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Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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JOHN D. MEGARIOTIS
Acting Director

January 18, 2019

Sent via email to: [REDACTED]
Samuel M. Gaylord, Esq.

[REDACTED]
[REDACTED]

RE: [REDACTED]

Dear Mr. Gaylord:

FINAL ADMINISTRATIVE DETERMINATION

I am writing in reference to the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) regarding the appeal of your client, Mr. John McGovern, challenging the Board's decision of September 19, 2018, in which it found that he was not eligible to participate in the PERS in accord with N.J.S.A. 43:15A-142 et seq. and N.J.S.A. 43:15C-1 et seq., after his appointment as a Judge of Worker's Compensation (JWC). At its meeting on December 12, 2018, the Board determined that there are no material facts in dispute, denied your request for a hearing and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the PERS Board at its January 16, 2019 meeting.

The PERS Board has reviewed your and Mr. McGovern's written submissions and the relevant documentation, and finds that the statutes, regulations and relevant case law governing the PERS do not permit Mr. McGovern to participate in the PERS after his appointment as a JWC.

FINDINGS OF FACT

The facts in this matter are essentially undisputed. In December 2001, the Legislature enacted L. 2001, c. 259, which created the Worker's Compensation Judges Part of PERS (Judges Part). N.J.S.A. 43:15A-142 et seq. In 2007, the Legislature enacted L. 2007, c. 92 (Chapter 92), effectively closing the Judges Part to any newly appointed JWC, with the exception of those individuals appointed as JWC who were active members of PERS prior to June 8, 2007, the effective date of Chapter 92. N.J.S.A. 43:15A-143 reads, in pertinent part:

Notwithstanding the provisions of any other law, workers compensation judges shall be members of the Workers Compensation Judges Part, established pursuant to this act, P.L.2001, c.259 (C.43:15A-142 et seq.), of the Public Employees' Retirement System, established pursuant to P.L.1954, c.84 (C.43:15A-1 et seq.), if enrolled in the part prior to the effective date of P.L.2007, c.92 (C.43:15C-1 et al.)

A workers compensation judge who becomes a member of the retirement system on or after the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not be a member of the Workers Compensation Judges Part and the provisions of P.L.2001, c.259 (C.43:15A-142 et seq.) shall not apply to such judge or the judge's survivors.

Individuals enrolled in the PERS prior to June 8, 2007, who were subsequently appointed as JWC were allowed to remain in the PERS. An individual appointed as a JWC after that date is required to enroll in the Defined Contribution Retirement Program (DCRP). N.J.S.A. 43:15C-1 et seq.

The record establishes that Mr. McGovern was enrolled in the PERS in March 2013 as a result of his employment as Deputy Attorney General with the New Jersey Department of Law and Public Safety, Office of the Attorney General (OAG). In January 2018, Mr. McGovern was appointed as a JWC in the Department of Labor and Workforce Development (DOLWD). At that time, the Division did not process a transfer of his PERS membership to the DCRP. Rather, because Mr. McGovern had already been paid through the State's Centralized Payroll, his pension deductions continued erroneously. Upon becoming aware of this error in May 2018, Luann Barnett, Chief of the Division's Enrollment, Purchase and Adjustments Bureau, directed the DOLWD to stop reporting pension contributions and to enroll him in the DCRP. Mr. McGovern requested clarification from Ms. Barnett regarding his PERS eligibility, but the Division ultimately determined that he was not eligible to participate in the PERS because he was not enrolled in the PERS as of June 8, 2007, and all PERS contributions remitted after his JWC appointment were refunded.

In his appeal, Mr. McGovern does not dispute that the plain language of N.J.S.A. 43:15A-142 et seq., or N.J.S.A. 43:15C-1 et seq., precludes his participation in PERS and his JWC appointment requires DCRP enrollment. Instead, Mr. McGovern argues that the Board is estopped from denying his participation in the PERS because he relied upon the advice of his employer(s) and the language in the Division's 2016 version of the PERS "Workers' Compensation Judges Addendum" handbook, which he interpreted to mean that he would be able to continue his PERS membership after his JWC appointment. The Judge's Part handbook stated, in pertinent part:

MEMBERSHIP

Closed to New Members

- Workers' Compensation Judges who were enrolled in the WCJ Part *prior* to its closure remain members of the WCJ Part.
- A member who is enrolled in the regular PERS, and who is appointed as a Workers' Compensation Judge on or after June 8, 2007, will remain a regular PERS member while a Workers' Compensation Judge.
- Workers' Compensation Judges who are appointed *on or after* July 1, 2007, and do not have an existing PERS membership may only be enrolled in the Defined Contribution Retirement Program (DCRP). See the DCRP for Elected and Appointed Officials, for more information. (emphases in original)

Mr. McGovern argues that he relied to his detriment on the language in the second bullet point, under the heading "Closed to New Members," and interpreted it to mean that any newly appointed JWC is eligible to participate in the PERS, so long as the individual has an active PERS account at the time of the appointment, even if the PERS enrollment occurred after Chapter 92 closed the Judges Part and required all JWC appointed thereafter to enroll in the DCRP. Although Mr. McGovern asserted that he inquired as to his eligibility to continue his PERS enrollment with his then-current and future employers, he concedes that he neither consulted the statute governing the pension status of JWC's, nor did he inquire as to his pension status with the Division prior to accepting his appointment. Nonetheless, Mr. McGovern asserts the Board is estopped from denying his continued enrollment in the PERS, notwithstanding that the plain language of the statute precludes the same.

