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BERNICE CURRY-MALCOLM

Petitioner-Plaintiff, **DECISION ORDER**
v. **& JUDGMENT**

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM Index No.: 2019/4349
(Filed Aug. 4, 2020)

Respondent-Defendant

RUSH-HENRIETTA CENTRAL
SCHOOL DISTRICT; HONEOYE
FALLS-LIMA CENTRAL
SCHOOL DISTRICT; BROWN
HUTCHINSON, LLP
ATTORNEYS AT LAW;
ROCHESTER CITY SCHOOL
DISTRICT; and ASSOCIATION
OF SUPERVISORS &
ADMINISTRATORS OF
ROCHESTER (ASAR)

“Necessary Joiner Parties”

APPEARANCES:

For Petitioner-Plaintiff:

Bernice Curry-Malcolm, *pro se*

For NYS Teachers' Retirement System: Ted O'Brien, Esq.

For Rush-Henrietta CSP:

Miles G. Lawlor, Esq.

For Honeoye-Falls Lima CSD:

Miles G. Lawlor, Esq.

For Brown Hutchinson, LLP:

Michael Cobbs, Esq.

For Rochester CSD:

Alison K.L. Moyer, Esq.

For Association of Supervisors

(ASAR): Jennifer L. Carlson, Esq.

Pro se petitioner Bernice Curry-Malcolm commenced an Article 78 proceeding challenging the June 26, 2019 final determination of respondent New York State Teachers' Retirement System (NYSTRS), which calculated her retirement service credit and earnings as a result of her employment with the above-captioned "Necessary Joiner Parties" school districts Honeoye-Falls Lima Central School District (HFL CSD), Rush-Henrietta Central School District (R-H CSD), and Rochester City School District (RCSD). All of the Respondents/ "Necessary Joiner Parties" (hereinafter respondents) made pre-answer motions to dismiss pursuant to CPLR § 3211, and petitioner then made a motion for a default judgment against all respondents.

The petition/complaint asserts four causes of action. The first cause of action asserts the June 26, 2019 final determination of the NYSTRS was an abuse of discretion, arbitrary, capricious and done in bad faith. The second cause of action asserts the NYSTRS does not have "jurisdiction" over a Settlement Agreement between the petitioner and HFL CSD. The third cause of action asserts the final determination of the NYSTRS violated her constitutional rights. The fourth cause of action asserts the NYSTRS "unlawfully

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withheld evidence” from its final determination to favor HFL CSD and RCSD.

As outlined above, the four causes of action in the petition/complaint are directed only against NYSTRS and all relate to the NYSTRS’s calculation and/or determination of petitioner’s salary and service credits. Stated differently, no causes of action are asserted against HFL CSD, R-H CSD, RCSD, Brown Hutchinson, LLP, Attorneys at Law (Brown Hutchinson), or the Association of Supervisors & Administrators of Rochester (ASAR), and instead, petitioner has named them as “Necessary Joiner Parties.” Indeed, the petition/complaint is devoid of any allegations of involvement by or wrongdoing against R-H CSD, Brown Hutchinson or ASAR regarding the calculation and/or determination of petitioner’s salary and service credits. Nor does the petition/complaint allege that any of the school district defendants or ASAR or Brown Hutchinson will be impacted by any reversal of the June 26, 2019 determination made by NYSTRS. The petition/complaint also does not allege that any modification of the June 26, 2019 determination cannot be made without joining the school districts or ASAR or Brown Hutchinson as respondents/defendants (see CPLR § 1001).

Petitioner also generally asserts in her petition/complaint that the HFL CSD terminated her without cause in 2008 and/or discriminated and/or retaliated against her, and that the RCSD, *inter alia*, unlawfully terminated her employment and breached a contract and/or Collective Bargaining Agreement. However, these assertions are not related to the instant Article

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78 proceeding challenging the June 26, 2019 service credit determination made by the NYSTRS. More importantly, though, petitioner's discrimination and retaliation claims and breach of contract claims have already been extensively litigated in Federal and State venues and were resolved in favor of HFL CSD and the RCSD.¹

