



State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions
November 25, 2008

JON S. CORZINE
Governor

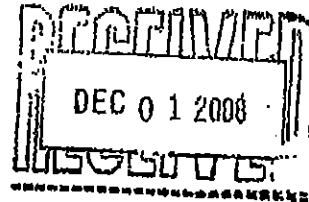
MAILING ADDRESS:
PO Box 295
TRENTON NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON NEW JERSEY

R. DAVID ROUSSEAU
State Treasurer

FREDERICK J. BEAVER
Director

Donna Young, Board Secretary
Upper Township Board of Education
525 Perry Road
Petersburg, NJ 08270



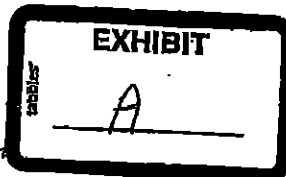
Re: Separation Program/Agreements
and Buyouts
#69-0239

Dear Ms Young:

On January 31, 2008, the Upper Township Board of Education (BOE) provided the New Jersey Division of Pensions and Benefits (Division) with information relative to a voluntary separation program being put forth by the BOE to its employees. You had indicated that no employees have elected to participate in the program as of January 31, 2008, but you did provide the names of those employees eligible for participation. As of this date, the Division has noted that only two of the seventy-three eligible participants retired. It was also noted that the two retirees did not receive the incentive service award in the third quarter of 2008 as established in the separation incentive. On July 21, 2008, the Division requested that the BOE provide it with an update to the program. To date, you have not responded.

Based on the aforementioned analysis, it appears that the separation incentive which required employees to terminate service by July 1, 2008 has not been set in motion. The Division requests that if this assertion is correct, you provide written confirmation. If the incentive has been modified, wherein the criteria for participation have been changed or dates revised, i.e. must terminate by July 1, 2009, please provide the updated information. This should include:

1. Any and all buyout, separation or other agreements relative to employment separation programs currently in-force or those being negotiated executed between the Board of Education and its



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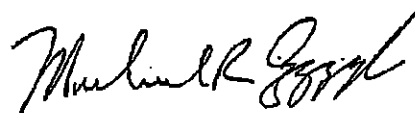
employees, specific group of employees or any individual employee.

2. Resolutions adopted relative to #1 above.
3. A list of employees eligible to participate in the aforementioned program, including, but not limited to,
 - Names of those eligible to participate¹
 - Pension membership #
 - Eligible Incentive compensation receivable
 - Amount of trade-in, buy-out component (i.e. Sick time)
 - Years of service in the pension system

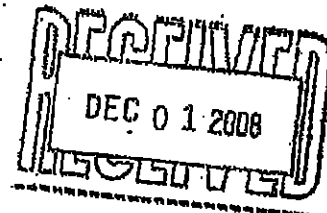
Please forward the requested information to my attention at the address noted on this letterhead no later than December 11, 2008. If you have any questions relative to this matter, I can be reached at 609-292-3664.

Thank you for your anticipated attention to this request.

Sincerely,



Michael R. Czyzyk
Supervisor, External Audit



c. Susanne Culliton-Assistant Director, Office of Professional Services

¹ Also, please identify from the eligible employee list, those electing to participate in the program.



State of New Jersey
 DEPARTMENT OF THE TREASURY
 DIVISION OF PENSIONS AND BENEFITS
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JON S. CORZINE
 Governor

December 24, 2008

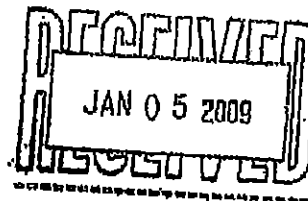
MAILING ADDRESS:
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LOCATION:
 50 WEST STATE STREET
 TRENTON NEW JERSEY

R. DAVID ROUSSEAU
 State Treasurer

FREDERICK J. BEAVER
 Director

Donna Young, Board Secretary
 Upper Township Board of Education
 525 Perry Road
 Petersburg, NJ 08270



Re: One-Time Separation Initiative
 #89-0239

Dear Ms Young:

The Division of Pensions and Benefits (Division) has reviewed the One-Time Separation Initiative offered by the Upper Township Board of Education (BOE) to those employees who separate from employment during specified period of calendar years 2008 and 2009. As you know from our previous correspondences, local employers are not authorized to offer early retirement incentive programs for their employees unless they are specifically authorized by State law. The law on this subject is clearly set forth in Fair Law Ed. Assn. v. Fair Lawn Bd. 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.

On its face, the BOE's separation incentive seems acceptable in that it is offered to all employees regardless of length of service and is not contingent upon retirement. However, in reality the incentive appears more likely to motivate early retirement. A careful analysis of the program reveals that the number of individuals who have participated in the program thus far as well as those who have expressed interest in participating are eligible to retire from either the Teachers' Pension and Annuity Fund (TPAF) or the Public Employees' Retirement System (PERS). As such, the program offered by the BOE is viewed as an early retirement incentive program. Accordingly, please accept this

EXHIBIT

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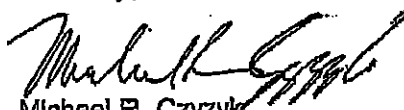
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correspondence as official notice that the one-time separation incentive is not acceptable.

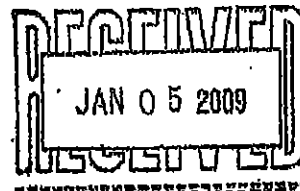
The Division will provide the names of those participants to the Fund actuaries in order to determine if an additional liability to the TPAF has resulted. The BOE may receive a bill directly related to those accelerated costs. In addition, the Division requests that you provide it with the status of those TPAF and PERS employees who have expressed interest in participating in the program, but have yet to exercise their option. The Division will monitor the membership status of these employees. Participation in the BOE's separation incentive will require that an actuary cost analysis be made to determine the financial impact that incentive may have on the TPAF and the PERS. Again, any accelerated cost to the Funds will be directly billed to the BOE.

If you have any questions related to this matter, I can be reached at 609-292-3664.

Sincerely,



Michael R. Czyzyk
Supervisor, External Audit



c: Susanne Culliton, Assistant Director of Professional Services

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperleventon.com

Direct Phone (609) 572-7610
Direct Fax 609-572-7611

FILE NO.: 54612.4

January 8, 2009

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

This firm represents the Upper Township Board of Education (the "Board"). This letter confirms receipt of your correspondence dated December 24, 2008 regarding the above-captioned matter notifying the Board that according to the External Audit Department of the Division of Pensions and Benefits the Board's 2008-2009 separation initiative appears appropriate but is nevertheless not acceptable.

In your letter, you indicate that the separation initiative seems to be acceptable on its face because it is offered to all employees regardless of length of service and is not contingent on retirement. Nevertheless, you then argue the "net" opinion that "in reality the incentive appears more likely to motivate early retirement." You note that the number of program participants so far and those expressing interest in participation are eligible to retire from either the Teachers' Pension and Annuity Fund ("TPAF") or the Public Employees' Retirement System ("PERS") and therefore the Board's program is "viewed as an early retirement incentive program." However you fail to provide any guidance how that fact is fatal to the initiative. You also note that the Division will provide participant names to Fund actuaries to determine if additional liability to the TPAF accrued and that the Board could receive a bill for those costs.

The Board disagrees with your determination. In particular, the Board disagrees that *Fair Lawn Education Association v. Fair Lawn Board of Education*, 79 N.J. 574 (1979), supports your determination. Under *Fair Lawn*, a board of education cannot offer an early retirement plan to employees that would encourage individuals to retire early by offering increased financial benefits for retiring at an earlier age. *Id.* at 577. The Court emphasized in *Fair Lawn* that to do so could result in a "substantial" impact on the TPAF. *Id.* at 583.

EXHIBIT

tabbies

C

UTBOE-01

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk, Supervisor, External Audit
January 8, 2009
Page 2

Unlike in *Fair Lawn*, and as you acknowledge, the Board's separation initiative does not differentiate between individuals' age in order to encourage retirement. You state that the Board's separation initiative appears on its face to be legal and acceptable. There is no analysis or explanation of your reasons for concluding that the Board's program is viewed as an early retirement incentive program just because the number of participants so far and those expressing interest are eligible to retire even though the Board offered the program to all employees. That individuals who participated in the program and those who are considering participating in the program are eligible for retirement neither proves nor is it highly probative evidence that the program is an early retirement incentive program.

Based on the above, the Board seeks to appeal the Division of Pensions and Benefits' determination. Please advise as to the specific process to be followed in order to appeal your determination, for example, if this letter provides a sufficient expression of a written appeal or if other administrative procedures should be followed. Please respond to this request as soon as possible as the Board seeks to timely appeal within any applicable required timeline.

Very truly yours,

William S. Donio

WSD/nw

cc: Vincent Palmieri, Superintendent
Donna L. Young, Business Administrator

CLAC; 297524.1

COOPER LEVENSON
ATTORNEYS AT LAW

WILLIAM S. DONIO
Also Admitted to PA Bar
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Direct Fax 609-572-7611

FILE NO.: 54612-4

January 12, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

This firm represents the Upper Township Board of Education (the "Board"). This letter confirms receipt of your correspondence dated December 24, 2008 regarding the above-captioned matter notifying the Board that according to the External Audit Department of the Division of Pensions and Benefits the Board's 2008-2009 separation initiative appears appropriate but is nevertheless not acceptable.

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COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk, Supervisor, External Audit
January 12, 2009
Page 2

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Based on the above, the Board seeks to appeal the Division of Pensions and Benefits' determination. Please advise as to the specific process to be followed in order to appeal your determination, for example, if this letter provides a sufficient expression of a written appeal or if other administrative procedures should be followed. Please respond to this request as soon as possible as the Board seeks to timely appeal within any applicable required timeline.

Very truly yours,



William S. Donio

WSD/jlb

cc: Vincent Palmieri
Donna L. Young Business Administrator

CLAC; 297524.1

COOPER LEVENSON

ATTORNEYS AT LAW

1125 Atlantic Avenue
Atlantic City, NJ 08401
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Direct Fax 609-572-7611
FILE NO.: 54612-4

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

January 15, 2009

Hank Schwedes, Auditor
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
Office of External Audit
PO Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Schwedes:

This firm represents the Upper Township Board of Education (the "Board"). This letter confirms receipt of your correspondence dated December 22, 2008 regarding the above-captioned matter.

In your letter, you indicate that the Office of External Audit is conducting an ongoing investigation of employee compensation packages as related to pension reporting and benefits separate from the Division of Pensions and Benefits' inquiry concerning the Board's 2008-2009 separation initiative. You also request copies of "all employment contracts, memoranda of agreement, supplements, addenda and sidebar agreements in force between the District and the several bargaining units, as well as with individual employees, covering the past five years."

However producing all employment contracts from the previous five years for employees otherwise covered by a collective bargaining agreement would require the Board to produce the substantially same single-page contracts for 200 employees each year (for a total of 1000 single-page employment contracts). As I do not imagine this was the intent of your request, individual contracts will not be produced for the employees covered by a collective bargaining agreement unless you advise me separately.

Hank Schwedes
January 15, 2009
Page 2

With regard to your other requests, enclosed please find the following:

1. Agreement between the Upper Township Education Association and the Upper Township Board of Education from July 1, 2005 to June 30, 2009;
2. Agreement between the Upper Township Education Association and the Upper Township Board of Education from July 1, 2002 to June 30, 2005;
3. Agreement between the Upper Township Support Staff and the Upper Township Board of Education from July 1, 2006 to June 30, 2009;
4. Agreement between the Upper Township Supportive Staff Association and the Upper Township Board of Education from July 1, 2003 to June 30, 2006;
5. Agreement between the Confidential Employees and the Upper Township Board of Education from July 1, 2005 to June 30, 2009;
6. Agreement between Upper Township Board of Education and Confidential Employees from July 1, 2002 to June 30, 2005;
7. Agreement between the Upper Township Board of Education and the Upper Township Administrators Association from July 1, 2006 to June 30, 2009;
8. Agreement between the Upper Township Administrators and the Upper Township Board of Education from July 1, 2003 to June 30, 2006;
9. Upper Township School District Employment Contract for Assistant Computer Technician from July 1, 2008 to June 30, 2009;
10. Upper Township School District Employment Contract for Computer Technician/Television Coordinator from July 1, 2007 to June 30, 2010;
11. Upper Township School District Employment Contract for Computer Technician/Television Coordinator for July 1, 2004 to June 30, 2007;
12. Upper Township School District Employment Contract for Maintenance/Night Supervisor for April 1, 2008 to June 30, 2009;
13. Upper Township School District Employment Contract for Interim Facilities Supervisor for January 1, 2008 to December 31, 2008;
14. Upper Township School District Employment Contract for Transportation Supervisor for July 1, 2007 to June 30, 2010;

Hank Schwedes
January 15, 2009
Page 3

15. Upper Township School District Employment Contract for Transportation Supervisor for July 1, 2004 to June 30, 2007;
16. School Business Administrator/Secretary of the Board Employment Contract Between the Board of Upper Township and Donna L. Young for July 1, 2006 to June 30, 2009;
17. School Business Administrator-Secretary of the Board Employment Contract Between the Board of Education of Upper Township and Donna L. Young for March 29, 2004 to June 30, 2006; and
18. Employment Contract for Upper Township Board of Education and Vincent J. Palmieri, Jr. for February 1, 2007 to June 30, 2010.

