



# State of New Jersey

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

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ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

December 9, 2019

Kathleen Naprstek Cerisano, Esq.  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

[REDACTED]  
[REDACTED]

RE: Lynn Topp

[REDACTED]

## **FINAL ADMINISTRATIVE DETERMINATION**

Dear Ms. Naprstek Cerisano:

I am writing in reference to the denial by the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) of your client, Lynn Topp's request to waive the amount of accrued interest assessed on the outstanding balance of her pension loan as determined by the Division of Pensions and Benefits (Division). The Board initially reviewed and denied Ms. Topp's request at its August 20, 2019 meeting. On October 4, 2019, you appealed the Board's decision. You did not dispute that Ms. Topp took the loan or that she owed interest as originally calculated on the loan. However, you dispute the accrued interest owed on the outstanding loan obligation. On November 14, 2019, the Board considered your appeal and determined that no material facts are in dispute 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 Board at its December 5, 2019 meeting.

The Board has reviewed your written submissions and the relevant documentation and finds that the statutes, regulations and relevant case law governing the TPAF do not permit the Board to grant Ms. Topp's request to waive the accrued interest charged by the Division on the outstanding balance of her loan obligation.

### **FINDINGS OF FACT**

The record establishes that Ms. Topp was enrolled in the TPAF on September 1, 1964 as a result of her employment as a Teacher with the Caldwell-West Caldwell Board of Education. Ms. Topp applied for a pension loan in 2006 and was issued a check<sup>1</sup> on April 26, 2006 in the amount of \$8,000.00. Interest was calculated at 4.00% per year, based on a decreasing balance each month. A Certification of Payroll Deductions (Certification) was issued to her employer, implementing the loan repayment schedule to begin June 1, 2006 for 20 monthly payments of \$418.21.<sup>2</sup>

Ms. Topp filed an application for Service retirement requesting a July 1, 2006 retirement date. The Caldwell-West Caldwell Board of Education certified that Ms. Topp's last date of employment would be June 30, 2006. Therefore, the Division only received one of the 20 scheduled payments as Ms. Topp's employment ended on June 30, 2006 due to her July 1, 2006 retirement. Once Ms. Topp retired and began receiving a monthly retirement benefit, loan deductions were not taken from her pension check. There is no record Ms. Topp inquired about the status of her loan repayment obligation between 2006 and September 2017.

On September 12, 2017, the Division notified Ms. Topp that a review of her TPAF account revealed that she had an existing loan balance in the amount of \$7,638.14 that was not carried into retirement and thus, no loan payments were deducted from her pension checks. In that letter, Ms. Topp was informed that the Division would begin deducting monthly loan payments in the amount of \$1,240.70, beginning with her pension check dated October 1, 2017. The last pension check from which said amount was deducted was dated June 1, 2018. Thereafter, a deduction was taken from her July 1, 2018 check for \$928.07, which satisfied the outstanding loan obligation including the accrued interest of \$4,456.23.

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<sup>1</sup> Check Number 307424

<sup>2</sup> At that time, Ms. Topp's employer should have provided her with a copy of the Certification.

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On June 11, 2019, Kaitlyn E. Dunphy, Esq. filed a letter of representation explaining that she was retained to represent Ms. Topp in her appeal. Ms. Dunphy argued that it was the Division's failure not to carry Ms. Topp's loan into retirement and, if the loan was carried into retirement, Ms. Topp would have only been responsible for five years of interest. In support of her argument, Ms. Dunphy stated the Board is precluded from seeking reimbursement of the original amount of the loan plus the accrued interest because the statute of limitations on such action has expired. Additionally, she argued that the doctrine of laches applies to this situation and the Board's delay has prejudiced Ms. Topp as she is on a fixed income.

In a letter dated June 14, 2019, Michael Kusmierczyk, Supervising Accountant with the Division, responded to Ms. Dunphy's letter and explained that it was the Division's review that revealed Ms. Topp's outstanding loan obligation and indicated that interest accrues on an outstanding loan balance until the loan is fully repaid and that in accordance with N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1 and the Internal Revenue Code (IRC), the Division is unable to waive the loan obligation and accrued interest. Ms. Topp was provided with appeal rights to the Board.

On July 17, 2019, Ms. Dunphy and Ms. Topp were notified that the Board would consider her appeal at its meeting on August 20, 2019.

On August 20, 2019, the Board considered the submissions and all documentation; however, the Board denied the request to waive the accrued interest owed on the outstanding balance of Ms. Topp's loan obligation. The basis of the Board's decision was set forth in its letter dated August 23, 2019.

Thereafter, you appealed the Board's determination. In addition to previous submissions, including those made by Ms. Topp's prior counsel, Kaitlyn E. Dunphy, Esq., you claim that the Board failed to provide information regarding the closing agreement with the IRS and offered no explanation of why the TPAF would be at risk of losing its tax qualified status if the accrued interest were to be waived. At its meeting on November 14, 2019, the Board determined that there were

no material facts in dispute and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which constitutes the Board's Final Administrative Determination.

### **CONCLUSIONS OF LAW**

The Board denied Ms. Topp's request to waive the accrued interest owed on the outstanding loan balance due her TPAF account. The Board relied upon N.J.S.A. 18A:66-35 and N.J.S.A. 18A:66-35.1.

N.J.S.A. 18A:66-35 states in pertinent part:

an amount equal to not more than 50% of the amount of his accumulated deductions, but not less than \$50.00; provided, that the amount so borrowed, together with interest thereon, can be repaid by additional deductions from compensation, not in excess of 25% of the member's compensation, made at the same time compensation is paid to the member. The amount so borrowed, together with interest on any unpaid balance thereof, shall be repaid to the retirement system in equal installments by deduction from the compensation of the member at the time the compensation is paid or in such lump sum amount to repay the balance of the loan but such installment shall be at least equal to the member's rate of contribution to the retirement system and at least sufficient to repay the amount borrowed with interest thereon.

