



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
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ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

October 18, 2018

Thomas J. Evans



RE: PERS Enrollment Eligibility

Dear Mr. Evans:

At its meeting of September 19, 2018, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the July 24, 2018, Appellate Division decision in IMO Thomas Evans, A-2698-16T3, remanding the matter to the Board to consider your argument(s) that the Board should have applied the Corrections of Errors statute to allow your retroactive enrollment in the PERS, pursuant to either N.J.S.A. 43:15A-54 or N.J.S.A. 43:8A-21. After careful consideration, the Board found that neither statute is applicable to your case. Rather, the Board found that you failed to perform your due diligence, and because PERS enrollment for your position was optional, it is impossible at this late stage to determine whether, in fact, an error was made that requires the Board to apply either statute. Findings of fact and conclusions of law as outlined below were approved at the Board's October 17, 2018 meeting.

## **FINAL ADMINISTRATIVE DETERMINATION**

The Board made the following factual findings in its original determination on January 19, 2017. In June 2003, you were sworn into office as a Nutley Commissioner. At that time, enrollment in the PERS was compulsory for elected officials with military veteran status under N.J.S.A. 43:15A-7(c), and optional for non-veteran elected officials like yourself under the provisions of N.J.S.A. 43:15A-7(d). Non-veteran elected officials who exercised their option to enroll in the PERS were enrolled on a perspective basis only, with enrollment becoming effective

the first of the month after the PERS enrollment application was received by the Division of Pensions and Benefits (Division). The Division has no record of any attempt by you or Nutley officials to enroll you in the PERS.

In June 2007, the Legislature enacted Chapter 92, P.L. 2007, which amended the rules for PERS enrollment for elected and other officials. After the effective date of Chapter 92, any elected officials who had not been enrolled in the PERS prior to that date no longer had the option to enroll in the PERS. Elected officials who meet the salary requirements are eligible for enrollment into the Defined Contribution Retirement Program (DCRP).<sup>1</sup>

The Board noted that when you were appointed Commissioner in 2003, you could have exercised your option to enroll in PERS as a non-veteran elected official. You claim that you informed Marilyn Allen, Nutley's Payroll Clerk, of your decision to join PERS. You also alleged that Ms. Allen did not submit a PERS Enrollment Application on your behalf. Approximately four years after your appointment, you questioned Ms. Allen as to the status of your PERS enrollment after you realized that you had not received any notice of enrollment in the PERS. You further claim that Ms. Allen advised you that she had erroneously failed to enroll you, and would immediately work to correct her error. As you were never enrolled, pension contributions were never deducted from your payroll checks.

Approximately two years later, upon Ms. Allen's retirement and subsequent passing in 2009, you learned you were still not enrolled in PERS. You then discussed the issue of your PERS enrollment with Ms. Rosemary Costa, Nutley's Treasurer and Chief Financial Officer, and your assistant, Ms. Eleni Pettas, unsuccessfully tried to submit your enrollment application electronically.<sup>2</sup>

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<sup>1</sup> You received less than the required \$5,000 per annum; therefore you do not meet the requirements for DCRP enrollment.

<sup>2</sup> The application could not have been processed at that time, because you were no longer eligible as a result of Chapter 92.

The Board noted that there was no further contact by you until October 24, 2013, almost four years after Ms. Pettas attempted to enroll you, and approximately ten (10) years from when you were eligible to exercise your option to enroll in the PERS, that you sent the Division a letter explaining the history of your attempt to enroll in PERS. On December 27, 2013, the Division's Acting Director, Florence Sheppard, sent a written reply to Assemblyman Ralph Caputo, who had written to her on your behalf, explaining that you no longer qualified for PERS enrollment due to the enactment of pension reform. The option to enroll in PERS was no longer available to any elected officials who had not exercised their option to enroll in the retirement system prior to the enactment of Chapter 92, P.L. 2007(July 1, 2007).

There is no record of further inquiries regarding this matter until February 10, 2016, when Mr. Genitempo inquired regarding your eligibility to enroll in the PERS. By letter dated July 14, 2016, the PERS Board Secretary responded by providing a copy of the December 27, 2013 letter from Acting Director Sheppard and requesting that you provide any additional documentation to supplement your claim. Thereafter, affidavits<sup>3</sup> were provided and the PERS Board reviewed the question of your eligibility for PERS enrollment.

At its meeting on September 21, 2016, the PERS Board denied your eligibility for enrollment in the PERS as an elected official with the Township of Nutley. By letter dated October 28, 2016, you appealed, thereby requesting a hearing in the OAL. At its meeting on December 14, 2016, the Board denied an administrative hearing for the reasons set forth in its letter dated September 22, 2016.

