



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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Lt. Governor

August 22, 2022

Sent via email to: [REDACTED]

James R. Lisa, Esq.
[REDACTED]
[REDACTED]

RE: Janet Costello
TPAF [REDACTED]
OAL DKT. NO. TYP 00793-20

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Lisa:

At its meeting on August 9, 2022, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) considered the Initial Decision (ID) of the Honorable Elia A. Pelios, Administrative Law Judge (ALJ), dated May 24, 2022; all exhibits; and the exceptions filed by Deputy Attorney General Matthew Melton, dated June 6, 2022. The Board noted the exceptions. After careful consideration, the Board voted to reject the ALJ's decision that reversed the Board's decision that Janet Costello is required to repay her outstanding loan balance with accrued interest.

The ALJ found the evidence in the record was insufficient in establishing that Ms. Costello received a pension loan in the amount of [REDACTED] in 2004.

For the reasons set forth below, the Board rejected the ALJ's decision that reversed the Board's decision that Ms. Costello is required to repay any outstanding loan balance and interest accrued therein. The Board directed the Secretary to prepare the Findings of Fact and Conclusions of Law as outlined below, which were approved by the TPAF Board at its meeting

on August 22, 2022.¹ This will constitute the Board's Final Administrative Determination in this matter.

FINDINGS OF FACT

The record shows that Ms. Costello established membership in the TPAF on October 1, 1974, based on her employment as a Teacher with the Hoboken Board of Education (Hoboken BOE). Her contributions with this location continued through June 30, 2004.

On May 17, 2004, Ms. Costello completed an *Application for Retirement Allowance* on which she requested a July 1, 2019 Early retirement under Option 1.

The Division conducted an audit in 2017 to measure compliance with the IRS regulations which mandate that all pensions loans must be paid off within a five-year period. The audit of Ms. Costello's account revealed an outstanding loan balance of [REDACTED]. To maintain compliance with the IRS, the Division notified Ms. Costello that it would begin deducting [REDACTED] from her pension checks starting January 1, 2017² to satisfy her outstanding loan balance. ID at 2.

On December 19, 2017, you wrote the Division on behalf of Ms. Costello and requested more information regarding the loan balance and an accounting delineating the balance before the deductions commenced. ID at 2. In your letter, you also stated that you wished to discuss a possible lump-sum settlement.

In response, by letter dated January 19, 2018, Michael Kusmierczyk, Supervising Accountant, advised you that according to the records posted to Ms. Costello's account, a check was issued to her on May 26, 2004, in the amount of [REDACTED]. Deductions were to begin on September 1, 2004; however, she retired effective July 1, 2004, so no deductions were ever

¹ Due to health and safety concerns for the public regarding COVID-19, the Board meeting was conducted via teleconference.

² The Board notes the ID incorrectly lists the start date for deductions to begin as January 1, 2017, the correct date is January 1, 2018.

withheld. There was an outstanding balance as of her retirement date and she should have been billed for the remaining balance due, but this did not occur and the payments were never carried into retirement. The balance due as of Ms. Costello's retirement date was [REDACTED], which includes the interest that accumulated from May 26, 2004 through June 30, 2004. Mr. Kusmierczyk further stated that the Division cannot negotiate a settlement; but that Ms. Costello could pay the total balance due in a lump sum in order to avoid additional interest charges. He then provided a payoff balance and date by which to make payment. He also provided account screen prints and the *Certification of Payroll Deductions* regarding the outstanding loan balance, but was unable to provide a copy of the cashed loan check as the retention period is 7 years.

Mr. Kusmierczyk's determination was made in accordance with the Correction of Errors statute, N.J.S.A. 18A:66-63, which states:

If any change or error in records results in a member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, then on discovery of the error, the board of trustees shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

He further stated that interest could not be waived for the outstanding loan balance, as the TPAF statutes (N.J.S.A. 18A:66-35 and N.J.S.A. 18A:66-35.1), Internal Revenue Code, and applicable regulations require interest to be paid on Ms. Costello's loan balance, which is also part of the loan agreement she entered into when the loan was taken.

