



PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

State of New Jersey  
DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
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*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

January 16, 2020

[REDACTED]

DONNELLY, MINTER & KELLY, LLC  
Patrick J. Galligan, Esq.

[REDACTED]

[REDACTED]

RE: Louis Pepe

[REDACTED]

**FINAL ADMINISTRATIVE DETERMINATION**

Dear Mr. Galligan:

I am writing in reference to the decision of the Board of Trustees of the Public Employees' Retirement System (PERS) regarding the appeal of your client, Louis Pepe, challenging the Board's decision of August 21, 2019. In that decision, the Board denied Mr. Pepe's request for PERS membership retroactive to January 1, 2004, as a result of his employment with the Morris County Public Safety Training Academy (Academy) as a Fire Instructor (Instructor). At its meeting on December 11, 2019, the Board determined that there are no material facts in dispute and directed the Board Secretary, in consultation with the Attorney General's Office, to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the Board at its January 15, 2019, meeting.

**FINDINGS OF FACT**

The record before the Board establishes that Mr. Pepe was enrolled in the PERS on December 1, 2011, as a result of his employment as Morris County Assistant Fire Marshal. It appears that Mr. Pepe began working as an Instructor at the Academy in 1994. The earnings history you provided to the Board indicates that Mr. Pepe did not meet the \$1,500 salary threshold for PERS eligibility until 2004. Thus, you have requested that Mr. Pepe be enrolled in the PERS beginning in 2004.

The inquiry into whether part-time “on-call” Academy Instructors were PERS eligible was first posed to the Division of Pensions and Benefits (Division) in July 2001. At that time, Gayle Jones, a Morris County Benefits Specialist, wrote to the Division requesting whether “permanent ‘on-call’ employees,” including Mr. Pepe, were eligible for PERS membership. Ms. Jones advised that because the Instructors were “on-call,” Morris County could not estimate what their annual salary would be “from year to year.” The Division advised Morris County that “on-call” employees are eligible for PERS enrollment if they meet the criteria as outlined in the regulations. For example, a 12-month employee would be eligible if they worked 120 days per year (10 days per month).

Mr. Pepe wrote to the Division in December 2008 and requested PERS enrollment based upon his Instructor service. On July 6, 2009, the Division wrote to Morris County and requested information concerning Mr. Pepe’s employment. Specifically, the Division requested payroll input sheets for each pay period for each year of employment as an Instructor, including a monthly breakdown reflecting the exact dates worked.

On November 5, 2009, the Division completed its review of the PERS eligibility for Academy Instructors and denied their request for PERS enrollment based upon that service. The Division found that the Instructors were employed on an “as needed” basis and their employment does not follow a regular predictable work schedule. The Division also responded directly to Mr. Pepe’s letter and advised that he was not eligible for PERS enrollment based upon his Instructor service because he did not meet the 120 day requirement as per the regulation. He also did not meet the minimum salary requirement until 2004. The records provided by Morris County note the following number of days and salary earned from 1994 through 2011:

<u>YEAR</u>	<u># Days Worked</u>	<u>Salary</u>
1994	(not available)	\$779.00
1995	22 days	\$1,157.00
1996	13 days	\$767.00
1997	17 days	\$885.76
1998	9 days	\$374.92
1999	4 days	\$288.12
2000	0 days	\$0.00
2001	11 days	\$809.44
2002	14 days	\$1,200.62

2003	15 days	\$(not available)
2004	53 days	\$4,883.90
2005	54 days	\$4,252.80
2006	52 days	\$6,120.91
2007	63 days	\$7,478.42
2008	51 days	\$7,376.39
2009	51 days	\$9,016.36
2010	(not available)	\$7,376.39
2011	(not available)	\$9,016.36

On or about April 14, 2015, Mr. Pepe filed an application to purchase his previously uncredited “on-call” service from January 1, 2003 through December 1, 2011. As a result, the Division requested information from Morris County in order to determine whether the service was eligible for PERS service. On or about July 9, 2015, Morris County filed an Employment Verification Form with the Division, indicating that Mr. Pepe was an “on-call,” part time, Instructor, beginning January 1, 2003 through December 1, 2011. Morris County also provided payroll and attendance records. On July 30, 2015, the Division advised that the service was not eligible for purchase because Mr. Pepe did not work the requisite number of days per year pursuant to the regulation. Moreover, after the enactment of L. 2010, c. 1, he did not qualify for PERS enrollment on the basis of his Instructor service because he was employed less than 32 hours per week.<sup>1</sup>

You filed an appeal on Mr. Pepe’s behalf, requesting that the Board reverse the Division’s determination. You asserted that, notwithstanding the employer’s classification of Mr. Pepe as an “on-call” employee, the regulations promulgated by the Board impermissibly expand upon the exceptions to PERS eligibility, such as the preclusion for seasonal or temporary employees, as outlined in N.J.S.A. 43:15A-7(b). You also assert that because the Instructors are authorized to select the day(s) they are to teach each month, are guaranteed a minimum number of hours per month<sup>2</sup> and the longevity of their Academy employment, that Mr. Pepe has a regular consistent work schedule and his service cannot be classified as temporary.