If you have any further questions, please feel free to contact me.

Very truly yours,



William S. Donio

WSD/jlb

Enc.

cc: Vincent Palmieri, Superintendent
Donna L. Young, Business Administrator

CLAC; 297338.1



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

JON S. CORZINE
Governor

January 23, 2009

MAILING ADDRESS:
PO Box 295
TRENTON NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON NEW JERSEY

R. DAVID ROUSSEAU
Acting State Treasurer

FREDERICK J. BEAVER
Director

William S. Sonio, Esquire
Cooper Levenson, Attorneys at Law
1125 Atlantic Ave
Atlantic City, NJ 08401

RE: Upper Township Board of Education – Creditable Compensation

Dear Mr. Sonio:

Thank you for providing the requested contracts on behalf of the Upper Township Board of Education in your submission dated January 15, 2009.

A review of the contracts for the several bargaining units at Upper Township Board of Education (District) has raised additional questions concerning the salaries reported to the Division of Pensions and Benefits (Division) on behalf of the employees of the District that are credited toward their Teachers Pension and Annuity Fund (TPAF) and Public Employees Retirement System (PERS) accounts.

By this letter, the Division is requesting further information with regard to reported creditable compensation for pensions and benefits calculation purposes for some members.

Specifically, the Division requires the following information:

- The list of all administrators who are covered under the District's agreement with the Upper Township Administrators Association;
- The list of all employees who are covered under the District's agreement with the Upper Township Education Association;
- The list of persons who have retired from the District since July 1, 2006 who belonged to either the Upper Township Administrators Association or the Upper Township Education Association, indicating to which association they belonged;

- A breakdown of salary by school year for the Superintendent and the School Board Administrator, beginning July 1, 2004 to the present, which includes the following figures:
 - Contractual base salary;
 - Pension and Group Life Insurance contribution reimbursements;
 - Performance incentives, if any;
 - Other salary components, reimbursements, etc.

Please forward this information to my attention no later than February 17, 2009 at the address included in the letterhead.

Because the Certifying Officer is the legal District representative for all business with the Division, a copy of this letter will also be forwarded to Donna Young, the School Business Administrator.

If you have any questions, please feel free to contact me at any time. In my absence, you may also contact Michael Czyzyk, the Supervisor of the Office of External Audit.

Thank you for your prompt attention to this matter.

Sincerely,



Hank Schwedes
Office of External Audit
(609) 633-7572
(609) 393-5037 (fax)
hank.schwedes@treas.state.nj.us

C. Donna Young, SBA, Upper Township Board of Education
Michael Czyzyk, Supervisor, External Audit

COOPER LEVENSON

ATTORNEYS AT LAW

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

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Direct Fax 609-572-7611
FILE NO.: 54612-4

February 17, 2009

via Facsimile (609) 393-5037 & Regular Mail

Hank Schwedes, Auditor
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
Office of External Audit
PO Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Schwedes:

As you know, this firm represents the Upper Township Board of Education (the "Board"). This letter confirms receipt of your correspondence dated January 23, 2009 regarding the above-captioned matter.

In your letter, you confirm receipt of our letter dated January 14, 2009 enclosing documents requested in your letter dated December 22, 2008. You now request additional materials, and in response to that request enclosed please find the following:

1. Upper Township Administrators Association list of members;
2. Upper Township Education Association Aides and Secretaries list;
3. Upper Township Education Association Teaching Staff Members list;
4. Upper Township Administrators Association list of Retirees from 7/1/2006 through 2/1/2009 (there are no such retirees);
5. Upper Township Education Association list of Retirees from 7/1/2006 through 2/1/2009; and
6. Upper Township School District Salary Information for Superintendent and School Business Administrator from 7/1/2004 through 6/30/2009.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Hank Schwedes
February 17, 2009
Page 2

If you have any further questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. Donio", with a long horizontal flourish extending to the right.

William S. Donio

WSD/jlb

Enc.

cc: Vincent Palmieri, Superintendent
Donna L. Young, Business Administrator

CLAC; 309470.1

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

Direct Phone (609) 572-7610
Direct Fax 609-572-7611

FILE NO.: 54612-4

February 19, ²⁰⁰⁹~~2015~~

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

This office represents the Upper Township Board of Education (the "Board"). By letter dated January 12, 2009, I responded to your correspondence of December 24, 2008 regarding the above-captioned matter in which you notified the Board that its 2008-2009 separation initiative appears appropriate but is nevertheless not acceptable according to the External Audit Department of the Division of Pensions and Benefits (the "Division").

As stated in my January 12, 2009 letter, the Board disagrees with the finding that the Board's separation initiative is unacceptable and seeks to appeal the decision. In particular, unlike the program prohibited in *Fair Lawn Education Association v. Fair Lawn Board of Education*, 79 N.J. 574 (1979), and as you acknowledge, the Board's separation initiative does not differentiate between individuals' age in order to encourage retirement. You provided no analysis or explanation of your reasons for concluding that the Board's program is viewed as an early retirement incentive program; to the contrary you noted that the Board offered the program to all employees.

I have not received a response from you regarding my request to appeal your decision or for guidance regarding the Division's appeals process. I note again that your decision does not appear to be a final agency decision, and there is no clear administrative process regarding the process for an appeal. Therefore, please advise as to the following: (1) whether your decision is a final agency decision, and if not, the process to obtain a formal final agency decision; and (2) the process that must be followed to appeal a Division decision.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk, Supervisor, External Audit
February 19, 2015
Page 2

Please respond to this request as soon as possible as the Board wishes to preserve its appeal and clearly already appealed within any applicable required timeline.

Very truly yours,

William S. Donio

WSD/jlb/nw

cc: Vincent Palmieri
Donna L. Young Business Administrator

CLAC 313156.1

COOPER LEVENSON
ATTORNEYS AT LAW

WILLIAM S. DONIO
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FILE NO.: 54612-4

February 25, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

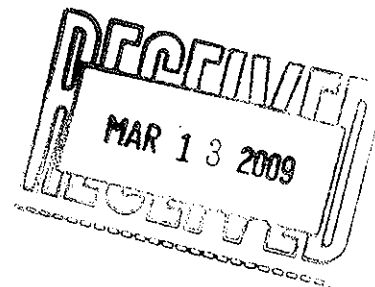
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COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk, Supervisor, External Audit
February 25, 2009
Page 2

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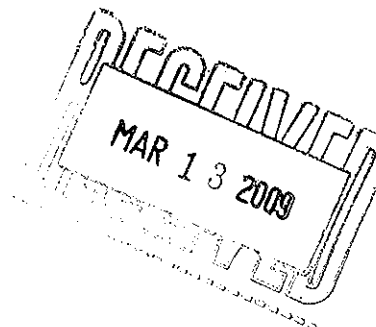


William S. Donio

WSD/jlb/nw

cc: Vincent Palmieri
Donna L. Young Business Administrator

CLAC; 313156.1



COOPER LEVENSON
ATTORNEYS AT LAW

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Atlantic City, NJ 08401

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Direct Phone (609) 572-7610

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FILE NO.: 54612-4

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

March 11, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295



Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

This office represents the Upper Township Board of Education (the "Board"). By letters dated January 12, 2009 and February 25, 2009, I informed you that the Board disagrees with your characterization of its separation initiative as unacceptable and your conclusion that the Board's program is viewed as an early retirement incentive program even though, as you acknowledge, the Board offered the program to all employees. I wrote requesting your advice as to: (1) whether your decision regarding the Board's separation initiative is a final agency decision, and if not, what the process is for obtaining a formal final agency decision; and (2) the process that must be followed to appeal such a decision. Copies of those letters are enclosed for your convenience.

I still have not received a response from you or anyone else at the Division of Pensions and Benefits regarding these requests. Since your decision does not appear to be a final agency decision, and there is no clear appeals process, I again ask that you please respond to this request as soon as possible as the Board wishes to preserve its appeal and clearly already appealed within any applicable required timeline.

Very truly yours,

William S. Donio

WSD/jlb/nw

Enc.

cc: Vincent Palmieri

Donna L. Young Business Administrator

CLAC; 317537.1

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

N. J. Offices: ATLANTIC CITY • CHERRY HILL • NEWARK • PRINCETON • SEA ISLE CITY • TRENTON
HARRISBURG, PA • BEAR, DE • LAS VEGAS, NV

UTBOE-16

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

Direct Phone (609) 572-7610
Direct Fax 609-572-7611

FILE NO.: 54612-4

June 4, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

As you know, this office represents the Upper Township Board of Education (the "Board") with regard to the above-captioned matter.

When we spoke on the telephone on March 12, 2009, you confirmed receipt of our letters concerning the Board's intent to appeal the decision of the Division of Pensions and Benefits (the "Division") regarding the Board's separation initiative. You stated that you do not know who an appeal would go through -- the Board of the New Jersey Public Employees' Retirement System ("PERS"), the Board of the Teachers' Pension and Annuity Fund ("TPAF"), both, or the Appellate Division of the New Jersey Superior Court. You acknowledged that the Board is not out of time to appeal and informed me that the question of where to appeal was before the Attorney General's Office.

I still have not heard from you, the Division or the Attorney General's Office regarding the issue of where to appeal.

As you can imagine, the Board is anxious to proceed with this matter and perfect its appeal. Please contact me at your earliest convenience in order to update me on the status of the issue and/or to advise the Board of the appropriate appeals process.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk

June 4, 2009

Page 2

If you have any questions, please feel free to contact me. Thank you for your attention to this matter.

Very truly yours,

William S. Donio

WSD/jlb

CLAC 343492.1

COOPER LEVENSON
ATTORNEYS AT LAW

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Direct Fax 609-572-7611
FILE NO.: 54612-4

June 16, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

As you know, this office represents the Upper Township Board of Education (the "Board") with regard to the above-captioned matter.

As you have previously acknowledged, the Board notified the Division of Pensions and Benefits (the "Division") of its intent to appeal the Division's decision regarding the Board's separation initiative. Indeed, you acknowledged that the Board's appeal has been preserved and the Board is not out of time to pursue the appeal. Despite our letters to you dated January 12, 2009, February 25, 2009, March 11, 2009 and June 4, 2009 requesting your guidance and indicating our intent to appeal, we have not actually received any direction from you or the Division regarding our inquiry. Nor have we heard from the Attorney General's Office before whom, you indicated in our March 12, 2009 telephone call, the question of the procedure for the Board's appeal is pending.

Please contact me at your earliest convenience in order to advise me of the status of the Board's appeal. Thank you for your attention to this matter, and please feel free to contact me if you have any questions.

Very truly yours,



William S. Donio

WSD/jlb
CLAC; 346095.1



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

August 12, 2009

JON S. CORZINE
Governor

MAILING ADDRESS:
PO Box 295
TRENTON NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON NEW JERSEY

R. DAVID ROUSSEAU
State Treasurer

FREDERICK J. BEAVER
Director

William S. Donio, Esq.
Cooper Levenson, Attorneys at Law
1125 Atlantic Ave
Atlantic City, NJ 08401

Re: Separation Incentive #69-0239

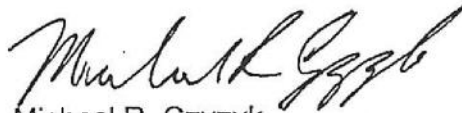
Dear Mr. Donio:

As you are aware, the Division of Pensions and Benefits (Division) has found that the one-time separation initiative offered by the Upper Township Board of Education (BOE) to those employees who terminate employment during specified periods of 2008 and 2009 is in reality an early retirement incentive program (ERI). From our previous communications, the Division has advised you and the BOE that local employers are not authorized to offer early retirement incentive programs for their employees unless they are specifically authorized by State law. The law on this subject is clearly set forth in Fair Lawn Ed. Assn. v. Fair Lawn Bd. 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.

The Division is aware that the BOE has filed an appeal of its determination and is awaiting instructions on the appeal process. The BOE will be advised of that process. In the interim, the Division has been monitoring the retirement activity of those members employed by the BOE. Specifically, it has identified those employees who were previously recognized as being eligible for participation in the BOE's incentive and who are now receiving a retirement benefit or who have filed for retirement at a future date. I have included a schedule of those members.

Please indicate if any of the listed members received the aforementioned separation incentive upon retirement or are expected to receive the incentive at, or subsequent to their scheduled retirement date. Your response should be directed to my attention at the address noted on this letterhead no later than August 20, 2009

Sincerely,



Michael R. Czyzyk
Supervisor, External Audit

RECEIVED
JUL 13 2011

Attachment

c. Vincent Palmieri, Jr., Superintendent-Upper Township BOE

COOPER LEVENSON
ATTORNEYS AT LAW

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Direct Phone (609) 572-7610
Direct Fax 609-572-7611
FILE NO.: 54612-4

August 25, 2009

via Facsimile (609) 393-5037 & Regular Mail

Michael R. Czyzyk, Supervisor, External Audit
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Mr. Czyzyk:

As you know, I represent the Upper Township Board of Education (the "Board") with regard to the above-captioned matter. Please allow this letter to confirm my receipt of your letter dated August 12, 2009.

