

4% employee contribution cannot be included to increase Ms. Chyatte's final year average salary for benefit computation purposes.

II. Relevant Statutes and Rules

In the instant administrative review, the Claims Hearing Committee is asked to apply 40 ILCS 5/16-121, Salary,¹ and TRS Rule 1650.450, Definition of Salary. Specifically, the Committee must determine the applicability of TRS Rule 1650.450(c)(6), which states:

- c) Examples of amounts not to be reported to the System include: . . .
- 6) Any amount paid by an employer as the employer's one time contribution (or on behalf of the employee as the employee's one-time contribution) required by the System as part of the statutory early retirement option in Section 16-133.2 of the Act; . . .

III. Issue Statement

The Parties failed to agree upon a statement of issues prior to hearing. However, after hearing the Parties' arguments and reviewing the exhibits submitted, the Claims Hearing Committee determines the issue raised in Ms. Chyatte's administrative review to be:

Under the provisions of 40 ILCS 5/16-121 and TRS Rule 1650.450(c)(6), is the amount paid directly by an employer to an employee to cover 2% of the employee's required 4% employee Early Retirement Incentive (ERI) contribution reportable to the System as creditable earnings?

IV. Statement of Facts

¹ "Salary": The actual compensation received by a teacher during any school year and recognized by the system in accordance with rules of the board. For purposes of this Section, "school year" includes the regular school term plus any additional period for which a teacher is compensated and such compensation is recognized by the rules of the board.

The Parties did not agree upon a statement of facts. Accordingly, based upon the testimony presented at hearing and a thorough review of all exhibits submitted therewith, the Claims Hearing Committee determines the following to be the facts of the case:

- 1) Josephine Chyatte retired from the Northern Suburban Special Education District (NSSED), Highland Park, Illinois, effective June 21, 1994, under the provisions of the Early Retirement Incentive (ERI) Program.
- 2) NSSED offered its employees a “TRS 5 + 5 Incentives” package.
- 3) The incentives package was summarized in a January 14, 1994, memorandum from Bill Charis, Director of Personnel and Planning, to NSSED staff.
- 4) The January 14, 1994, memorandum stated:

The NSSED incentive includes the following:

. . . 2. Payment of 2% of employee’s 4% contribution (NSSED incentive).

- 5) On February 25, 1994, Mr. Charis sent a memorandum to Ms. Chyatte stating:

\$7,446 2% for five years on incentive enhanced salary.
 You will pay the 4% for five years yourself.

- 6) On March 9, 1994, Mr. Charis sent a memorandum to the NSSED Governing Board stating:

The NSSED 5 + 5 Early Retirement Incentive proposal was approved by the Executive Committee on January 12, 1994, and includes: 1) payment of 2% of the employee’s 4% contribution
. . .

- 7) The Claims Hearing Committee specifically finds that NSSED’s \$7,446.00 payment to Ms. Chyatte was an employer payment of Ms. Chyatte’s ERI employee contributions.

- 8) Neither NSSED or Ms. Chyatte ever contacted TRS to inquire if the \$7,446.00 would be reportable as creditable earnings.
- 9) On January 13, 1993, TRS notified its membership in TRS Information Bulletin 0050-93 that employer-paid employee contributions were not reportable as salary to TRS.

V. Position of the Parties

It is Ms. Chyatte's position that:

- 1) Since the \$7,446.00 in question was paid directly to her in a paycheck, it is salary *per se* and salary is reportable to the System.
- 2) The \$7,446.00 was not paid to cover 2% of Ms. Chyatte's 4% ERI Employee contribution; rather, it was only the means for determining the amount of the payment. Therefore, the \$7,446 is reportable.
- 3) Since she relied upon NSSED's representations that the \$7,446.00 would be reportable to TRS, NSSED's representations are binding upon TRS.

It is the position of the System that:

- 1) The amount of money a teacher receives is not reportable *per se* to the System as creditable earnings.
- 2) TRS Rule 1650.450(c)(6) prevents the reporting of employer paid ERI employee contributions whether paid to the System or the employee to pay to the System.
- 3) NSSED is not the agent of TRS for any purpose.

