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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
POLICE AND FIREMENS' RETIREMENT SYSTEM
OF NEW JERSEY
(609) 292-7524 TDD (609) 292-7718
www.nj.gov/treasury/pensions

ELIZABETH MAHER MUOIO
State Treasurer

ED DONNELLY
Chairman, PFRSNJ

October 8, 2019

Sent via email to: [REDACTED]

CRIVELLI & BARBATI, LLC
Amanda E. Nini, Esq.

[REDACTED]

RE: Richard Kesner

[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Ms. Nini:

I am writing in reference to the determination of the Board of Trustees of the Police and Firemen's Retirement System of New Jersey (PFRSNJ) regarding the denial of Mr. Kesner's request to cancel any loan obligation owed to his PFRS membership account as determined by the Division of Pensions and Benefits (Division). The PFRSNJ Board initially reviewed and denied Mr. Kesner's request to cancel the loan repayment schedule on his outstanding loan obligation, with accrued interest, at the June 10, 2019 meeting. Mr. Kesner asserts that he believes he paid his outstanding loan balance prior to his retirement; however, in addition to his loan balance of \$31,635.02, there was an arrears balance due in the amount of \$31,338.41 for the purchase of additional service credit. On July 7, 2019, Mr. Kesner indicated that he did not agree with the Board's decision. He asserts that in 2004 he retired with no debt and that he paid the balance of the loan prior to his retirement. However, the PFRSNJ Board reviewed the account and determined that while Mr. Kesner made a payment of \$31,338.41 by check dated June 15, 2004, the payment was for the balance due from the purchase of 23 months of military service credit he purchased which was certified on December 1, 2002. Mr. Kesner was notified in May 2004 that the balance of the unpaid purchase (arrears balance) must be paid in full before he could begin to collect retirement benefits. Mr. Kesner was also notified that he had

an outstanding loan balance in the amount of \$31,635.02 which he had the option to pay in full or to pay \$610.36, the same monthly deduction he was paying as an active member, which would be deducted from his monthly retirement benefit. The Division never received a lump sum payment, nor was the amount deducted from his retirement benefit. The record indicates that there are no material facts in dispute and the PFRSNJ Board directed the Board Secretary, in conjunction with Board's attorney, to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the PFRSNJ Board at its October 7, 2019 meeting.

The PFRSNJ Board has reviewed all correspondence and the relevant documentation and finds that the laws governing the PFRS do not permit the Board to grant Mr. Kesner's request to waive the repayment of his loan balance or the accrued interest, charged by the Division of Pensions and Benefits, on the outstanding balance of his loan obligation.

FINDINGS OF FACT

Mr. Kesner was enrolled in the PFRS on June 1, 1981 as a result of his employment as a firefighter with Jersey City. On July 17, 2002, Mr. Kesner applied to purchase military service and included all the required documentation. On September 26, 2002, Mr. Kesner was quoted the cost to purchase of 23 months of eligible military service beginning May 31, 1966 and ending May 16, 1968 in the amount of \$35,137.31. On November 1, 2002, Mr. Kesner authorized monthly payroll deductions to pay for the purchase. The Certification of Payroll Deductions form indicated that 120 payments in the amount of \$434.11 would begin December 1, 2002. Thereafter, on March 18, 2004, the Division received Mr. Kesner's "Application for Retirement Allowance", requesting Special retirement benefits, effective July 1, 2004. The Certification of Service and Final Salary was submitted by Mr. Kesner's employer, the Jersey City Fire Department, advising that Mr. Kesner's employment would terminate effective June 30, 2004.

At the time of his retirement, the outstanding balance on the purchase was \$31,338.41. On April 1, 2004, Mr. Kesner was notified of this outstanding balance and the fact that it would have to be paid in full prior to his retirement. Mr. Kesner's eligibility for Special retirement benefits was based on the years of service which included the purchase of military service. If not for the completion of the purchase, Mr. Kesner would have been ineligible for a Special retirement benefit at that time.

By letter dated April 19, 2004, Mr. Kesner was advised that his Special retirement, effective July 1, 2004, was approved by the Board of Trustees.

On April 21, 2004, prior to effective date of retirement, Mr. Kesner received a loan from the PFRS by check (#695906) in the amount of \$32,000.00. A Certification of Payroll Deductions was issued (as he was still on payroll at that time), for 58 monthly payments in the amount of \$610.36 to begin June 1, 2004. However, as Mr. Kesner terminated employment on June 30, 2004, due to retirement, only one payroll deduction was taken from his paycheck, leaving a remaining balance of \$31,635.02.

On May 20, 2004 Mr. Kesner was sent a new Quotation of Retirement Benefits providing information about his outstanding arrears balance (for the purchase of service), and informing Mr. Kesner that the full amount had to be paid prior to start of retirement benefits. This same letter provided him with information regarding his outstanding loan balance, indicating that he had the option of repaying the amount in full or that having deductions taken from his monthly retirement benefit. On June 22, 2004, Mr. Kesner's check (#946) was received by the Division to satisfy the arrears balance in the amount of \$31,338.41. As a result, his retirement benefits could commence. However, there was still an outstanding loan obligation for which deductions were never taken, nor was a check to satisfy the loan obligation ever received.