In your letter you request that the Board forward a list of members who received the Board's separation initiative or are expected to receive the separation initiative. As you also know, the Board has been attempting to obtain direction or any other informational response from you for over eight months regarding the exact procedure to perfect an appeal of the Division of Pensions and Benefits' (the "Division") finding that the Board's separation initiative is not acceptable. The Board's efforts are well documented in numerous correspondence to you and by your confirmation of the Division's understanding of the Board's desire to appeal.

Based on the status of our appeal, and the lack of any progress from the Division regarding same, the Board will not forward to you the names you request. Your letter confirms that the Division is more than familiar with the Board's desire to appeal the Division's decision and our request for information from you, but has done nothing to act on our request or cooperate with the Board's efforts. Your letter suggests that the Division has not in good faith sought to take any action with regard to the Board's appeal, even though the Board has a good faith belief that its separation initiative is proper.

I await your direction on the Board's inquiry regarding its appeal. The Board is currently looking into other avenues of appeal, and if the Board does not hear from you regarding same shortly, it will take further legal action as appropriate.

EXHIBIT

E

COOPER LEVENSON APRIL
N. J. Offices: ATLANTIC CITY • CHERRY HILL •
HARRISBURG, PA • BEAR, DE • LAS VEGAS, NV

HEIM, P.A.
ATLANTIC CITY • TRENTON

UTBOE-22

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

Michael R. Czyzyk
August 25, 2009
Page 2

I look forward to hearing from you. If you have any questions, please feel free to contact me.

Very truly yours,



William S. Donio

WSD/jlb
CLAC; 365199.1

COOPER LEVENSON

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Direct Fax 609-572-7611
FILE NO.: 54612-37

September 21, 2009

New Jersey Department of the Treasury
Division of Pensions and Benefits
PO Box 295
Trenton, NJ 08625-0295
Attention: Director's Office

Re: Open Public Records Act Request

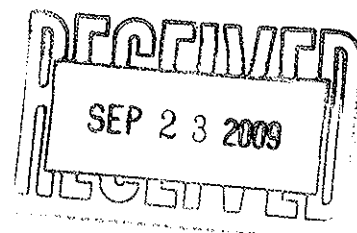
Dear Sir/Madam:

This office represents the Upper Township Board of Education (the "Board"). On August 25, 2009, my office submitted an Open Public Records Act ("OPRA") request through the online form provided by the State of New Jersey at https://www6.state.nj.us/DCA_OPRA/departments.jsp, which contains a link to a form for OPRA requests to the Department of the Treasury. We have received no response from the Department of the Treasury regarding this request. A copy of that request, which includes a confirmation number W45435, is enclosed with this letter.

In that request, we specifically sought copies of all records and materials in any and all reviews of any separation initiative offered by any Public School District or Board of Education by the Division of Pensions and Benefits as well as any records regarding the result of any reviews.

Please advise as to the status of our OPRA Request. As indicated in our August 25, 2009 request, we have authorized a maximum \$100.00 amount for the costs associated with producing this information and request that the information be provided by U.S. Mail.

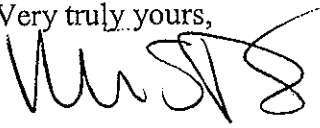
If we do not receive a response to this request within ten (10) days we will be forced to move before the Government Records Council and/or the Superior Court of New Jersey to enforce our request.



New Jersey Department of the Treasury
September 21, 2009
Page 2

If you have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'WSD', with a large, stylized flourish extending from the end.

William S. Donio

WSD/jlb
Enc.
CLAC; 372485.1

njhome | gov home | OPRA | OPRA central

search

Open Public Records Act

about OPRA | about GRC | state request form | state services index | department/agency index | state

The following Request for Information has been forwarded to the
Department of Treasury.

Your confirmation number is **W45435**. Please write this number down or print this page as a reference

Requestor Information

First Name MI Last Name
William S Donio

Company
Cooper Levenson

Mailing Address
1125 Atlantic Avenue - 3rd Floor

City State ZIP
Atlantic City New Jersey 08401 -

Email
wdonio@cooperlevenson.com

Day Time Area Code Number Extension
Telephone: 609 572 - 7610

Preferred Delivery: US Mail

Under penalty of N.J.S.A. 2C:28-3, I certify that I **Have Not** been convicted of any indictable offense under the laws of New Jersey, or any other state, or in United States.

Record Request Information:

Please provide copies of all records and materials in any and all reviews of any separation initiative offered by any Public School District or Board of Education by the Division of Pensions and Benefits as well as any records regarding the result of any reviews.

Payment Information

Maximum Authorized Cost:
\$ 100.00

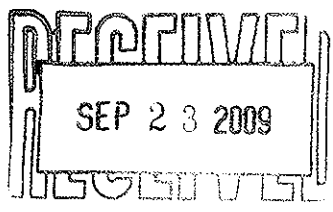
Payment Method:
Check

Fees: Pages 1-10 @ \$0.75
Pages 11-20 @ \$0.50
Pages 21 - @ \$0.25

Delivery: Delivery / postage fees
additional depending upon
delivery type.

Extras: Extraordinary service fees
dependent upon request.

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State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

MAILING ADDRESS:
PO Box 295
TRENTON, NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON, NEW JERSEY

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

February 6, 2014

Upper Township Board of Education
Donna L. Young, Certifying Officer
525 Perry RD
Petersburg, NJ 08270

RE: Unauthorized Early Retirement Incentive Program

Dear Ms. Young:

After reviewing the details of the severance package offered by Upper Township Board of Education to its employees, the Division of Pensions and Benefits has determined it to be an unauthorized early retirement incentive program. Unauthorized early retirement incentive (ERI) programs are retirement incentive programs not expressly authorized by law. However, even if the ERI program was expressly authorized by law, employers who offer such a program are always responsible for the additional pension liabilities created as a result of the program. Consequently, Upper Township Board of Education must be held financially liable for the additional pension costs resulting from the unauthorized program.

The program deemed to be an unauthorized ERI program offered by Upper Township Board of Education, under a separation agreement, provided bonuses ranging from \$3,000 to \$50,000 to employees who terminated service by July 1, 2008 or July 1, 2009. Fifteen employees who were members of the Teachers' Pension and Annuity Fund (TPAF) took advantage of the program.

The prohibition of unauthorized ERI programs has been validated by the State Appellate Courts and most notably by the State Supreme Court as set forth in Fair Lawn Ed. Assn. v. Fair Lawn Bd. Of Education, 79 N.J. 574 (1979). Enclosed is the Division's publication Fact Sheet #52: Retirement Incentive Programs which details the prohibition of unauthorized ERI programs and the pension costs associated with them.

The present value of the additional pension liabilities associated with the unauthorized ERI program, as detailed on the enclosed list, have been actuarially determined to be as follows:

System	Participating Members	Additional Pension Liability
TPAF	15	\$ 1,350,200
Total	15	\$ 1,350,200

Upper Township Board of Education
Donna L. Young, Certifying Officer
February 6, 2014



Enclosed is a bill due the Teachers' Pension and Annuity Fund reflecting the amount referenced above.
Payment is due upon receipt.

Should you have any questions, please contact me at 609-292-3678.

Sincerely,

A handwritten signature in blue ink, appearing to be "F. Sheppard", written over the typed name.

Florence J. Sheppard
Acting Director

Enclosures

COOPER LEVENSON

ATTORNEYS AT LAW

1125 Atlantic Avenue – 3rd Floor
Atlantic City, NJ 08401
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FILE NO. 54612/00004

March 10, 2014

Via Certified Mail

Florence J. Sheppard
Acting Director
State of New Jersey
Department of the Treasury
Division of Pension and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Ms. Sheppard:

This office represents the Upper Township Board of Education (the "Board") with regard to the above-referenced matter. Please allow this letter to confirm receipt of your letter dated February 10, 2014.

As you should be aware, the Board received a number of communications from the State of New Jersey, Department of Treasury, Division of Pension and Benefits (the "Division") regarding the Board's separation initiative, dating back to 2008. In fact, the Division initially stated the position which you now reiterate, and requested information from the Board on this issue in separate correspondence dated December 1 and 24, 2008. See 12/1/08 and 12/24/08 letters from Michael Czyzyk attached hereto as Exhibits A and B, respectively. In response thereto, this office responded to the Division by way of letter dated January 8, 2009, wherein the Board expressed its disagreement with the Division's conclusions as to the Board's separation initiative, and its intent to appeal. The Board further requested guidance on the proper procedure, and appealed, and requested information as to the forum in which the formal appeal of the Division's conclusory findings would be adjudicated. See 1/8/09 letter from William Donio attached hereto as Exhibit C.

Approximately eight (8) months later, on August 12, 2009, the Division sent another letter to the Board requesting additional information and expressly acknowledged the Board's appeal. At that time, the Division indicated that it was "awaiting instructions on the appeal process", and that "the BOE will be advised of that process". See 8/12/09 letter from Michael Czyzyk attached hereto as

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N. J. Offices: ATLANTIC CITY • CHERRY HILL • TRENTON
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UTBOE-29

COOPER LEVENSON, P.A.

Florence J. Sheppard
March 10, 2014
Page 2

Exhibit D. In response thereto, the Board sent a letter to the Division on August 25, 2009, requesting direction regarding the appeal process. See 8/25/09 letter from William Donio attached hereto as Exhibit E.

The Division has simply neglected to respond to the Board's stated, and acknowledged, appeal of this matter for nearly four (4) years, until your letter of February 10, 2014. Accordingly, please accept this letter as an additional formal notice of the Board's appeal of the Division's findings with respect to the Board's separation initiative, and an additional request for information on the appeal process.

Further, please be advised that the Board's position is that the Division is now out of time to proceed on this issue, and the Board will seek to dismiss the Division's determination based upon all applicable statutes of limitations and the equitable doctrines of laches and estoppel. In addition, and alternatively, the Board disagrees with your determination that *Fair Lawn Education Association v. Fair Lawn Board of Education*, 79 N.J. 574 (1979), supports the Division's determination. Under *Fair Lawn*, a board of education cannot offer an early retirement plan to employees that would encourage individuals to retire early by offering increased financial benefits for retiring at an earlier age. *Id.* At 577. The Court emphasized in *Fair Lawn* that to do so could result in a "substantial" impact on the Teachers' Pension and Annuity Fund. *Id.* At 583.

Unlike in *Fair Lawn*, and as the Division has previously acknowledged, the Board's separation initiative did not differentiate between individuals' age in order to encourage retirement. Although the Division's most recent letter provides only conclusory statements that the Board's separation initiative was an "Early Retirement Incentive" that was "not authorized by law," the Division provides no substantive basis as to why or how it reaches this conclusion. There is no analysis or explanation of the Division's reasons for concluding that the Board's separation initiative should be viewed as an early retirement incentive program.

Accordingly, based upon the above, the Board again appeals the Division's determination. Please advise as to the specific process to be followed in order to expedite the appeal. Please respond to this request as soon as possible as the Board continues to reserve all rights and remedies available at law and equity.

Very truly yours,


William S. Donio

WSD
Enc.



MAILING ADDRESS:
PO Box 295
TRENTON, NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON, NEW JERSEY

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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www.state.nj.us/treasury/pensions

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

June 4, 2014

Upper Township
Board of Education
Donna L. Young, Certifying Officer
525 Perry Rd.
Petersburg, NJ 08270



RE: Unauthorized Early Retirement Incentive Program
Additional Detail

Dear Ms. Young:

As a follow-up to my letter dated February 6, 2014, enclosed is a detailed breakdown of the additional pension liabilities being assessed to Upper Township Board of Education resulting from what the Division deemed to be an unauthorized early retirement incentive program. This breakdown lists the 15 members of the Teachers' Pension and Annuity Fund and 4 members of the Public Employees' Retirement System who elected to participate in the program offered by Upper Township Board of Education which under a separation agreement, provides bonuses ranging from \$3,000 to \$50,000 to employees who terminated service by July 1, 2008 or July 1, 2009.

Should you have any questions, please contact John Megariotis at (609) 292-3674 or Henry Matwiejewicz at (609) 984-0574.

Sincerely,



Florence J. Sheppard
Acting Director

Enclosure

c. John Megariotis
Susanne Culliton
Henry Matwiejewicz
Mary Ellen Conway
Michael Czyzyk

COOPER LEVENSON

ATTORNEYS AT LAW

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Atlantic City, NJ 08401
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Direct Phone (609) 572-7610
Direct Fax 609-572-7611
FILE NO. 54612/00004

June 19, 2014

Via UPS Overnight Mail

Florence J. Shepard
Acting Director
State of New Jersey
Department of the Treasury
Division of Pension and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative

Dear Ms. Sheppard:

This office represents the Upper Township Board of Education (the "Board") with regard to the above-referenced matter. Please allow this letter to confirm receipt of your letter dated June 4, 2014 and serve as a further response thereto.

