



State of New Jersey

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

TRENTON, NEW JERSEY 08625-0295
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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

April 20, 2023

CORRECTED COPY

Sent via email to: [REDACTED]

Brown & Connery, LLP
William M. Tambussi, Esq.
[REDACTED]

RE: Jill Mayer
PERS #: [REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Tambussi:

I am writing in reference to the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) finding that your client, Jill Mayer, is ineligible to collect her PERS Prosecutors Part pension and accept a Judgeship with the State of New Jersey. The Board originally denied Ms. Mayer's request at its meeting of December 7, 2022,¹ finding that she failed to properly separate from her previous position with the State of New Jersey prior to attempting to return to the same employer and beginning the judicial nomination process in accord with the rules and regulations of the retirement system.

On or about February 27, 2023, you filed a timely appeal on Ms. Mayer's behalf. At its meeting of March 15, 2023, the Board reconsidered Ms. Mayer's appeal, but reaffirmed its previous determination. The Board also determined that no genuine issue of material fact is in dispute, and therefore it could make its determination without the need for an evidentiary hearing,

¹ The December 2022 meeting was conducted via teleconference.

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and directed the undersigned to draft this Final Administrative Determination, which the Board approved at its meeting of April 19, 2023.

FINDINGS OF FACT

The Board made the following factual findings.

The record before the Board reveals that, immediately prior to her retirement, Ms. Mayer was employed by the State of New Jersey, Department of Law & Public Safety, Division of Criminal Justice, and for the final two years of her employment she served as the Acting Camden County Prosecutor. Ms. Mayer filed her retirement application on August 11, 2021, through the Division's Member Benefits Online System (MBOS), requesting a Special Retirement under Option A, with an effective retirement date of December 1, 2021. At the time she was to separate from employment, Ms. Mayer had 26 years and 10 months of service credit in the PERS Prosecutors' Part. The Division of Criminal Justice filed its *Certification of Service and Final Salary* on her behalf on September 5, 2021.

Prior to Ms. Mayer's retirement, beginning in October 2021, Ms. Mayer began the judicial nomination process, which included completing questionnaires and interviews for the position of Judge of the Superior Court of New Jersey. At the completion of that process, Governor Murphy nominated Ms. Mayer to be a Judge of the Superior Court of New Jersey on January 3, 2022. Ms. Mayer's nomination was confirmed by Senate vote on January 10, 2022.

When Ms. Mayer submitted her application via MBOS, she was required to "agree and accept" the terms and conditions of the retirement system's statutes and regulations. Ms. Mayer acknowledged the terms and conditions applicable to her retirement, including that she understood she "cannot make any pre-arrangement to return to public employment after retirement in any capacity." A link to more information regarding "Post-Retirement Employment Restrictions" was also provided. Ms. Mayer certified that she had read the post-retirement

employment restrictions, and had made no pre-arrangement to return to public employment. The application also provides the following information regarding post-retirement employment:

INTERNAL REVENUE CODE

The PERS, TPAF, PFRS, SPRS, and JRS are established as qualified governmental defined benefit plans in accordance with the Internal Revenue Code (IRC) Sections 401(a) and 414(d). To preserve the qualified status of these plans and to protect retirees from a 10% excise tax penalty on their retirement benefits, the Division of Pensions and Benefits was required to adopt and to enforce regulations to ensure compliance with the IRC requirements.

...

Re-employment by a different unit of the same public entity, whether in a position covered by the same retirement system or a different retirement system, is considered to be employment by the same employer...

If you return to public employment with the former employer prior to satisfying the requirements of a bona fide severance from employment, you will be required to repay all retirement benefits you received from the date of retirement and may be required to enroll in the same or a different retirement system. All employee/employer pension contributions related to the new enrollment will be retroactive to the date of re-employment.

The Internal Revenue Service (IRS) does not consider a pre-arranged return to public employment to be a bona fide severance from employment no matter how long the break in employment. If you and your employer make an arrangement prior to your retirement to return to employment in any capacity, at any future time, regardless whether the position is covered by the former retirement system — the employer/employee relationship is not completely severed and the retirement will be invalid. In this event you will be required to repay all retirement benefits received from the date of retirement and may be required to enroll in the same or a different retirement system.

...

OTHER CONSIDERATIONS

A “bona fide” retirement must also be “due and payable.” Accordingly, retirees are also required to satisfy a separation from service period before returning to NJ public employment with a different employer in a position which would not have been covered by the same retirement system. The Division of Pensions and Benefits will notify you in writing when your retirement is approved by the Board of Trustees. You must wait until at least 30 days after the date of this notification or 30 days following your date of retirement, whichever is later, before you agree to accept employment with another employer in a position which is not covered by your retirement system. During this 30-day period you can still cancel your retirement application. Thereafter, your retirement benefits are finalized and become “due and payable.”

