

**BEFORE THE BOARD OF TRUSTEES
TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS**

In the Matter of:)
)
)
 Paul Kimmelman)
)
 Petitioner.)

**PROPOSED DECISION RECOMMENDED BY THE CLAIMS HEARING
COMMITTEE IN THE ADMINISTRATIVE REVIEW OF PAUL KIMMELMAN**

I. Introduction

Pursuant to 80 Ill. Admin. Code 1650.640(e), Petitioner Paul Kimmelman agreed with System staff that his request for administrative review would be presented to the TRS Board of Trustees' Claims Hearing Committee solely upon the record agreed to by the parties. The Claims Hearing Committee met by telephonic conference on January 16, 2003, to consider Dr. Kimmelman's appeal. Present were Presiding Hearing Officer Ralph Loewenstein, Committee Chairman Sharon Leggett and Committee members James Bruner, John Glennon and Molly Phalen.

Petitioner Kimmelman filed the instant administrative review to challenge the staff's disallowance of \$24,000.00 in the 1998-99 school year; \$54,427.00 in the 1999-00 school year; and \$37,147.25 in the 2000-01 school year as creditable earnings to be used in Dr. Kimmelman's final average salary calculation. These amounts were disallowed as creditable earnings based upon the staff's determination that their source was the Trust under the West Northfield School District No. 31 Severance Pay Plan, established for Kimmelman's benefit by his employer, West Northfield School District No. 31 (West Northfield) on May 9, 1991.

Dr. Kimmelman raises three arguments as to why the sums in question or a part thereof should be creditable earnings. His first claim is that the System should have advised him in 1992 that he could not cash in his Severance Pay Plan account and reprocess the sums in question as salary in his last three years of employment to increase his final average salary. Having failed to advise him he could not do this, the System was estopped at his retirement from applying TRS Rule 1650.450 the System's salary rule, to disallow his reprocessing scheme.

Kimmelman's second claim is that he should at least be able to report \$21,840.00 in the 1998-99 school year and \$6,829.57 in the 1999-00 school year as creditable earnings. These amounts represent payments remitted by West Northfield on behalf of Dr. Kimmelman to pay his 2.2 upgrade, the source of which was Kimmelman's Severance Pay Plan which were reprocessed through the District payroll. Dr. Kimmelman claims the System is estopped from disallowing these particular amounts based upon a conversation with TRS Comptroller Todd Kennedy as a will be discussed in greater detail.

Lastly, Dr. Kimmelman claims the funds in question were always the funds of his employer to do with as it saw fit. Accordingly, they could be used to pay the compensation in question without running afoul of TRS Rule 1650.450.

After considering the Position Statements of the parties, their stipulations of fact and the agreed upon exhibits contained in the Claims Hearing Packet, the Committee's recommendation is to uphold the staff's determination. As will be more fully explained, the Committee finds that the earnings in question were noncreditable, nonqualified deferred compensation and that Dr. Kimmelman has failed to state any claim of estoppel against the System.

II. Findings of Fact

Prior to hearing, the parties stipulated to the following facts which the Claims Hearing Committee adopts in their entirety. The stipulations are as follows:

- 1) Paul Kimmelman (Kimmelman) was employed by West Northfield School District No. 31 (District 31) beginning in 1988-89 School Year.
- 2) On May 9, 1991, Kimmelman and District 31 entered into the West Northfield School District No. 31 Severance Pay Plan.

- 3) On June 14, 1999, Kimmelman and District 31 entered into a Side Letter of Understanding regarding the Severance Pay Plan.
- 4) The following contributions were made by District 31 to Kimmelman's Severance Pay Plan:

1991-92	\$5,000.00
1992-93	\$5,000.00
1993-94	\$5,000.00
1994-95	\$7,500.00
1995-96	\$5,000.00
1996-97	\$5,000.00
1997-98	\$5,000.00
1998-99	\$5,009.13
1999-00	\$5,027.88
<u>2000-01</u>	<u>\$5,000.00</u>
Total	\$52,537.01

- 5) The contributions made by District 31 into Kimmelman's Severance Pay Plan were invested in the following investment accounts:

