



State of New Jersey

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

TRENTON, NEW JERSEY 08625-0295
Telephone (609) 292-7524 / Facsimile (609) 777-1779
TRS 711 (609) 292-6683
www.nj.gov/treasury/pensions
March 10, 2023

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via email to: [REDACTED]

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
Albert J. Leonardo, Esq.

[REDACTED]

RE: Richard Wasserman
TPAF 1-[REDACTED]
OAL DKT. NO. TYP 08714-2021 N

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Leonardo:

At its meeting on February 2, 2023, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) considered the Initial Decision (ID) of the Honorable Kelly J. Kirk, Administrative Law Judge (ALJ), dated December 16, 2022, together with the evidence submitted by the parties, the exceptions filed by Deputy Attorney Payal Y. Ved, dated December 27, 2022, and the reply to exceptions filed by attorney Albert J. Leonardo, Esq., dated December 30, 2022. The Board noted the exceptions and the reply to exceptions. After careful consideration, the Board voted to reject the ALJ's decision recommending that Mr. Wasserman's annual minimum instructor pay be deemed creditable for pension purposes.

The ALJ found that the military stipend, or entire minimum instructor pay (MIP), Richard Wasserman received for his position as a Military Science Teacher/ Junior Reserve Officer Training Corps (JROTC) instructor at Paterson Board of Education (Paterson) to be creditable for pension purposes. ID at 17.

For the reasons set forth below, the Board rejects certain factual findings and conclusions below by the ALJ, and find that Mr. Wasserman's "military stipend" or full annual minimum

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instructor pay is not creditable for pension purposes. 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 March 9, 2023. This will constitute the Board's Final Administrative Determination in this matter.

FINDINGS OF FACT

As set forth more fully below, the Board rejects the ALJ's determination that Mr. Wasserman's "military stipend" or full annual minimum instructor pay is creditable for pension purposes.

The Board notes that Mr. Wasserman was employed by Paterson Public Schools as a Teacher of Military Science for the 2018-2019 school year, at a salary of \$59,105. ID at 3. Before signing a contract with Paterson, Mr. Wasserman was employed by the Jersey City School District (Jersey City) as a Senior Army Instructor. T10:6-11. Mr. Wasserman asserts that his entire salary received at Jersey City was pensionable, yet he was unable to provide any supporting evidence to back this claim.

The Board first rejects the ALJ's finding that Mr. Wasserman "received pension credit for all pay – regular salary and military stipend – from Jersey City," his former employer. ID at 7. T24:9-19. The Board rejects the finding that Mr. Wasserman's full salary from Jersey City, including a military stipend, was credited to his TPAF account for pension purposes due to the self-serving nature of the statement and in the absence of any evidence. In addition, what was or was not reported at as pensionable from Jersey City is not germane to the Paterson matter. And, even if Jersey City incorrectly credited Mr. Wasserman's military stipend to his TPAF account, such error should not be compounded by continuing to grant pension credit based on an uncreditable military stipend.

CONCLUSIONS OF LAW

The Board objects to the ALJ's determination that Mr. Wasserman's military stipend is creditable because Paterson employs Mr. Wasserman and pays the entire MIP. The federal government stipulates how JRPTC instructors are paid, pursuant to its own rules and regulations. 10 U.S.C. 2031 states, in pertinent part:

(d) the Secretary of the military department concerned may authorize qualified institutions to employ, as administrators and instructors in the program, retired officers and noncommissioned officers who are in receipt of retired pay, and members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and the institution concerned and who request such employment, subject to the following:

(1) A retired member so employed is entitled to receive the member's retired or retainer pay without reduction by reason of any additional amount paid to the member by the institution concerned. In the case of payment of any such additional amount by the institution concerned, the Secretary of the military department concerned shall pay to that institution the amount equal to one-half of the amount paid to the retired member by the institution for any period, up to a maximum of one-half of the difference between the member's retired or retainer pay for that period and the active duty pay and allowances which the member would have received for that period if on active duty.

[Ibid. (emphasis added).]