The petition/complaint also does not allege that petitioner served a notice of claim against any of the school districts prior to commencing this action, which is a condition precedent to commencing an action against a school district (*School Aid Specialists, LLC v Board of Education of Warwick Valley Central School District*, 130 AD3d 1006 [2d Dept 2015]; see also *McGovern v Mt. Pleasant Central School District*, 114 AD3d

¹ For a list of the actions/proceedings Bernice Curry-Malcolm has brought against HFL CSD entities and employees, see the Decision and Order of U.S. District Court Judge David Larimer in *Malcolm v Honeoye Falls-Lima Central School District*, 278 F Supp 3d 677 (WDNY 2017). In addition, a September 14, 2010 Decision and Order from the U.S. District Court for the Western District of New York permanently enjoined petitioner from filing further *pro se* actions in Federal Court against the HFL CSD without seeking leave of court (see *Malcolm v Board of Education of the Honeoye Falls-Lima Central School District*, 737 F Supp 2d 117 [WDNY 2010]). For a list of the actions/proceedings Bernice Curry-Malcolm has brought against the RCSD entities and employees and/or ASAR, see the Affirmation of Alison M.K. Moyer, Esq., dated November 19, 2019, with exhibits. In addition, petitioner has been permanently enjoined from commencing any further *pro se* actions in Federal Court against the RCSD, any RSCD employee, the ASAR, or any ASAR representatives or members arising out of her employment with the RSCD without seeking leave of court (see *Malcolm v ASAR et al.*, 388 F Supp 3d 242 [WDNY 2019]).

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795 [2d Dept 2014], aff'd 25 NY3d 1051 [2015]). Nor does the petition/complaint allege compliance with notice of claim and pleading obligations arising under New York Education Law § 3813, which is fatal to her claims against the school districts (*Parochial Bus Systems, Inc. v Board of Education of the City of New York*, 60 NY2d 539 [1983]).

The WHEREFORE clause in the petition/complaint asks the Court to award various relief in favor of petitioner and against the three maned school districts (*i.e.*, restore her service credits, pay her earnings, vacation and sick time, etc.) and a judgment in her favor for the value of lost employment benefits, service credits and earnings in an amount to be determined by the Court, but not less than one million dollars. However, as noted above, a reading of the entire petition/complaint reveals that petitioner's complaints are directed against the NYSTRS and arise from the June 26, 2019 final determination of the NYSTRS that calculated her retirement service credit and earnings. Moreover, as set forth above, respondents HFL CSD, R-H CSD, RCSD, ASAR and Brown Hutchinson have demonstrated that the petition/complaint fails to state a cause of action and/or otherwise has no merit as against them. Accordingly, the pre-answer motions to dismiss the petition/complaint brought by HFL CSD, R-H CSD, RCSD, ASAR and Brown Hutchinson are granted, and petitioner's Notice of Motion to Strike and For Default Judgment against these respondents is denied.

The pre-answer motion to dismiss the petition/complaint brought by NYSTRS cites to CPLR §7804(f)

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and argues dismissal based on lack of personal jurisdiction because the Notice of Petition served on the Attorney General did not include a date by which the petition was made returnable. NYSTRS cites to some older case law in support of its motion. However, in light of the recent amendment to CPLR § 2001 and subsequent case law, and because NYSTRS does not argue that it was prejudiced or did not have adequate notice to respond as a result of the omission of the return date, NYSTRS's pre-answer motion to dismiss the petition/complaint based on lack of personal jurisdiction is denied (*Bender v Lancaster Central Scool District*, 155 AD3d 1590 [4th Dept 2017]; *Oneida Public Library District v Town Board of the Town of Verona*, 153 AD3d 127 [3d Dept 2017]). As a result, NYSTRS shall have 20 days from service of Notice of Entry of this Decision, Order & Judgment to file and serve an Answer and other supporting documents, if any, to the petition/complaint. Accordingly, petitioner's Notice of Motion to Strike and For Default Judgment against NYSTRS is denied.