Monetta Fund
 Vanguard Prime Money Market
 Vanguard Index Trust 500
 Vanguard Extended Market Index Fund
 Vanguard GNMA Fund
 Vanguard Total International Stock Index Fund
 Vanguard 500 Index Fund
 Vanguard Index Trust Extended Market Portfolio
 The American Funds EuroPacific Growth Fund
 Olde Discount Corporation – Brokerage Account

- 6) The accounts were held in the name "Jordon Bock, Trustee, West Northfield School District 31 Severance Pay Plan Trust FBO Paul Kimmelman and "Lisa Lawler, Trustee, West Northfield School District 31 Severance Pay Plan Trust FBO Paul Kimmelman."
- 7) The accounts yielded dividend earnings and gains on sales to Kimmelman in the amount of \$55,405.51

- 8) The funds from Kimmelman's Severance Pay Plan were processed through District 31's accounts in the following school years and reported as creditable earnings for Dr. Kimmelman:

1998-99	\$23,985.68
1999-00	\$50,204.00
2000-01	\$33,752.84

- 9) The above amounts were disallowed as creditable earnings by the System.
- 10) Additionally, TRS disallowed the following district paid TRS contributions associated with the above non-creditable Severance Pay Plan payments:

1998-99	\$14.32
1999-00	\$4,223.00
2000-01	\$3,394.41

- 11) The District made the following payments for Kimmelman's 2.2 Upgrade with funds from his Severance Pay Plan (these sums are included in the amounts set forth in sentence 8 above and not additional amounts):

1998-99	\$21,840.00
1999-00	\$6,829.57

- 12) Kimmelman's TRS retirement date was January 1, 2001.
- 13) Kimmelman's present TRS monthly annuity is \$6,576.43.
- 14) If Kimmelman were to prevail in this administrative review, and all amounts disallowed were found creditable his initial TRS monthly annuity would be increased to \$7,705.82 provided Kimmelman pays an additional \$14,335.09 in member ERO cost and District 31 pays an additional \$40,871.93 in employer ERO cost.
- 15) If Kimmelman were to prevail in this administrative review with regard to his claim regarding the 2.2 amounts paid on his behalf only,

his TRS annuity would be \$6,870.85, provided Kimmelman pays an additional \$3,297.25 in member ERO cost and District 31 pays an additional \$9,420.70 in employer ERO cost.

Based upon the hearing record and the affidavits filed by the parties, the Committee makes the following additional findings of fact:

- 1) The source of the funds used to pay for Dr. Kimmelman's 2.2 upgrade was not disclosed to Mr. Kennedy by Dr. Kimmelman.
- 2) The \$52,537.01 contributed to Dr. Kimmelman's Severance Pay Plan was fully vested in his possession in the years the District made the contributions as set forth in stipulation 4.
- 3) The funds held in Dr. Kimmelman's Severance Pay Plan Trust was not the property of the District's to spend as it saw fit.

III. Issues to be Decided

The Claims Hearing Committee is faced with deciding the following issues in this case:

- 1) Are sums of money the source of which was a member's Severance Pay Plan that are returned to the member's employer and then reprocessed through the employer's payroll in the member's final three school years of employment for the purpose of increasing final average salary, creditable earnings under TRS Rule 1650.450?
- 2) Is the Teachers' Retirement System equitably estopped from applying TRS Rule 1650.450 to disallow as creditable earnings the sums at question in this matter, the source of which was Dr. Kimmelman's Severance Pay Plan, by reason of any action of TRS staff as alleged by Dr. Kimmelman?

IV. Discussion and Analysis

- 1) **Dr. Kimmelman failed to state a claim of estoppel regarding TRS' alleged failure to advise him in 1992 that he could not return his Severance Pay Plan Trust funds to West Northfield**

District for reprocessing through the District payroll in the 1998-99, 1999-00, and 2000-01 school years.

Equitable estoppel is a doctrine that is invoked to prevent fraud and injustice and arises whenever a party, by his word or conduct, reasonably induces another to rely on his representations and leads another, as a result of that reliance, to change his position in his injury. (Payne v. Mill Race Inn (1987), 152 Ill.App.3d 269, 276-77, 105 Ill.Dec. 324, 504 N.E.2d 193.) (Gianetti at p. 751).

