only 4 months after her Tier 1 account had expired (Pa 31). It was also after her period of receiving temporary disability benefits through workers' compensation had ended and she was receiving workers' compensation permanent partial disability benefits as a result of the settlement of her workers' compensation case. The TPAF acted arbitrarily in not allowing Appellant a hearing to explore the impact that her workers' compensation accident had upon her ability to obtain a new position within the 2-year period following the elimination of her position at Monmouth Regional.

**CONCLUSION**

Based upon the following, it is respectfully submitted that this matter should be remanded for a full hearing to be conducted on the basis for the 2 years of inaction in the Appellant's Tier 1 membership account. The Board of Trustees of TPAF acted arbitrarily and capriciously in its rigid interpretation of N.J.S.A. 18A:66-7 and N.J.S.A. 18A:66-8.

Respectfully submitted,  
**SHIMBERG & FRIEL, P.C.**

Dated: December 5, 2024

BY: /s/ Barbara E. Riefberg  
Barbara E. Riefberg



*State of New Jersey*  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 MARKET STREET  
PO BOX 106  
TRENTON, NJ 08625-0106

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lt. Governor*

MATTHEW J. PLATKIN  
*Attorney General*

MICHAEL C. WALTERS  
*Acting Director*

March 11, 2025

VIA eCOURTS

Marie C. Hanley, Clerk  
Superior Court of New Jersey - Appellate Division  
R.J. Hughes Justice Complex  
PO Box 006  
Trenton, NJ 08625-0006

Re: Jennifer Kackos v. Board of Trustees, Teachers' Pension and Annuity Fund  
Docket No. A-2673-23T2

On Appeal from a Final Agency Decision of the Board of Trustees,  
Teachers' Pension and Annuity Fund

Letter Brief of Respondent, Board of Trustees, Teachers' Pension and  
Annuity Fund on the Merits of the Appeal

Dear Ms. Hanley:

Please accept this letter brief on behalf of Respondent, Board of Trustees,  
Teachers' Pension and Annuity Fund in this appeal.



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### **PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS<sup>1</sup>**

Appellant, Jennifer Kackos, was first enrolled in the Teachers’ Pension and Annuity Fund on September 1, 1998, when she began employment with the Middletown Township Board of Education. (Pa18).<sup>2</sup> On September 1, 2001, Kackos transferred to Ocean County Vocational Schools. *Ibid.* Subsequently, on July 1, 2015, Kackos transferred to Monmouth Regional Schools, where she was employed until June 30, 2016. *Ibid.* Near the end of the 2015-2016 school year, Monmouth Regional High School did not recommend Kackos for rehire for the 2016-2017 school year. (Pa6). The record indicates that Monmouth Regional High School made the last contribution to her TPAF membership account on June 30,

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<sup>1</sup> Because the procedural history and facts are closely related, they are combined to avoid repetition and for the court’s convenience.

<sup>2</sup> “Pa” refers to Kackos’ appendix; “Pb” refers to her brief.

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2016. (Pa18; Pa25). On June 30, 2018, Kackos' TPAF membership account expired pursuant to the provisions of N.J.S.A. 18A:66-7(a). Ibid.

On October 1, 2018, Kackos was hired by the Neptune Board of Education, which submitted a Report of Transfer to TPAF of her behalf. (Pa25). On October 16, 2018, the Division of Pensions and Benefits notified the Neptune Board of Education that it was unable to process Kackos' Report of Transfer because her previous TPAF account had expired and she would have to enroll online for a new account. Ibid. Kackos was enrolled in TPAF with a new Tier 5 membership as of October 1, 2018. Ibid. On November 22, 2022, Monmouth Regional School's superintendent provided a letter stating that Monmouth Regional High School had eliminated one position and therefore did not renew Kackos for rehire for the 2016-2017 school year. (Pa6).

On May 2, 2023, Kackos, through her attorney, requested that her expired TPAF account and her new TPAF account be merged. (Pa4). On September 25, 2023, the Division responded, explaining that Kackos' Tier 1 TPAF account was credited with pension contributions through June 30, 2016, and subsequently expired on June 30, 2018, after being inactive for two consecutive years, pursuant to the requirements of N.J.S.A. 18A:66-7(a). (Pa7). When Kackos was hired by the Neptune Board of Education in October 2018, she had to be enrolled into a new TPAF account. Ibid. The Division further explained that, contrary to Kackos'

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assertions, the Monmouth Regional Schools confirmed that her employment was terminated effective July 1, 2016, and there was no support for the assertion that she was subject to a reduction of force or approved leave. Ibid.