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<sup>1</sup> This requirement only applies to service after May 21, 2010. See L. 2010, c. 1.

<sup>2</sup> There is no documentation concerning a minimum number of hours per month. In fact, the record belies this statement as there are a number of months in which Mr. Pepe did not work at all.

The Board considered Mr. Pepe's appeal at its meeting of August 21, 2019, and affirmed the Division's decision that his service from 2003 through 2011 was not eligible for PERS enrollment, substantially for the reasons as outlined in the Division's previous determinations. On or about October 11, 2019, you filed an appeal on Mr. Pepe's behalf, reiterating your previous arguments, including that the position was not an "on-call" position, notwithstanding the irregular work schedule and minimal days worked each month and year. You also asserted that a question of material fact existed as to whether other Academy Instructors were enrolled in the PERS, and that your client was mistakenly not included in that enrollment.

#### **CONCLUSIONS OF LAW**

N.J.S.A. 43:15A-7(b) generally provides that employees of the State or other participating employers who meet the statutory and regulatory eligibility criteria are required to be enrolled in the PERS. Prior to 2008, employees were required to earn \$1,500 and the position had to be covered by Social Security. It is undisputed that Mr. Pepe did not earn \$1,500 until 2004.

"On-call" employees, meaning those individuals who do not follow a regular, predictable work schedule, such as Mr. Pepe, are also not eligible for PERS enrollment unless the employee meets the minimum number of days worked as required under N.J.A.C. 17:2-2.3(a)(6), which states:

Any person not in the career, senior executive, and unclassified service, or a regular budgeted position, who is employed on an "on-call" basis and works on average less than 10 days a month throughout the regular work year of the employer. This type of employment is temporary employment that is not continuous.

N.J.A.C. 17:2-2.10(a)(1) outlines the PERS eligibility of "on-call" employees, and states, in pertinent part:

An individual who assumes a position as an "on-call" employee, such as a substitute teacher, or bedside or home instructor, is eligible to enroll in the PERS at the beginning of the 13th month of continuous employment, provided all other eligibility requirements are met... pursuant to the provisions of N.J.S.A. 43:15A-7. "On-call" employees have unpredictable work schedules and their employment is usually temporary in nature.

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The Board considered the employer's "on-call" classification of Mr. Pepe's employment (and all of its Fire Instructors), as well as his unpredictable work schedule, and the limited number of days worked per year, and determined that he did not meet the eligibility criteria for PERS enrollment. The Board also found that, after the enactment of Chapter 1, he did not meet the minimum weekly 32 hours per week requirement for PERS eligibility.

Mr. Pepe's employment history reveals that he did not have continuous, predictable or regularly scheduled part-time employment, but rather, was employed on as needed basis, as established by the attendance sheets and payroll records provided by his employer. The records provided confirmed that Mr. Pepe averaged, at best, 5 days per month and he did not work for several weeks or, on some occasions, for several months at a time. In fact, from 1994-2009, he average less than 2.5 days per month. Moreover, the salaries from year to year varied, in some instances decreasing or increasing as much as 10-20% or more. While Mr. Pepe has been employed as a Fire Instructor for many years consecutively, the Division considers such a sporadic work schedule to be temporary in nature. N.J.A.C. 17:2-2.3(a) (6). Thus, not only did Mr. Pepe not average the required number of days worked per month, he failed to meet the salary threshold, and his employment was not consistent of that of regular part-time employee with a continuous regular work schedule. Finally, his service after the enactment of Chapter 1 is not eligible for PERS because he did not work 32 hours per week. While the Board recognizes Mr. Pepe's many years of public service, his employment as an Academy Instructor is not eligible for PERS enrollment.

You also asserted that other Instructors were enrolled in PERS on the basis of their Morris County service. Please be advised that all of these cases are fact-sensitive, and the Division is reviewing the names you provided to determine whether they were enrolled on the basis of their Instructor service.

As noted above, the PERS Board has considered your written submissions and all documentation in the record. Because this matter does not entail any disputed questions of fact, the PERS 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 regulations without the need for an administrative hearing.

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Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' 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. All appeals should be directed to:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large loop at the end.

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

G-11/JSI

cc: L. Barnett (ET); N. Munko (ET)

Louis Pepe