Please be advised that the Board formally appealed the Division of Pension and Benefits (the "Division") determination regarding the Board's separation initiative. As set forth at length in the Board's March 10, 2014, letter to the Division, the Board's position is that the Division is now out of time to proceed on this issue, and the Board will seek to dismiss the Division's determination based upon all applicable statute of limitations and the equitable doctrines of estoppel and laches. Further, and alternatively, the Board disagrees with the Division's determination that *Fair Lawn Education Association v. Fair Lawn Board of Education*, 79 N.J. 574 (1979), supports the Division's determination. The Board's substantive disagreement with this position, as well as its position to the legal and equitable deficiencies with the Division proceeding in this manner, are fully set forth in the Board's letter to the Division dated March 10, 2014, which is attached hereto as Exhibit "A" for your reference.

As previously stated in the Board's March 10, 2014, letter, the Board appeals the Division's determination. Please advise as to the specific process to be followed in order to expedite the appeal.

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COOPER LEVENSON, P.A.

Florence J. Shepard
June 19, 2014
Page 2

Please respond to this request as soon as possible as the Board continues to reserve all rights and remedies available at law and equity.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. S. Donio', with a long horizontal flourish extending to the right.

William S. Donio

WSD/
Enclosure

CLAC 2582256.1



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7531 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

MAILING ADDRESS:
P.O. Box 295
TRENTON, NJ 08625-0295

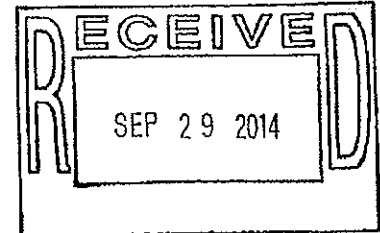
LOCATION:
50 WEST STATE STREET
TRENTON, NEW JERSEY

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

September 22, 2014

William S. Donio, Esq.
Cooper Levenson
Attorneys at Law
1125 Atlantic Avenue-3rd Floor
Atlantic City, NJ 08401



Re: 69-0652

Dear Mr. Donio:

I have reviewed your arguments as set forth in documents submitted on March 10, 2014; this on behalf of your client, the Upper Township Board of Education (BOE). Specifically, the BOE is appealing the Division of Pensions and Benefits (Division) February 10, 2014 determination concerning the 2008 separation incentive offered by the BOE to its employees enrolled in the Teachers' Pension and Annuity Fund (TPAF) and the Public Employees' Retirement System (PERS). The Division had determined that the incentive was, in fact, an unauthorized Early Retirement Incentive (ERI). As a result, the Division required that the BOE remit \$1,350,200 to the TPAF and \$78,911 to the PERS; amounts which represents the unfunded liability incurred by the Funds' as a result of this action.

In response to your appeal, I would like to address the following points.

- You challenge the Division's assertion that the one-time separation incentive offered by the BOE was not an unauthorized ERI. Although the BOE's separation incentive was offered to all employees regardless of length of service and is not contingent upon retirement, the incentive motivated a vast majority of participants to file for retirement. The Division received a variety of documents from the BOE identifying prospective participants. However, in correspondence dated July 21, 2008, the Division requested the names of those employees who ultimately participated in the program. In your response of August 25, 2009, you refused to provide the names requested; citing as a reason, the lack of progress regarding your appeal of the Division's December 24, 2008 determination. Based on information previously provided by the BOE as well as data garnered from the Division, 24 employees were originally identified as participants of the program. Nineteen retired from either the

TPAF or the PERS. Three employees terminated with less than three years-service in the PERS and received minimal payouts. One employee terminated with 11 years-service in the TPAF and filed for a Deferred Retirement; one additional TPAF member, eligible to retire resigned and obtained subsequent employment with another school district.

The Division provided to the Funds' actuaries the names of the retirees. An unfunded liability was determined based on the retirements of 19 members. The retirements of two participants had no effect on the PERS. The Division identified as a participant in the program, one BOE employee who retired from the TPAF during the eligibility period. Caroline Collins retired from the TPAF effective August 1, 2008. However, she was not initially identified as a "Deferred Retiree". Her last contributions to the TPAF were remitted by the BOE, but ceased after June 30, 2002 when she terminated employment with the BOE. Ms Collins filed for a Deferred Retirement and exercised that option when she became eligible for a Service Retirement in August of 2008. Although listed as a BOE employee through her last active employment with the BOE, Ms Collins could not have participated in the ERI. As such, the Division is correcting the assessment and is reducing the amount owed to the TPAF by \$54,200.

Of the 23 participants to the program, 18 members retired from either the TPAF or the PERS. These retirees represent over 78% of the participants in the program with over 93% of the incentive being paid to those retiring. Although the incentive did not require retirement, the structure of the program produced those results.

- In January of 2008, the BOE was advised that the Division had concerns over a possible separation incentive being offered to its employees and requested various documents. The BOE complied with that request indicating that no eligible employees elected to participate in the program as of January 31, 2008. On July 21, 2008 the Division requested an update of the status of any incentive being offered; the BOE did not comply. On November 25, 2008, the Division again requested information relative to any such separation programs being offered. On December 5, 2008, the BOE responded indicating that a new separation initiative was negotiated and agreed upon during May and June of 2008. Information was provided to the Division, but Division approval was not requested. On December 24, 2008, the Division advised the BOE that the incentive was an unauthorized ERI. It requested that the status of the program be provided. The Division noted that the BOE proceeded with the incentive before it contacted the Division asking the status of the Division's review.

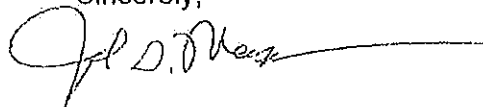
The Division acknowledges that in various correspondences on January 12, 2009, February 25, 2009, March 11, 2009, June 4, 2009 and August 25, 2009 you had expressed the BOE's desire to appeal the Division's determination. It further realizes that it was not until February 10, 2014 did

the Division provide the BOE with an assessment requiring payment by the BOE. You contend that this delay renders the assessment unenforceable based upon all applicable statute of limitations and the equitable doctrines of laches and estoppel; the Division disagrees. The assessments represents the unfunded liability incurred by the TPAF and the PERS as a result of the actions by the BOE; this as determined by the Funds actuaries. It also realizes that a considerable amount of time has now passed since completion of the ERI. However, the additional pension liability, now adjusted at \$1,374,911, represents only the present value liability as the time the program concluded; interest was not factored into this amount. The BOE has incurred no additional obligation as a result of the timing of the assessment.

- Under Fair Lawn Education Association v. Fair Lawn Board of Education, the courts have ruled that locally negotiated programs that incentivized retirement was an illegal retirement inducement. Unlike the Fair Lawn issue, the BOE did not require retirement or establish age parameters. However, the Division considers the actual impact a program has upon the Funds. In the case of the Upper Township BOE incentive, the Division determined that the program did target retirement eligible employees as evidenced by those who participated in the program. Of the 23 employees who participated in the program, 18 were either TPAF or Public Employee Retirement System (PERS) retirement eligible with 17 members retiring. The Division considers implications of the Fair Lawn matter relevant to this issue.

Unfortunately, after reviewing your various arguments, the Division must affirm its position relative to this matter. By copy of this letter, I am advising Mary Ellen Rathbun, Secretary to the TPAF Board of Trustees and Hank Schwedes, Secretary to the PERS Board of Trustees to proceed with the scheduling of your appeal to the respective Boards. Correspondence to either the TPAF or PERS Boards of Trustees should be directed to the attention of Ms. Rathbun or Mr. Schwedes as appropriate

Sincerely,



John D. Megariotis,
Deputy Director

- c. Mary Ellen Rathbun, TPAF Board of Trustee Secretary
Hank Schwedes, PERS Board of Trustee Secretary
Susanne Culliton, Assistant Director



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FILE NO. 54612/00004

October 20, 2014

Via Facsimile and Regular Mail

Ms. Mary Ellen Rathbun
TPAF Board of Trustees
State of New Jersey
Department of Treasury
Division of Pension and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative
Your Reference No.: 69-0652

Dear Ms. Rathbun:

Please accept this letter on behalf of the Upper Township Board of Education (the "Board") as a follow up to Deputy Director, John D. Megariotis', September 22, 2014, correspondence, a copy of which is enclosed for your reference. Pursuant to Mr. Megariotis' direction, the Board would like to schedule its appeal to the Teacher's Pension and Annuity Fund Board in response to the Division of Pensions and Benefits' February 10, 2014, determination. Kindly advise as to the scheduling, process and procedure for the appeal at your earliest convenience. Your prompt assistance is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read 'WSD' followed by a stylized flourish.

William S. Donio

WSD
Enclosure

COOPER LEVENSON
ATTORNEYS AT LAW

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FILE NO. 54612/00004

October 20, 2014

Via Facsimile and Regular Mail

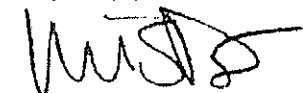
Mr. Hank Schwedes
PERS Board of Trustees
State of New Jersey
Department of the Treasury
Division of Pension and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education - Separation Initiative
Your Reference No.: 69-0652

Dear Mr. Schwedes:

Please accept this letter on behalf of the Upper Township Board of Education (the "Board") as a follow up to Deputy Director, John D. Megariotis', September 22, 2014, correspondence, a copy of which is enclosed for your reference. Pursuant to the direction of Mr. Megariotis', the Board would like to schedule its appeal to the Public Employees' Retirement System Board in response to the Division of Pensions and Benefits' February 10, 2014, determination. Kindly advise as to the scheduling, process and procedure for the appeal at your earliest convenience. Your prompt assistance is appreciated.

Very truly yours,



William S. Donio

WSD
Enclosure



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

MAILING ADDRESS:
PO BOX 295
TRENTON, NJ 08625-0295

LOCATION:
50 WEST STATE STREET
TRENTON, NEW JERSEY

ANDREW P. SUDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

December 30, 2014

COOPER LEVENSON
William S. Donio, Esquire
1125 Atlantic Avenue-3rd Floor
Atlantic City, NJ 08401

Re: Upper Twp. BOE
TPAF Loc #05021

Dear Mr. Donio:

At its meeting of February 5, 2015, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) will consider your appeal submitted on behalf of your client, the Upper Township Board of Education. This matter is before the Board as you are appealing the Division of Pensions and Benefits administrative determination that the Upper Township Board of Education offered an Unauthorized Early Retirement Incentive Program to its employees enrolled in the TPAF.

If you and/or your client wish to attend the Board's meeting on Thursday, February 5, 2015, you may do so in accordance with the Open Public Meetings Act. The meetings are held at the Division of Pensions and Benefits, One State Street Square, 50 W. State Street, First Floor Boardroom, Trenton and begin at 10:30 a.m. Any additional information that you wish the Board to review in consideration of your appeal must be submitted no later than **January 22, 2015**.

If you plan to attend the meeting, please contact our staff at (609) 984-6890 in order that your attendance for this agenda item may be noted. As it is difficult to determine the amount of time the Board will need to properly review each agenda item, our staff will only be able to provide you with an *approximate* time that your matter may be addressed.

Sincerely,

Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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LOCATION:
50 WEST STATE STREET
TRENTON, NEW JERSEY

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

February 3, 2015

Upper Township
Board of Education
Donna L. Young, Certifying Officer
525 Perry Rd.
Petersburg, NJ 08270

RE: Unauthorized Early Retirement Incentive Program
Additional Detail

Dear Ms. Young:

Enclosed is a revised detailed breakdown of the additional pension liabilities being assessed to Upper Township Board of Education. We have modified the amount to reflect the elimination of any interest assessed after the member retired. The previous breakdown assessed interest from the date of retirement to January 1, 2012, the expected payment date as of that time. The following table compares the revised liability figures with those initially provided.

Comparison of Additional Liability Figures due to Unauthorized ERIs		
Location	Initial Liability	Revised Liability
Upper Township	\$ 1,350,200	\$ 1,105,200

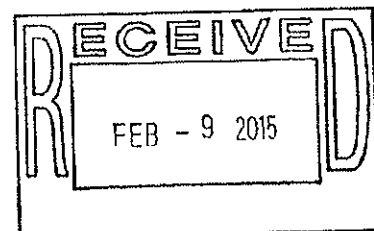
Should you have any questions, please contact John Megariotis at (609) 292-3674 or Henry Matwiejewicz at (609) 984-0574.

Sincerely,


Florence J. Sheppard
Acting Director

Enclosure

c. William S. Donio, Esq.
John Megariotis
Susanne Culliton
Henry Matwiejewicz
Mary Ellen Rathbun



WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

Direct Phone (609) 572-7610
Direct Fax 609-572-7611
FILE NO. 54612/00004

February 19, 2015

Via E-mail (MaryEllen.Rathbun@treas.nj.gov)

Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
50 West State Street
Trenton, NJ 08625

Re: Upper Township BOE
TPAF Loc #05021

Dear Ms. Rathbun:

This firm represents the Upper Township Board of Education (the "Board"). Please accept this letter brief in lieu of a more formal brief in appeal of the decision by the New Jersey Department of Treasury, Division of Pension and Benefits (the "Division"): (1) classifying the Board's June, 2008, separation initiative offered to all Upper Township School District employees (the "separation initiative") as an illegal early retirement incentive; and (2) assessing a \$1,105,200 unfunded pension liability to the Board.