On December 7, 2023, the Board considered Kackos' submissions and the relevant documentation and denied her request to extend her expired TPAF Tier 1 account, affirming the Division's determination from September 23, 2023. (Pa17-20).

On January 11, 2024, Kackos filed an appeal of Board's December 7, 2023 determination, requested a hearing and for the Board to reconsider its denial "in light of the workers' compensation credits that are missing from the member's expired account." (Pa21).<sup>3</sup>

On April 5, 2024, the Board issued its Final Agency Determination affirming its December 11, 2023 determination based on N.J.S.A. 18A:66-7(a) and N.J.A.C. 17:3-7.2(a)2. (Pa24-30). The Board rejected Kackos' request for a hearing, finding that it was able to make its findings of fact and legal conclusions without the

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<sup>3</sup> Ms. Kackos was paid temporary benefits as a result of a Workers' Compensation Claim covering the period of July 1, 2016, through June 15, 2017, and permanent partial disability benefits for 150 weeks, thereafter. (Pa29). The Board noted that, after an employee is properly terminated, the employer is no longer required to pay pension contributions solely because the employee obtains a Workers' Compensation award for pre-termination injuries. N.J.S.A. 43:15A-25.1. Ibid. There was no dispute that Kackos was no longer an employee at the time she received these payments.

necessity of an administrative hearing because there were no “disputed questions of fact.” (Pa30).

This appeal followed.

### **ARGUMENT**

#### **THE BOARD REASONABLY DETERMINED THAT KACKOS’ TIER I TPAF ACCOUNT EXPIRED ON JUNE 30, 2018.**

The scope of review of an administrative agency’s final decision is limited. Russo v. Bd. of Trs., Police & Firemen’s Ret. Sys., 206 N.J. 14, 27 (2011). “An appellate court affords a ‘strong presumption of reasonableness’ to an administrative agency’s exercise of its statutorily delegated responsibilities.” Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep’t of Env’t Prot., 82 N.J. 530, 539 (1980)). “Judicial review of an agency’s final decision is generally limited to a determination of whether the decision is arbitrary, capricious, or unreasonable or lacks fair support in the record.” Mattia v. Bd. of Trs., Police & Firemen’s Ret. Sys., 455 N.J. Super. 217, 221 (App. Div. 2018) (quoting Caminiti v. Bd. of Trs., 431 N.J. Super. 1, 14 (App. Div. 2013) (additional citation omitted)). The party challenging the validity of the administrative decision bears the burden of showing that it was “arbitrary, unreasonable or capricious.” Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).



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While New Jersey pension statutes should be construed liberally “in favor of the persons intended to be benefitted thereby,” Bumbaco v. Bd. of Trs., Pub. Employees’ Ret. Sys., 325 N.J. Super. 90, 94 (App. Div. 1999), “eligibility is not to be liberally permitted.” Smith v. Dep’t of Treas., 390 N.J. Super. 209, 213 (App. Div. 2007). “Instead, in determining a person’s eligibility to a pension, the applicable guidelines must be carefully interpreted so as not to ‘obscure or override considerations of . . . a potential adverse impact on the financial integrity of the [f]und.’” Ibid. (quoting Chaleff v. Teachers’ Pension & Annuity Fund, 188 N.J. Super. 194, 197 (App. Div. 1983) (alterations in original)).

Generally, membership of any person in TPAF shall cease “if, except as provided in section 18A:66-8, he shall discontinue his service for more than two consecutive years.” N.J.S.A. 18A:66-7(a). N.J.S.A. 18A:66-8(a) provides a ten-year extension in limited circumstances. Relevant here, if a teacher:

(1) is dismissed by an employer by reason of reduction in number of teachers employed in the school district, institution or department when in the judgment of the employer it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization or other good cause; or becomes unemployed by reason of the creation of a regional school district or a consolidated school district; or has been discontinued from service without personal fault or through leave of absence granted by an employer or permitted by any law of this State; and

(2) has not withdrawn the accumulated member's contributions from the retirement system, the teacher's membership may continue, notwithstanding any provisions of this article, if the member returns to service within a period of 10 years from the date of discontinuance from service.

[N.J.S.A. 18A:66-8(a).]

This exception to the general rule should "be narrowly construed." Petition of Singer Asset Fin. Co., L.L.C., 314 N.J. Super. 116, 121 (App. Div. 1998). The Board's interpretation of N.J.S.A. 18A:66-8 is entitled to "great weight." Lally v. Pub. Employees' Ret. Sys., 246 N.J. Super. 270, 273 (App. Div. 1991).