NOW, upon reading and considering the "Summons, Petition and Verified Complaint" and "Notice of Petition, Summons and Verified Complaint," both dated October 22, 2019, with exhibits; "Notice of Motion to Strike and For Default Judgment Against All Respondents," dated December 4, 2019; "Plaintiff/Petitioner's Declaration in Support of Motion to Strike and For Default Judgment Against All Respondents," dated December 4, 2019, with exhibits; and Plaintiff/Petitioner's Memorandum of Law, dated December 4, 2019;

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The Notice of Motion of HFL CSD, dated November 13, 2019; Attorney Affirmation of Miles G. Lawlor, Esq., dated November 13, 2019, with exhibits; the Affidavit of Dr. Bruce Capron, dated November 13, 2019; Memorandum of Law, dated November 13, 2019; and the Attorney Reply Affirmation of Miles G. Lawlor, Esq., dated February 18, 2020;

The Notice of Motion of R-H CSD, dated November 13, 2019; Attorney Affirmation of Miles G. Lawlor, Esq., dated November 13, 2019, with exhibits; Affidavit of Dr. Patrick McCue, dated November 12, 2019; Memorandum of Law, dated November 13, 2019; and Attorney Reply Affirmation of Miles G. Lawlor, Esq., dated February 18, 2020;

The Notice of Cross-Motion of RCSD, dated November 19, 2019; and Attorney Affirmation of Alison M.K. Moyer, Esq., dated November 19, 2019, with exhibits;

The Notice of Motion of ASAR, dated November 25, 2019; Attorney Affirmation of Jennifer L. Carlson, Esq., dated November 25, 2019, with exhibits; and Memorandum of Law, dated November 25, 2019;

Notice of Motion of NYSTRS, dated December 9, 2019; Attorney Affirmation of Ted O'Brien, Esq., dated December 9, 2019; and Memorandum of Law, dated December 9, 2019; and

Notice of Motion of Brown Hutchinson, dated March 18, 2020 [sic] but filed on March 10, 2020; and

Attorney Affirmation of Michael Cobbs, Esq., dated March 18, 2020 [sic], with exhibits;

AND, after due deliberation and deciding this matter on the aforementioned papers, and consistent with this Decision, Order & Judgment, it is hereby

ORDERED and ADJUDGED, that the pre-answer motions to dismiss the petition/complaint brought by respondents HFL CSD, R-H CSD, RCSD, ASAR and Brown Hutchinson are GRANTED; and it is further

ORDERED and ADJUDGED, that the pre-answer motion to dismiss the petition/complaint brought by respondent NYSTRS is **DENIED**; and it is further

ORDERED and ADJUDGED, that NYSTRS shall have 20 days from service of Notice of Entry of this Decision, Order & Judgment to serve an Answer and other supporting documents, if any, to the petition/complaint; and it is further

ORDERED and ADJUDGED, that petitioner's "Motion to Strike and for a Default Judgment Against All Respondents" is **DENIED**.

August
DATED: July 3, 2020 /s/ Gail A. Donofrio
Hon. Gail A. Donofrio
Supreme Court Justice

BERNICE CURRY-MALCOLM

Petitioner-Plaintiff, **DECISION ORDER**
v. **& JUDGMENT**

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM Index No.: 2019/4349
(Filed Dec. 8, 2020)

Respondent-Defendant

APPEARANCES:

For Petitioner-Plaintiff:

Bernice Curry-Malcolm, *pro se*

For NYS Teachers' Retirement System: Ted O'Brien, Esq.

Pending before the Court is petitioner's Article 78 proceeding challenging the June 26, 2019 final determination of respondent New York State Teachers' Retirement System (NYSTRS), which calculated petitioner's retirement service credit and earnings.

Petitioner joined NYSTRS on September 1, 1997, as a Tier 4 member, and remains an active member as no application for retirement has been made. Petitioner was employed by the Rush-Henrietta Central School District (R-H CSD), the Honeoye Falls-Lima

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Central School District (HF-L CSD) and the Rochester City School District (RCSD).¹

Petitioner entered into a settlement agreement with HF-L CSD on July 16, 2007. As a result of the settlement agreement, petitioner received a lump sum payment of \$97,427.28 from HF-L CSD. Although HF-L CSD reported this amount to NYSTRS as “ordinary compensation,” NYSTRS determined that all payments received by petitioner under the settlement agreement with HF-L CSD were not pensionable because the payments constituted credit for time *not* worked in exchange for petitioner’s resignation. As a result, NYSTRS removed all monies paid under the agreement and removed one month of service credit for the 2005 - 2006 school year, two months of service credit for the 2006 - 2007 school year, and one year of service credit for the 2007 - 2008 school year from petitioner’s pensionable earnings.