VI. Discussion and Analysis

1) Ms. Chyatte first contends that since she received the \$7,446.00 in question in her final paycheck, it is *ipso facto* salary and, therefore, reportable as creditable earnings to TRS. However, that the \$7,446.00 was received by Ms. Chyatte in a paycheck is not dispositive on the issue of reportability. As held by the Board in the McCracken Administrative Review (dec. Feb. 21, 1992):

The Board notes with some concern that a number of appeals it has heard recently have featured confusion over the meaning of the word “salary.” The board is strictly interested in interpreting “salary” as defined in section 16-121 of the Pension Code, Ill. Rev. Stat. ch. 108 1/2, par. 16-121. There, salary is defined as “[t]he actual compensation received by a teacher during any school year and recognized by the system in accordance with rules of the board.” (Emphasis added.) This Board’s administrative rules regulating the reporting of “salary” are contained at 80 Ill. Adm. Code Section 1650.450. As it has had to do in previous controversies, the Board specifically notes here that a member’s receipt, through and with his or her regular payroll check, of a specific type or item of compensation or reimbursement does not, ipso facto, automatically render such an item “salary” under the statute and rules. (McCracken at p. 3 and 4).

2) Ms. Chyatte next argues that the \$7,446.00 paid to her was not to reimburse her for 2% of her 4% ERI employee contribution. Rather, NSSD was merely using the 2% as a formula to determine her retirement bonus. However, as stated in Bd. of Trustees v. Dept. of Ins., 65 Ill. Dec. 315, 441 N.E.2d 107 (1982):

We are not, however, bound by the terminology used by the parties. We are required to look beyond that to the actual legal character of the compensation. (See Commonwealth Life & Accident Insurance Co. v. Board of Review of the Department of Labor (1953), 414 Ill. 475, 483-84, 111 N.E.2d 345.) In reaching this conclusion we are constrained to look “to the facts rather than to the self-serving characterizations of the parties.” Mississippi River Fuel Corp. v. Illinois Commerce Commission (1953), 1 Ill.2d 509, 524, 116 N.E.2d 394. (Bd. of Trustees at p. 317).

In looking at all the documentary evidence regarding the \$7,446.00 payment, the Board concludes its purpose was to cover Ms. Chyatte’s ERI employee contribution, making it an employer-paid employee early retirement contribution barred from reporting.

3) To provide guidance to the System’s employers and membership in the reporting of earnings, the Board has duly promulgated TRS Rule 1650.450,

Definition of Salary. TRS Rule 1650.450 sets forth examples of what is and is not recognized by the System as reportable salary.² As stated in paragraph (a):

. . . Subsection (b) of this Section lists the more common elements of compensation that are recognized by the System as “salary,” for purposes of illustration. For further illustration, subsection (c) mentions several examples of items not recognized by the System as “salary.” However, “salary” within the meaning of Section 16-121 of the Act is not limited to the items so enumerated.

This proviso clearly places employers and members on notice that because a pay arrangement is not specifically mentioned in Rule 1650.450, it does not mean that the pay arrangement is automatically reportable to TRS.

In the instant case, Rule 1650.450 should have alerted Ms. Chyatte and NSSED that NSSED’s payment of 2% of Ms. Chyatte’s employee ERI contribution was not reportable as salary. As stated in 1650.450(c)(6):

(c) Examples of amounts not to be reported to the System include: . . .

6) Any amount paid by an employer as the employer’s one time contribution (or on behalf of the employee as the employee’s one-time contribution) required by the System as part of the statutory early retirement option in Section 16-133.2 of the Act . . . (Emphasis added).

The Board finds that paragraph (c)(6) was sufficiently illustrative to cover ERI employer-paid employee contributions within its prohibition. That § 16-133.5, the provision that Ms. Chyatte retired under, is not specifically referenced therein does not negate (c)(6)’s applicability.

