



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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September 21, 2017

Essex County College
Assistant General Counsel
Syrion A. Jack, Esq.

[REDACTED]
[REDACTED]

Sent via email to: [REDACTED]

RE: A. Zachary Yamba
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Jack:

I am writing in reference to the denial by the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) of your appeal of its determination that N.J.S.A. 43:15A-57.2(c) does not apply to Dr. A. Zachary Yamba. N.J.S.A. 43:15A-57.2(c) exempts certain retirees determined by the State Education Commissioner or a school-board superintendent as filling temporary positions of "critical need" from the reenrollment requirements applicable upon the return to work in positions that are covered by the pension system from which the retiree is receiving benefits. The PERS Board initially reviewed this matter at its May 17, 2017 meeting and determined that Dr. Yamba's position as President of Essex County College (ECC) does not make him a "critical need" employee exempted from the reenrollment requirement. On July 5, 2017, you appealed on behalf of Dr. Yamba and requested a hearing in the Office of Administrative Law ("OAL"). At its meeting of August 16, 2017, the PERS Board reviewed your

statements and submission in this matter and denied the request for an administrative hearing. Findings of Fact and Conclusions of Law, as outlined below, were presented to and approved by the PERS Board at its September 20, 2017 meeting.

FINDINGS OF FACT

Dr. Yamba was employed with the Ridgewood Board of Education as a teacher, and was enrolled in the Teachers Pensions and Annuity Fund (TPAF) effective September 1, 1967. An Intra-fund Transfer was completed on September 1, 1968, when Dr. Yamba accepted a position with ECC. Thereafter, he remained in the TPAF through his positions as Faculty/Administration at ECC from September 1968 to June 30, 1976. Subsequently, he became a Dean of Faculty at ECC (approximately November 5, 1974) and an Inter-Fund Transfer was submitted to the Division and processed on September 1, 1976 transferring his 106 month's service credit from the TPAF to the PERS; thus, he established his membership in the PERS before resuming the position of President for the remainder of his pre-retirement career. He had established service credit under the PERS in titles that were covered by the Alternate Benefit Program ("ABP") throughout his employment with ECC, but had elected to waive ABP participation and remain in and retire from the PERS through the ABP-covered position of President¹.

On February 4, 2010, the Division of Pensions and Benefits ("Division") received an *Application for Retirement Allowance* in which Dr. Yamba requested a Service retirement effective April 1, 2010. ECC's certifying officer completed an electronic *Certification of Service and Final Salary for Retirement* on February 9, 2010 indicating that Dr. Yamba had resigned effective March

¹ The Division received an Election of Retirement Coverage form dated August 28, 1984 signed by Dr. Yamba (July 3, 1984) indicating that he wished to remain in the PERS waiving his statutory right to participate in the ABP. The election is irrevocable. N.J.S.A. 18A:66-170.

31, 2010. At its meeting of March 17, 2010, the PERS Board approved Dr. Yamba's Service retirement effective April 1, 2010.

By email dated June 10, 2016, Sunanda Rana, of the Division's External Audit Unit ("EAU"), confirmed that the Division had received a *Notification of Employment after Retirement Form* from ECC. It was noted in the email that Dr. Yamba's position was listed as "Acting President-Critical Need Employee." Later that day, ECC provided additional documentation requested by the Division regarding Dr. Yamba's post-retirement employment. On June 13, 2016, via email, Ms. Rana confirmed receipt of the documents and advised that the critical need "exemption under N.J.S.A. 43: 15A-57.2(c) may not be available to Mr. Yamba since you verified that his position does not require a school administrator's certification issued by the New Jersey Department of Education and nor does he possess it." (Positions of critical need with local school boards require such certification, and qualify the incumbent for membership in the Teachers' Pension and Annuity Fund (TPAF) retirement system.)

Subsequently, several exchanges between ECC and the Division were made via phone calls, email and letters regarding Dr. Yamba's employment. By letter dated June 30, 2016, Ms. Rana noted that ECC had raised issues² in their correspondence dated June 10, 2016 and June 20, 2016 that were not related to Dr. Yamba's post-retirement employment matter. By letter dated July 11, 2016, the EAU notified ECC that Dr. Yamba must be reenrolled in the PERS pursuant to the provisions of N.J.S.A. 43:15A-7(d)(4) and that an online PERS Enrollment application must be submitted on his behalf. By letter dated July 22, 2016, the EAU cited Dr. Yamba for returning to full-time employment in a PERS-covered position after having a bona-fide retirement, and

² Exemption of pension reenrollment of a PERS retiree employed by the State Department of Education or by a board of education in a position of critical need pursuant to the provisions of N.J.S.A. 43:15A-57.2(c) and a bona-fide severance of employment pursuant to the provisions of N.J.A.C. 17:1-17.14 (a) 2 (180 day rule).

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notified him that he was required to reenroll in the PERS for the duration of his post-retirement employment. Thereafter, on August 11, 2016, Russel L. Lichtenstein of Cooper Levenson, Attorneys At Law, appealed on behalf of Dr. Yamba and ECC. This appeal asserted that ECC had demonstrated the “critical need” for the employment of Dr. Yamba and requested that he be allowed to continue in his position as Acting President without: (1) reenrolling in PERS; (2) losing his entitlement to pension payments until his retirement from the new position; and (3) reimbursing the pension payments he had collected after his reemployment began. Further, the letter asserts that Dr. Yamba falls under subsection (c) of N.J.S.A. 43:15A-57.2, which provides that the cancellation, reenrollment, and additional retirement allowance provisions of N.J.S.A. 43:15A-57.2(a) will not apply where there has been a determined “critical need.”