The Division determined that the Board's separation initiative was an illegal early retirement incentive based upon the Division's interpretation of *Fair Lawn Education Association v. Fair Lawn Board of Education*, 79 N.J. 574 (1979). Unfortunately, however, the Division provided no

Mary Ellen Rathbun, Secretary

February 19, 2015

Page 2

explanation for its decision other than a bare assertion that the net effect of the separation initiative was the premature retirement of participating employees. The Division offered no fact-based, quantitative analysis as to how or why this determination was made. Equally as troubling, the Division assessed \$1,105,200 to the Board as an unfunded pension liability without providing the facts, assumptions and calculations upon which the Division's actuaries relied in determining this number¹. Essentially, the Division is requiring the Board, and ultimately the taxpayers of the Upper Township School District, to accept on faith that the Division's determination of illegality and assessment of monetary penalties are correct, while refusing to "show its work". Moreover, the Division failed to take any action on this matter for nearly six (6) years. Accordingly, the Board relied on this representation, and subsequent inaction, to its detriment by planning and budgeting under the assumption that the program was deemed legal and no monetary assessment would be forthcoming. The Division, therefore, is equitably estopped from proceeding against the Board as a matter of law under the doctrines of estoppel and laches, as well as any applicable Statutes of Limitations.

Stated simply, the Board has a legal duty, and a fiduciary obligation to the taxpayers of the Upper Township School District, to demand that the Division fully explain itself before simply turning over \$1,105,200. Moreover, it is respectfully submitted that the Division has an equally compelling reciprocal duty to the taxpayers of the State of New Jersey to provide a transparent, fact-based and complete explanation of the process that led to its ultimate conclusion of illegality and assessment of a monetary fine. The Board, and the taxpayers, are entitled to a full explanation as to the Division's actions and, if necessary, to challenge the Division's findings if its process proves faulty.

¹ The Board has also requested that the Division schedule an appeal regarding the assessment by the Division on behalf of the Public Employee Retirement System ("PERS"). To date, the Division has not responded or scheduled an appeal regarding the Board's PERS appeal and, accordingly, the Board expressly reserves all rights with respect thereto.

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 3

As set forth more fully herein, unlike the non-service related retirement benefit prohibited in *Fair Lawn*, the Board's separation initiative is permitted by law and was offered to all employees based upon the service the employee provided to the District without regard to age. Moreover, and in the alternative, assuming that the Division's determination is correct as to the illegality of the separation initiative, the Board has no way of knowing if the monetary assessment is correct without knowing the information, assumptions and calculations upon which the Division's actuaries relied. Without more, the Division's determination and assessment are arbitrary, capricious and without merit. Accordingly, the Board respectfully requests that the Division:

- 1) Reconsider and reverse its finding that the Board's separation initiative is an illegal early retirement incentive;
- 2) Provide all facts, documents and other evidence upon which the Division relied in reaching the conclusion that the net effect of the separation initiative was premature retirement of participating employees;
- 3) Provide all facts, documents and other evidence upon which the Division relied in determining that the separation initiative resulted in a substantial impact to the Teacher's Pension and Annuity Fund;
- 4) Provide all facts, documents, assumptions, calculations, analyses and other evidence upon which the Division and the Division's actuaries relied in determining that the Board's separation initiative caused an unfunded liability to the TPAF in the amount of \$1,105,200.

FACTS AND PROCEDURAL HISTORY

On or about June 2008, the Board and all Board employees negotiated a one-time separation initiative as memoranda of agreement to the parties' employment contracts and/or collective bargaining agreements ("CBA"). The separation initiative provides for a lump sum payment on separation from the District, provided the employee satisfies the years of service required in his or her particular position. *See Exhibit "A"*. The Board hoped that by offering the separation initiative, some employees would participate in same, decreasing the overall size of the Board's workforce and ultimately resulting in a long-run savings of school funds that would otherwise be spent on employee salaries.

The mechanics of the separation initiative involve the providing of a per diem payment for accumulated sick days at a rate agreed to in the memoranda of agreement for each employee and/or bargaining unit. *Id.* In order to receive the payment for accumulated sick days at the higher rate contained in the memoranda of agreement instead of the rate originally negotiated, the separation initiative requires that the employee notify the Board in writing by 12 pm on June 19, 2008 that he or she intended to separate from the District between July 1, 2008 and August 31, 2008, or July 1, 2009 and August 31, 2009. *Id.* Upon doing so, the Board would pay the employee the per diem amount of accumulated unused sick leave days accrued during his or her employment in the District. The separation initiative memorandum of agreement provides for a maximum payout under the memorandum of agreement.

By letter dated December 24, 2008, Division External Audit Supervisor Michael Czyzyk informed the Board that after reviewing the separation initiative it "appears more likely to motivate early retirement" in violation of a prohibition against early retirement plans as provided in *Fair Lawn*,

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 5

supra, even though it “seems acceptable in that it is offered to all employees regardless of length of service and is not contingent on retirement.” *See Exhibit “B”*. Mr. Czyzyk stated the Division’s opinion that “the number of individuals who have participated in the program thus far as well as those who have expressed interest in participating are eligible to retire from either the Teachers’ Pension and Annuity Fund (TPAF) or the Public Employees’ Retirement System (PERS),” and therefore the Division viewed the separation initiative as an early retirement incentive program and unacceptable.²

By letter dated January 12, 2009, the Board, through counsel, responded to Mr. Czyzyk and informed him that the Board did not agree with the Division’s determination that the separation initiative is unacceptable under *Fair Lawn* because the separation initiative does not differentiate between individuals’ ages in order to encourage retirement, because there is no analysis or explanation of the reasons for concluding that the separation initiative is viewed as an early retirement incentive merely because the number of participants expressing interest in the program are eligible to retire even though offered to all employees. *See Exhibit “C”*. The Board also stated its desire to appeal the Division’s determination and requested advice as to the specific process to be followed in order to appeal. The Board requested that the Division respond to this request as soon as possible so that the Board could timely appeal within any applicable timeline.

By letter dated February 19, 2009, because neither Mr. Czyzyk nor the Division had responded to the Board’s letter of January 12, 2009, counsel for the Board followed up on its inquiry regarding

² By letter dated December 22, 2008, Division Auditor Hank Schwedes informed the Board that it was “conducting an ongoing investigation of employee compensation packages as they relate to pension reporting and benefits,” an inquiry Mr. Schwedes declared was “unrelated to the district’s inquiries concerning a possible early retirement incentive now on the desk of Michael Czyzyk.” Mr. Schwedes requested copies of “all employment contracts, memoranda of agreement, supplements, addenda and sidebar agreements in force between the District and the several bargaining units, as well as with individual employees, covering the past five years.” The Board responded to this request with the requested documents by letter dated January 15, 2009. The Board also responded to a supplemental follow-up request to produce additional information from Mr. Schwedes by letter dated January 23, 2009 by letter dated February 17, 2009.

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 6

the process to appeal the Division's decision. *See Exhibit "D"*. In particular, the Board reiterated its request that the Division advise as to whether the Division's decision was a final agency decision and, if not, the process to obtain a formal final agency decision and what process must be followed to appeal a Division decision.

On March 12, 2009, Mr. Czyzyk called William S. Donio, Esq., counsel for the Board to confirm receipt of counsel's letters and indicating that he did not know where an appeal would go to. Mr. Czyzyk confirmed receipt of Mr. Donio's letters regarding the Board's intent to appeal the decision of the Division regarding the Board's separation initiative. Mr. Czyzyk acknowledged that the Board was not out of time to appeal and informed Mr. Donio that the question of where to appeal was before the Attorney General's Office.

By letter dated June 4, 2009, the Board followed up with Mr. Czyzyk again and indicated that it was anxious to proceed with the matter and perfect its appeal and requested that Mr. Czyzyk contact Mr. Donio at his earliest convenience to update him on the status of the issue and/or to advise the Board of the appropriate appeal process. *See Exhibit "E"*. Lack of a response to this follow-up letter led Mr. Donio to request another status update by letter dated June 16, 2009. *See Exhibit "F"*. Mr. Donio emphasized to Mr. Czyzyk that despite the Board's letters to the Division dated January 12, 2009, February 25, 2009, March 11, 2009 and June 4, 2009 requesting guidance and indicating the Board's intent to appeal, the Board had not actually received any direction from Mr. Czyzyk or the Division regarding its inquiry.

The Division simply neglected to respond to the Board's stated, and acknowledged, appeal of this matter for nearly five (5) years, until the Division's letter of February 10, 2014 demanding payment from the Board. *See Exhibit "G"*. Thereafter, the Board sent another letter to the Division

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 7

on March 10, 2014, again outlining its disagreement with the Division's determination and requesting the scheduling of an appeal. *See Exhibit "H"*. Next, on June 4, 2014, the Division sent yet another letter to the Board demanding payment, but once again neglecting to advise the Board of the appeal process. *See Exhibit "I"*. In response thereto, on June 18, 2014, the Board sent another letter to the Division requesting to schedule an appeal. *See Exhibit "J"*. Thereafter, on September 22, 2014, Division Deputy Director John Megariotis sent a letter to the Board outlining the reasons for the Division's position that the separation initiative is an illegal early retirement incentive. *See Exhibit "K"*. While purporting to set forth a thorough explanation of the Division's reasoning for its position, the September 22, 2014 letter contained little more than empty platitudes such as, "the incentive motivated all of the participants to file for retirement" and "the Division determined that the program did target retirement eligible employees", but offered no insight as to how or why the Division reached these conclusions. *Id.* Next, on October 20, 2014, the Board sent a letter to Hank Schwedes of PERS and Mary Ellen Rathbun of TPAF, requesting to schedule an appeal per Mr. Megariotis' September 22, 2014 letter. *See Exhibit "L"*. Thereafter, on December 30, 2014, the Board received correspondence from the Division advising the Board that its appeal as to the TPAF would be heard at a public meeting of the Board of Trustees of the Teacher's Pension and Annuity Fund. *See Exhibit "M"*. Finally, on February 3, 2015, the Division sent a letter to the Board advising the Board that the Division had revised its liability calculation from \$1,350,200 to \$1,105,200, while providing no detail as to how this calculation was determined. *See Exhibit "N"*. To date, the Division has failed to clarify its position as to whether its determination constitutes a "final determination," and has failed to provide any substantive evidence supporting its determination and assessment.

STANDARD OF REVIEW

Mary Ellen Rathbun, Secretary

February 19, 2015

Page 8

While the review of administrative actions is generally limited, a reviewing agency or court must reverse an agency's final determination if it is "clearly demonstrated to be arbitrary or capricious," . . . or an "an abuse of discretion." *Crapelli v. Board of Trustees of the Red Bank Charter School*, 2009 WL 1750710 (App. Div. June 23, 2009) (internal quotations and citations omitted); *In re Taylor*, 158 N.J. 644, 656 (1999) (A reviewing court may only overturn an agency's decision if it is "arbitrary, capricious or unreasonable, or violative of express or implied legislative policies."). The burden rests on the individual or entity challenging a final agency decision to show that the determination was arbitrary, capricious or unreasonable. *Ibid.*

Nevertheless, the Appellate Court's review of a final agency determination is "not simply a pro forma exercise in which the court rubberstamps findings that are not reasonably supported by the evidence." *Taylor, supra*, 158 N.J. at 656 (quoting *Chou v. Rutgers*, 283 N.J. Super. 524, 539 (App. Div. 1995)). "Appellate courts must engage in a 'careful and principled consideration of the agency record and findings.'" *Id.* at 657-58 (quoting *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 93 (1973)). Furthermore, "[a]n appellate tribunal is ... in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." *Ibid.*

LEGAL ARGUMENT

A. As Found By The Division, The Separation Initiative is Legal Under Fairlaw

N.J.S.A. 18A:27-4 provides public boards of education with the authority to "make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal same" Such authority under *N.J.S.A.* 18A:27-4 includes the authority for a board to make payments for unused sick

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 9

leave “either as part of the teacher’s annual salary or in the form of additional compensation upon retirement.” *Maywood Educ. Association, Inc. v. Maywood Bd. of Educ.*, 131 N.J.Super. 551, 555 (Ch. Div. 1974) (finding that school board had authority to authorize payment of retirement benefits based on unused sick leave, notwithstanding contention that the Legislature’s failure to provide such benefits to teachers while providing them to other public employees impliedly prohibited payments to teachers). Based on recently enacted legislation, which was not in effect at the time of the separation initiative, such compensation for payment of unused accumulated sick leave may now be no more than \$15,000 pursuant to N.J.S.A. 18A:30-3.5.