In Lyle v. Commissioner¹, the United States Tax Court interpreted 10 U.S.C. 2031(d)(1) as "establish[ing] a formula for computing the minimum 'additional amount' that will be paid by the Federal Government." 76 T.C. 668, 675 (1981). The Lyle court explained that while the employing schools are free to determine the schedule of pay and the terms of employment, they must "pay the instructors the full 'additional amount' specified in the

¹ In Lyle, the court addressed the issue of whether pay received as a JROTC instructor "included such nontaxable allowances or whether it was instead merely an amount received as compensation for services." 76 T.C. 668, 672 (1981).

statute[.]” Id. at 674 (emphasis added). The “Federal Government [will] reimburse the school districts for one-half of the ‘additional amount’ paid to the retired officers.” Ibid. However, the “responsibility of disbursing these funds and determining the ultimate amount of the retired officers’ compensation rests with the employing school.” Ibid. The court also explained that the “‘additional amount’ was designed as an incentive payment to induce personnel to accept employment as Junior ROTC instructors so that the Government could realize economies in staffing the Junior ROTC program.” Id. at 676. It is important to note, the court frequently emphasized the federal government’s portion as an “additional amount” of pay.

Although “Lyle is not binding and the underlying issue in dispute is entirely different than the issue herein,” ID at 13, it discusses and explains 10 U.S.C. 2031(d)(1), which dictates how JROTC instructors are to be paid. It makes it clear that the MIP is an incentivized additional amount of pay provided by the federal government.

Pursuant to 10 U.S.C. 2031(d)(1), retired members of the military who are employed as JROTC instructors are required to be paid a certain amount determined by the federal government, also known as the MIP, and that the federal government will reimburse the school one half of the MIP. See also Lyle, 76 T.C. at 674.

In this matter, the federal government set Mr. Wasserman’s MIP for the 2018-2019 school year at \$9,460, due to his retirement as a Lieutenant Colonel. R-3. The ALJ found that according to the JROTC program rules, JROTC instructors are employees of the school, not the federal government. ID at 14-15. The ALJ also found that the JROTC program rules require the school to pay the entire salary, and concluded that because the MIP is paid by the school, that the MIP should be creditable for pension purposes. ID at 13-15. However, this interpretation ignores the reality of how the JROTC program actually works.

The federal government establishes and calculates the formula for JROTC instructors. Paterson is not involved in this process and sets its own base salary, pursuant to the salary guides and steps for similarly situated employees – the salary that is relevant for pension purposes. However, Paterson is required to act in accordance with 10 U.S.C. 2031(d)(1) and pay the full “additional amount” that is required. This “additional amount” that it pays is reimbursed by the federal government. Consequently, Paterson issues two checks to cover Mr. Wasserman’s entire MIP – (1) the “additional amount” that is established, calculated and paid by the federal government, and (2) his salary through his employment with Paterson, which is governed by Paterson’s established pay scale. P-1. According to Paterson’s pay scale, and Mr. Wasserman’s corresponding contract for the 2018-2019 school year he was provided compensation in the amount of \$59,105.00. R-2; P-6. The fact that Paterson issues a check for the federal government’s “additional amount” is immaterial to the determination of whether Mr. Wasserman’s entire MIP is creditable for pension purposes because the federal government requires that the school disburse the amount of the MIP. Lyle, 76 T.C. at 674.

Furthermore, the ALJ noted that it was significant that the federal government classifies the payment structure as “cost-sharing” and a “reimbursement,” but not “extra compensation.” ID at 15. Yet, the classifications of “cost-sharing” and “reimbursement” show that the “additional amount” included in Mr. Wasserman’s MIP is coming from the federal government. Pursuant to the JROTC rules, Mr. Wasserman’s full pay is not coming from Paterson.

The Board notes that the State of New Jersey’s statutes and regulations determine what is deemed creditable for pension purposes. In this matter, Mr. Wasserman was hired by Paterson Public Schools on July 16, 2018, as a Military Science Teacher with a contractual base salary of \$59,105.00 for the 2018-2019 school year. R-1, R-2, T30:16-

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31:15; T31:16-32:18. This is evidenced through Wasserman's employment contract and Paterson's salary guides. Ibid. According to the salary contracts provided by Paterson, Mr. Wasserman was paid at Step 8 for the 2018-2019 school year, Step 9 for the 2019-2020 school year, and Step 10 for the 2020-2021 school year. T49:7-18; P-6.² These are the amounts creditable to Mr. Wasserman's TPAF account based on the pension statutory and regulatory framework.³

Moreover, the "additional amount" that Mr. Wasserman receives is considered an "incentive payment" that the federal government pays to retired military members to incentivize them to work as JROTC instructors. Mr. Wasserman receives this "additional amount" of "incentive payment" because he accepted a position that is available for retired members of the military.