Here, the Board correctly determined that Kackos was not entitled to the ten-year extension, and that her Tier I TPAF account rightfully expired after two years of inactivity. (Pa29). The record is clear. Kackos was employed by the Monmouth Regional High School as non-tenured teacher on a yearly contract, until she was notified by the school that her contract was not going to be renewed for the following year effective June 30, 2016. (Pa6). Her employer, Monmouth Regional Schools, confirmed that Kackos' employment was not renewed. Ibid. Accordingly, by operation of law, her account expired two years later on June 30, 2018, as her service was discontinued for more than two consecutive years. N.J.S.A. 18A:66-7(a).

An employer's non-renewal of a teacher's non-guaranteed employment does not fall within the narrow carve-out of N.J.S.A. 18A:66-8(a) as it is not considered

a reduction in number or a discontinuance of service (which both apply to tenured teachers). Cf. Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 497 (2007) (“The practice of offering separate, annual employment contracts to nontenured school employees is long-standing.”). See also id. at 492 (noting non-tenured school employees “have no right to the renewal of their individual contracts”); Bd. of Educ. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497, 501 (App. Div. 1979) (“the right not to renew the contracts of non-tenured teachers” is “a management prerogative”).

With this appeal, Kackos unsuccessfully attempts to distinguish Buskey v. Board of Trustees, A-3559-19 (App. Div. Nov. 22, 2019) (slip op. at 9) (Pa45), and Harwelik v. Board of Trustees, A-0251-21 (App. Div. Feb. 13, 2023) (slip op. at 13) (Pa32). (Pb9). In Buskey, the appellant’s non-tenured teaching position was not renewed and her Tier 2 TPAF account then expired because no contributions had been made to the account in two years. (Pa47). When the appellant began working again in a TPAF-eligible position a few months later, she was enrolled in a new Tier 5 TPAF membership account. Ibid. The appellant’s request to continue her membership in her original Tier 2 account was denied by the Division and upheld by the Board, citing N.J.S.A. 18A:66-7 and N.J.S.A. 18A:66-8. (Pa48).

The Appellate Division upheld the Board’s determination, finding that appellant “was not terminated, dismissed, or otherwise laid off as envisioned by

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N.J.S.A. 18A:66-8. Rather, her contract expired and was not renewed.” (Pa53). The court rejected the appellant’s reliance on the “without personal fault” language in N.J.S.A. 18A:66-8(a)(1), concluding instead that “[n]otwithstanding the fault issue, the statutory extension did not apply to Buskey because she had no right to continued employment after the expiration of her contract.” Ibid. Similarly, here, Kackos did not have a right to continued employment since her position was not tenured and, as Monmouth Regional High School confirmed in its November 22, 2022 letter, Kackos’ employment was not renewed at the end of the 2015-2016 school year. (Pa6).

In Harwelik, the appellant’s TPAF account also expired after two years of no contributions. (Pa33-34). When the appellant attempted to reinstate her Tier I account four years later, the Board denied the request, relying on N.J.S.A. 18A:66-7 for the position that her account had expired after two years of inactivity and N.J.S.A. 18A:66-8 for the position that “a nonrenewal of a teaching contract cannot extend the expiration of membership beyond two years.” (Pa34-36). This court considered whether the statutory exception applied to “non-tenured teachers . . . whose contracts were not renewed” and found “[a]s a matter of law, it does not.” (Pa44). It found “the Board’s interpretation of N.J.S.A. 18A:66-8 to exclude [teachers with expired contracts that are not renewed] from the statutory exemption is reasonable and consistent with legislative objectives.” (Pa43). Again, for the

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same reasons, Kackos is not entitled to reinstatement of her Tier I account because her contract had expired and was not renewed. (Pa6).

Kackos argues on appeal that her case is different because she “was on an authorized workers’ compensation leave of absence for a significant period of time following the non-renewal of her contract.” (Pb9). She argues now that this leave of absence “directly impacted her ability to obtain a new teaching position within the two year statutory window” and that the “TPAF Board erred in giving no consideration to that unique situation.” Ibid.

As noted, the Board did acknowledge that Kackos was paid temporary benefits under her workers’ compensation claim from the period of July 1, 2016, through June 15, 2017, and that she received permanent partial disability benefits for 150 weeks thereafter. (Pa29). Significantly, Kackos was no longer an employee at the time she received those payments. Ibid. Thus, the Board found that “[a]fter an employee is properly terminated, the employer is no longer required to pay pension contributions solely because the employee obtains a Workers’ Compensation award for pre-termination injuries.” Ibid. (citing N.J.S.A. 43:15A-25.1 (effect of receiving periodic workers’ compensation benefits for members); James v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 323 N.J. Super. 100, 111 (App. Div. 1999) (“25.1 does not require any continued pension contributions after an employee has been properly terminated, solely because that employee obtains a workers’

compensation award for pre-termination injuries”). On this record, it is clear that the Board did consider the fact that Kackos received workers’ compensation benefits after her contract was not renewed but rightly rejected that as unconnected to the inactivity on her pension account. (Pa29-30).

