



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295

TRENTON, NEW JERSEY 08625-0295
Telephone (609) 292-7524 / Facsimile (609) 777-1779
TRS 711 (609) 292-6683
www.state.nj.us/treasury/pensions
October 17, 2017

FORD M. SCUDDER
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

Sent via email to: [REDACTED]

Craig S. Gumpel, Esq.
[REDACTED]
[REDACTED]

RE: City of Newark
[REDACTED]
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Gumpel:

I am writing in reference to the denial by the Board of Trustees of the Police and Firemen's Retirement System (PFRS) of your client, Newark Firefighters Union (NFU) in regard to the NFU's request that the PFRS Board determine that N.J.A.C. 17:1-3.1(b) is inconsistent with N.J.S.A. 43:16A-15.1 and that a delinquent enrollment penalty should be assessed against the City of Newark for failing to timely enroll fifty-seven firefighters¹. At its meeting on June 12, 2017 the PFRS Board reviewed and denied this request. Thereafter, you requested reconsideration or in the alternative the Board issue a Final Administrative Determination.

At its meeting on September 11, 2017, the Board noted your statements and arguments set forth in your letter; however, the Board denied your request for reconsideration and stands by its determination of June 12, 2017 that N.J.A.C. 17:1-3.1(b) is consistent with N.J.S.A. 43:16A-15.1 and that a delayed enrollment penalty should not be assessed to the City of Newark except for the cases

¹ This reflects the number of firefighters noted in the appeal dated March 16, 2017. However, as a result of the Division of Pensions and Benefits' determination dated April 5, 2017 the number of firefighters for which you assert a delinquent enrollment penalty should be assessed is reduced to forty-nine.

deemed delinquent by the Division of Pensions and Benefits (Division). The statute and regulation use consistent language and provide the employer with the same one year to file an enrollment application to the Division. Thereafter, the Board voted to issue a Final Administrative Determination in accordance with your request as there are no issues of fact in dispute.

The Board finds that the statutes and relevant case laws governing the PFRS do not permit the Board to grant your client's request. Findings of Fact and Conclusions of Law, as outlined below, were approved by the PFRS Board at its meeting of October 16, 2017.

FINDINGS OF FACT

In 2013 you began writing to the Division regarding the enrollment in the PFRS of several firefighters hired by the City of Newark. Additionally, there was correspondence in 2013 and 2014 between the Division and the NFU regarding the enrollment of the firefighters. The Enrollment Section denied the enrollment in the PFRS for thirty-one firefighters because their medical examinations to qualify for fitness for duty were more than one year prior to the proposed PFRS enrollment dates. By letter dated October 23, 2014, you appealed the Division's denial not to enroll the thirty-one firefighters and also expressed concern regarding the timely enrollment of City of Newark firefighters.

At its meeting on November 10, 2014, the PFRS Board approved enrollment for the thirty-one firefighters based upon the medical examinations provided, as the dates of the exams were within one year of the dates employment began and they successfully completed their medical requirements for membership in the PFRS. At that time, the Board indicated that the City of Newark should take all steps necessary to timely enroll their police and fire members in the PFRS and cautioned that any request for PFRS enrollment submitted over one year after the compulsory enrollment date will be subject to the delinquent enrollment statute as denoted in N.J.S.A. 43:16A-15.1.

On May 29, 2015, the NFU filed a four count Complaint for Injunctive Relief and Declaratory Judgment in the Mercer County Superior Court against the Division and Newark relating to the Division's failure to charge Newark a delinquent enrollment penalty of NFU firefighters. An Amended Complaint adding additional NFU members as plaintiffs was filed on March 18, 2016. Only Counts Three and Four of the NFU's Amended Complaint pertained to the Division. Specifically, Count Three of the Amended Complaint alleged that the Division violated the terms of N.J.S.A. 43:16A-15.1 by failing to assess a delinquency against Newark for not enrolling twenty-four of the NFU's members in the PFRS in a timely manner. Count Four of the Amended Complaint alleged that N.J.A.C. 17:1-3.1(b) violates N.J.S.A. 43:16A-15.1 because it provides an additional two months to the time that an employer may enroll an employee in PFRS without being assessed a penalty. However, effective June 20, 2016, N.J.A.C. 17:1-3.1(b) was amended and omits the phrase "plus an additional two months to allow for administrative processing." The amendment to N.J.A.C. 17:1-3.1(b) rendered Count Four moot. Thus, Count Three which asked the trial court to find that the Division violated N.J.S.A. 43:16A-15.1 by not assessing delinquencies for certain plaintiffs, was the only allegation that remained when NFU filed its motion for summary judgment on November 2, 2016.