Next, the Board takes exception to the ALJ's determination that Mr. Wasserman's duties are not extracurricular. The ALJ found that all the duties Wasserman performs are required as part of the JROTC program, thus they are not considered extracurricular in the same way a math teacher coaching basketball would be considered an extracurricular activity. ID at 16. In addition, the ALJ found that Mr. Wasserman's JROTC duties were not extracurricular because he was not eligible for coaches' pay. Ibid.

² The May 6, 2021 letter from the Division states "We have requested contracts from the Paterson Board of Education and they have outlined that he was paid at an MA, Step 8 for the 2018-2019 year, an MA Step 9 for the 2019-2020 year, and an MA Step 10 for the 2020-2021 year." P-6.

³ See N.J.S.A. 18A:66-2(d)(1), which defines creditable compensation as "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[.]" Ibid. (emphasis added).

The pension's statutory and regulatory framework specifically define the types of compensation that can be considered for pension purposes. N.J.S.A. 18A:66-2(d)(1) states, in pertinent part:

“Compensation” means the contractual salary, for services 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 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.

[ibid. (emphasis added).]

In addition, N.J.A.C. 17:3-4.1 states, in pertinent part:

(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 or normal duty assignment;

[. . .]

x. Any form of compensation which is not included in the base salary of all employees in the same position or covered by the same collective bargaining agreement or employment;

[. . .]

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

[. . .]

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

[Ibid. (emphasis added).]

With regard to N.J.S.A. 18A:66-2(d)(1), compensation is not creditable if the duties are (1) performed “beyond the regular school day or the regular school year” and (2) temporary or extracurricular in nature. Siri v. Bd. of Trs., Teachers’ Pension and Annuity Fund, 262 N.J. Super. 147, 151 (App. Div. 1993) (quoting N.J.S.A. 18A:66-2(d)). In Siri, the court held that the petitioner’s work as a department chairperson was creditable because the department chairperson’s duties were not performed beyond the regular school day or regular school year and because the duties of a chairperson are not temporary or extracurricular. Id. at 151, 156. In contrast, Mr. Wasserman’s JROTC duties are performed beyond the regular school day or regular school year and are extracurricular. The JROTC summer leadership camp, JROTC drill teams, JROTC Raider Challenge teams, JROTC Leadership Challenge and Academic Bowl teams, JROTC Military Ball, and JROTC Drill all require Wasserman to perform duties that are beyond the regular school day or regular school year. R-17; R-19. Mr. Wasserman’s duties include his attendance at drill competitions, raider challenges, and the students’ participation in cadet challenges, which occur on many Saturdays throughout the year. T37:5-13.

The record establishes that some of Mr. Wasserman’s duties as a JROTC instructor are extracurricular in nature. Mr. Wasserman, himself characterized his duties as “administering, advising, and appraising extracurricular teams.” R-16; R-18. Furthermore, according to his job description, one of his duties is to “establish and maintain two integrated or extracurricular teams, (drill team, color guard, raider team)” and one of the environmental demands requires duties beyond school hours for “extracurricular teams (color guard, parades, community service, service learning, fundraising, required training events).” P-3. Paterson distinguishes activities like drill team, color guard, raider team, community service, and fundraising by labeling them as extracurricular activities in the Job Description for

Senior Army Instructor of Military Science. Ibid. Wasserman admitted that he administers, advises, and appraises JROTC drill teams, JROTC Raider Challenge teams, JROTC Leadership Challenge and Academic Bowl teams, JROTC Military Ball, and JROTC Drill meets,⁴ all of which he admits are extracurricular activities. See R-18, Petitioner's Answers, no. 6.

Thus, the Board finds because Mr. Wasserman's duties as a JROTC instructor are performed beyond the regular school day, beyond the regular school year, and are extracurricular, the "additional amount" which is paid as a "military stipend," and is reimbursed by the federal government is not creditable for pension purposes. See N.J.S.A. 18A:66-2(d)(1).