In addition, NYSTRS was advised by the RCSD that during the 2017 - 2018 school year, petitioner took a paid administrative leave of absence from December 8, 2017 through April 23, 2018, and did not return to her position with the RCSD after the leave of absence. NYSTRS states it was advised by RCSD that petitioner was terminated on April 23, 2018. Respondent NYSTRS determined that because petitioner did not return to her position after her leave of absence, any

¹ By Decision, Order and Judgment dated August 3, 2020, this Court dismissed the petition/complaint as against R-H CSD, HF-L CSD, RCSD, Brown Hutchinson, LLP, and Association of Supervisors & Administrators of Rochester.

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service or salary was not pensionable and any earnings and service credit for this time period were therefore removed from petitioner's pensionable earnings. NYSTRS also determined that because petitioner's service for the 2017 - 2018 school year was less than 20 days (*i.e.*, from November 20, 2017 through December 7, 2017), no service credit was earned for that year pursuant to 21 NYCRR § 5001.2.

It is settled law that a determination by NYSTRS, made without a hearing, must be upheld if it has a rational basis and was not arbitrary and capricious (*Pell v Union Free School Dist. No. 1*, 34 NY2d 222, 231 [1974]; *Wartko v New York State Teachers' Retirement Sys.*, 121 AD3d 1484, 1485 [3d Dept 2014]). In addition, NYSTRS's interpretation and application of the statutes and regulations for which it is responsible will be upheld if supported by a rational basis (*John P. v Whalen*, 54 NY2d 89, 95 [1981]; *Martone v New York State Teachers' Retirement Sys.*, 105 AD2d 511, 512 [3d Dept 1984]). In determining what constitutes termination pay, compensation paid in anticipation of retirement, and/or average regular compensation, the substance of the transaction, not what the parties label it in an agreement, is what is determinative (*Matter of Green v Regan*, 103 AD2d 878 [3d Dept 1984], *Holbert v New York State Teachers' Retirement Sys.*, 43 AD3d 530, 532 [3d Dept 2007]). Moreover, "employers and employees cannot agree to alter the rights and obligations of either with respect to the retirement system" (*Holbert v New York State Teachers' Retirement Sys.*, 43 AD3d at 533).

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Here, the Court concludes there was a rational basis for the determinations made by NYSTRS. In making its determinations, NYSTRS relied upon the employment and earnings information reported by the three school districts and information provided by RCSD with regard to petitioner's leave of absence and termination. The NYSTRS also relied upon the terms of the settlement agreement entered into between petitioner and HF-L CSD on July 16, 2007. Respondent considered all this information, applied the relevant rules and regulations set forth in 21 NYCRR § 5001.1 *et seq.* and Education Law § 501, and made its determinations. As the determinations made by NYSTRS were rational and not arbitrary or capricious, this Court finds no reason to disturb them (*Wartko v New York State Teachers' Retirement Sys.*, 121 AD3d at 1485). Based upon the foregoing, the petition/complaint is dismissed.

NOW, upon reading and considering the "Notice of Petition, Summons and Verified Complaint" and "Summons, Petition and Verified Complaint," dated October 22, 2019, with Exhibits; and respondent NYSTRS's Verified Answer and Return, dated August 27, 2020, with Exhibits A - K; the Affirmation of Rebecca L. Kannan, Esq., dated August 19, 2020; and respondent's Memorandum of Law, dated August 27, 2020;

AND, upon consideration of the aforementioned papers, oral argument, due deliberation, and consistent with this Decision, Order & Judgment, it is hereby

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ORDERED and ADJUDGED, that petitioner's petition/complaint is **DISMISSED**.