A public board of education cannot offer an early retirement plan to employees that would encourage individuals to retire early by offering increased financial benefits for retiring at an earlier age. *Fair Lawn, supra*, 79 N.J. at 577. In *Fair Lawn*, the court determined that an Early Retirement Remuneration Plan (ERR) agreed to between the Fair Lawn Board of Education (“Fair Lawn Board”) and the Fair Lawn Education Association (“FLEA”) in the parties’ collective bargaining agreement could not be implemented because it: “(1) lack[ed] statutory authorization; (2) contravene[d] this Court’s [earlier] holdings; and (3) [wa]s preempted by the comprehensive statutory scheme relating to the operation of retirement benefits.” *Id.* at 576-77. Describing the mechanics of the ERR, contained in Article VI of the parties’ CBA, the Court explained:

Under the terms of the contract, teachers between the ages of 55 and 64 who retired prior to September 1, 1977 would receive an additional payment in the amount of \$6,000 upon leaving the Board’s employ. Instructors retiring after the start of the 1977-1978 school year were also entitled to remuneration over and above their normal pension. The value of their benefit, however, was dependent upon age, with those relinquishing their positions at an earlier age receiving a larger bonus. The sums to be paid ranged from \$500 for a 64-year-old teacher to \$6,000 for retiring instructors aged 55 to 57.

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 10

[*Id.* at 577.]

In particular, because under the ERR plan at issue in *Fair Lawn*, the payments were “geared to age, not service,” and “the sums to which instructors are entitled decrease as length of service increases” so that the “contract intended to reward early retirement rather than the amount and quality of work that a particular teacher had performed.” *Id.* at 580. For those reasons, the Court found that such payments are therefore “not authorized by *N.J.S.A.* 18A:27-4,” distinguishing *Maywood, supra*, and that the payments are not even considered compensation under *N.J.S.A.* 18A:27-4 because the payment is not related to employees’ service to the district. *Id.* t 580-81. The Court emphasized that the ERR could result in a “substantial” financial impact on the TPAF due to an increased burden on the State to finance the fund and the possibility existed that other districts would institute similar retirement incentive plans and lead a trend in early retirement. *Id.* at 583, 579-80. The Court concluded by holding that “local school boards are without power to authorize the payment of non-service related retirement benefits” like those provided in the ERR. *Id.* at 587.

In *Morris School District Board of Education v. Education Association of Morris*, 310 *N.J.Super.* 332, 334, 338 (App. Div.), *certif. denied* 156 *N.J.* 407 (1998), the Appellate Division visited and distinguished *Fair Lawn* in its consideration of the Morris Board’s appeal from a scope of negotiation determination by the Public Employment Relations Commission (“PERC”) that determined that a proposed cap on payments for unused sick leave which retroactively decreased the leave already accumulated by employees unless they retired in a certain phased-in grace period constituted an illegal inducement to early retirement and was thus non-negotiable. Alternatively, PERC determined that the Education Association did not knowingly bargain away accrued sick leave compensation when it

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 11

consented in advance to be bound by a factfinder's recommendation when the retroactive cap had been first conceived by the factfinder and had not been proposed by either party. *Id.* at 334.

In addressing PERC's conclusion that the factfinder's proposed cap on accumulated sick leave constituted an illegal inducement to retire, the Appellate Division noted its "reservations concerning [PERC's] application of the *Fair Lawn* decision." *Id.* at 337. The Appellate Division emphasized that the payment in *Fair Lawn* was "dependent upon age, not years of service, and was structured to provide greater benefits to those retiring at an earlier age." *Ibid.* The court noted "substantial differences" between the plan in *Fair Lawn* and the plan at issue in *Morris*:

Unlike *Fair Lawn*, the option permitting retirement without application of the cap on sick leave pay provides a benefit that is appropriately keyed to length and quality of service, i.e., those who have been employed in the district the longest with the best attendance records receive the most compensation. Further, the negotiated clause in this case was not designed to encourage or induce early retirement. We note that a plethora of negotiated terms and conditions of employment may have the incidental effect of encouraging eligible teachers to retire. Surely, not every such negotiated condition may be deemed unlawful merely because it may incidentally cause teachers to consider retiring earlier than they might otherwise have chosen. Moreover, we are struck by the absence of any evidence indicating that implementation of the plan might undermine the actuarial assumptions underlying the statutorily created pension plan. It can reasonably be inferred from the factfinder's report that most districts presently apply a cap to sick leave compensation. As we noted, the factfinder characterized the absence of a cap as "unusual." We doubt that the plan would be copied statewide if found to be valid. Consequently, there should be little or no proliferation of effects on the teachers' pension plan from bringing this district into line with others.

[*Id.* at 339.]

Citing *Maywood*, the court stated its concern that "sick leave pay and other forms of deferred compensation have long been considered 'additional compensation upon retirement' subject to mandatory negotiation." *Id.* at 340. The court emphasized that when it is "argued that a negotiated

Mary Ellen Rathbun, Secretary
February 19, 2015
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term or condition of employment undermines the actuarial integrity of a pension plan, the issue should be carefully explored by the presentation of evidence,” which the court noted was not done in *Morris*. *Ibid.* Affirming PERC’s decision, the court concluded that because the retirement benefits sought by the employee are a form of deferred compensation, and the employee worked on days when ill, the employee fulfilled a service condition to which a benefit vested which could only be divested “by failure to satisfy eligibility requirements.” *Id.* at 347.

In this case, the Division’s determination finding the Board’s separation initiative unacceptable is arbitrary, capricious, unreasonable, and contrary to law. The Board clearly has the authority to negotiate and set the terms and conditions of employment, including compensation, for employment-related services. As the Legislature provides in *N.J.S.A.* 18A:30-3.5 and the Court stated in *Maywood* (which the Court distinguished in *Fair Lawn*), this includes the authority to make payments for unused accumulated sick leave to employees separating from the District. Payment under the separation initiative is related to service to the Board and therefore constitutes compensation under the Education Laws. Compensation based on years of service is negotiable, and, in contrast to *Fair Lawn*, unlike payments not considered compensation or a customary fringe benefit because it is not based on years of service. *See also Morris, supra*, at 338.

The Board’s separation initiative awards the amount and quality of the work that an employee performed. That is, unlike in *Fair Lawn*, the separation initiative awards employees for years of service as demonstrated through the accumulation of unused sick days. Also unlike in *Fair Lawn*, the Board’s separation initiative does not increase for younger employees and therefore does not incentivize early retirement like the ERR did in *Fair Lawn*. There is no age differentiation between benefits provided in the separation initiatives; unlike in *Fair Lawn*, and as the Division’s Mr. Czyzyk

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 13

acknowledges, the Board's separation initiative does not differentiate between individuals' age in order to encourage retirement. The separation initiative is offered to all employees who are otherwise eligible for payment for unused accumulated sick leave (for example, if they satisfy years served requirements) under the agreement between the Board and the employee and/or bargaining unit.

In this case, the principal purpose of the separation initiative is to decrease the overall size of the Board's workforce without instituting a reduction in force. This is in clear contrast to the principal purpose of the retirement incentive in *Fair Lawn* was to "encourage early retirements in order that tenured teachers could be replaced with less experienced instructors whose salary levels would be much lower." *Morris, supra*, 310 N.J.Super. at 337. The Board's intention in offering a separation initiative to all employees is for no other reason than to try to save the District financial resources by consolidating the size of its workforce, and ultimately, decrease the Board's financial obligation in paying that workforce. If successful, such a separation initiative could avoid the need to eventually institute a reduction in force, which can have adverse effects on the morale of District employees.

B. The Division's Failure to Provide More Than a "Net" Opinion is Arbitrary, Capricious and Contrary to Law.

Furthermore, the Division's decision finding the separation initiative unacceptable is a net opinion not supported by any evidence. A net opinion is "[a]n expert's opinion unsupported by factual evidence is a 'net opinion.'" *Jimenez v. GNOC, Corp.*, 286 N.J.Super. 533, 540 (App. Div.), *certif. denied*, 145 N.J. 374 (1996). An expert must provide "the why and wherefore of his expert opinion, not just a mere conclusion." *Byrd v. Salem Community College*, 2009 WL 2015128 (App. Div. July 14, 2009). An actuary may be considered an expert in discussing matters concerning TPAF. *See Fair Lawn, supra*, 79 N.J. at 578 (identifying a witness testifying at a plenary hearing in the matter who was an actuary

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 14

employed by the firm that assisted in setting up TPAF as an "expert actuary"). Mr. Czyzyk indicated in his letter dated December 24, 2009 that the separation initiative seems to be acceptable on its face because it is offered to all employees regardless of length of service and is not contingent on retirement. Nevertheless, he then states, without providing any reason why, that "in reality the incentive appears more likely to motivate early retirement." Mr. Czyzyk noted only that the number of program participants so far and those who expressed interest in participation were eligible to retire from either the TPAF or the PERS, and therefore the Board's program was "viewed as an early retirement incentive program." Mr. Czyzyk failed to provide any guidance how that assertion was determined or how it is fatal to the initiative. Despite Mr. Czyzyk's contention that the Division would provide participant names to Fund actuaries to determine if additional liability to the TPAF accrued and that the Board could receive a bill for those costs, no actuarial evidence or statements thoroughly examining the impact of the separation initiative has ever been provided, even though the Board requested same on multiple occasions through letters to the Division.

The Board offered the program to all employees. That individuals who participated in the program retired or were eligible for retirement neither proves, nor is it highly probative evidence, that the program is an early retirement incentive program.

C. The Division is Equitably Estopped From Proceeding in This Manner.

In order to invoke the doctrine of equitable estoppel against a public official or public entity, the party claiming the estoppel must demonstrate detrimental reliance on the action or inaction of the official or entity. "The party seeking the benefit of estoppel has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private party's misapprehension, stood by while the private party acted in detrimental reliance" *Newark v. Natural*

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 15

Resource Council in the Dept. of Env'tl. Protection, 82 N.J. 530, 545, 414 A.2d. 1304 (1980). Here, the Division took no action on the separation initiative despite being aware of its implementation for nearly six (6) years. The Board, in reliance on this representation, implemented the separation initiative, and proceeded for the next six years as if the Division had indeed approved the plan. The Board, understandably, relied on this representation in its budgeting and operations for over half a decade after implementation of the separation initiative, only to find out over six years later that the Division changed its mind and is demanding in excess of \$1,000,000 in monetary assessments. It is respectfully submitted that the Board's reliance, and subsequent detriment based upon that reliance, is squarely within the purview of the *Natural Resource* case cited above. Accordingly, the Division is estopped from proceeding in this manner as a matter of equity and justice.

D. The Division is Out of Time to Proceed in this Action Based Upon the Statute of Limitations and Laches.

The New Jersey Supreme Court has expressly recognized that the State and its agencies are bound by applicable statutes of limitations as to both tort and contract claims. "Consistent with the logical and historical experience of the abolition of contractual immunity and the legislative enactment of the Contractual Liability Act, N.J. Stat. Ann. 59:13-1 to -10, the court recognizes that the state itself should prosecute its contract claims in accordance with existing statutes of limitations." *N.J. Educ. Facilities Auth. v. Gruzen P'ship*, 125 N.J. 66 (N.J. 1991). *N.J. Stat. § 2A:14-1* expressly provides that, "Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their

Mary Ellen Rathbun, Secretary

February 19, 2015

Page 16

factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.” Accordingly, because the Division has waited over six years after its alleged cause of action accrued against the Board, the Division is now out of time to proceed.

Further, the Division is prohibited from proceeding against the Board based upon the equitable doctrine of laches. “Laches is an equitable principle applied to a party who, without explanation or excuse, delayed in asserting a claim now stale. The delay must be unreasonable under the circumstances, and must create prejudice to the party asserting the delay.” *Allstate v. Howard Savings Inst.*, 127 N.J. Super. 479, 489, 317 A.2d 770 (Ch.Div.1974). It is undisputed that the Division has been aware of this matter for over six years, and has failed to take any affirmative action thereon during that time despite being made aware of the separation initiative prior to its enactment. Based upon the knowledge, and subsequent failure to act by the Division, the Board has relied on the Division’s actions and inaction in its budgeting and operational planning. The Division’s years-long delay is unreasonable and without justification and, accordingly, the equitable doctrine of laches prohibits the Division from proceeding now.

CONCLUSION

For all of the reasons set forth herein, the Division’s arbitrary and unreasonable finding that the Board’s separation initiative is unacceptable is contrary to law and an abuse of discretion. The separation initiative follows the mandates of *Fair Lawn*, and the Division’s rejection of the separation initiative is a rubber-stamp denial of public board of education’s compensation plan without consideration or evaluation of the law or an explanation of the reasoning for the Division’s decision.

For the foregoing reasons, the Board respectfully requests that the Division:

COOPER LEVENSON, P.A.