If there was a pre-arrangement at the time of your retirement to commence employment with another employer and the position is covered by your former retirement system, your retirement may be cancelled, and you may be required to continue as an active employee under your original retirement account.

The Board approved Ms. Mayer’s retirement application at its meeting of December 8, 2021, and confirmed the same via letter on that same date. The letter advised that:

... If you are considering working after retirement, you should be aware of the restrictions imposed by law and regulations governing post-retirement employment. It is your responsibility to inform your prospective employer that you are receiving retirement benefits from a New Jersey public retirement system, and to understand the impact employment will have on those retirement benefits. In some instances, your retirement benefits may be suspended or even cancelled entirely, and if this occurs, you will be responsible for the repayment of any benefits you were not entitled to receive. You may also be required to re-enroll in your former retirement system or a different retirement system, and make pension contributions to that system. Please read Fact Sheet #86 regarding Post-Retirement Employment Restrictions located on the Division of Pensions and Benefits’ website:

<http://www.nj.gov/treasury/pensions/documents/factsheets/fact86.pdf>

Upon reading Fact Sheet #86, if you have any additional questions regarding return to public employment please contact the Office of Client Services at (609) 292-7524.

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The Board also notes that on or about December 30, 2021, Ms. Mayer requested that her retirement option be changed from Option A to Option B. The Board ultimately approved the option change at its meeting of April 20, 2022. Once an option change is approved, the member's pension benefit becomes due and payable 30 days after the date of the Board's approval. N.J.A.C. 17:2-6.3(b). Thus, Ms. Mayer's retirement would not become effective until May 20, 2022.

The record reveals that Ms. Mayer began communicating with the Division in December 2021, regarding her intention to return to public employment after retirement. On December 28, 2021, Brittany Zulla, a Pension Benefits Specialist with the Judicial Retirement System, emailed Ms. Mayer and advised that she would be required to observe a 30-day break in service in order to effectuate a bona fide retirement. However, this information was incorrect because Ms. Mayer was intending to return to the same employer, the State of New Jersey, after her retirement. Ms. Zulla followed up with an email on January 19, 2022, and advised Ms. Mayer via email that she was required to observe a 180-day break in service in order to effectuate her retirement prior to returning to public employment.

On or about January 19, 2022, Ms. Mayer spoke with Sunanda Rana, an Auditor with the Division's External Audit Unit. Ms. Rana explained that a PERS retiree must have a bona fide severance of employment prior to returning to public employment in New Jersey. Ms. Rana further explained that, under IRS and PERS rules, a bona fide separation from employment requires that the retiree completely terminate the employer/employee relationship for a period of 180 days prior to returning to the same employer. See N.J.A.C. 17:1-17.14. Ms. Rana also directed Ms. Mayer to the Division's Fact Sheet #86, entitled *Employment After Retirement Restrictions*. Furthermore, Ms. Rana also informed Ms. Mayer that if she accepted the Judgeship at that time, she would not have a 180-day break in service and would not be eligible to receive her PERS Prosecutors' Part pension benefits.

On or about August 18, 2022, Acting Director John Megariotis sent Ms. Mayer a letter in response to her inquiries regarding her intended post-retirement employment. Mr. Megariotis advised Ms. Mayer that because she would be returning to employment with the same employer, she was required to observe a 180-day break in order for her retirement to be considered bona fide. Mr. Megariotis also explained that, because Ms. Mayer's appointment was pre-planned, her assuming the judgeship based on the nomination confirmed on January 10, 2022 would render her retirement non-bona-fide. Because Ms. Mayer's retirement was non-bona-fide, if she assumed the Judgeship, she would be required to reimburse the PERS for all pension benefits received up until that point. You filed an appeal on Ms. Mayer's behalf on or about September 30, 2022.

The Board considered Ms. Mayer's appeal at its meeting of December 7, 2022. After careful consideration, the Board affirmed the determination of Acting Director Megariotis, substantially for the reasons outlined in his August 18, 2022, letter. On or about February 27, 2023, you filed a timely appeal on Ms. Mayer's behalf. At its meeting of March 15, 2023, the Board reconsidered Ms. Mayer's appeal, but affirmed its prior decision.

CONCLUSIONS OF LAW

The Board made the following legal conclusions.

Under certain limited circumstances, PERS retirees may return to public employment after retirement. However, PERS is required to enforce IRS regulations in order to maintain the PERS's tax-qualified status. Thus, PERS is required to ensure that its retirees who return to public employment while receiving a pension benefit do so in compliance with the IRS Code and PERS, regulations.

