SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1570-15T1

EAST WINDSOR REGIONAL
BOARD OF EDUCATION,

Appellant,

v.

BOARD OF TRUSTEES OF THE TEACHERS'
PENSION AND ANNUITY FUND,

Respondent.

Argued February 1, 2017 – Decided March 7, 2017

Before Judges Alvarez and Manahan.

On appeal from the Division of Pensions and Benefits, Teachers' Pension and Annuity Fund, Docket No. 0121.

David B. Rubin argued the cause for appellant.

Danielle P. Schimmel, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Schimmel, on the brief).

PER CURIAM

The East Windsor Regional Board of Education (BOE) appeals from a final agency decision of the Board of Trustees of the

Teachers' Pension and Annuity Fund (Board), finding that the BOE offered its employees an unauthorized Early Retirement Incentive (ERI) and assessing the BOE the Teachers' Pension and Annuity Fund's (Fund) resultant increased pension liability. We affirm.

On May 18, 2007, the BOE and the East Windsor Education Association (Association) approved a Sidebar Agreement (Agreement) which supplemented Article XVIII of the 2006-09 collective negotiations agreement. The Agreement provided:

> 1. This [] Agreement and amendment shall be in effect for all members of the Association who voluntarily terminate their service effective June 30, 2007, and will automatically be rendered null and void at midnight on June 30, 2007.
>
> 2. Any teacher who voluntarily terminates employment in the East Windsor School District and submits an irrevocable letter of resignation effective not later than June 30, 2007, shall be entitled to payment for accumulated unused sick days on the following terms:
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> > A. Retirement under [the Fund] will NOT be a requirement for payment;
> >
> > B. No minimum number of accumulated sick days will be required for payment;
> >
> > C. All accumulated unused days will be eligible for payment for employees with [twenty] years employment or more by the East Windsor Regional School District;

> D. Two hundred dollars ($200) will be paid for each and every accumulated sick day up to and including 100 days;
>
> E. One hundred dollars ($100) will be paid for each and every accumulated sick day beyond 100 days;
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> F. The maximum payment shall be $30,000[.]

The Agreement also provided that the enhanced payouts would be made in three equal installments in 2007, 2008, and 2009.

On July 3, 2007, upon receipt of notice that the BOE was offering a voluntary separation program, Michael Czyzyk, Supervisor of the Division of Pensions and Benefits (Division), External Audit Unit, wrote to Kurt Stumbaugh, Secretary of the BOE, and advised that the Division sought to review the Agreement. In furtherance of the Division's review, Czyzyk requested the BOE provide information and documentation relating to:

> 1. Any and all buyout, separation of other agreements relative to employment separation programs currently in[]force, those being negotiated or those that have been in[]force, but have terminated within the last two years from the date of this correspondence; executed between the [BOE] and its employees, specific group of employees or any individual employee.
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> 2. Resolutions adopted relative to [number one] above.

> 3. A list of employees eligible to participate in the aforementioned program, including but not limited to:
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> > [a.] Names of those eligible to participate[;]
> >
> > [b.] Pension membership [number;]
> >
> > [c.] Eligible incentive compensation receivable[;]
> >
> > [d.] Amount of trade-in, buy-out component (i.e. sick time)[;]
> >
> > [e.] Years of service in the pension system.

Czyzyk also requested that Stumbaugh "identify from the eligible employee list, those electing to participate in the program." Stumbaugh responded to the Division by letter on July 12, 2007, attaching the Agreement, a list of eligible employees, actual participants in the program with pension numbers, compensation and sick time, and certified minutes. The information provided a list of 142 eligible employees who had attained the required years of service, 13 of whom took advantage of the incentive. In correspondence dated July 31, 2007, Stumbaugh informed Czyzyk that the maximum payout for unused sick time under the Agreement was $30,000. He also provided an executed copy of the Agreement.