Mary Ellen Rathbun, Secretary
February 19, 2015
Page 17

- 1) Reconsider and reverse its finding that the Board's separation initiative is an illegal early retirement incentive;
- 2) Provide all facts, documents and other evidence upon which the Division relied in reaching the conclusion that the net effect of the separation initiative was premature retirement of participating employees;
- 3) Provide all facts, documents and other evidence upon which the Division relied in determining that the separation initiative resulted in a substantial impact to the Teacher's Pension and Annuity Fund;
- 4) Provide all facts, documents, assumptions, calculations, analyses and other evidence upon which the Division and the Division's actuaries relied in determining that the Board's separation initiative caused an unfunded liability to the TPAF in the amount of \$1,105,200.

Very truly yours,



William S. Donio

WSD/mal



From: Vincent Palmieri palmieri@upperschools.org
Subject: Re: Upper Township Board of Education & Middle Township Board of Education
Date: March 4, 2015 at 5:01 PM
To: Will Donio wdonio@cooperlevenson.com
Cc: Laurie Ryan ryan@upperschools.org, Michele Barbieri barbieri@upperschools.org

Thanks, Will.

On Mar 4, 2015, at 3:57 PM, Michele Barbieri <barbieri@upperschools.org> wrote:

----- Forwarded message -----

From: Donio William S. <WDONIO@cooperlevenson.com>
Date: Wednesday, March 4, 2015
Subject: Upper Township Board of Education & Middle Township Board of Education
To: "Dennis M. Roberts (RobertsD@middletp.k12.nj.us)" <RobertsD@middletp.k12.nj.us>, "Michele Barbieri (barbieri@upperschools.org)" <barbieri@upperschools.org>, "foxd@middletp.k12.nj.us" <foxd@middletp.k12.nj.us>, "Laurie Ryan (ryan@upperschools.org)" <ryan@upperschools.org>, Vincent Palmieri <palmieri@upperschools.org>, "salvod@middletp.k12.nj.us" <salvod@middletp.k12.nj.us>
Cc: Learn Mary Ann <MLEARN@cooperlevenson.com>, "Houck Amy L." <AHOUCK@cooperlevenson.com>

See below. No hearing tomorrow.

William S. Donio, Esquire
Cooper Levenson, Attorneys at Law

1125 Atlantic Avenue

Atlantic City, NJ 08401

Direct Dial: (609) 572-7610

Direct Fax: (609) 572-7611

Mobile: (609) 703-6472

E-Mail: wdonio@cooperlevenson.com

URL: <http://www.cooperlevenson.com>

Cooper Levenson

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From: Rathbun, Mary Ellen [<mailto:MaryEllen.Rathbun@treas.nj.gov>]
Sent: Wednesday, March 04, 2015 2:45 PM
To: Donio William S.
Cc: Rathbun, Mary Ellen
Subject: RE: Upper Township Board of Education & Middle Township Board of Education

Dear Mr. Donio,

Your request for the matters to be rescheduled have been approved. I will advise you at a later date when the cases have been rescheduled.

Sincerely,

Mary Ellen Rathbun
TPAF Board Secretary

From: Donio William S. [mailto:WDONIO@cooperlevenson.com]
Sent: Wednesday, March 04, 2015 2:37 PM
To: Rathbun, Mary Ellen
Subject: Upper Township Board of Education & Middle Township Board of Education

Dear Ms. Rathbun,

Please allow this email to confirm my request to you on behalf of my clients the Upper Township Board of Education and the Middle Township Board of Education to postpone the hearings scheduled for tomorrow, March 5, 2015 before the Board of Trustees of TPAF due to the anticipated inclement weather. Due to the forecast for Southern New Jersey, I anticipate that neither I nor any client who might have attended will actually be able to make the hearing (even if there is a delayed opening for the State of New Jersey) due to the anticipated hazardous road conditions and therefore respectfully request postponements to a later Board of Trustees meeting date.

I understand that the matters will be postponed and that you will advise me when they are rescheduled.

Thank you for your courtesies in these matters.

Very Truly Yours,

William S. Donio, Esquire
Cooper Levenson, Attorneys at Law

1125 Atlantic Avenue

Atlantic City, NJ 08401

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Direct Fax: (609) 572-7611

Mobile: (609) 703-6472

E-Mail: wdonio@cooperlevenson.com

URL: <http://www.cooperlevenson.com>

Cooper Levenson



MAILING ADDRESS:
PO Box 295
TRENTON, NJ 08625-0295

LOCATION:
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TRENTON, NEW JERSEY

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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ANDREW P. SIDAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

April 1, 2015

COOPER LEVENSON
William S. Donio, Esquire
1125 Atlantic Avenue-3rd Floor
Atlantic City, NJ 08401

Re: Upper Twp. BOE
TPAF Loc# 05021

Dear Mr. Donio:

At its meeting of May 7, 2015, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) will consider your appeal submitted on behalf of your client, the Upper Township Board of Education. This matter is before the Board as you are appealing the Division of Pensions and Benefits administrative determination that the Upper Township Board of Education offered an Unauthorized Early Retirement Incentive Program to its employees enrolled in the TPAF.

If you and/or your client wish to attend the Board's meeting on Thursday, May 7, 2015, you may do so in accordance with the Open Public Meetings Act. The meetings are held at the Division of Pensions and Benefits, One State Street Square, 50 W. State Street, First Floor Boardroom, Trenton and begin at 10:30 a.m.

If you plan to attend the meeting, please contact our staff at (609) 984-6890 in order that your attendance for this agenda item may be noted. As it is difficult to determine the amount of time the Board will need to properly review each agenda item, our staff will only be able to provide you with an *approximate* time that your matter may be addressed.

Sincerely,

Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

From: Donio William S. WDONIO@cooperlevenson.com
Subject: FW: Appeals for Upper Township Board of Education

Date: April 22, 2015 at 12:52 PM

To: Laurie Ryan (ryan@upperschools.org) ryan@upperschools.org, Vincent Palmieri palmieri@upperschools.org
Cc: Fiore Mark A. MFIORE@cooperlevenson.com, Learn Mary Ann MLEARN@cooperlevenson.com

DS

See below.

William S. Donio, Esquire
Cooper Levenson, Attorneys at Law
1125 Atlantic Avenue
Atlantic City, NJ 08401
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From: Rathbun, Mary Ellen [mailto:MaryEllen.Rathbun@treas.nj.gov]
Sent: Wednesday, April 22, 2015 12:47 PM
To: Donio William S.
Cc: Rathbun, Mary Ellen
Subject: RE: Appeals for Upper Township Board of Education

Thanks . I will be out of the office April 27 through April 30, 2015.

Mary Ellen Rathbun

From: Donio William S. [mailto:WDONIO@cooperlevenson.com]
Sent: Wednesday, April 22, 2015 12:05 PM
To: Rathbun, Mary Ellen
Subject: RE: Appeals for Upper Township Board of Education

Ms. Rathbun,

I received your email and apologize for not responding sooner. I am working on collecting the information the Board requires. I will be in communication with you shortly as to the time line for that submission.

Thank you for following up with me.

William S. Donio, Esquire
Cooper Levenson, Attorneys at Law
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Atlantic City, NJ 08401
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Direct Fax: (609) 572-7611
Mobile: (609) 703-6472
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From: Rathbun, Mary Ellen [<mailto:MaryEllen.Rathbun@treas.nj.gov>]
Sent: Wednesday, April 22, 2015 11:39 AM
To: Donio William S.
Cc: Rathbun, Mary Ellen
Subject: FW: Appeals for Upper Township Board of Education

Dear Mr. Donio,

Please confirm receipt of my e-mail dated April 17, 2015.

Thank you,

Mary Ellen Rathbun
TPAF Board Secretary

From: Rathbun, Mary Ellen
Sent: Friday, April 17, 2015 2:55 PM
To: wdonio@cooperlevenson.com
Cc: Rathbun, Mary Ellen
Subject: Appeals for Upper Township Board of Education

Dear Mr. Donio,

Upon review of the information that you provided in support of your appeal for your client, the Upper Township Board of Education, it was noted that the copy of the Early Employment

Upper Township Board of Education, it was noted that the copy of the Early Employment Separation Initiative for the Certified Teaching Staff members, and the Administrators is not dated or signed (Exhibit A) and the following documents were not included in your submission: (1) copy of the Collective Bargaining agreement between the Upper Township Education Association (teachers) and the Upper Township Board of Education for the relevant time period, (2) copy of the Collective Bargaining agreement between the Upper Township Administrators and the Upper Township Board of Education for the relevant time period, (3) copy of the Employment contract between the Upper Township Board of Education and the Business Administrator/Board Secretary for the relevant time period and (4) signed and dated copy of the Early Employment Separation Initiative for the Business Administrator/Board Secretary. In order to proceed with the appeal for the Upper Township Board of Education scheduled for May 7, 2015, please provide a dated and signed copy of the Early Employment Separation Initiative for the certified teachers, and Administrators as well and the aforementioned documents that were not included with your submission.

As you are representing both the Upper Township Board of Education and the Middle Township Board of Education in order to make it more convenient for you, both appeals were scheduled for the meeting on May 7, 2015. However, as indicated in order to proceed with the appeal for the Upper Township Board of Education at the meeting of May 7, 2015, the requested information is needed by April 30, 2015. The information can be e-mailed directly to my attention or sent by regular mail. However, if you need additional time to submit the requested information, please advise no later than next Friday, April 24, 2015, so that the matter for the Upper Township Board of Education can be rescheduled. Your cooperation in this matter is appreciated.

Mary Ellen Rathbun
TPAF Board Secretary.

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WILLIAM S. DONIO
Also Admitted to PA Bar
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Direct Phone (609) 572-7610
Direct Fax 609-572-7611

FILE NO. 54612/00004

April 29, 2015

Via E-mail (MaryEllen.Rathbun@treas.nj.gov)

Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
50 West State Street
Trenton, NJ 08625

Re: Upper Township BOE
TPAF Loc #05021

Dear Ms. Rathbun:

As you know, this firm represents the Upper Township Board of Education (the "Board") in the above captioned matter. Pursuant to your e-mail communication of April 17, 2015 requesting additional documentation, please allow this letter to comply with that request by supplementing the Board's submission to the letter brief as follows:

1. Agreement between the Upper Township Education Association and the Board from July 1, 2005 through June 30, 2009;
2. Agreement between the Board and the Upper Township Administrators Association from July 1, 2006 through June 30, 2009;
3. School Business Administrator/Secretary of the Board Employment Contract between the Board and Donna L. Young; and
4. Memorandum of Agreement between the Board and the School Business Administrator/Secretary of the Board.

COOPER LEVENSON, P.A.

Mary Ellen Rathbun, Secretary

April 29, 2015

Page 2

The enclosed documentation is being provided pursuant to the TPAF's April 17, 2015 request for additional documentation. The Board expressly reserves any and all rights with respect to the information contained herein, including without limitation, the right to challenge any determination, assessment or conclusion of the TPAF made prior to the provision of this information.

If you have any questions regarding the enclosed documents, please feel free to contact me.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. Donio', with a long horizontal flourish extending to the right.

William S. Donio

WSD/mal
Enclosures



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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DIVISION OF PENSIONS AND BENEFITS
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ANDREW P. SHAMON-ERISTOFF
State Treasurer

FLORENCE J. SHEPPARD
Acting Director

May 8, 2015

COOPER LEVENSON
William S. Donio, Esquire
1125 Atlantic Avenue-3rd Floor
Atlantic City, NJ 08401

Email to wdonio@cooperlevenson.com

Re: Upper Twp. BOE
TPAF Loc# 05021

Dear Mr. Donio:

At its meeting of May 7, 2015, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) considered your correspondence, your personal statements and the statements of John Megariotis, Deputy Director, regarding the appeal on behalf of your client, the Upper Township Board of Education (Upper Twp. BOE) of the Division of Pensions and Benefits (Division) administrative determination that the separation initiative¹ was an Unauthorized Early Retirement Incentive (ERI). As a consequence the Division assessed the Upper Twp. BOE for the unfunded liability as determined by the TPAF actuary.

Upon review of the information that was provided the Board noted that the following documents set forth the terms of the one-time separation initiative. They are as follows:

- (1) Agreement between the Upper Township Education Association and the Upper Twp. BOE, the County of Cape May, New Jersey from July 1, 2005-June 30, 2009. Specifically, article XIV, titled Sick Leave;
- (2) MOA Between the Upper Twp. BOE and the Upper Township Education Association for the Purposes of Establishing Language for a one-time Separation Initiative and Extending the Contractual Agreement to June 30, 2010, signed by the Upper Township Education Association June 2, 2008, and by the Upper Twp. BOE on June 5, 2008;

¹ The Upper Twp. BOE negotiated a Memorandum of Agreement (MOA) to the parties' employment contracts and collective bargaining agreements in which the terms of the agreement offered employees an enhanced sick leave payout in exchange for terminating their employment.