The System and its staff did absolutely nothing to induce Dr. Kimmelman to undertake his reprocessing scheme. As was determined in the Richard Olson Administrative Review, the noncredibility of nonqualified deferred compensation has been well documented in TRS publications since 1992. Furthermore, the System surveyed Kimmelman's employer every school year to determine if Kimmelman had a nonqualified deferred compensation arrangement. In every year that contributions were made to Kimmelman's Severance Pay Plan Trust, West Northfield acknowledged they were being made and that West Northfield understood they were noncreditable. There was absolutely no reason for System staff to suspect or expect Dr. Kimmelman's reprocessing scheme.

In this instance, failure to detect Dr. Kimmelman's reprocessing scheme does not constitute an estoppel. Even if staff had known of the scheme and approved it which it did not, the reporting of nonqualified deferred compensation as creditable earnings is not authorized under TRS Rule 1650.450. As stated in Lewis-Connelly v. Bd Ed, 214 Ill.Dec. 92, 660 NE2d 283 (1996):

Defendant correctly asserts that "the doctrine of estoppel cannot be invoked against a public body when the action taken by it was ultra vires, i.e., beyond its authority and void." (Evans v. Benjamin School District no. 25 (1985), 134 Ill.App.3d 875, 883, 89 Ill.Dec. 637, 480 N.E.2d 1380.) here, the Board's action of allowing plaintiff to teach until February 25 was beyond its authority because sections 21-1 and 21-1b prohibited

such action. “The doctrine of estoppel may not be applied to validate an ultra vires act, and we will not do so here.” Evans, 134 Ill.App.3d at 883, 89 Ill.Dec. 637, 480 N.E.2d 1380. (Lewis-Connolly at p. 96).

Under the provisions of TRS Rule 1650.450, only qualified deferred compensation under I.R.C. 403(b) and 457(b) which is reportable in the year contributed, constitutes creditable earnings. The Committee is without authority to alter or ignore the operation of TRS Rule 1650.450.

2) Dr. Kimmelman failed to state a claim of estoppel regarding his conversation with Todd Kennedy regarding his 2.2 upgrade.

The Claims Hearing Committee has reviewed the affidavits of Dr. Kimmelman and Todd Kennedy regarding their telephone conversation of May 4, 1999, as well as Mr. Kennedy’s letter of May 5, 1999. The Committee finds that the information provided to Dr. Kimmelman by Mr. Kennedy was entirely accurate based upon Dr. Kimmelman’s representations.

The telephone conversation between Dr. Kimmelman and Mr. Kennedy dealt solely with the application of former TRS Rule 1650.357 (now TRS Rule 1650.1205). This rule provides the procedure for employer payment of a member’s 2.2 upgrade. In Dr. Kimmelman’s case, his employer did not pay his 2.2 upgrade. Dr. Kimmelman paid his own 2.2 upgrade through his reprocessing scheme. As the TRS Board of Trustees found in the Richard Olson Administrative Review (attached and made a part hereof), such a scheme does not result in creditable earnings.

The Committee again finds that Mr. Kennedy had no duty to read Dr. Kimmelman’s mind. Furthermore, the Committee and TRS Board has previously dealt with the exact same issue in the Ralph Haldorson Administrative Review. In that case, a member failed to disclose certain material information regarding his employment arrangements with various school districts. As this Committee found:

Under the provisions of §16-106(a), Mr. Haldorson was not eligible to contribute to TRS because he was not serving in certificated positions in the 24 districts. The Committee finds that, even if Mr. Kennedy had received all the facts from Mr. Haldorson, no representation by a TRS staff member could change the operation of §16-106(a).

Likewise, even if Kennedy had misinformed Kimmelman, which the Committee finds he did not, Kennedy had no authority to change the operation of TRS Rule 1650.450 to make noncreditable earnings creditable.

3) The funds in question were Dr. Kimmelman's and not those of his employer.