On November 27, 2019, you filed an appeal of the January 29, 2018 administrative determination. In your appeal, you contend that Ms. Costello never took a pension loan in 2004, immediately preceding her retirement, and that it was your position that either there was an error in the database or that someone with access to Ms. Costello's account and/or database took the loan.

Thereafter, you appealed directly to the Superior Court of New Jersey Law Division instead of first submitting the appeal to cancel the outstanding loan obligation billed by the Division of Pensions and Benefits to the TPAF Board. Because of a court order, the deductions from Ms. Costello's retirement benefits were suspended.

At its meeting of January 9, 2020, the TPAF Board considered your personal statements on behalf of your client, Ms. Costello requesting that the Board cancel the loan repayment schedule and refund any payments made for the outstanding balance of her pension loan obligation owed as determined by the Division.

Following its review, the Board denied your request to cancel the loan repayment scheduled to satisfy the loan obligation with accrued interest that is owed to Ms. Costello's account, but approved your request to transmit the matter to the Office of Administrative Law. The Board noted that with evidence of a loan obligation, the Board cannot cease collections of the loan obligation. The Board also denied your request to stay any further loan deductions from Ms. Costello's monthly retirement allowance and thereafter resumed collection of such payments. In making its decision the Board relied on N.J.A.C. 17:1-2.10(d)2, which states in pertinent part:

...

(d) Rules concerning the unresolved differences in retirement accounts are as follows:

...

2. All money found to be due and payable subsequent to a member's retirement shall be repaid in one sum. In the event the retiree is unable to make payment in one lump sum, repayment may be scheduled over a period not to exceed five years. Regular interest, as defined by N.J.S.A. 43:15A-6n, 18A:66-2m, 43:16A-1(9), 53:5A-3p and 43:6A-3n, shall apply to all such repayment schedules. Any other schedule of repayment shall be referred to the Board of Trustees for consideration. As a condition of establishing a repayment schedule, the Division will automatically put a hold on the distribution of the member's group life insurance

until such time that the obligation is satisfied. Any remaining funds from the group life insurance will be distributed in accordance with the member's last Designation of Beneficiary on file.

CONCLUSIONS OF LAW

N.J.S.A. 52:14B-10(c), provides for the rejection or modification of findings of fact and conclusions of law by the ALJ so long as Board "state[s] clearly the reasons for doing so." It is well within the right of the Board to "make new or modified findings supported by sufficient, competent, and credible evidence in the record." Ibid. The Board rejects the ALJ's finding that there is insufficient evidence to find Ms. Costello received a pension loan in 2004. "The order or final decision rejecting or modifying the initial decision shall state in clear and sufficient detail the nature of the rejection or modification, the reasons for it, the specific evidence at hearing and interpretation of law upon which it is based and precise changes in result or disposition caused by the rejection or modification." N.J.A.C. 1:1-18.6(b). See In re Carter, 191 N.J. 474 (2007) (There the court erred by concluding that the punishment of removal for the sleeping charges was too severe and substituting its own reevaluation of the case for the Board's opinion that terminated the police officer from his position.)

Active TPAF members may be eligible to take out a pension loan as follows:

Any member who has at least 3 years of service to his credit for which he has contributed as a member may borrow from the retirement system, an amount equal to not more than 50% of the amount of his accumulated deductions, but not less than \$50.00; provided, that the amount so borrowed, together with interest thereon, can be repaid by additional deductions from compensation, not in excess of 25% of the member's compensation, made at the same time compensation is paid to the member.

...

Loans shall be made to a member from his accumulated deductions. The interest earned on such loans shall be treated in the same manner as interest earned from investments of the retirement system.

[N.J.S.A. 18A:66-35]

Repayment of such loans when a member retires is addressed at N.J.S.A. 18:66-35.1, which states:

In the case of any member who retires without paying the full amount so borrowed, the Division of Pensions and Benefits shall deduct from the retirement benefit payments the same monthly amount which was deducted from the compensation of the member immediately preceding retirement until the balance of the amount borrowed together with the interest is repaid. In the case of a pensioner who dies before the outstanding balance of the loan and interest thereon has been recovered, the remaining balance shall be repaid from the proceeds of any other benefit payable on the account of the pensioner either in the form of monthly payments due to his beneficiaries or in the form of lump sum payments payable for pension or group life insurance.