Just over one year later, Susanne Culliton, the Division's Assistant Director, wrote to Stumbaugh to advise that the ERI had

neither been reviewed by the Division nor authorized by enabling legislation.[1] Culliton requested that Stumbaugh provide "a final list of all individuals that retired under your ERI" so that the Board's actuary, per N.J.S.A. 18A:66-58, could determine "the acceleration cost of this incentive" for which the BOE would be billed. Attached to Culliton's letter was a Division "Fact Sheet" relating to "Early Retirement Incentives."[2]

There was no response communicated by Stumbaugh to the Culliton letter. A draft letter authored by Stumbaugh was located on a backup computer disk that appears not to have been sent to the Division.

The next communication from the Division regarding the Agreement was a February 6, 2014 letter from Florence Sheppard, the Acting Director. In her letter to Dianna Bonilla, the BOE's Certifying Officer, Sheppard advised that "[a]fter reviewing the details of the severance package offered by [the BOE] to its

[1] Legislation authorizing ERI programs for employees of school boards was enacted in 1991, 1993, and 2003. See L. 1991, c. 231; L. 1993, c. 163; L. 2003, c. 129.

[2] The BOE takes issue with whether Culliton's letter was received or, if received, whether the fact sheet was included. Although we do not find a determination of this issue between the BOE and the Board to be relevant to our decision, we note that both the letter and the fact sheet are part of the BOE's appendix. We also note that the BOE does not dispute that the letter was sent or the letter's content.

employees, [the Division] has determined it to be an unauthorized early retirement incentive." Sheppard further advised that as a result of the unauthorized ERI program, the district would be assessed $1,519,000 in "additional pension liability," and enclosed a "bill" for that amount which was "due upon receipt."

On March 10, 2014, the BOE appealed this determination and requested additional time to investigate the matter and gather information. The BOE sought assistance with reconstructing the correspondence between Stumbaugh and Czyzyk. The Board responded to the inquiry, supplying a copy of Culliton's letter of August 1, 2008, as an attachment. On May 13, 2014, the BOE filed a brief in support of its appeal wherein it disputed that the Agreement was an ERI, arguing that it was a labor agreement addressing a mandatorily negotiable term and condition of employment. The BOE further argued that even if the Agreement were an ERI, the seven-year delay relieved it of liability.

On June 4, 2014, the Division provided the BOE with a detailed spreadsheet entitled "Unauthorized ERI Summary" containing the breakdown of costs associated with the ERI.

The Division's Deputy Director, John Megariotis, replied to the BOE brief on June 6, 2014, in which he noted the Agreement provided an enhanced sick leave payout contingent upon the termination of services by a specified date. Megariotis further

noted that the enhancement was only available to those employees with twenty years or more service with the BOE and that the incentive was targeted to and attractive only to retirement-eligible employees.

Megariotis also noted the Division advised the BOE in writing in July 2007, that there were concerns over a possible separation incentive being offered and, although the BOE complied with the Division's request for information, it had proceeded with the incentive prior to contacting the Division for guidance. Megariotis acknowledged the delay between the Division's initial communication and its actuarial assessment calculating the unfunded costs owed, but stated this delay did not prejudice the BOE, since its liability for the accelerated costs was applied without interest. Finally, Megariotis advised that the BOE's disagreement with the Division's determination would be submitted to the Board.

The first meeting scheduled for the Board to consider the BOE's appeal was on October 2, 2014. However, due to various scheduling conflicts and information requests and exchanges, this date, and subsequent scheduled dates to hear the appeal, were adjourned. The Board did not consider the appeal until the September 10, 2015, regular meeting.

In a final written decision, the Board affirmed the Division's administrative finding that the terms of the Agreement constituted an illegal ERI and that the BOE was required to reimburse the unfunded liability. The Board denied the BOE's request to have the matter referred to the Office of Administrative Law for a hearing, finding no factual issues in dispute.