COOPER LEVENSON
William S. Donio, Esquire
Re: Upper Twp. BOE
Page 2 of 2
May 8, 2015

- (3) Agreement between the Upper Twp. BOE and the Upper Township Administrators Association from July 1, 2006-June 30, 2009. Specifically, article XIII titled Sick Leave at Retirement;
- (4) MOA(Replaces MOA dated and BOE Approved on 6/9/08) between the Upper Twp. BOE and the Upper Township Administrators Association for the Purposes of Establishing Language for a One-time Separation initiative and Extending the Contractual Agreement to June 30, 2010; signed by the parties on **June 25, 2008**;
- (5) MOA between the Upper Twp. BOE and the School Business Administrator/Secretary of the Board, signed by the Upper Township School Business Administrator on May 28, 2008 and the Upper Township BOE on May 29, 2008; and
- (6) School Business Administrator/Secretary of the Board Employment Contract between the Board of Upper Township and Donna L. Young executed on January 22, 2007, covering the period from July 1, 2006 through June 30, 2009.

Following its review of the information, the Board determined additional facts need to be obtained that are not in the record. Therefore, the Board tabled this matter and directed the Board Secretary to request the information. Specifically, the Board requests that you provide the following information:

- (1) Complete list of TPAF members who were eligible for the separation initiative (for each member, identify the bargaining unit);
- (2) Complete list of TPAF members who elected to participate in the separation initiative (for each member, identify the bargaining unit);
- (3) Complete list of TPAF members who participated in the separation initiative and retired during the requisite timeframe as set forth in the terms of the negotiated MOA (for each member, identify the bargaining unit); and
- (4) Explain the reason that some of the participants of the separation initiative worked beyond the parameters set forth in the MOA. For example, the Board noted that some of the participants retired in 2010, well beyond the applicable timeframe listed in the MOA.

Please submit this information to my attention.

Subsequently, you will be notified as to when the appeal will be resubmitted to the Board.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

F-3/mer

c: Upper Twp. BOE, Donna Young, Certifying Officer, young.donna@upperschools.org

WILLIAM S. DONIO
Also Admitted to PA Bar
EMAIL: wdonio@cooperlevenson.com

Direct Phone (609) 572-7610
Direct Fax 609-572-7611

FILE NO. 54612/00100

November 24, 2015

VIA CERTIFIED MAIL
VIA E-MAIL

Mary Ellen Rathbun
Secretary
Board of Trustees
Division of Pensions and Benefits
PO Box 295
Trenton, NJ 08625-0295

Re: Upper Township Board of Education
TPAF Loc # 05021

Dear Ms. Rathbun:

As you are aware this office represents the Upper Township Board of Education ("Board" or "District"). We are in receipt of your May 8, 2015, letter outlining additional information sought by the Board of Trustees ("Division") in order to complete the Division's assessment in this matter. In order to accurately respond to the Division's inquiry, Counsel reviewed voluminous documentation supplied by the Board, some of which was contained in storage, and compared the Board's records to Division correspondence. As you know, on October 22, 2015 our office corresponded with you to inform the Division that an analysis of information had been ongoing and a response was forthcoming. Accordingly, please allow this letter to serve as the Board's response.

First, as previously articulated, the Board wholly disputes the Division's determination in this matter. Specifically, the Board's separation initiative was not an illegal retirement incentive and accordingly no penalty should be assessed. The Board offered the initiative to all employees. Further, the Division is time barred from bringing its claim as the Division failed to notify the Board of any issue the Division had with its separation initiative plan for six (6) years. The Board acted in reasonable good faith in implementing the separation initiative.

As you are aware, the Division's May 8, 2015 letter specifically requested the following:

1. Complete List of TPAF members and bargaining units who were eligible for the separation initiative;

COOPER LEVENSON, P.A.

Mary Ellen Rathbun

November 24, 2015

Page 2

2. Complete list of TPAF members who elected to participate in the separation initiative;
3. Complete list of TPAF members who participated in the separation initiative and retired during the requisite timeframe as set forth in the terms of the negotiated MOA;
4. Explanation the reason that some of the participants of the separation initiative worked beyond the parameters set forth in the MOA.

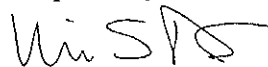
Attached herewith in the form of a spreadsheet please find the requested information with regard to items 1-3 above. The spreadsheet indicates a complete list of TPAF members who were eligible for the separation initiative; notes the members bargaining units, and specifies those sixteen (16) members who elected to in participate in the separation initiative. The spreadsheet indicates if the member retired during the requisite timeframe as set forth in the terms of the negotiated memorandum of agreement ("MOA"). Any discrepancy between the Division's Unauthorized ERI Summary spreadsheet ("Division Spreadsheet") dated June 4, 2014 and the Board's records is noted on the enclosure. By way of further background, employees, Patricia Reilly (#438726) and Jane Halliday (#464118) are not listed on the Division's Spreadsheet but were part of the initiative; while employee Shelley Safer (#367925) was not part of the initiative but is listed on Division Spreadsheet.

With regard to item 4, there are two (2) employees listed whose retirement dates fall outside of the time frame specified within the MOA. By way of further explanation, employee, John Phillips, whose retirement date is January 1, 2010, is a single day beyond the time frame delineated within the MOA. With regard to employee, John Burke, whose separation date is September 1, 2009 and retirement date is January 1, 2010, it is the Board's understanding that that this employee attempted to rescind his resignation resulting in a delay of his retirement.

Finally, please be advised that the Board provides this response without waiving, or intending to waive, but rather preserving, and intending to preserve, its right to any and all claims and defenses relating to or arising from the separation initiative.

Should you have any questions or require any clarification please contact me.

Respectfully Submitted,



William S. Donio

WSD

Attachment

CLAC 3192704.1

Learn Mary Ann

From: Rathbun, Mary Ellen <MaryEllen.Rathbun@treas.nj.gov>
Sent: Tuesday, February 02, 2016 4:45 PM
To: Donio William S.
Cc: Rathbun, Mary Ellen
Subject: RE: Appeals for Upper Township Board of Education

Dear Mr. Donio,

This is in regard to the pending appeal for Upper Township Board of Education. The information you submitted as requested by the Board was received. However, at this point, I am waiting for a determination if an amendment to the bill is required based on the information you provided. I expect to be advised in the near future if the bill will be amended and if so when you will be issued a revised bill. For this reason, I have not rescheduled the appeal for consideration by the Board. I anticipate scheduling the matter on the Board's agenda for its meeting on March 3, 2016. Can you advise if this date will accommodate your schedule?

Should you have any further, questions please contact me directly at 609-292-2865.

Mary Ellen Rathbun
TPAF Board Secretary

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State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295
TRENTON, NEW JERSEY 08625-0295

CHRIS CHRISTIE
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FLORENCE J. SHEPPARD
Acting Director

June 8, 2016

COOPER LEVENSON
William S. Donio, Esquire
1125 Atlantic Avenue-3rd Floor
Atlantic City, NJ 08401

Re: Upper Twp. BOE
TPAF Loc# 05021

Dear Mr. Donio:

At its meeting of June 2, 2016, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) considered the statements made by Kelli Prinz, an attorney from your firm, the letters of appeal with supporting documentation, the additional information provided and the Division of Pensions and Benefits (Division) reduction of the assessment regarding the appeal on behalf of your client, the Upper Township Board of Education (Upper Twp. BOE) of the Division's administrative determination that the one-time separation initiative¹ was an Unauthorized Early Retirement Incentive (ERI).

This appeal was tabled at the TPAF Board meeting held on May 7, 2015, to provide you with an opportunity to submit additional information. The same was received and subsequently the assessment was revised as the Division determined that 13 employees participated in the one-time separation initiative, rather than 15 employees. Therefore, a revised assessment was issued by the Division.

At its meeting on June 2, 2016, the Board determined that it was necessary to obtain clarification regarding the specific terms of the one-time separation initiative for the employee(s) in the bargaining unit for the Upper Township Education Association, the Upper Township Administrators, and for the School Business Administrator. As noted at the meeting several documents were provided. However, it was unclear to the Board which documents set forth the terms of the one-time separation initiative.

¹ The Upper Twp. BOE negotiated a Memorandum of Agreement (MOA) to the parties' employment contracts and collective bargaining agreements in which the terms of the agreement offered employees an enhanced sick leave payout in exchange for terminating their employment.

With regard to the separation initiative for the Upper Township Education Association enclosed are the following documents for your reference. Specifically, (1) page 5 of the letter dated February 19, 2015 (referenced as page 82 lower right hand of the page), "...indicating that the employee satisfies the years of service required in his or her particular position.."; (2) Exhibit A (referenced as page 96); the Early Employment Separation Initiative, Certified Teaching Staff Members (referenced as page 97 which is undated and unsigned); (3) the Agreement between the Upper Township Education Association and the Upper Township Board of Education, the County of Cape May, New Jersey from July 1, 2005-June 30, 2009 (referenced pages 148-179); the Memorandum of Agreement between the Upper Township Board of Education and the Upper Township Education Association for the Purposes of Establishing Language for a One-time Separation Initiative and Extending the Contractual Agreement to June 30, 2010 (referenced as page 191) and Attachment A-Article XIV Sick Leave (referenced as page 192). After a review of this information the Board requests that the following is confirmed:

Identify which documents (use the reference number in the lower right hand of the page) that comprise the entire one-time separation initiative for the Upper Township Education Association (teachers). Include any missing documents that are part of the initiative. For example, page 97 is undated and unsigned;

Indicate for each referenced document if any of the term(s) contained on the document were not part of the term(s) of the initiative. For example, page 97 indicates #3. Service Reward: "Any eligible certified teaching staff member whop elects to participate in this initiate shall receive a payment of \$20,000." It was unclear if the participants received \$20,000 plus an additional payment for each unused sick day or only received an increased amount under the initiative for each unused sick day;

Also, Article XIV-Sick Leave (referenced as page 164 and is part of the contract) indicates a teacher for the 2004-2005 school years shall receive \$50.00 for accumulated sick leave up to a maximum amount payable of \$10,000. However, there is no payment information provided that a retiree would receive for the contract period beyond the 2004-2005 school years. Please provide this information;

For each participant in this bargaining unit indicate the total amount paid by the Upper Township BOE; and

For each participant, explain in detail how the total amount paid was determined based upon the terms of the initiative for this bargaining unit. Indicate how much would have been paid under the terms of the regular contact for the requisite time period and the number of years required to have been eligible for the initiative.

With regard to the agreement for the one-time separation initiative for the Upper Township Administrators Association enclosed are the following documents provided for your reference. The Memorandum of Agreement (Replaces Memorandum of Agreement Dated and BOE Approved on 6/9/08) between the Upper Township BOE and the Upper Township

Administrators Association For The Purposes of Establishing Language for a One-Time Separation Initiative and Extending the Contractual Agreement to June 30, 2010 (referenced as page 68 and 69); and the Agreement between the Upper Township Board of Education and the Upper Township Administrators Association from July 1, 2006-June 30, 2009 (referenced pages 197-210). After a review of this information the Board requests that the following is confirmed:

Identify which documents (use the reference number in the lower right hand of the page) that comprise the entire one-time separation initiative for the Upper Township Administrators Association. Please include any missing documents that are part of the initiative;

If applicable for each referenced document note if any of the term(s) contained on the document was not part of the term(s) of the initiative;

For each participant in this bargaining unit indicate the total amount paid by the Upper Township BOE; and

For each participant, explain in detail how the total amount paid was determined based upon the terms of the initiative for this bargaining unit. Please indicate how much would have been paid under the terms of the regular contract for that time period and the number of years required to have been eligible for the initiative.

With regard to the agreement for the one-time separation initiative for the School Business Administrator/Secretary enclosed are the following documents provided for your reference. The Employment Contract between the Board of Upper Township and Donna L. Young (referenced as page 69-72); and the Memorandum of Agreement Between the Upper Township Board of Education and the School Business Administrator/Secretary of the Board (referenced as page 73 and 74). After a review of this information the Board requests that the following is confirmed:

Identify which documents (use the reference number in the lower right hand of the page) that comprise the entire one-time separation initiative for Donna Young, the School Business Administrator/Secretary of the Board. Please include any missing documents that are part of the initiative;

If applicable for each referenced document note if any of the term(s) contained on the document was not part of the term(s) of the initiative;

For Ms. Young, as a participant of the initiative, indicate the total amount she received by the Upper Township BOE; and

For Ms. Young explain in detail how the total amount paid was determined based upon the terms of her initiative. Indicate how much Ms. Young would have been paid under the terms of her employment contract and indicate if she had to satisfy years of service to have been eligible for the initiative.

Also, enclosed is a copy of the Division's listing of the number of employees who retired under the program (13) in total (referenced as page 221). As this is the final list of those

COOPER LEVENSON
William S. Donio, Esquire
RE: Upper Twp. BOE Pa
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determined to have participated, it will assist in determining some of the requested information above.

Please submit this information to my attention. In the interim should you have any questions or need further clarification, please contact me directly at (609) 292-2865.

Subsequently, you will be notified as to when the appeal will be resubmitted to the Board.

Sincerely,

A handwritten signature in black ink that reads "Mary Ellen Rathbun". The signature is written in a cursive, flowing style.

Mary Ellen Rathbun, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

F-2/mer
Enclosures

C: Upper Twp. BOE
Kelli Prinz, Esquire, COOPER LEVENSON