...

Loans shall be made to a member from his accumulated deductions. The interest earned on such loans shall be treated in the same manner as interest earned from investments of the retirement system.

Further, "[t]he rate of interest for a loan requested by a member prior to the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall be 4% per annum on any unpaid balance thereof." N.J.S.A. 18A:66-35. After the enactment of Chapter 92, the State Treasurer sets "a commercially reasonable rate" on January 1 of each calendar year. Ibid. Additionally, N.J.S.A. 18A:66-35.1 states:

In the case of any member who retires without paying 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 benefit 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.

The TPAF is a “qualified governmental defined benefit plan[] pursuant to sections 401(a) and 414(d) of the federal Internal Revenue Code of 1986, as amended, or such other provision of the federal Internal Revenue Code, as applicable, regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service.” N.J.S.A. 43:3C-18(a). The Director of the Division is “authorized to modify the provisions of the [TPAF], when a modification is required to maintain the qualified status of the [TPAF] under the Internal Revenue Code of 1986, applicable regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service (IRS).” N.J.S.A. 43:3C-18(c).

IRC Section 401(a) and federal tax law require that pension loans comply with IRC Section 72(p). Specifically, IRC Section 72(p)(2)(B) requires pension loans to be repaid within 5 years of issuance and IRC Section 72(p)(2)(A) prohibits total outstanding loan amounts from exceeding \$50,000. Ibid. If a member fails to repay the pension loan within the 5-year period or the amount exceeds the IRS limit, then the loan becomes a “deemed distribution” taxable as income to the member and subject to additional penalties. IRC Section 72(p)(1). The deemed distribution does not cancel the loan obligation, which still must be repaid to the Plan, with applicable interest. See Rev. Proc. 2016-51, Section 6.02(1).

There is no dispute that Ms. Topp took a loan from her TPAF account in 2006, and only 1 of 20 loan payments was made prior to retirement. The Board acknowledges that Ms. Topp’s loan payments were not carried into retirement and automatically deducted from her pension checks by the Division. When the Division realized Ms. Topp’s loan was not being repaid, she

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was informed by the Division of the outstanding loan obligation, and thereafter the Division implemented a modified repayment schedule to repay her loan.

The Board is also aware that the issue of the repayment of loans in retirement implicates more than just her loan. Because the TPAF is a federally tax-qualified plan, as required by N.J.S.A. 43:3C-18(a), the TPAF's failure to comply with all the requirements of the IRC could result in the IRS determining that the TPAF would no longer be a tax-qualified plan under IRC Sections 401(a) and 414(d). To that end, the Board is aware that the State Treasurer and Director of the Division, in accordance with his authority and responsibility under N.J.S.A. 43:3C-18(c) to keep the TPAF tax-qualified, signed a Closing Agreement with the IRS. In addition to setting forth methods to repay certain loans, the Closing Agreement reiterates that the plan is subject to IRC Section 72(p). Even when a loan is not properly repaid under the provisions of IRC Section 72(p), and there is a reported deemed distribution, the deemed distribution would not relieve a member of the obligation to repay the loan, with interest.

Ms. Topp asserts that she should only be required to repay the principal and interest as originally calculated when she took the loan in December 2006. Additionally, Ms. Topp contends that the interest that accrued is not a result of her error. While the Board acknowledges that the Division did not withhold loan repayments from Ms. Topp's pension check, she took the loan prior to her retirement and never made an inquiry of the Division about the status of the loan. Per N.J.S.A. 18A:66-35 and -35.1, interest accrues on any unpaid loan balance. Because loan payments were not made or taken from Ms. Topp's pension checks, the balance of her loan did not decrease as contemplated by the original loan term. Therefore, per the statutory requirements that govern the loan, N.J.S.A. 18A:66-35 and -35.1, there is additional interest that accrued on Ms. Topp's loan that must be repaid.

The Board also relies on its ability to correct errors pursuant to N.J.S.A. 18A:66-63, which states, in pertinent part:

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If any change or error in records results in a member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, then on discovery of the error, the board of trustees shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

While the Board noted your original arguments, and those in your appeal letter, the Board has no authority to grant your request to waive the amount of accrued interest charged on Ms. Topp's loan because doing so could harm the overall pension scheme. See *Sellers v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 399 N.J. Super. 51, 62 (App. Div. 2008). Reducing interest on the outstanding loan balance would violate N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1, IRC Section 72(p), and the State's Closing Agreement with the IRS, which could result in the TPAF no longer being considered a tax-qualified plan, which would affect the entire State, all employers in the TPAF, and every member and retiree.

The Board notes that the statute of limitations you cited in your appeal letter, N.J.S.A. 2A:14-1, does not apply to this matter as it is not the filing of civil litigation, and, as noted above, the Board has the authority to correct errors pursuant to N.J.S.A. 18A:66-63.

As noted above, the Board has considered your personal statements and your written submissions and because this matter does not entail any disputed questions of fact, the Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the TPAF'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 Teachers' Pension and Annuity Fund.

You have the right, if you wish, to appeal this final administrative determination to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in

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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  
Phone: (609) 292-4822

Sincerely,



Angelina Scales, Secretary  
Board of Trustees  
Teachers' Pension and Annuity Fund

G-1/as

c: DAG Amy Chung (ET)  
C. Chianese (ET); M. Kusmierczyk (ET); D. Dinkler (ET)  
Lynn Topp