At that time, the Board noted the provisions of N.J.S.A. 43:15A-7 that the enrollment of elected official who qualified as veterans was compulsory, but the enrollment of non-veteran elected officials was optional. Prior to the enactment of pension reform legislation, Chapter 92, P.L. 2007, non-veteran elected officials who chose to enroll in the PERS could only be enrolled

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<sup>3</sup> Affidavits were submitted by Thomas Evans; Jason M. Kirk, employee of Nutley Township; Rosemary Costa, Principal Payroll Clerk, Nutley Township; and Eleni Pettas, Municipal Clerk, Nutley Township.

prospectively. The enrollment would become effective the first of the month after the PERS enrollment application was received by the Division, in accordance with N.J.S.A. 43:15A-7.

Under Chapter 92, P.L. 2007, the option to enroll into PERS is no longer available to any previously elected non-veteran official who did not exercise the option before the effective date of the statute. The Board noted your claim that your employer did not follow through with your request to enroll in PERS when you were appointed in 2003. However, the Board also noted that no attempt to enroll was made in the years between 2003 and the effective date of Chapter 92 on July 1, 2007. Further, the Board noted that a memorandum was mailed from the Division to all Certifying Officers of the PERS in October 2008 that provided information regarding pension reform. That memorandum specifically noted that under Chapter 92, the optional enrollment of non-veteran elected officials no longer applied.

The Board also relied on N.J.S.A. 43:15A-7(d), which states, in pertinent part:

Membership in the retirement system shall be optional for elected officials other than veterans, and for school crossing guards, who having become eligible for benefits under other pension systems are so employed on a part-time basis. Elected officials commencing service on or after the effective date of sections 1 through 19 of P.L.2007, c.92 (citations omitted) shall not be eligible for membership in the retirement system based on service in the elective public office, except that an elected official enrolled in the retirement system as of that effective date who continues to hold that elective public office without a break in service shall be eligible to continue membership in the retirement system under the terms and conditions of enrollment. (Emphasis added)

The Board denied your request for the retroactive enrollment in the PERS. The Board also found that no issues of material fact were in dispute, and issued its final administrative decision. You appealed the matter to the Superior Court, Appellate Division. Ultimately, the Appellate Division remanded the matter to the PERS Board to determine whether the alleged error of “not enrolling” you in the PERS “should be rectified by the Board through the correction of error statute, N.J.S.A. 43:15A-54.”<sup>4</sup>

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<sup>4</sup> As noted in the Appellate Division’s decision, you no longer rely on N.J.S.A. 43:8A-21 “as a basis to gain enrollment in PERS...” Slip op. at 5-6.

N.J.S.A. 43:15A-54, the correction of errors statute, states:

If any change or error results in an employee or beneficiary receiving from the retirement system more or less than he would have been entitled to receive, then on discovery of the error, the retirement system shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

The application of any member for prior service credit or credit for all previous service shall be approved if the employer, for whom the service was rendered stipulates, in writing, to the retirement system that the information necessary for the award of such credit was not presented to the employee and agrees to make the necessary additional contribution to the contingent reserve fund and the employee makes the required contributions, if any.

After careful consideration, the Board denied your request to apply N.J.S.A. 43:15A-54. The Board first noted that at the time you commenced service as a commissioner, you had the option of enrolling in the PERS. By your own admission, you did not follow up to determine whether you had, in fact, been enrolled. Even after determining that you had not been enrolled, it was not until two years after that, and two years after the passage of Chapter 92, that you again followed up with your employer regarding your PERS status. Subsequent to your employer's attempt to enroll you in 2009, it is undisputed that another four years passed until you contacted the Division to request retroactive enrollment. Another 3 years passed until you provided certifications from your Nutley officials concerning efforts to enroll you in the PERS.

The Board noted that you initially delayed inquiring into your PERS enrollment for approximately four years. It is undisputed that during the that time period no deductions for PERS service credit were taken from your paychecks, you received no account statements or any information concerning your PERS enrollment. Ultimately, ten years had passed since you began employment before you contacted the Division to complain of any error regarding your enrollment. Based on the above, the Board found that you failed to exercise due diligence in correcting any alleged mistake.

The Board determined that the corrections of errors statute does not apply here, because the Board is unable to determine whether your employer's failure to effectuate your PERS enrollment was an error the Board may correct under the statute. For example, if your position or status required your PERS enrollment, the Board would be able to determine that an error was made and retroactively enroll you in the PERS. In fact, N.J.S.A. 43:15A-7.1 provides that employers who fail to enroll compulsory PERS members are required to pay for one-half of the employees PERS contributions for the delinquent period. Here, because your PERS enrollment was optional, you would only be enrolled on the first day of the month after your application was filed. Due to the passage of time, the lack of any documentation supporting any attempt by you or your employer to effectuate your enrollment, as well as the unreasonable 10-year delay in contacting the Division regarding your PERS enrollment, the Board is unable to determine that an error was actually made. In the absence of a demonstrable error N.J.S.A. 43:15A-54 does not apply.

You have the right, if you wish, to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter, in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey  
Appellate Division  
Attn: Court Clerk  
PO Box 006  
Trenton, NJ 08625

Sincerely,



Jeff Ignatowitz, Secretary  
Board of Trustees  
Public Employees' Retirement System |

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C: L. Barnett (ET)