DATED: December 2nd, 2020 /s/ Gail A. Donofrio
Hon. Gail A. Donofrio
Supreme Court Justice

App. 14

**SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department**

CA 21-00402 AND CA 21-00771

**PRESENT: CENTRA, J.P., NEMOYER, CURRAN,
AND BANNISTER, JJ.**

**BERNICE CURRY-MALCOLM, PETITIONER-
APPELLANT,**

V

**NEW YORK STATE TEACHERS' RETIREMENT,
HONEOYE FALLS-LIMA CENTRAL SCHOOL
DISTRICT, RUSH-HENRIETTA CENTRAL
SCHOOL DISTRICT, ROCHESTER CITY
SCHOOL DISTRICT, ASSOCIATION OF
SUPERVISORS AND ADMINISTRATORS OF
ROCHESTER, RESPONDENTS-RESPONDENTS,
AND BROWN HUTCHINSON LLP, RESPONDENT.**

Appellant having moved to adjourn oral argument, and for other relief, on the appeals taken herein from orders and judgments of the Supreme Court, Monroe County, entered August 4, 2020, and December 8, 2020,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: January 25, 2022

Ann Dillon Flynn
Clerk of the Court

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**Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.**

*I, ANN DILLON FLYNN, Clerk of the Appellate
Division of the Supreme Court in the Fourth Judicial
Department, do hereby certify that this is a true copy of
the original document, now on file in this office.*

*IN WITNESS HEREOF, I have hereunto
set my hand and affixed the seal of said
[SEAL] Court at the City of Rochester, New York,
this JAN 25 2022*

/s/ Ann Dillon Flynn

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 21-00402

PRESENT: CENTRA, J.P., NEMOYER, CURRAN,
AND BANNISTER, JJ.

IN THE MATTER OF BERNICE CURRY-
MALCOLM, PETITIONER-APPELLANT,

V

ORDER

NEW YORK STATE TEACHERS'
RETIREMENT SYSTEM,
RESPONDENT,
HONEOYE FALLS-LIMA CENTRAL
SCHOOL DISTRICT, RUSH-HENRIETTA
CENTRAL SCHOOL DISTRICT,
ROCHESTER CITY SCHOOL DISTRICT,
ASSOCIATION OF SUPERVISORS AND
ADMINISTRATORS OF ROCHESTER,
AND BROWN HUTCHINSON LLP,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

(Filed Feb. 4, 2022)

BERNICE CURRY-MALCOLM, PETITIONER-
APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY
(DUSTIN J. BROCKNER OF COUNSEL), FOR RE-
SPONDENT NEW YORK STATE TEACHERS' RE-
TIREMENT SYSTEM.

FERRARA, FIORENZA PC, EAST SYRACUSE (MILES G. LAWLER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT AND RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT.

STEVEN G. CARLING, ACTING GENERAL COUNSEL, ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR RESPONDENT-RESPONDENT ROCHESTER CITY SCHOOL DISTRICT.

ARTHUR P. SCHEUERMANN, GENERAL COUNSEL, SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE, LATHAM (JENNIFER L. CARLSON OF COUNSEL), FOR RESPONDENT-RESPONDENT ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS OF ROCHESTER.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY CAMPBELL OF COUNSEL), FOR RESPONDENT-RESPONDENT BROWN HUTCHINSON LLP.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 4, 2020 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the pre-answer motions to dismiss the petition brought by respondents Honeoye Falls-Lima Central School District, Rush-Henrietta Central School District, Rochester City School District, Association of Supervisors and Administrators of Rochester, and Brown Hutchinson LLP.

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It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, ANN DILLON FLYNN, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.

IN WITNESS HEREOF, I have hereunto set my hand and affixed the seal of said [SEAL] Court at the City of Rochester, New York, this February 4, 2022.

/s/ Ann Dillon Flynn
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 21-00771

PRESENT: CENTRA, J.P., NEMOYER, CURRAN,
AND BANNISTER, JJ.

IN THE MATTER OF BERNICE CURRY-
MALCOLM, PETITIONER-APPELLANT,

V

ORDER

NEW YORK STATE TEACHERS'
RETIREMENT SYSTEM,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

BERNICE CURRY-MALCOLM, PETITIONER-
APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY
(DUSTIN J. BROCKNER OF COUNSEL), FOR RE-
SPONDENT-RESPONDENT.

(Filed Feb. 4, 2022)

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered December 8, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition against respondent New York State Teachers' Retirement System.

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It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, ANN DILLON FLYNN, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.

IN WITNESS HEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this February 4, 2022.

