



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
P. O. Box 295

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ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

May 5, 2023

Sent via email to: [REDACTED]

Samuel J. Halpern, Esq.  
Attorney at Law

[REDACTED]

Re: Cheryl Kress  
TPAF [REDACTED]  
TPAF [REDACTED]

Dear Mr. Halpern:

I am writing in reference to the decision of the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) regarding the matter of your client, Cheryl Kress, and her request for the compensation she received as a result of a settlement agreement between her and Kenilworth Board of Education (Kenilworth)<sup>1</sup> to be deemed creditable and be used for her pension benefit calculation. At its meeting of April 13, 2023, the Board reviewed your written submissions and accompanying documentation and found that the statutes and relevant case law governing TPAF do not permit the Board to grant Ms. Kress' request. Finding no genuine issue of material fact in dispute, the Board also denied your request for an administrative hearing. The Board's Findings of Fact and Conclusions of Law as outlined below were presented to and approved by the Board at its May 4, 2023 meeting.

## **FINDINGS OF FACT**

The record before the Board establishes that Cheryl Kress was enrolled in TPAF effective September 1, 1991, on the basis of her employment with Union Township Board of Education as

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<sup>1</sup> Cheryl Kress vs. Kenilworth Board of Education vs. Kenilworth Education Association

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a Teacher. On September 1, 1997, she transferred to Kenilworth Borough Board of Education where she held the position of Teacher. She remained in this position and at this location until her resignation on April 30, 2021. Mrs. Kress applied for retirement effective May 1, 2021, having accrued 41 years, and 1 month of service credit.

The record also shows that Mrs. Kress terminated employment as a result of a settlement agreement that resolved a civil lawsuit she brought against Kenilworth to remedy her claims of gender discrimination against her, in which she alleged that Kenilworth's male teachers were illegally paid more compensation than her.

By letter dated August 5, 2022, Michael Kusmierczyk, Manager, Fiscal Resources, of the Division's Defined Benefit and Defined Contribution Plans Reporting Bureau, informed you that the salaries awarded as a result of the settlement agreement were not acceptable for pension calculation purposes. Citing N.J.A.C. 17:3-4.1, the Division denied Mrs. Kress' retroactive salary increase of \$32,083 (which resulted in an average annual salary increase of 30.5%) because it was determined to be a significant increase in anticipation of retirement and there was no explanation provided as to how the figure was calculated. In addition, the settlement agreement only increased Mrs. Kress' salary for the final three years of service, rather than distributing the salaries equally during the years she alleged she was illegally underpaid in relation to her male counterparts. Arranging the settlement in such a way had the effect of improperly enhancing Mrs. Kress' retirement benefits. You appealed the decision, arguing that it was merely coincidental that the "remedy was achieved at the end of Cheryl's employment." You also assert that the fact that the settlement agreement did not provide for additional payment for the years prior is immaterial. You requested a hearing in the Office of Administrative Law and that this matter be presented to the Board.

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The Board considered the record and noted that the April 12, 2021, settlement agreement between Mrs. Kress and Kenilworth contained the following relevant terms:

Mrs. Kress received a retroactive increase of approximately \$32,083 per year for only the final three years of service (total increased benefit equals \$96,250) and \$3,750 was allocated towards Mrs. Kress' counsel fees. In exchange, Mrs. Kress agreed to resign effective May 1, 2021; and to fully dismiss her civil suit. It is beyond dispute that structuring the agreement to place all of the back pay into only the final three years of employment, the years upon which her pension is calculated) rather than during all of the years Mrs. Kress maintained she was denied equal pay, increases her pension benefit in violation of TPAF rules and regulations.

The Board noted that the April 12, 2021, settlement agreement does not stipulate that the payments she received will be creditable for pension purposes. Page 4 of the agreement states, "The BOE and KEA are not responsible for any determinations made by the Division of Pensions and Benefits, Teachers' Pension and Annuity Fund, and/or any other entity regarding the Plaintiff, including by not limited to her pension and benefits entitlements."

The Board noted that Mrs. Kress' civil lawsuit was not adjudicated. As a result, there was no court order or legal judgment that concluded she was entitled to an increase in salary as a matter of law.

The Board determined that, because there is no clear connection between the settled salary increase and rendered service or across the board salary increases, nor is it required as a matter of law, the payment of additional salary is extra compensation offered as an inducement to drop her lawsuit and leave employment with Kenilworth. The \$32,083 per year increase in compensation was determined to be extra compensation that was made primarily in anticipation of her retirement, contrary to N.J.A.C. 17:3-4.1, and is not creditable for pension calculation purposes.

By letter dated February 17, 2023, you filed an appeal of the Board's decision. At its meeting of April 13, 2023, the Board considered your appeal and request for a hearing. The Board ultimately found that no genuine issue of material fact was in dispute and therefore directed the Board Secretary to draft detailed findings of fact and conclusion of law for review at its meeting of May 4, 2023.

### **CONCLUSIONS OF LAW**

The issue is whether the salary Ms. Kress received in the settlement agreement is creditable and can be used in her pension benefit calculation. As noted above, as a result of the April 12, 2021, settlement agreement Ms. Kress received a retroactive increase of approximately \$32,083 per year for only the final three years of service (total increased benefit equals \$96,250). Using the agreed upon salaries for only the final three years, rather than during all of the years Mrs. Kress maintained she was denied equal pay, increases her pension benefit in violation of TPAF statutes and regulations, specifically N.J.S.A. 18A:66-2(d)(1) and N.J.A.C. 17:3-4.1. N.J.S.A. 18A:66-2(d)(1) states:

"Compensation" means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year.

In addition, the Board has established N.J.A.C. 17:3-4.1

(a) The compensation of a member subject to pension and group life insurance contributions and creditable for retirement and death benefits in the Fund shall be limited to base salary, and shall not include extra compensation.

1. Forms of compensation that have been identified as extra compensation include, but are not limited to:

ii. Pay for extra work, duty or service beyond the normal work day, work year for the position, or normal duty assignment;

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...

v. Any compensation which the employee or employer has the option of including in base salary;

xix. Compensation paid for additional services performed during a normal duty assignment, which are not included in base salary.

...

(b) The Board may question the compensation of any member or retiree to determine its creditability, where there is evidence that compensation reported as base salary may include extra compensation.

(c) Extra compensation shall not be considered creditable for benefits and all employee contributions made thereon shall be returned without interest.

As noted above, the Board has reviewed all relevant documentation and written submissions, and because this matter does not entail any disputed questions of fact, the Board was able to reach its Findings of Fact and Conclusions of Law without the need for an administrative hearing. Accordingly, this correspondence constitutes the Final Administrative Determination of the Board of Trustees of the Teachers' Pension and Annuity Fund.

You have the right, if you wish, to appeal this final administrative determination 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,

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A handwritten signature in black ink, appearing to read "Saretta Dudley", enclosed in a thin black rectangular border.

Saretta Dudley, Secretary  
Board of Trustees  
Teachers' Pension and Annuity Fund

G-4/SD

c: M. Kusmierczyk(ET)  
DAG Jeffrey Padgett (ET)

Cheryl Kress