N.J.A.C. 17:1-17.14 governs a PERS retiree's return to public employment. The regulation requires that a member completely separate from employer for 180 days before becoming employed again by the same public employer. The regulation states, in pertinent part:

2. "Bona fide severance from employment" means a complete termination of the employee's employment relationship with the employer for a period of at least 180 days. The following does not constitute a complete termination of the employee's relationship with the employer:

- i. Employment or reemployment in a part-time position;
- ii. Employment or reemployment in a position that is not covered by the Defined Benefit Plan;
- iii. A change in title;
- iv. Employment or reemployment as a contract employee, a leased employee, or an independent contractor; or
- v. Termination of employment with a pre-arranged agreement for reemployment.

(b) Qualified plan status. In accordance with the N.J.S.A. 43:3C-18, the defined benefit plans are established as qualified governmental defined benefit plans in accordance with Internal Revenue Code Sections 401(a) and 414(d), or such other provision of the Federal Internal Revenue Code as applicable, regulations of the United States Department of the Treasury, and other guidance of the Federal Internal Revenue Service.

(c) Requirement for a bona fide severance from employment. In order to maintain qualified plan status, as set forth in (b) above, Federal law requires that a defined benefit plan pay retirement benefits to a member only when there is bona fide severance from employment unless both of the following conditions are met:

1. The member has attained normal retirement age under the defined benefit plan; and
2. A defined benefit plan provides for the distribution without a bona fide severance from employment (also referred to as an "in-service distribution"). As of March 9, 2012, none of the defined benefit plans provide for an in-service distribution. The Federal law requirement does not apply to disability benefits.

(d) In order to demonstrate that there has been a bona fide severance from employment in compliance with Federal law, each member and the member's employer shall certify as part of the

application for a retirement benefit that the member has had a bona fide severance from employment with the employer as of a specific date and that there is no pre-arranged agreement for that member to be reemployed by the employer as an employee, a contract employee, a leased employee, or an independent contractor. The certification shall be made under penalties of perjury.

The regulation requires a retiree to completely separate from service with the previous employer and observe a 180-day break in service in order to be considered retired from the system prior to returning to public employment.

The Board also notes that because Ms. Mayer changed her retirement option, N.J.A.C. 17:2-6.3 requires the Board to approve the amendment and extends the due and payable period 30 days. N.J.A.C. 17:2-6.3(b) states,

The regulation states that "If a member requests a change of retirement date or option selection before the member's retirement allowance becomes due and payable, said change will require approval of the Board and the revised retirement allowance shall not become due and payable until 30 days have elapsed following the effective date or the date the Board met and approved the change in the member's retirement application, whichever is later.

Thus, because the Board approved Ms. Mayer's option change at its April 20, 2022, meeting, her retirement would not become due and payable until May 20, 2022.

In your appeal, you assert that Ms. Mayer is not in violation of IRS or PERS rules because Ms. Mayer had only gone through the process of seeking appointment as a Judge with the State of New Jersey, but she was not guaranteed to be nominated by the Governor or approved by the Senate. You assert that pre-planning a return to employment is permitted where no final agreement is reached before retirement. The Board disagrees. Ms. Mayer sought to return to the same employer well before her retirement became due and payable, and took substantial steps toward doing so during that time period. The process of appointment was completed days after her original due-and payable date, and months before 180 days had passed since her retirement date. In addition, because Ms. Mayer opted to change her retirement option, her retirement

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benefit did not become due and payable until May 20, 2022, several months after her Senate confirmation.²

Based on the undisputed factual record as detailed above, the Board found that Ms. Mayer is not permitted to begin working as a Judge of the Superior Court and simultaneously collect her Prosecutors Part pension benefit. The records establish that Ms. Mayer had pre-planned her return to public employment by engaging in the judicial nomination process during the months of October, November and December 2021, immediately prior to her December 1, 2021, retirement, in violation of N.J.A.C. 17:1-17.14. Therefore, the Board determined, based on both IRS and PERS rules and regulations, that were Ms. Mayer was to accept this judicial nomination her retirement would be deemed non-bona-fide; she would not be able to collect a Prosecutors Part pension benefit and a judicial salary simultaneously, and would be required to return all benefits received during the invalid retirement.

As noted above, the Board has considered your written submission and all documentation in the record. 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 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 Public Employees' Retirement System.

You also have the right 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:

² The Board is aware that a processing error delayed the approval of Ms. Mayers' option change, but even if the error had not occurred the due-and-payable date would have occurred after the Senate confirmed her nomination.

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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 S. Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

F-2/JSI
C: J. Ehrmann (ET); S. Rana (ET); S. Fenstermacher (ET)

Division of Criminal Justice
Tracy Manfready, Certifying Officer