On November 14, 2017, Mr. Kesner was notified that a post-retirement audit of his account revealed the outstanding loan balance which was never paid. Mr. Kesner was notified that the monthly loan deduction of \$610.36 would begin with the December 1, 2017 retirement check. Thereafter, by letter dated April 18, 2018, the Division was notified that Mr. Kesner retained the services of Alan G. Cosner, Esquire, who contested on his behalf, the fact that his loan balance was not satisfied. By letter dated May 4, 2018, Mr. Cosner was provided with a copy of Mr. Kesner's records and notified of his option to appeal the Division's decision to the PFRS Board of Trustees. Thereafter, a letter from Mr. Kesner dated April 10, 2019 to the PFRS Board Secretary, Mary Ellen Rathbun, was received disagreeing with the Division's determination. Mr. Kesner was notified that the PFRSNJ Board would hear his matter at its meeting on June 10, 2019. The notification letter informed Mr. Kesner that he could attend the meeting to address the Board if he so wished. Although Mr. Kesner did not appear before the Board, the PFRSNJ Board made a determination affirming that his loan balance was never satisfied and denying the cancellation of the outstanding loan obligation.

Additionally, the Board noted that all loans are subject to section 72(p) of the Internal Revenue Code (I.R.C.). Therefore, the Division established a repayment schedule with payments being deducted from Mr. Kesner's monthly retirement allowance to satisfy the outstanding loan obligation with applicable interest. The basis for the Board's decision was set forth in its letter dated June 11, 2019.

Thereafter, Mr. Kesner e-mailed the PFRSNJ Interim Board Secretary, Jacquelyn Bussanich, reaffirming his position that he did not have an outstanding loan balance at the time he retired. Mr. Kesner's disagreement with the Board was placed on the Board's agenda as a request for a hearing in the Office of Administrative Law at its meeting of August 12, 2019. On August 8, 2019, by way of e-mail, Mr. Kesner requested a postponement due to the fact that his attorney would not be available to attend the meeting. The Board approved Mr. Kesner's request for a postponement and rescheduled the matter for its September 9, 2019 meeting. In the interim, Mr. Kesner notified the Board Secretary that Mr. Kesner terminated his services several months ago.

Then, on September 3, 2019 you notified Lisa Pointer, the PFRSNJ Board Secretary, that you were representing Mr. Kesner and requested a copy of his file and also that the matter be transferred to the Office of Administrative Law (OAL) for a hearing.

At its meeting of September 9, 2019 the Board considered your request for an OAL hearing and determined that there were no material facts in dispute. The Board directed the Board Secretary, in conjunction with its general counsel, to prepare the Findings of Fact and Conclusions of Law which constitutes the Board's Final Administrative Determination.

CONCLUSIONS OF LAW

Following its review, the PFRSNJ Board voted to deny the request to cancel the repayment of Mr. Kesner's outstanding loan obligation and to cancel the deductions for the repayment of the loan from his monthly retirement allowance. In addition, Mr. Kesner is required to pay the interest assessed and paid on the loan. In making its determination, the Board relied upon N.J.S.A. 43:16A-16.2 states:

In the case of any member who retires without repaying the full amount so borrowed, the Division of Pensions and Benefits shall deduct from the retirement benefit payments the same monthly amount which was deducted from the compensation of the member immediately preceding retirement until the balance of the amount borrowed together with the interest is repaid. In the

case of a pensioner who dies before the outstanding balance of the loan and interest thereon has been recovered, the remaining balance shall be repaid from the proceeds of any other benefits payable on the account of the pensioner either in the form of monthly payments due to his beneficiaries or in the form of lump sum payments payable for pension or group life insurance.

While the Board notes that Mr. Kesner's loan was not deducted from his monthly retirement benefits at the time he retired, N.J.S.A. 43:16A-18 provides for the corrections of errors, stating, in pertinent part:

...Should any change or error in the records result in any member or person receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, the retirement system shall correct such error, and as far as practicable, shall adjust the payments in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid. The actuarial equivalent of any shortage in required contributions at the time of retirement on account of misstatement of age, leave of absence, or clerical error, shall be deducted from the retirement allowance otherwise payable.

Further, the PFRSNJ Board relies on the fact that the PFRS is a tax-qualified plan in accordance with the Internal Revenue Code, which requires that pension loans comply with I.R.C. section 72(p). Failure of the PFRS to comply with I.R.C. section 72(p) could result in plan disqualification, meaning the PFRS could lose its tax-qualified status. The Board is also aware that the State entered into an Agreement with the Internal Revenue Service to correct errors in the loan program that could have disqualified the PFRS, and as part of that Agreement, the PFRS Board must comply with I.R.C. section 72(p).

As noted above, the PFRSNJ Board has reviewed all documents relevant to this matter. However, the Board cannot grant the relief requested. Because this matter does not entail any disputed questions of fact, the PFRSNJ 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 laws and regulations 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 of New Jersey.

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:

Amanda Nini, Esq.
RE: Richard Kesner
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Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625
Phone: (609) 292-4822

Sincerely,



Lisa Pointer
Board Secretary
Police and Firemen's Retirement System of New Jersey

Jb/G-6

c: Richard Kesner
Robert S. Garrison, Jr., Esq., Board Counsel (ET)