Where a government agency engages in enforcement activity, the burden falls on the agency to establish the claimed violations by a preponderance of credible evidence. In re Verdese, 96 N.J.A.R. 2d (TYP) 11. One of the critical functions of this court is to make “findings of fact as to issues of credibility of lay witness testimony.” N.J.S.A. 52:14B-10(c). The choice of accepting or rejecting a witness’s testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). A fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” In re Estate of Perrone, 5 N.J. 514, 521-22 (1950); see also Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In this matter, a preponderance of credible evidence shows that Ms. Costello received a pension loan in May 2004. Robin Willever, who testified on behalf of the Board, noted three Division documents that corroborate the existence of the loan. First, Ms. Willever testified towards a *Certification of Payroll Deductions*, which is a system-generated document that is routinely sent to both the member and the employer after a loan application has been processed and a check

has been issued. ID at 3. The *Certification of Payroll Deductions* reflects a check # [REDACTED] in the amount of [REDACTED] was issued to Ms. Costello on May 26, 2004, and that payments were to begin in September 2004 to satisfy the obligation. Ibid. Second, Ms. Willever testified regarding Ms. Costello's "Account History Screen," which displays the amounts the Division receives quarterly for pension contribution, pension deductions, loan repayments, etc. Ibid. The Account History Screen for Ms. Costello's account showed a loan balance of [REDACTED] in the second quarter of 2004, and a previous loan was paid off in the prior year. Ibid. Finally, a "TPAF Loans History Report" for the third quarter of 2005 shows the loan was entered into the system on May 17, 2004, the same date Ms. Costello applied for a retirement allowance. This report corroborates the amount of the loan check and the date issued as described on the *Certification of Payroll Deductions*. Ibid. As indicated previously, copies of the loan check and loan application were not available, however Ms. Willever reliably testified that the check had been cashed because there was no indication in the Division's bookkeeping system that the check remained outstanding. Ibid.

The Board asserts that the ALJ unreasonably based his decision on the fact that only one document was generated contemporaneously to the actual loan to corroborate the same. ID at 7. Instead, the Board held Ms. Costello's Account History and the TPAF Loan History Report further show that around the time the loan was taken out the Division had data in relation to the loan in its system. Additionally, the ALJ incorrectly suggests the Board relied solely upon circumstantial business practices to prove the existence of the loan. As stated above, three separate documents specifically link Ms. Costello to the loan in question. None of the aforementioned documents would exist absent the loan.

Moreover, Ms. Willever provided a reasonable explanation as to why the loan balance went undetected. She reliably testified that due to an error, the pension loan identified as Ms. Costello's was not transferred into her retirement account. ID at 4. She further testified that as a ten-month employee, repayment for the loan was not scheduled to commence until September

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2004 and that the loan section was unaware she applied for retirement at the time of processing the loan. In addition, she testified to approximately 2,300 other accounts that were identified by the audit that exhibited similar errors, many where the debt was acknowledged and paid in full. ID at 4. The Appellate Division upheld the Board's right to correct similar errors and recoup outstanding loan balances, including interest accrued on outstanding loan amounts that went undetected by the Division. See Zilberberg v. Bd. Of Trs., Teachers' Pension and Annuity Fund, 468 N.J. Super. 504,513 (App. Div. 2021)

In contrast, Ms. Costello offered no evidence to rebut Ms. Willever's testimony and the three documents that substantiate the existence of the loan. Further, Ms. Costello did not even deny that she took out the loan, only that she didn't remember taking out a loan at that time. ID at 4-5. Therefore, the Board has proven by a preponderance of evidence that Ms. Costello did indeed receive a pension loan in 2004.

For the foregoing reasons, the Board rejected the ALJ's conclusion that there is insufficient evidence to prove Ms. Costello received a pension loan in 2004, and affirms its January 9, 2020 determination.

You have the right to appeal this administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter, in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



Saretta Dudley, Secretary
Board of Trustees

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Teachers' Pension and Annuity Fund

G-2/SD

c: Janet Costello
D. Bernardini (ET); R. Willever (ET);

DAG Jeffrey Padgett (ET); DAG Matthew Melton (ET)
OAL, Attn: Library (ET)