STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
EDWARD WARTKO,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK STATE TEACHER'S
RETIREMENT SYSTEM and NEW
YORK STATE TEACHER'S
RETIREMENT SYSTEM BOARD,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3970 Index No. 5182-12

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner is a retired teacher who commenced this Article 78 Proceeding challenging the respondents' calculation of his highest three years salary for retirement purposes. Respondents oppose the proceeding contending their calculation is correct pursuant to law and the petition fails

to state a cause of action.

Edward Wartko was a teacher in the Buffalo City School District who retired on June 30, 2007, having joined the New York State Teacher's Retirement System on September 3, 1973. Petitioner's pension benefit was calculated at the time of retirement and he has been receiving pension benefits according to the calculations made at that time. Prior to retirement petitioner applied for coaching positions. The compensation paid for coaching would be added to petitioner's salary as a teacher thereby increasing his highest three years earnings for retirement purposes. Petitioner was denied a coaching position for the 2004-2005 school year. Petitioner filed a grievance pursuant to the teacher's union contract. A settlement of the grievance was made and petitioner was paid $9,500.00. The $9,500.00 was included in petitioner's salary for retirement purposes.

Edward Wartko again applied for coaching positions for school years 2005-2006 and 2006-2007. Petitioner did not receive appointment to a coaching position for either year. Petitioner again filed grievances for each year. Petitioner retired after the 2006-2007 school year. The grievances filed for the 2005-2006 and 2006-2007 school years were not settled until June of 2011. Respondent paid petitioner the sum of $5,605.00 for each year; that sum being the amount petitioner would have earned had he been appointed to a coaching position. After payment of the settlement petitioner requested respondent recalculate his final three years salary to include the settlement amount for each year. Respondent determined that the latest two payments were not to be included in petitioner's final three years salary calculation for retirement purposes.

Petitioner contends he was qualified for the coaching positions in school years 2005-2006 and 2006-2007 and the settlement he received was for services that he would have rendered in those school years had he been appointed as a coach. Petitioner argues that it was irrational, arbitrary and capricious for respondent to exclude the two $5,605.00 payments made to him for the 2005-2006

and 2006-2007 school years while including the payment of the $9,500.00 settlement he received for the 2004-2005 school year.

Respondents contend the settlements are different in that the 2004-2005 grievance acknowledged it was for compensation that petitioner would have earned as a coach. The 2005-2006 and 2006-2007 amounts were paid to settle the district's wrongful action and as such would not be considered regular compensation includable in the calculation of petitioner's three year final average salary. Retirement and Social Security Law 443(a) defines the final average salary computation to include the average salary earned but excluding termination pay, lump sum payment for deferred compensation, sick leave, accumulated vacation credit, or any other payment for time not worked. There is no dispute that payment for coaching duties is includable. Respondents determined that the 2005-2006 and 2006-2007 payments were not regular compensation. The respondents argue that their determination based upon the record is not irrational, arbitrary, or capricious.

Respondents' exhibit B is the settlement agreement of the 2004-2005 grievance which recites that Mr. Edward Wartko applied for a coaching position, he was not given a position, that Mr. Wartko did have the proper credentials to coach these sports and then it states that "to settle this matter without additional costs of arbitration proceedings, the District agrees, without precedent or prejudice to the District's position in this or any other matter, to pay Mr. Wartko the sum of $9,500.00 in complete satisfaction of this grievance."

Respondents' Exhibit J is the Memorandum of Understanding in settlement of the 2005-2006 and 2006-2007 grievances. The recitations include a denial that the district violated the contract and a recitation that Mr. Wartko was unqualified for the coaching position at issue, the District did agree " to compensate Mr. Wartko in the amount of $11,220.00 in full satisfaction of the above mentioned matters, constituting the stipend of $5,605 he would have received for the 2005-2006 school year

and the stipend of $5,605 he would have received for the 2006-2007 school year."

The first settlement recites that Edward Wartko was qualified to coach, the second recites his qualifications being in dispute. Neither settlement recites which sports Edward Wartko applied to coach and which sports he was qualified for or those he was not qualified for. Respondents Exhibit H is the Level III grievance decision for the 2005-2006 school year. That decision recites that Mr. Wartko was given a fall sport to coach. It recites that he does not have extensive experience as a coach and he has never coached basketball before. The other teacher had experience coaching basketball and was chosen over Mr. Wartko. The grievance was denied at that level. The arbitration hearing that was settled is apparently the next step in the grievance process.

Respondents' Exhibit O is the final determination of the Teacher's Retirement System dated May 15, 2012 in which it recites the documentation upon which it relied in making its determination. Significantly it states " The monies you were paid four years after your retirement on June 30, 2007 represent an award to settle the dispute with your former employer, not for services that would have been rendered, and as such are not usable in the calculation of your retirement benefit." Mr. Wartko forwarded additional information to the retirement system and upon review by letter dated June 26, 2012 (exhibit Q) the Teacher's Retirement System confirmed its determination not to include the settlement amounts in Mr. Wartko's final average salary. The letter confirms petitioner's final average salary of $87,732.38 including salary as a summer school teacher, soccer and tennis coach.

It is well established that the very limited standard which governs judicial review of administrative determinations pursuant to Article 78 is whether the determination was arbitrary and capricious, and that a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and...without regard to the facts." Matter of Pell v. Board of Education, 34 NY2d 222 (1974). Moreover, in order to maintain the limited nature of

this review, it is incumbent upon the court to defer to the agency's construction of the statutes and regulations that it administers as long as that construction is not irrational or unreasonable. Albano v Kirby, 36 NY2d 526 (1975); Salvati v Eimicke, 72 NY 2d 784 (1988). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the local Board unless it clearly appears to be arbitrary, capricious, or contrary to the law. Hauser v Town of Webb, 34 AD3d 1353 (2006).

In this case the record includes a settlement of a grievance that recites that petitioner was qualified as a coach but further recites that such qualification is not to be used as a precedent. The settlement of the later grievances recites that the petitioner's qualifications were in dispute. The court finds the respondents' interpretation of the differences in the settlements to be rational and supported by the record. Respondents' determination that the later settlements were not for regular compensation is supported by the record. The determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition dated September 17, 2012 is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: March 26, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated September 17, 2012
2. Verified Petition dated September 17, 2012 with exhibits
3. Petitioner's memorandum of law dated October 17, 2012
4. Verified Answer dated November 5, 2012
5. Affirmation of Yiselle R. Ruoso, Esq. dated October 24, 2012 with exhibits
6. Respondents' memorandum of law dated November 5, 2012
7. Petitioner's reply to Verified Answer dated November 14, 2012
8. Petitioner's reply memorandum of law dated November 14, 2012.