Despite the amendment to the regulation, NFU asked the trial court to invalidate the then recently-amended regulation and replace it with NFU's own statutory interpretation. The Division filed a cross-motion to dismiss the matter because jurisdiction rested properly with the PFRS Board and not with a trial court judge. On December 9, 2016, The Honorable William Anklowitz, J.S.C. dismissed the case because the court lacked jurisdiction to decide the issue. Judge Anklowitz ordered that the PFRS Board hear the matter upon proper application to the PFRS Board. Subsequently, by letter dated March 16, 2017, you made an application to the PFRS Board Secretary indicating that the NFU's members sought a determination from the PFRS Board as they contend that based on the plain meaning of N.J.S.A. 43:16A-15.1, the Division failed to assess Newark a delinquent enrollment penalty

for 57 firefighters enrolled in the PFRS. Or in the alternative, if it is determined that the Division's interpretation of N.J.S.A. 43:16A-15.1 is correct, you requested that a delinquent enrollment penalty be assessed for eleven of the firefighters whose PFRS enrollment applications were received more than one year from the compulsory enrollment date in the PFRS.

In your appeal you argue that N.J.A.C. 17:1-3.1 is inconsistent with N.J.S.A. 43:16A-15.1. N.J.S.A. 43:16A-15.1, states, in relevant part:

- a. In the case of any person who (1) was required to become a member of the retirement system as a condition of employment, and whose application for enrollment in the retirement system or whose application for transfer from one employer to another within the system was filed beyond the effective date for his compulsory enrollment in the system or his transfer within the system or (2) is eligible for membership on the basis of special legislation, such person shall be required to purchase membership credit for his compulsory coverage by paying into the annuity savings fund the amount required by applying, in accordance with section 15 of chapter 255 of the laws of 1944, his full rate of contribution on his current base salary subject to the retirement system for each year of previous service during which he was required to have been a member.
- b. If more than 1 year has elapsed from the time that contributions would have been required from such person, 1/2 of the employee's cost, established by the computation provided by subsection a. of this section, will be required of his employer and shall be included in the next budget subsequent to the certification of this special liability by the retirement system. The amount certified by the system shall be payable by the employer to the pension accumulation fund and shall be due and owing to the system even if the employee is no longer in the employ of the employer by the date such moneys are to be paid to the system.

Further N.J.A.C. 17:1-3.1 states, in relevant part:

- (a) Employers have a statutory responsibility to enroll employees on a timely basis. Employers are required to use the available online enrollment applications provided through the Employer Pensions and Benefits Information Connection (EPIC), to enroll newly hired employees.

....

2. When an employer fails to file an application for enrollment even though the employee and employer have been advised of the compulsory nature of enrollment, the employer shall pay the employee contributions required as a result of a delayed enrollment, as required by the governing statute and pursuant to (b) and (c) below.

....

- (b) For the purpose of establishing an employer's liability for payment of the employee contributions on delinquent filed enrollment applications, as well as the member's requirement to prove insurability, one year shall cover the 12-month period elapsing between the employee's date of enrollment or transfer and the date the enrollment application or report of transfer is received by the Division.

...

Specifically, you claim that the employee's date of enrollment or transfer as used in the regulation is inconsistent with the statutory requirement that employer delinquency is measured from the time that contributions would have been required. You also argue that N.J.S.A. 43:16A-15.1 requires a delinquent enrollment penalty if pension deductions were not started within one year from the compulsory date of contributions whereas N.J.A.C. 17:1-3.1(b) only requires the application to be filed.

Prior to the Board's consideration of your appeal, the Division reviewed the circumstances surrounding the enrollment of eleven firefighters whose PFRS applications you indicated in your March 16, 2017 appeal to the PFRS Board, were submitted more than one year after their compulsory enrollment date. On April 5, 2017, the Division informed you that Newark will be assessed a delinquent enrollment penalty for eight² of the eleven firefighters, whose applications were not received timely in accordance with the statute and regulation. By letter dated April 18, 2017, you set forth additional arguments related to the three firefighters for whom the Division determined that the enrollment

² Alicea, Barnette, Charles, Clark, Moore, Pierre, Williams and Willis.

applications were received timely. In addition to your argument that the governing statute requires pension deductions to commence within one year from the date of compulsory enrollment, you assert that because the Division did not have all information necessary to completely process the enrollment of these 3 firefighters within the year, a delinquent enrollment penalty must be assessed.