The Board rejects the ALJ's conclusion that Mr. Wasserman's duties are not extracurricular because they are a required part of the JROTC program because they do not comport with N.J.S.A. 18A:66-2(d)(1). N.J.S.A. 18A:66-2(d)(1) clearly specifies that if the duties are (1) performed beyond the regular school day or the regular school year and (2) are extracurricular in nature, that the compensation is not creditable.

In his position as Military Science Teacher, Mr. Wasserman received compensation for extra work, duty or service beyond the normal work day and beyond the normal work year in accordance with N.J.A.C. 17:3-4.1(a)(1)(ii). As mentioned above, the duties that both Paterson and Mr. Wasserman admitted and characterized as extracurricular take place during and beyond the regular school day and at times beyond the regular academic year. Therefore, the "military stipend" reimbursed by the federal government for his role as a JROTC instructor is not creditable for pension purposes because it represents extracurricular duties that take place beyond the regular school day and year.

⁴ Mr. Wasserman does not administer JROTC drill meets. R-19, Petitioner's Admissions, no. 27.

The Board rejects the ALJ's conclusion that the salary guidelines issued by Paterson do not include a salary specific guide for JROTC teachers and does not take into account the JROTC policies and guidelines. ID at 16.

Pursuant to N.J.A.C. 17:3-4.1(a), creditable compensation "shall be limited to base salary, and shall not include extra compensation." Compensation considered "extra compensation" includes "[a]ny form of compensation which is not included in the base salary of all employees in the same position or covered by the same collective bargaining agreement or employment. N.J.A.C. 17:3-4.1(a)(1)(x).

As mentioned previously, Mr. Wasserman was hired by Paterson as a Military Science Teacher and was paid \$59,105.00. In accordance with Paterson's salary contracts, he was paid at Step 8 for the 2018-2019 school year; Step 9 for the 2019-2020 school year; and Step 10 for the 2020-2021 school year. P-6. Any compensation he received beyond these "step" amounts is not creditable for pension purposes, as it is extra compensation above his contractual salary.

The monthly MIP established by the federal government at \$9,460.50 for the 2018-2019 school year exceeded Mr. Wasserman's contractual salary and Paterson's "step" system. R-3. Moreover, Mr. Wasserman was paid by Paterson and the federal government on a "cost shared basis." Ibid. This cost sharing plan is substantiated by Mr. Wasserman being compensated by two separate checks - one check for his base salary and the other for the "additional amount" (listed as a "military stipend") in the amount reimbursed by the federal government. P-1. The check labeled "military stipend," signifies the "additional amount" or "extra compensation" established and paid by the federal government (although issued by Paterson) and is extra compensation above his contracted base salary.

Mr. Wasserman is paid a base salary according to the salary guides established with Paterson along with all other teachers covered by the same collective bargaining agreement.

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The extra compensation that he receives is set by the federal government who reimburses Paterson for the “additional amount.” Therefore, his military stipend is not creditable compensation.

The ALJ determined that that the paycheck labeled “military stipend” is creditable compensation because it was part of his biweekly compensation that accompanied his “regular earnings” check and represents duties integral to the JROTC program. The ALJ further determined that Mr. Wasserman’s two separate checks represented his “regular biweekly compensation,” and concluded that it equates to being a part of his regular payroll check. ID at 17. The Board rejects both determinations. The regulation at N.J.A.C. 17:3-4.1(j), clearly states that a stipend is creditable if it (1) “is included as part of the petitioner’s regular payroll check” and (2) “represents duties not addressed in base compensation that are integral to the effective functioning of the member’s contracted position.” Ibid. The regulation requires that the stipend be a part of the “regular payroll check.”

Paterson issued Mr. Wasserman two separate checks, one identified as “regular earnings” and the other as “military stipend.” P-1. The separate check containing the “military stipend” is not included as part of his “regular payroll check,” thus the military stipend is not creditable pursuant to N.J.A.C.17:3-4.1(j).

For the foregoing reasons, the Board rejected the aforementioned factual findings and rejected the ALJ’s conclusion that the full MIP, or “military stipend,” is creditable for pension purposes.

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

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PO Box 006
Trenton, NJ 08625

Sincerely,

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

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

G-7/SD

c: M. Kusmierczyk (ET)

DAG Payal Y. Ved (ET)
OAL, Attn: Library (ET)

Richard Wasserman (sent via regular mail)