CONCLUSIONS OF LAW

This matter is controlled by N.J.S.A. 43:15A-142 et seq. and N.J.S.A. 43:15C-1 et seq. The Board first relied on the language in N.J.S.A. 34:15-49, which requires that a JWC "be appointed on a bipartisan basis by the Governor, with the advice and consent of the Senate..." Next, N.J.S.A. 43:15C-2 requires that the following individuals "shall participate" in the DCRP:

person(s) who commences service on or after the effective date [July 1, 2007] of this section in an employment, office or position of the State or of a political subdivision thereof, or an agency, board, commission, authority or instrumentality of the State or of a subdivision, pursuant to an appointment by the Governor that requires the advice and consent of the Senate, or pursuant to an appointment by the Governor to serve at the pleasure of the Governor only during his or her term of office.

[emphasis supplied.]

Thus, the Board finds that the plain language of the applicable statutes requires Mr. McGovern to enroll in the DCRP as of January 2018 when he was appointed as a JWC.

While the Board noted that Mr. McGovern does not dispute this interpretation of the applicable statutes, he asserted that the Board is estopped from denying his continued participation in the PERS because he relied upon the advice of his employers as well as the JWC handbook. The Board rejected Mr. McGovern's argument that the equities require his continued enrollment in PERS.

The Board first notes that "[E]quitable estoppel is rarely invoked against a governmental entity, particularly when estoppel would 'interfere with essential governmental functions.'" In re Johnson, 215 N.J. 366, 378 (citation omitted) (quoting Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). While the Board is mindful of the liberal approach to interpreting pension statutes "in favor of the persons intended to be benefited thereby," Steinmann v. State, Dep't of Treasury, 116 N.J. 564, 572 (1989), "eligibility [itself] is not to be liberally permitted." Francois v. Bd. of Trs. Pub. Employees' Ret. Sys., 415 N.J. Super. 335, 351 (App. Div. 2010) (internal citations omitted). Moreover, "[A]n administrative agency may not under guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." Kingsley v. Hawthorne Fabrics, Inc., 43 N.J. 521, 528 (1964).

The Board finds that although the JWC handbook was not updated until May 2018, “[T]he terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation.” Spina v. Consolidated Police & Fireman’s Pension Fund Commission, 41 N.J. 391, 400 (1964). Our courts have held that “one accepting a public office or position is presumed to do so with full knowledge of the law as to salary, compensation and fees. . . all limitations prescribed must be strictly observed. Shalita v. Township of Washington, 270 N.J. Super. 84, 91 (App. Div. 1994). “The statute trumps whatever implied contract may have existed between the parties.” Golden v. Union, 163 N.J. 420, 431 (2000). Thus, the Board finds that, based on the factual circumstances here, the principles of equitable estoppel do not apply, and the plain language of the statute clearly precludes his continued participation in the PERS after his JWC appointment.

Further, the Board finds that Mr. McGovern’s reliance on the JWC handbook language was misplaced, as it specifically advised the individual to refer to the statutes and regulations governing the PERS. The handbook includes the following disclaimer:

Benefits and provisions of the Public Employees’ Retirement System are subject to changes by the legislature, courts and other officials. While this booklet outlines the benefit and contribution schedules of the Public Employees’ Retirement System, it is not a final statement. Complete terms governing any employment benefit program are set forth in the New Jersey Statutes Annotated. Regulations, new or amended, are published in the New Jersey Register by the State Office of Administrative Law supplementing the New Jersey Administrative Code.

The Board also notes that Mr. McGovern conceded that he did not consult the PERS or DCRP statutes prior to accepting his appointment, and that he did not contact the Division for guidance at any time.

Accordingly, the Board denied Mr. McGovern request to participate in the PERS on the basis of his appointment as a JWC.

As noted above, the Board has determined that this matter does not entail any disputed questions of fact, and the Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the statutory language without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees’ Retirement System.

Samuel Gaylord, Esq.
Re: Hon. John H. McGovern, J.W.C.
January 18, 2019
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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,



Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees' Retirement System

G-12/MER

c: L. Barnett (ET)

John McGovern, J.W.C. (Sent via e-mail to: [REDACTED])