Addressing the BOE's argument that the Agreement did not constitute an ERI, the Board held:

> (1) The provisions of the [] Agreement offered to employees in the [East Windsor Regional School District] enrolled in the [Fund] an enhanced sick leave payout with [twenty] years of employment or more with the district and with no minimum number of accumulated sick days, in exchange for submitting an irrevocable letter of resignation effective not later than June 30, 2007. The fact that the terms of the program did not require the participants to retire is not germane to the ultimate funding especially since each of the participants did, in fact, retire;
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> (2) It is the Board's and the Division's responsibility to administer regulations established to safeguard the integrity of the various retirement systems administered by the State. Arrangements that are offered to employees as an incentive to retire are generally impermissible unless they are provided through permissive legislation. The law on this subject is clearly set forth in Fair Lawn Education Association v. Fair Lawn Board of Education, 79 N.J. 574 (1979), in which the Supreme Court of New Jersey held invalid an early retirement plan because it posed a potential for financial harm to the

> State-administered retirement system and was not authorized by State law; and
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> (3) Even though the provisions of the [] Agreement did not increase a member's monthly retirement amount, it provided a financial incentive to include those who were eligible to retire, thus creating an earlier retirement than they would otherwise plan. This factor is significant in that the funding of the [Fund] is predicated upon the experience ratings of the total membership.

The Board explained that the subject of public employee pensions had been preempted by the Legislature, which permitted ERIs on only three occasions. The decision continued:

> Per N.J.S.A. 18A:66-58, the actuary for the [Fund] establishes probabilities of retirement based upon experience of the entire group and uses that as a basis to develop employer contribution requirements. When employers offer employees incentives to retire sooner than when actuarially anticipated, as in this instant matter, it alters the retirement pattern of the Fund and impacts the ability of the retirement system to establish reasonably accurate experience assumptions, on which funding is based.

The Board further determined that the Agreement provided a meaningful inducement for those eligible to retire.

In light of our review, we are satisfied that the Board's decision was comprehensive and well-reasoned. The Board addressed the BOE's argument that disputed issues of material fact required a hearing. The decision addressed each issue raised by the BOE. The decision explained the Agreement's early retirement incentives

were clear and unambiguous. In addition, in recognition of its delay in billing, the Board established a five-year payment schedule with no additional interest. Finally, the Board found the assessment was calculated by the Fund's actuaries, in accordance with N.J.S.A. 18A:66-58, and represented the unfunded liability, which the BOE was required to pay.

On appeal, the BOE disputes the Agreement is an ERI. It also contends the Division's delay in asserting its alleged claim against the BOE estops the Division from collecting the assessment. Lastly, the BOE argues it was deprived of the opportunity to challenge the Division's determination and assessment at a hearing before an Administrative Law Judge.

The scope of appellate review of a final administrative agency decision is limited. In re Taylor, 158 N.J. 644, 656 (1999) (citation omitted). Generally, courts "defer to the specialized or technical expertise of the agency charged with administration of a regulatory system." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). For those reasons, "an appellate court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial

evidence." Ibid. "Where . . . the determination is founded upon sufficient credible evidence seen from the totality of the record and on that record findings have been made and conclusions reached involving agency expertise, the agency decision should be sustained." Gerba v. Bd. of Trs. of the Pub. Emps. Ret. Sys., 83 N.J. 174, 189 (1980) (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

Applying those principles, we affirm substantially for the reasons given by the Board in its final written determination. We conclude that the Board's determination was supported by sufficient credible evidence culled from the totality of the record, and that the Board reached its conclusion based on its agency expertise.

The BOE's assertions that the Board is estopped from taking agency action, and the BOE's claim that it was denied a hearing on disputed issues, are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D) and (E). We add only these comments.

The BOE did not justifiably rely upon any action taken by the Division. To the contrary, the BOE approved the Agreement without consulting the Division or obtaining approval and then implemented the Agreement after receiving a letter from the Division stating approval was required before such a plan could be implemented.

The argument that the BOE was not provided a fair opportunity to challenge the Division's assessment finds no support in the record. Again, to the contrary, the Board reduced the assessment based on challenges presented by the BOE. As to the actuarial computations, the BOE provided no actuarial evidence to contradict the charges.

Affirmed.