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Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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ELIZABETH MAHER MUOIO
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Acting Director

January 16, 2020

[REDACTED]

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

[REDACTED]
[REDACTED]

RE: Christopher Barrella
[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, Christopher Barrella, challenging the Board's decision of August 21, 2019. In that decision, the Board denied Mr. Barrella's request for PERS membership retroactive to January 1, 1994, 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. Barrella was enrolled in the PERS on June 1, 2008, as a result of his employment with Victory Gardens Borough.¹ Mr. Barrella began working

¹ Mr. Barrella was enrolled by the Borough on or about December 21, 2015, retroactive to June 1, 2008, the date his employment began. The Borough was assessed a delayed enrollment

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as an Instructor at the Academy in 1994. The earnings history you provided to the Board indicates that Mr. Barrella exceeded the \$1,500 salary threshold for PERS eligibility in each year of his employment as an Instructor except for 1995 and 2003. Thus, you have requested that Mr. Barrella be enrolled in the PERS beginning in 1994, with PERS service credit for all years except 1995 and 2003.

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. Barrella, 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. Barrella wrote to the Division in January 2009 and requested PERS enrollment based upon his Instructor service. On July 6, 2009, the Division wrote to Morris County and requested information concerning Mr. Barrella’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. Barrella’s letter and advised that he was not eligible for PERS enrollment based upon his

penalty due to the fact that Mr. Barrella was not enrolled within one year of the date of his PERS eligibility.

Instructor service because he did not meet the 120 day requirement as per the regulation. He also did not meet the minimum salary requirements in 1995, 2003 and 2005. The records provided by Morris County note the following number of days and salary earned from 1994 through 2010:

<u>YEAR</u>	<u># Days Worked</u>	<u>Salary</u>
1994	(not available)	\$1,677.00
1995	17 days	\$1,001.00
1996	32 days	\$1,885.00
1997	31 days	\$2,300.81
1998	24 days	\$1,726.14
1999	25 days	\$2,052.65
2000	26 days	\$1,962.90
2001	16 days	\$1,705.00
2002	14 days	\$1,808.48
2003	5 days	\$421.10
2004	16 days	\$2,109.47
2005	12 days	\$1,404.35
2006	34 days	\$6,665.89
2007	54 days	\$9,618.09
2008	79 days	\$11,845.72
2009	54 days	\$10,946.60
2010	(not available)	\$7,025.39

Your firm contacted the Division on Mr. Barrella's behalf in July 2017, seeking a reconsideration of the Division's previous decision(s). The Division requested employment documentation from Morris County including payroll input sheets for each pay period for each year of employment as an Instructor, including a monthly breakdown reflecting the exact dates worked. Morris County filed an Employment Verification Form with the Division, indicating that Mr. Barrella was an "on-call" part time Instructor, beginning in 1994. Morris County also provided payroll and attendance records. On or about October 11, 2018, the Division advised that Mr. Barrella's service prior to 2010 was not eligible for PERS service credit as he did not work for at least 10 days per month in any year. After 2010, Mr. Barrella's service was not eligible for purchase because he was employed less than 32 hours per week.²

² This requirement only applies to service after May 21, 2010. See L. 2010, c. 1.

You filed an appeal on Mr. Barrella's behalf, requesting that the Board reverse the Division's determination. You asserted that, notwithstanding the employer's classification of Mr. Barrella 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 month³ and the longevity of their Academy employment, that Mr. Barrella has a regular, consistent part-time work schedule and his service cannot be classified as temporary and thus he is eligible for PERS enrollment retroactive to his start date in 1994.

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.

"On-call" employees, such as Mr. Barrella, 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:

³ 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. Barrella did not work at all.

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.

The Board considered the employer’s “on-call” classification of Mr. Barrella’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 does not meet the eligibility criteria for PERS enrollment, both prior to and after May 21, 2010.

Mr. Barrella’s employment history reveals that he did not have continuous regularly scheduled part-time employment, but rather, was employed on an as needed basis, as established by the attendance sheets and payroll records. The records provided confirm that Mr. Barrella averaged, at best, 8 days per month in one year, and from 1994 through 2009, he averaged less than 2.5 days per month. Moreover, Mr. Barrella did not work for several weeks or, on some occasions, for several months at a time. The salaries from year to year varied, in some instances increasing as much as 400% in one year, while decreasing 30% in other years. While Mr. Barrella 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. Barrella not average the required number of days worked per month, he failed to meet the salary threshold in 1995, 2003 and 2005, and his employment was not consistent with that of regular part-time employee with a continuous and predictable regular work schedule. After May 21, 2010, Mr. Barrella did not work the required number of hours for PERS enrollment under Chapter 1.

While the Board recognizes Mr. Barrella’s many years of public service, it finds that his employment as an Instructor is not eligible for PERS enrollment.

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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 that 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. 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, sweeping flourish at the end.

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

G-10/JSI
cc: L. Barnett (ET); N. Munko (ET)
Christopher Barrella