Additionally, Kackos’ reliance on Seago v. Board of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381, 396 (2024) (Pb10), is misplaced. The facts of Seago are incomparable and unique. There, the employer failed to timely complete their portion of the appellant’s transfer application and there was nothing appellant could have done to force her employer to submit the form. Id. at 384. In ruling in favor of appellant on the equities, the Court stated that:

[W]e do not hold that it is in fact the employer’s responsibility to file an interfund transfer application on a member’s behalf. Additionally, we do not hold that a member will be entitled to an interfund transfer in every case in which a former employer fails to complete an interfund transfer application on the member’s behalf within the time limitations provided in the regulations. Rather, under the specific circumstances presented in this case, we conclude that as a matter of equity the TPAF Board must grant [appellant]’s interfund transfer application as if it were timely filed.

[Seago, 257 N.J. at 400-01.]

There are no factual similarities between Seago and this case and the Supreme Court clearly stated that its holding was to be narrowly applied to the “unique circumstances” there. Ibid. The Court also concluded that the harm to the pension

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system would not be significant as compared to the harm to the appellant in that case. Ibid.

Here, Kackos' last contribution to her Tier I membership was on June 30, 2016, and her membership expired June 30, 2018, pursuant to the provisions of N.J.S.A. 18A:66-7(a). (Pa7). There was no failure on the part of the employer in processing the new application. The Board considered all relevant documents and submissions, and applied the clear statutory mandate of N.J.S.A. 18A:66-7 to the facts of the matter. (Pa30). The plain language of N.J.S.A. 18A:66-7 does not provide any grace period for account expiration. Kackos' argument on appeal that "TPAF Board gave no consideration to the fact" that Kackos was hired "only 4 months after her Tier 1 account had expired" (Pb11), is without merit. The Board considered all circumstances of Kackos' matter when rendering its decision and found no basis to usurp the clear statutory mandate. (Pa27-30).

Finally, Kackos argues that TPAF "acted arbitrarily in not allowing Appellant a hearing to explore the impact that her workers' compensation accident had upon her ability to obtain a new position within the 2-year period following the elimination of her position at Monmouth Regional." (Pb11). "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." Frank v. Ivy Club, 120 N.J. 73, 98 (1990). "The mere existence of disputed facts is not conclusive." Ibid.

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Accordingly, the Board must grant an administrative hearing here only if there is a dispute as to the material facts of Kackos' employment. Bally Mfg. Corp. v. Casino Control Comm'n, 85 N.J. 325, 334 (1981). On this record, there is no dispute. All the terms of Kackos' employment are contained in the record. The only issue to be resolved is whether as a matter of law the ten-year account extension applies to non-tenured teachers whose contract is not renewed.

Thus, in denying Kackos' request for an administrative hearing here, the Board relied on its consistent application of N.J.S.A. 18A:66-8, coupled with the evidence presented by Kackos and her employers. (Pa30). There is no distinction between non-renewal of a teaching contract for budgetary reasons and for performance reasons—in either scenario N.J.S.A. 18A:66-8 does not apply. Buskey, slip op. at 8. (Pa53). No new factual evidence or testimony could be espoused by Kackos that can change the Board's analysis. Accordingly, the record amply supports that there is no dispute that warrants a hearing in this matter.

### **CONCLUSION**

For these reasons, the Board's determination that Kackos' TPAF Tier I account expired on June 30, 2018, and cannot be merged with her newly opened Tier 5 account should be affirmed.



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Respectfully submitted,

Matthew J. Platkin

ATTORNEY GENERAL OF NEW JERSEY

By: Roza Dabaghyan, DAG  
Roza Dabaghyan - 068132013  
Deputy Attorney General  
Roza.Dabaghyan@law.njoag.gov

Janet Greenberg Cohen  
Assistant Attorney General  
Of Counsel

cc: Barbara E. Riefberg, Esquire



Charles Shimberg°  
Sara K. Saltsman°  
Nicholas W. Kaulback  
Mary T. Madden\*  
Samantha N. DiGiuseppe\*  
Alexander P. Maddams\*  
Nancy A. Nolan\* - Of Counsel  
Barbara E. Riefberg\* - Of Counsel