Lastly, Dr. Kimmelman claims the funds contributed to his Severance Pay Plan by West Northfield School District were at all times the property of West Northfield. Dr. Kimmelman bases this assertion upon certain canned language in his Severance Pay Plan Trust which was inserted therein in an effort to avoid current year taxation on the District's contributions there to purportedly pursuant to this tax language is not dispositive on the issue of ownership of the funds as will be further explained. Furthermore, had the funds as will be further explained. Furthermore, had the funds in question truly been the district's, there would have been no reason for Kimmelman to terminate the Severance Pay Plan on March 27, 1997, to effectuate his reprocessing scheme.

That the funds in the Severance Pay Plan were Dr. Kimmelman's is evidenced by the following clauses in the Severance Pay Plan and the acknowledgement of West Northfield's attorney Michael Richardson.

As stated in Clause 2.1:

The School District's Contribution Credit with respect to Dr. Kimmelman shall be 45,000 (or such larger amount as the School District may determine); and such Contribution Credit, and the earnings thereon, shall at

all times be fully vested in Dr. Kimmelman. (Emphasis added).

The vested portion of Dr. Kimmelman's Account shall be a percentage of the total amount credited to his Account, determined on the basis of the number of Dr. Kimmelman's Plan Years of Service to the School District after June 30, 1991, according to the following schedule:

VESTING SCHEDULE
PLAN YEARS OF SERVICE – PERCENTAGE VESTED

<i>1</i>	<i>10%</i>
<i>2</i>	<i>20%</i>
<i>3</i>	<i>30%</i>
<i>4</i>	<i>40%</i>
<i>5</i>	<i>50%</i>
<i>6</i>	<i>60%</i>
<i>7</i>	<i>70%</i>
<i>8</i>	<i>80%</i>
<i>9</i>	<i>90%</i>
<i>10</i>	<i>100%</i>

At the time, Dr. Kimmelman terminated his Severance Pay Plan agreement, he was vested in all the funds he turned back to the school district.

As stated in Clauses 4.1, 4.2 and 4.3:

ENTITLEMENT TO BENEFITS

4.1 DISABILITY. If Dr. Kimmelman terminates his employment with the School District because he has become totally and permanently Disabled, and if proof of such Disability satisfactory to the School District shall be furnished, Dr. Kimmelman, as of the date of the determination of Disability by the School District, shall become fully vested in his Account, and such Account shall be valued and payable according to the provisions

of Article V. Total and permanent Disability means a medically determinable physical or mental impairment which can be expected to result in death or to last at least twelve (12) months, and by reason of which Dr. Kimmelman will be prevented from performing his usual duties or any other similar duties available in the employ of any other public school.

4.2 DEATH. If Dr. Kimmelman dies, the full value of his Account shall become fully vested, such Account shall be valued as provided in Article V and such Account shall become payable to Dr. Kimmelman's designated Beneficiary as provided in Article V.

4.3 INVOLUNTARY TERMINATION OF EMPLOYMENT. If Dr. Kimmelman's employment with the School District is involuntarily terminated by the School District for reasons other than those set forth in Section 10-22.4 of the Illinois School Code (Ill. Rev. Stat., ch. 122, sec. 10-22.4), all School District contributions to Dr. Kimmelman's account which are due or to become due during his then current contract with the School District shall be immediately payable, the full value of his Account shall become fully vested and such Account shall become valued and payable according to the provisions of Article V. For purposes of this paragraph, involuntary termination of employment includes Dr. Kimmelman's resignation at the request of the School District at a time when he otherwise is willing to serve out his applicable vesting period.

These sections all refer to the Severance Pay Plan Trust as "his account" and in the event of disability, death or termination vest the balance due under the agreement in his possession. These clauses further confirm that the amounts already contributed and the investments earnings thereon were already in Kimmelman's control and possession.

The Severance Pay Plan Trust itself also makes it clear the sums in question were the property of Kimmelman.

As stated in Clause 1.1:

ESTABLISHMENT OF TRUST

1.1 ESTABLISHMENT OF TRUST. The School District hereby establishes with the Trustee an irrevocable trust (the “Trust”) for the benefit of Dr. Kimmelman and his Beneficiary or Beneficiaries under the Plan. The Trust so established shall be governed by the terms of this Trust Agreement.

This clause makes it clear the funds were contributed on an irrevocable basis on behalf of Kimmelman by the district.

