



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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April 20, 2023

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State Treasurer

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Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via email to [REDACTED]

David B. Rubin, Esq.
[REDACTED]

RE: Michael Lenz
PERS [REDACTED]
OAL DKT. NO. TYP 02385-19

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Rubin:

At its meeting on March 15, 2023, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision of the Honorable Julio C. Morejon, Administrative Law Judge (ALJ), dated January 27, 2023, the exceptions filed by DAG Jeffrey D. Padgett, dated February 21, 2023, and your reply thereto, dated March 2, 2023. After careful consideration, the Board rejected the ALJ's decision recommending that the substantial salary increase Michael Lenz ("Lenz") received due to a negotiated Settlement Agreement (Agreement) be included as creditable compensation for pension calculation purposes. Thereafter, the Board directed the undersigned to draft Findings of Fact and Conclusions of Law consistent with its determination. Findings of Fact and Conclusions of Law were presented to and approved by the Board at its meeting of April 19, 2023.

By way of background, at its meeting of January 16, 2019, the Board considered and denied Lenz's request to include the retroactive salary increases he negotiated in a March 29, 2018, Agreement with Hudson County (Hudson) in the calculation of his retirement benefit. Lenz filed a timely appeal of the Board's decision and the matter was transferred to the Office of Administrative Law as a contested case.

The record before the Board establishes that Lenz was enrolled in the PERS on or about February 1, 2008, when he commenced employment with Hudson as a Confidential Aide. He applied for and was granted an Ordinary Disability retirement benefit that became effective March 1, 2018. Several weeks after Lenz's retirement became effective, Lenz and his employer settled his lawsuit, which had alleged that he had been underpaid, in violation of Hudson's personnel policies, for the entirety of his tenure, from 2008 through 2018. However, Lenz and Hudson settled the lawsuit by retroactively increasing his salary only on the final three years of his employment.

Lenz's Complaint alleged that for the full ten years he worked for Hudson he had served in a "managerial, supervisory capacity" and that beginning in August 2012 he held the title of "Manager Public Property." It further alleged that throughout his tenure, Hudson's personnel policies provided that supervisors be paid 5% more than "their highest paid subordinate." According to Hudson, Lenz alleged that he was owed "approximately \$300,000 in lost income with the County calculating [much] less than that." Ultimately, the parties settled for a compromised back pay amount, without agreeing that Lenz had been paid less than his highest paid subordinates.

Ultimately, the Agreement stated that Lenz would receive either:

- 1) \$78,163.47 in "back pay" for the years 2014, 2015, 2016 and 2017 paid by Hudson County and \$21,836.53 for "personal injury" paid by the Hudson County Insurance Fund Commission (the "IFC"); or
- 2) if the Division of Pension and Benefits (the "Division") does not accept the \$78,163.47 amount as "back pay," then a \$100,000 lump sum amount paid by the IFC.

Notwithstanding the fact that Lenz alleged he had been underpaid by approximately \$300,000, beginning in 2008, Lenz and the County settled his case for \$100,000, with all of the salary adjustments incorporated into only his final three years of employment. The Agreement

substantially increased Lenz's salaries over the final three years, but provided no back pay for any of the other years in which he was not paid 5% more than his highest paid subordinate, including retroactive payments of \$14,373.75 for the fiscal year ending June 30, 2015; \$25,078.44 for the fiscal year ending June 30, 2016; \$27,228 for the fiscal year ending June 30, 2017; and \$11,483.28 for the period of November 30, 2017 through June 30, 2023.¹ Order at 4.

FINDINGS OF FACT

The Board voted to modify the ALJ's findings of fact as follows.