Rule 1650.450(c)(6) was adopted October 29, 1990. Since then, the Illinois General Assembly has enacted numerous amendments to Article 16 of the Illinois Pension Code. During this period, the General Assembly has never seen fit to enact legislation overturning TRS’ position regarding the reportability of

² Pay arrangements in the Illinois public schools are so variable in nature there is absolutely no way they could all be encompassed in one reporting rule.

employer-paid employee contributions. As stated in Freeman Coal v. Ruff, 228 N.E.2d 279 (1967):

Rules of statutory construction are tools or aids for ascertaining legislative intention and the application of a particular rule is not in and of itself determinative of legislative intention. It is, of course, axiomatic that long-standing contemporaneous construction by ones charged with the administration of a particular statute is entitled to great weight in construing the statute. This doctrine of contemporaneous construction becomes even more persuasive when it has been of long-standing and the legislature, presumably aware of the administrative interpretation, has amended other sections of the act during the period involved but left untouched the sections subject to the seemingly approved administrative interpretation. Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 414 Ill. 275, 111 N.E.2d 329 (1953). Bell v. South Cook Co. Mosquito Abatement Dist., 3 Ill. 2d 353, 121 N.E.2d 473 (1954). Mississippi River Fuel Corp. v. Illinois Commerce Comm'n, 1 Ill.2d 509, 116 N.E.2d 394 (1953). (Emphasis added.) (Ruff at p. 282.)

When the General Assembly passed the ERI Program into law with an employee contribution provision similar to that of the Early Retirement Option Program, it was aware of the System's interpretation regarding the reportability of employer paid employee contributions, yet it included nothing in § 16-133.5 to change the System's long-settled interpretation. Clearly, the legislature has concurred in TRS' construction of § 16-133.5 by its past actions regarding § 16-133.2 and TRS Rule 1650.450(c)(6).

Furthermore, TRS informed its membership on January 13, 1993, that employer paid employee ERI contributions were not reportable as creditable earnings. As stated in TRS Information Bulletin 0050-93 (TRS Hearing Exhibit K):

If a member's employer elects to pay all or part of the member's Early Retirement Incentive cost prior to retirement, this payment is **not** included in the member's creditable earnings and therefore has no effect on the calculation of average salary.

Again, Ms. Chyatte and NSSED were on notice that the \$7,446.00 was not reportable to TRS when they entered into their agreement on February 25, 1994.

Furthermore, the Committee finds that it does not matter that the employee contribution was paid to the member instead of the System directly. Rule 1650.450(c)(6) prevents the reporting of any amount paid by the employer. There is no distinction in the rule allowing the member to avoid Rule 1650.450(c)(6)'s impact by passing the contribution through the member's hands first.

4) Lastly, Ms. Chyatte argues that she would not have submitted her resignation were it not for the alleged advice provided by her business manager, Mr. Charis. However, Mr. Charis is not an employee or agent of TRS. As stated in Milwaukee Mutual Ins. Co. v. Wessels, 70 Ill.Dec. 550, 449 N.E.2d 897 (1983):

Agency is a consensual, fiduciary relationship whereby the principal has the right to control the conduct of the agent, and the agent has the power to effect the legal relations of the principal. (Slates v. International House of Pancakes, Inc. (1980), 90 Ill.App.3d 716, 724, 46 Ill.Dec. 17, 23, 413 N.E.2d 457, 463.) The agency relationship differs from other fiduciary relationships in that it is the duty of the agent to respond to the desires of the principal. (Wessels at p. 554).

TRS gives no authority to school officials to advise their employees on behalf of TRS. Furthermore, TRS exercises no supervision or control over school officials, nor does TRS have the ability to employ or discharge school officials. Clearly, NSSED's business manager was not TRS' agent and had no power to bind TRS through any advice given by him.

VII. Conclusion

Based upon the foregoing, it is the Claims Hearing Committee's recommendation that the staff determination in the instant case be upheld and Ms. Chyatte's request to report the \$7,446.00 she received from her employer to cover 2% of her 4% ERI employee contribution be denied.

VIII. Notice of Right to File Exceptions

Exceptions to the Claims Hearing Committee's Proposed Decision must be filed within fifteen (15) days of receipt by the Petitioner. A Final Decision will be issued by the Board of Trustees after it has considered the Claims Hearing Committee's Proposed Decision and any exceptions filed by the Petitioner.