Cherry Hill Plaza  
1415 Route 70 East  
Suite 103  
Cherry Hill, New Jersey 08034

Tel: (856) 857-0700 ♦ Fax: (856) 857-1166

Ten Penn Center  
1801 Market Street, Suite 1100  
Philadelphia, PA 19103

°Member NJ, PA & NY Bars  
\*Member NJ & PA Bars

Kathleen D. Friel (1969-2010)

March 25, 2025

**Via eCourts**

Marie C. Hanley, Clerk  
Superior Court of New Jersey- Appellate Division  
R.J. Hughes Justice Complex  
P.O. Box 006  
Trenton, NJ 08625-0006

**RE: Jennifer Kackos v. Board of Trustees, Teachers' Pension and Annuity Fund**  
**Docket No.: A-2673-23T2**

**On Appeal from a Final Agency Decision of the Board of Trustees, Teachers' Pension and Annuity Fund**

**Letter Brief of Petitioner in Reply to the Letter Brief of Respondent, Board of Trustees, Teachers' Pension and Annuity Fund**  
**Our File No.: 03227**

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Dear Ms. Hanley:

Please accept this Letter Brief on behalf of Appellant Jennifer Kackos in reply to the Brief recently filed by the Respondent.

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## **ARGUMENT**

### **I. THE BOARD ERRED IN DENYING PETITIONER A PLENARY HEARING**

As noted in the Petitioner's Brief, the dispute in this case met the definition of a "contested case" as set forth in N.J.A.C. 1:1-21. She was not permitted an opportunity to have a plenary hearing. Had such a hearing been granted, she would have had the opportunity to explain in detail how the workers' compensation leave that she was on from July 1, 2016, through June 15, 2017, directly impacted her ability to obtain alternate employment. Since her Tier 1 Pension Account was not active from June 30, 2016, through June 30, 2018, the impact of the workers' compensation leave was significant.

She would also have had an opportunity to explain the impact of the loss of her Tier 1 status had on her ability to retire. This Petitioner had already paid into the TPAF System from 1998 until 2016. She only lost the Tier 1 status because she chose to accept a position in another school district which ended up being eliminated before she obtained tenure. Had the position been eliminated after she attained tenure, she would have been subject to N.J.S.A. 18A:66-8(a) since it would have been considered a reduction in force. The longer ten (10) year period would have been applicable.

### **II. THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ITS RIGID INTERPRETATION OF N.J.S.A. 18A:66-7 AND 18A:66-8**

The Board contends that its decision to deny Petitioner's request to have her Tier 1 pension account maintained was correct and should be upheld. It virtually ignores the long line of cases that provide that New Jersey pension statutes should be liberally construed "in favor of the persons intended to be benefited thereby." Bumbaco v. Board of Trustees, PERS 325 N.J. Super. 90.94 (App. Div. 1999). The Board cites to cases that discuss the potential adverse impact on the financial integrity of the pension system. However, that ignores the fact that the instant dispute is very fact specific and not going to have a significant adverse impact on the financial integrity of the Teachers' Pension and Annuity Fund. It will however have a significant impact upon the Petitioner and her prospective retirement benefits.

An administrative agency's interpretation of a statute is always subject to *de novo* review by an appellate court. Russo v. Board of Trustees, Police & Fireman's

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Retirement System, 206 N.J. 14.27 (2011) (citing Toll Bros. Inc. v. Twp. Of Winslow, 173 N.J. 502, 549 (2022)). It is respectfully submitted that the Court should review the Board's decision as to the denial of the Petitioner's request to maintain her Tier 1 pension status. There were unique facts that the Board chose to ignore and it wrongfully denied the Petitioner an opportunity to explain these facts at a plenary hearing.

The significance of the Petitioner's citation to the case of Seago v. Board of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381 (2024) is not based upon factual similarity to this case. Rather it was cited to highlight the Supreme Courts recognition that pension statutes for public employees serve a public purpose and are designed to encourage public employees to remain employed and render faithful service. Petitioner was a long-term employee and through circumstances not of her own doing, she has experienced a significant reduction of her pension rights. She was injured on the job and then was the subject of a contract termination for budgeting reasons. Neither instance was her fault, yet she is experiencing a significant financial impact due to the different retirement benefits available to a Tier 1 member as opposed to a Tier 1 member.

### **CONCLUSION**

It is respectfully submitted that the decision of the TPAF Board should be reversed and the matter remanded for a plenary hearing.

SHIMBERG & FRIEL, P.C.  
Attorneys for the Appellant,  
Jennifer Kackos

BY: /s/ Barbara E. Riefberg  
Barbara E. Riefberg

BER/kag