The ALJ found that Lenz's salary "adjustment" was not increased "at or near the end of Lenz's service" because he had left employment prior to the parties settling his lawsuit. This finding ignores the fact that Lenz filed his lawsuit in June 2015, his retirement became effective on March 1, 2018, and the parties settled the lawsuit on or about March 29, 2018. ID at 3, 7. The Board rejects this factual finding and notes that the Agreement was contemporaneous with Lenz's retirement. Moreover, Lenz concedes that the settlement contemplated increasing his retirement benefit to redress what he alleged was a violation of the County's unwritten rule that he be paid 5% more than his highest paid subordinate. The Board also notes that the ALJ failed to make any factual findings as to whether it was proper to apportion the retroactive back pay into only the final three years of service, thus inflating Lenz's pension benefit.

The Board also rejected the ALJ's finding that "at all times, [Lenz] served in a managerial, supervisory capacity with the full knowledge and authority from [his] Department superiors." Order 2. The Board notes that in Lenz's Answers to the First Set of Interrogatories, prepared by Dermody in Lenz v. County of Hudson, and admitted into evidence as P-6, states that "the only time Lenz actually supervised anyone was from 2008 to 2010." The Board notes that Lenz did

¹ Lenz retired from the PERS effective March 1, 2018, but had left his employer "well before" his retirement date. ID at 7.

not testify at the hearing, and the ALJ failed to address the contradiction between Lenz and his own witness.

CONCLUSIONS OF LAW

The Board made the following conclusions of law.

First, the Board voted to reject the ALJ's conclusory analysis of the legal issues in this case. Based solely on the fact that Lenz had retired a few weeks prior to the execution of the Agreement, the ALJ found that the significant increase in his final three years of employment was not in anticipation of his retirement. The Board voted to reject the ALJ's flawed legal analysis, and instead determined that it is undisputed the Agreement was intended to increase his retirement benefit. The ALJ failed to conduct any analysis of whether including the settlement monies in the final three years was proper or simply used as a way to settle his lawsuit in a way most favorable to Lenz and the employer, with the PERS paying an inflated pension benefit over Lenz's lifetime.

A PERS retiree is entitled to a pension based on compensation deemed creditable under N.J.S.A. 43:15-6(r), which is defined as "the base or contractual salary, for services as an employee, which is in accordance with established salary policies of the member's employer for all employees in the same position." Ibid. The Board notes the purpose of N.J.S.A. 43:15-6(r) and "the implementing regulations is to protect the actuarial soundness of the pension fund by prohibiting the use of 'ad hoc salary increases intended to increase retirement allowances without adequate compensation to the [pension] fund' in calculating pensions." In re Puglisi, 186 N.J. 529, 534 (2006) (interpreting analogous PFRS statute and regulation). Creditable compensation is limited to "base salary and shall not include extra compensation." N.J.A.C. 17:2-4.1(a). Extra compensation means "individual salary adjustments which are granted primarily in anticipation of a member's retirement" and includes:

11. Any form of compensation that is not included in the base salary of all employees in the same position or covered by the same collective bargaining agreement who are members of the PERS and who receive the compensation;

12. Retroactive increments or adjustments made at or near the end of a member's service, unless the adjustment was the result of an across-the-board adjustment for all similarly situated personnel; [Ibid.]

The Board found that it is undisputed that the compensation Lenz received from the Agreement was not included in his base salary while he was employed by Hudson. However, Lenz filed a lawsuit because Hudson had not once included the extra compensation in his salary. . In addition, Hudson rejected his efforts to include the additional 5% in his salary every time it was requested over several years. The negotiated retroactive salary increases simply do not represent his base salary. Rather, these negotiated salaries represent an individual salary adjustment that would allow Lenz to calculate his retirement benefit using a salary greater than what he actually earned.