On October 31, 2016, the Board Secretary notified ECC that Dr. Yamba’s re-employment would be considered at the Board meeting of December 15, 2016. At that meeting, the Board postponed action and requested additional information before making a determination in the matter. On April 25, 2017, the Board Secretary notified ECC that the Board would consider Dr. Yamba’s case at its monthly meeting on May 17, 2017.

On May 17, 2017, the Board considered your personal statements and submissions and determined that because Dr. Yamba has not exceeded the applicable \$15,000 earnings limit, he is not required to cancel his retirement and reenroll in PERS, unless he later exceeds that limit. However, the Board determined that N.J.S.A. 43:15A-57.2(c) does not exempt Dr. Yamba from the requirement to reenroll in PERS if he exceeds the earnings limit because he is not employed by the State Department of Education or a by a board of education, and therefore his position as Acting President of ECC has not been determined by the State Commissioner of Education or an employing superintendent of a school-board to be one of “critical need” as expressly required by the statute’s clear terms.

By letter dated July 5, 2017, you appealed solely the Board's May 22, 2017 determination that the "critical need" exemption of N.J.S.A. 43:15A-57.2(c) does not apply to Dr. Yamba. At its meeting on August 16, 2017, the Board denied your appeal and your request for a hearing in the OAL. This Final Administrative Determination serves as formal notice of the substance and rationale of the Board's decision.

CONCLUSIONS OF LAW

N.J.S.A. 43:15A-57.2(c) controls this matter. It states, in pertinent part:

c. The cancellation, reenrollment, and additional retirement allowance provisions of subsection a. and the compensation limitations of subsection b. of this section [N.J.S.A. 43:15A-57.2] shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed by the State Department of Education in a position of critical need as determined by the State Commissioner of Education, or becomes employed by a board of education in a position of critical need as determined by the superintendent of the district on a contractual basis for a term of not more than one year; except that the cancellation, reenrollment, and additional retirement allowance provisions and the compensation limitations shall apply if the former member becomes employed within 120 days of retirement in a position with the employer from which the member retired. Nothing herein shall preclude a former member so reemployed by a board of education from renewing a contract for one additional year, provided that the total period of employment with any individual board of education does not exceed a two-year period.

Id. (Emphasis added).

The statute thus specifies two narrowly-defined types of employment covered by the retirement system paying more than \$15,000 per year that PERS retirees can accept without loss of pension benefits during reemployment. The first is employment "by the State Department of Education in a position of critical need as determined by the State Commissioner of Education." Dr. Yamba is not so employed, nor has the Commissioner made a determination as to his position. The second is employment "by a board of education in a position of critical need as determined

by the superintendent of the district.” Dr. Yamba is not so employed, nor has a district superintendent made a determination as to his position. President of a county college is not among the positions specifically set forth in the statute. The Board understands and respects the college’s view that Dr. Yamba’s position is one of “critical need”; however, the Board determined that the college’s view is inconsistent with the plain wording and the intent of the governing statute, which requires that the determination of critical need be made by the Commissioner of Education or the superintendent of a school board, not by a community college and not by the PERS Board.

You correctly argue Dr. Yamba’s position of President with ECC does not require a school administrator’s certification issued by the New Jersey Department of Education³. However, Dr. Yamba’s employment is not comparable to employment by a local Board of Education nor is Dr. Yamba employed by the State Department of Education. Dr. Yamba’s service, however valuable, does not fall within the two specific groups of positions expressly exempted by the Legislature from the reenrollment statute. Therefore, the Board determined, there is no statutory exemption available to Dr. Yamba.

You characterize the Board’s interpretation of N.J.S.A. 43:15A-57.2(c) as unlawfully restrictive. You argue that there is no explicit statement in the statute concerning county college presidents, and that a county college may be fairly deemed a “school district” as contemplated by the legislature. The Legislature did not specifically exempt employees in institutions of higher learning nor did it generally exempt employees in positions that their employers might consider to be comparable to the positions that the Legislature expressly exempted. The Board finds that it is the province of the Legislature, not the Board, to enlarge the scope of a clearly-written statute.

³ N.J.S.A. 18A:66-53.2 (b) exempts from reenrollment a retiree of TPAF who is a certificated superintendent or a certificated administrator employed by the State Department of Education in a position of critical need as determined by the State Commissioner of Education, or becomes employed by a board of education as a certificated superintendent or a certificated administrator.

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The fact that the title of president of a county college, and the employer (county or county college) are not enumerated in the statute, combined with the fact that the statute does not contain words (e.g., “such as,” or “not limited to”) indicating that the list of exceptions to the rule is not exclusive, strongly support the Board’s position that the exemptions cannot be extended to someone in Dr. Yamba’s position. The Board’s position is consistent with the legal maxim “*expressio unius est exclusio alterius*, which stands for the proposition that explicitly naming one or more things implies the exclusion of all other things.” Wolverine Flagship Fund Trading Ltd. v. American Oriental Bioengineering, Inc., 444 N.J. Super. 530, 535 (App.Div. Mar. 11, 2016) (internal citation omitted). The Board finds that the clear and unambiguous language of the statute lists the only two groups of retirees that are exempt from the reenrollment statute. Dr. Yamba’s position does not fall into either of the Legislature’s carefully-described exceptions to the general rule, and the Board is not vested with the authority to make legislative policy. The Board must apply its enabling statutes as written.

As noted above, the Board has reviewed the record in this matter and, because this matter does not entail any disputed questions of fact, the Board was able to reach the foregoing 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.

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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.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees' Retirement System

G-17/MER

C:

Dr. A. Zachary Yamba
Essex County College, Certifying Officer, Cynthia Lewis-Parson (ET) [REDACTED]
DAG Robert Kelley (ET); DAG Amy Chung (ET)