On May 22, 2017 Michael A. D'Anton, Special Counsel to the City of Newark requested additional time to file a response to the appeal. On June 5, 2017, Mr. D'Anton indicated that it did not dispute the Division's administrative determination of April 5, 2017 that a delinquent enrollment would be assessed to the City of Newark for the untimely enrollment of 8³ of the 11 firefighters.

At its meeting on June 12, 2017, the PFRS Board denied your appeal, determining that N.J.A.C. 17:1-3.1(b) is consistent with N.J.S.A. 43:16A-15.1. Therefore, a delayed enrollment penalty should not be assessed against the City of Newark except for the 8 cases deemed delinquent by the Division which the City of Newark did not appeal. The statute and regulation use consistent language providing the employer with the same one year to file an enrollment application to the Division. However, the Board noted that each of the forty-nine firefighters might have their own equitable arguments regarding enrollment. The Board invited you to submit arguments on the specific facts and equities relating to each of these individuals, which the Board will consider together, upon submission of all of the requested information. Additionally, the Board invited Mr. D'Anton to submit arguments on behalf of Newark.

By letter dated July 21, 2017 you requested reconsideration of the Board's determination that N.J.A.C. 17:1-3.1(b) is consistent with N.J.S.A. 43:16A-15.1 and that a delinquent enrollment penalty should not be assessed against the City of Newark for failing to timely enroll the remaining forty-nine firefighters. In the alternative, you requested that the Board issue a Final Administrative Determination. On September 7, 2017, Mr. D'Anton again noted that it did not dispute the Division's determination of April 5, 2017 regarding the delinquent enrollment assessed for eight of the eleven firefighters. However,

³ Alicea, Barnette, Charles, Clark, Moore, Pierre, Williams and Willis.

Mr. D'Anton noted that if the PFRS Board determines any additional action is taken with regard to the forty-nine firefighters, the City requests an opportunity to respond before it is implemented.

At its meeting on September 11, 2017, the PFRS Board denied reconsideration and affirmed its determination of June 12, 2017 that N.J.A.C. 17:1-3.1(b) is consistent with N.J.S.A. 43:16A-15.1. The statute and regulation use consistent language providing the employer with the same one year to file an enrollment application to the Division. Thereafter, the Board voted to issue a Final Administrative Determination in accordance with your request as there are no issues of fact in dispute.

CONCLUSIONS OF LAW

The Board denied your request to declare that N.J.A.C. 17:1-3.1(b) is inconsistent with N.J.S.A. 43:16A-15.1. N.J.S.A. 43:16A-15.1(a) refers to an individual "whose application for enrollment in the retirement system or whose application for transfer from one employer to another within the system was filed beyond the effective date for his compulsory enrollment in the system or his transfer within the system." N.J.S.A. 43:16A-15.1(b) measures the timeframe for delinquent enrollment as one year "from the time that contributions would have been required from such person." N.J.A.C. 17:1-3.1(b) measures delinquent enrollment as one year from "the employee's date of enrollment or transfer" which is the same language as used in N.J.S.A. 43:16A-15.1(a). Therefore, the statute and regulation use consistent language. The statute and the regulation both provide the employer with the same one year to file an enrollment application to the Division. Neither the statute nor the regulation requires pension deductions to be taken within the year. The Board noted that there were delays in Newark's response to the Division's request for additional information during the enrollment process. However, these delays were after the completed application was timely filed by Newark. The information requested by the Division is not part of the application itself, therefore, the Board determined that the regulation is valid and the Division's application of the regulation is consistent with the statute.

Craig S. Gumpel, Esq.
RE: City of Newark
October 17, 2017
Page 8

As noted above, the PFRS Board has reviewed your written submissions and because this matter does not entail any disputed questions of fact, the PFRS Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Police and Firemen's Retirement System.

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.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Police and Firemen's Retirement System

G-10/MER

C: L. Barnett (ET); DAG Danielle Schimmel (ET)

Michael A. D'Anton (Sent via email to: [REDACTED])