The Board finds that such an arrangement, settling years of salary disputes by incorporating all of the retroactive salaries agreed up into the final three years violates the stated purpose of N.J.S.A. 43:15-6(r) and the implementing regulations, as it would allow an increase in retirement allowances without adequate compensation to the pension fund. In re Puglisi, 186 N.J. at 534. In particular, the Agreement only applies the 5% policy increase to the years 2014-2017, despite Lenz's assertion that the 5% policy should have been applied starting in 2008. cf. In re Snellbaker, 414 N.J. Super. 26, 41 (App. Div. 2010) (Retroactive salary adjustments not extra compensation where they covered the entire period at issue, not just the last three years.). Thus, the Board finds, between 2008 and 2013, Lenz did not earn the salary upon which he seeks to calculate his retirement benefit and did not make contributions to the pension fund based on the higher salary, which results in harm to the fund through underpayment of contributions. Rather,

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all of the back pay to which Lenz had claimed he was entitled was negotiated into the final three years of service.

The Board also finds that the Agreement was clearly structured in contemplation of Lenz's retirement, as it applies the compensation award only to the last three years of Lenz's employment, which conveniently coincides with the years used to calculate his retirement benefit. See N.J.A.C. 17:2-6.20(b). Lenz's stated motives for retiring are not determinative as N.J.A.C. 17:2-4.1(a) does not require the extra compensation to induce the member to retire. When the salary adjustment clearly contemplates the member's retirement, as is the case here, N.J.A.C. 17:2-4.1(a) acts to bar the adjustment as extra compensation. See In re Puglisi, 186 N.J. at 534. (Puglisi's retirement "was not simply anticipated when he began receiving [the higher salary] but had actually occurred."). The Board notes that such an agreement would allow settling parties to easily circumvent N.J.A.C. 17:2-4.1(a) by timing a settlement immediately after a retirement.

The negotiated final three years of retroactive salary falls under the definition of extra compensation found in N.J.A.C. 17:2-4.1(a)(11), as it is not compensation included in the base salary of all employees in the same position. The Order concluded that Lenz had not established "that the back pay awarded him is also included in the base salary of all employees 'in the same position.'" Order 16. The only additional evidence Lenz produced at hearing was Dermody's testimony, after review of N.J.A.C. 17:2-4.1(a)(11), that Hudson employees who were entitled to the 5% policy, received the increase included in their base salary.

The Board also finds that Dermody's testimony calls into question whether these other employees actually received the increase based upon the unwritten policy. Dermody testified that Hudson employees Kevin Barry ("Barry") and Salvana Kaminsky ("Kaminsky") did not receive the 5% policy in their base salary and had to receive a retroactive adjustment. Dermody only testified regarding employees who were entitled to the 5% policy and does not provide evidence to establish which employees held the same position as Lenz. ID at 7. The Board also notes that

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on cross-examination, Dermody could not identify any other individuals with the same title as Lenz during the time Lenz was employed by Hudson. Ibid. Further, the compensation Lenz received was an individual adjustment to three specific years, 2014-2017, at the end of his employment. It was not a complete adjustment of his salary to include the increased pay under the 5% policy during all of the years of his employment.

The Board finds that there is nothing in the record to establish that all employees in the same position as Lenz received a similar adjustment or even a similar application of the 5% policy to only certain years. Rather, the Board finds that, as Dermody testified, there was no across-the-board adjustment relating to the 5% policy. The policy was usually applied in the normal course of business, so there was no need for an across-the-board adjustment. Barry and Kaminsky were the other individuals Dermody could identify who received an adjustment similar to that received by Lenz. However, Barry received his adjustment before Lenz was hired by Hudson and Dermody did not know when Kaminsky received her adjustment. Thus, Lenz simply cannot establish that all similarly situated employees received such a substantial increase. The Board finds that the compensation Lenz received from the Agreement is nothing more than an individual salary adjustment made in contemplation of retirement that is barred as extra compensation under 17:2-4.1(a)(12).

For these reasons, the Board rejects the ALJ's recommendation that the salary increase Lenz received in the Agreement be included as creditable compensation for pension calculation purposes. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

You have the right to appeal this final 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:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Jeff Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-10/JSI

C: J. Ehrmann (ET); M. Kusmierczyk (ET)
OAL, Attn: Library (ET)
DAG Jeffery D. Padgett (ET)
Michael Lenz (via regular mail)