/s/ Ann Dillon Flynn
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NOS. 44-45/22
CA 21-00402 AND CA 21-00771
PRESENT: CENTRA, J.P., NEMOYER, CURRAN,
AND BANNISTER, JJ.

IN THE MATTER OF BERNICE CURRY-
MALCOLM, PETITIONER-APPELLANT,

V

NEW YORK STATE TEACHERS
RETIREMENT SYSTEM, RESPONDENT,
HONEOYE FALLS-LIMA CENTRAL
SCHOOL DISTRICT, RUSH-HENRIETTA
CENTRAL SCHOOL DISTRICT,
ROCHESTER CITY SCHOOL DISTRICT,
ASSOCIATION OF SUPERVISORS AND
ADMINISTRATORS OF ROCHESTER,
AND BROWN HUTCHINSON LLP,
RESPONDENTS-RESPONDENTS.

(Filed Apr. 22, 2022)

Appellant having moved for leave to appeal to the
Court of Appeals from the orders of this Court entered
February 4, 2022,

Now, upon reading and filing the papers with re-
spect to the motion, and due deliberation having been
had thereon,

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It is hereby ORDERED that the motion is denied.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, ANN DILLON FLYNN, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.

IN WITNESS HEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this APR 22 2022

/s/ Ann Dillon Flynn
Clerk

***State of New York
Court of Appeals***

***Decided and Entered on the
fourteenth day of June, 2022***

Present, Hon. Janet DiFiore, *Chief Judge*, presiding.

SSD 20

In the Matter of Bernice Curry-Malcolm,
Appellant,

v.

New York State Teachers' Retirement
System, et al.,
Respondents.

Appellant having appealed to the Court of Appeals
in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without
costs, by the Court *sua sponte*, upon the ground that no
appeal lies as of right from the unanimous orders of
the Appellate Division absent direct involvement of a
substantial constitutional question (*see* CPLR 5601).

Judge Troutman took no part.

/s/ Lisa LeCours
Lisa LeCours
Clerk of the Court

U.S. Const. amend. V

In relevant part, nor be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. XIV, 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

New York State Const. V, § 7

Section 7 of article V of the Constitution of the State of New York provides: After July [1, 1940], membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

New York State Const., Art. 1, § 11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

**Title VII of the Civil Rights Act of 1964 –
Disparate Treatment**

Title VII makes it unlawful for an employer “to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or natural origin.” 42 U.S.C. § 2000e-2(a)(1)

42 U.S.C. § 1981

In pertinent part, All persons within the jurisdiction of the United States shall have the same right in

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every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Education Law, § 501(4)

“Teacher” shall mean any regular teacher, special teacher, including any school librarian or physical training teacher, principal, vice-principal, supervisor, supervisory principal, director, superintendent, city superintendent, assistant city superintendent, district superintendent and other member of the teaching or professional staff of any class, public school, vocational school, truant reformatory school or parental school, and of any or all classes of schools within the state of New York, including schools on the Indian reservation, conducted under the order and superintendence of and wholly or partly at the expense of the New York state education department or of a duly elected board of education, board of school directors or board of trustees of the state or of any city or school district thereof, provided that no person shall be deemed a teacher within the meaning of this article who is not so employed for full time outside vacation periods. The word, “teacher,” shall also include any person employed in the state education department who at the time he entered such employment, or within one year prior thereto, was a teacher within the foregoing definition, or who was engaged in such department in the performance of duties pertaining to instructional services. In all cases of

doubt, the retirement board shall determine whether any person is a teacher as defined in this article. (emphases added).

Education Law, § 501(11)(b)

b. . . . commencing July 1, 1969, "Final Average Salary" shall mean the average regular compensation earned as a teacher during the three years of actual service immediately preceding his date of retirement, or any other three years of consecutive service upon application of the member . . . (emphases added)

Education Law, § 501(19)

Defines "Service," provides that "[l]eave of absence with pay granted by the employer may be considered service under regulations prescribed by the retirement board.

Education Law, § 525(3)

Education Law, § 525(3) provides, should any change or error in records result in any employee or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, then, on the discovery of any such error, the retirement board shall correct such error, and, as far as practicable, shall adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Education Law, § 3020-a

Education Law § 3020(1) governs the discipline of tenured teachers and provides that “[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause” and in accordance with statutory procedures”. This statute is the exclusive method of disciplining a tenured teacher in New York State.