As stated in Clause 7.2:

7.2 SCHOOL DISTRICT OBLIGATIONS. The insufficiency of assets in the Trust shall not relieve the School District of its obligation or liability to make benefit payments otherwise due under the terms of the Plan.

This clause makes it clear that the district was liable to Kimmelman for the sums in question. As the payments were made they became Kimmelman’s funds.

As stated in Clause 12.1:

AMENDMENTS

12.1 POWER TO AMEND. The School District may from time to time amend or modify, in whole or in part, any or all of the provisions of this Trust Agreement, except to make it revocable. Any such amendment or modification may only be made after advance written notice to the Administrator and with the written consent of the Trustee and, with respect to amendments which may adversely affect Dr. Kimmelman’s and/or his

Beneficiaries' rights hereunder, Dr. Kimmelman and/or his Beneficiaries.

The Trust could not be amended without Kimmelman's consent. Therefore, he had ultimate control and dominion over the funds in question, which the Committee finds makes them his.

Lastly, as stated in Clause 13.1:

TERMINATION OF TRUST

13.1 POWER TO TERMINATE. Except as provided in Sections 1.2 and 4.2, no part of the corpus or income of the Trust shall be paid to the School District or be used prior to the satisfaction of all liabilities under the Plan for any purpose other than for the exclusive purposes of providing benefits to Dr. Kimmelman and his Beneficiary or Beneficiaries and paying the expenses related to the Plan and the Trust. Notwithstanding anything to the contrary set forth in the Trust Agreement, the Trust may be terminated by the School District at any time until thirty (30) days following the issuance by the Internal Revenue Service of tax rulings requested by the School District in conjunction with the establishment of the Trust. In addition, the Trust may be terminated by the School District at such time as all amounts due Dr. Kimmelman and his Beneficiary or Beneficiaries under the terms of the Plan shall have been paid. The Trust also shall terminate at the latest date, if any, on which, under applicable law, the Trust must terminate in order to be deemed a valid Trust.

Clause 4.2 is a canned clause required to defer taxation under §457(f) of the Internal Revenue Code. To defer income under §457(f), a nonqualified tax deferral arrangement must be subject to the claims of an employer's general creditors. However, under Illinois law school district property is not subject to the claims of creditors. As this Committee found in the Richard Olson Administrative Review:

The Committee further disagrees with Olson's position that the funds in Olson's rabbi trust were subject to the claims of the district creditors, a federal requirement for a valid rabbi trust. As the staff rightly points out, in Illinois, the property of public bodies is not subject to the claims of judgment creditors (see Estate of Walter DeBow v. City of East St. Louis, 92 N.E.2d 1137, 170 Ill. Dec. 457 (1992) and Carmel v. Orr, 220 B.R.619 (1998). No creditor of the district could ever have claimed a right to Olson's rabbi trust funds.

This is not a case of Illinois trust law. Rabbi trusts are not governed by Illinois trust law. They are a creature of federal tax law. If Olson's rabbi trust truly was the property of the district, it was required by law to be held solely in the Freeport's name (see Bd. of Ed. v. Bd. of Ed., 276 N.E. 2d 732 (1971). That it was not is dispositive on the issue of ownership.

Additionally, West Northfield's attorney Michael Richardson acknowledged in his letter of January 22, 1997, that the funds in question were Kimmelman's.

Regardless of whether you retain the current Plan design, there are some aspects of the severance plan that you should consider changing.

First, Section 2.1 states that your account "shall at all times be fully vested." This appears to contradict the vesting schedule and thus should be replaced with the following: "shall at all times be vested in accordance with the schedule set forth below."

Based upon the foregoing analysis of Dr. Kimmelman's Severance Pay Plan and Trust, the Committee finds the sums in question were Kimmelman's and that he used them through his reprocessing scheme to pay the amounts that were rightly disallowed as creditable earnings by staff.

V. Conclusion

The Claims Hearing Committee finds in favor of the staff in this matter. Dr. Kimmelman has failed to establish either of his claims of estoppel and the Committee finds that staff rightly applied TRS Rule 1650.450. The Committee recommends the Board adopt this proposed decision.

VI. 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.