Education Law, § 3108

Payment of salaries. No teacher or other employee of any board of education shall be requested or required to make, execute and deliver a general release or waiver as a condition prerequisite to the payment of any salary, compensation or other emolument to which he is entitled; and no board of education shall deprive any such teacher or other employee of the whole or any part of such salary, compensation or other emolument for refusing to make, execute and deliver a general release.

**Article 15 of Retirement and
Social Security Law, § 601**

“Wages” shall mean regular compensation earned by and paid to a member by a public employer, except that for members who first join the New York state and local employees’ retirement system or the New York state teachers’ retirement system on or after January first, two thousand ten, overtime compensation paid in any year in excess of the overtime ceiling, as defined

by this subdivision, shall not be included in the definition of wages. RSSL §601, further defines “wages” as follows: I. (a) “Wages” shall mean regular compensation earned by and paid to a member by a public employer.

**Article 15 of Retirement and
Social Security Law, § 608**

Defines the final average salary, for members who first become members of a public retirement system of the state before April first, two thousand twelve, a member’s final average salary shall be the average wages earned by such member during any three consecutive years which provide the highest average wage . . .

**Article 19 of Retirement and
Social Security Law**

Article 19 of the Retirement and Social Security Law in 2000 eliminated the required 3% contributions for current Tier 3 and 4 members of the System when they reached 10 years of credited service or had been a member for ten (10) years.

Chapter 890 of the Laws of 1976

§ 6. Notwithstanding any inconsistent provision of law, until July first, nineteen hundred eighty-six, any person other than a retiree of a public retirement system of the state, who was a member of a public retirement system of the state, or any political

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subdivision thereof, on September first, nineteen hundred seventy-five, and who, on such date, prior thereto or subsequently thereafter, was separated from his public employment due to the adverse fiscal circumstances of his public employer, shall upon his return to public employment be entitled to every retirement right, benefit and privilege which would have been available to him had he reentered employment on the date of this separation.

CPLR, Article 78

A petitioner must seek review of determination within four months after the determination to be reviewed becomes final and binding[.]” A determination becomes final and binding when it has an impact on the petitioner

CPLR, § 1001

Defines necessary parties as: “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants.

CPLR, § 5601

Appeals to the court of appeals as of right. (a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate’s court, the family

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court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

- (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
 - 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
 - 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.
- (c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.
- (d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final

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determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

CPLR, § 7803(3)

Whether [the] determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion.

21 N.Y.C.R.R. § 5001

NYSTRS regulations governing service credit, codified at 21 N.Y.C.R.R. Part 5001, provide that “[a] member who is on a leave of absence and earning at least half pay for the period of his or her leave may be granted full service credit, or, service credit at half the full rate, whichever is more beneficial.

21 N.Y.C.R.R. § 5001.1(d)

“Termination pay” is defined by the regulations as “any payment received in anticipation of the termination of a member’s employment, for any reason.

21 NYCRR 5003.2[b]

Termination pay is includable in the calculation of final average salaries only if "it constitutes compensation earned as" an administrator.

21 N.Y.C.R.R. § 5003.4

Final Average Salary for Members Joining the System on or After July 1, 1976.

- (a) A member's final average salary shall be the average wages earned by such a member during any three consecutive years which provide the highest average wage . . .
- (b) Wages shall mean regular compensation earned by and paid to a member by a public employer.

Reportable Workers' Compensation Payments

Under NYSTRS' reportable workers' compensation payments regarding reporting workers' compensation payments to the System, Workers' Compensation payments to NYSTRS members having an employer-employee relationship (i.e., the employee is entitled to benefits under the negotiated agreement) and being paid directly by their employer are pensionable and must be reported to the System.

Other Relevant Material References

Collective Bargaining Agreement(s) Between Honeoye Falls-Lima Central School District and Honeoye Falls Lima Education Association

Settlement Agreement Between Honeoye Falls-Lima School District and Bernice Malcolm

Collective Bargaining Agreement(s)

Between Rochester City School District and Association of Supervisors an Administrators of Rochester

Collective Bargaining Agreement(s) Between Rochester City School District and Rochester Teacher Association
