

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Defendant
R.J. Hughes Justice Complex
PO BOX 106
Trenton, New Jersey 08625

By: Debra A. Allen
Deputy Attorney General
(609) 777-3432

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005660-00T3

G. PHILIP LEWIS)	
Petitioner-Appellant,)	Civil Action
v.)	CERTIFICATION OF SERVICE
BOARD OF TRUSTEES)	
PUBLIC EMPLOYEES')	
RETIREMENT SYSTEM,)	
Respondent-Respondent.)	

Renee L. Pylypiak hereby certifies and says:

1. I am employed as a Legal Secretary with the Division of Law and Public Safety.

2. On December 21, 2001, I caused to be served two copies of the Brief and Appendix on Behalf of Respondent and Certification of Service to the following:

JOHN G. DeSIMONE, ESQ.
66 Euclid Street - Suite B
P.O. Box 237
Woodbury, NJ 08096

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

Dated: December 21, 2001


Renee L. Pylszak

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005660-00T3

G. PHILIP LEWIS,)	
Appellant,)	Civil Action
v.)	On Appeal From A Final
BOARD OF TRUSTEES,)	Determination of the
PUBLIC EMPLOYEES')	Board of Trustees,
RETIREMENT SYSTEM,)	Public Employees'
Respondent.)	Retirement System

BRIEF ON BEHALF OF RESPONDENT,
BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
Board of Trustees of the
Public Employees'
Retirement System
R.J. Hughes Justice Complex
P.O. Box 106
Trenton, New Jersey 08625
(609) 777-3432

PATRICK DeALMEIDA
Deputy Attorney General
Of Counsel

DEBRA A. ALLEN
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The narrow issue on appeal is whether State law permits Appellant, G. Philip Lewis, to purchase service credit earned during the time he was employed in various temporary positions in Salem County created under the federal Job Training Partnership Act (JTPA). The specific law at issue, N.J.S.A. 43:15A-7(h), bars temporary employees employed under the JTPA from membership in the Public Employees' Retirement System ("PERS"). The law also provides for a termination of PERS membership and refund of contributions for all temporary employees of the JTPA who were enrolled in the PERS on or before September 19, 1986.

Since Appellant had been enrolled in the PERS in 1985 as a JTPA employee, his membership in the pension system had to be terminated by operation of N.J.S.A. 43:15A-7(h). Nevertheless, Appellant was able to become a member of the PERS again in April 1993 when Salem County passed a resolution converting his temporary employment status to that of a full-time County employee entitled to pension benefits.

Upon retirement, Appellant wished to purchase his prior temporary service time. The Board of Trustees of the PERS approved Mr. Lewis' purchase of eighteen years temporary service time. The only time, however, that the Board could not approve for purchase was the seven-and-one-half years JTPA service time that was precluded by statute as creditable PERS service.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

G. Philip Lewis appeals a denial by the Board of Trustees, Public Employees' Retirement System (PERS) to purchase prior service time pursuant to the federal Job Training Partnership Act (JTPA) in Salem County, New Jersey. Appellant was employed in various temporary positions by Salem County from December 1, 1974 through June 30, 2000.

All of the positions held by Mr. Lewis prior to April 7, 1993 were deemed temporary by Salem County. (Ra2)². The positions were designated as either CETA or JTPA, the former as part of the County's Comprehensive Employment and Training Act. Mr. Lewis' first job at Salem County was as a Teachers' Aide under the CETA Program. Appellant held this position from December 1, 1974 through December 2, 1976. Appellant's next position was under CETA, as a Community Service Planner that he held for a few weeks, from December 13, 1976 through December 31, 1976. Effective that next year on January 1, 1977, Mr. Lewis obtained a third CETA post as a Senior Community Service Planner. Six months later on July 1, 1977, Appellant became the Deputy Director for the Department of Community Development with CETA. Mr. Lewis held this job title

¹The Procedural History and Counterstatement of Facts are closely related and therefore, have been combined for purposes of this brief.

²"Pa#" refers to "Appellant's Appendix;" "Ab#" refers to "Appellant's Brief;" and "Ra#" refers to "Respondent's Appendix."

from July 1, 1977 through December 31, 1979. On January 1, 1980, Appellant took the job title of Manpower Coordinator with CETA. This position continued until September 30, 1983 and was the last CETA title Appellant held at Salem County. (Ra2).

In October 1983, Mr. Lewis accepted his first JTPA position as an Administrator. He worked in this position from October 1, 1983 through June 30, 1988. During this time as Administrator, Mr. Lewis received raises that appeared to coincide with renewal periods on July 1, 1984, July 1, 1985 and July 1, 1986. The next JTPA position Appellant held as a Human Resources Coordinator commenced on July 1, 1988. Mr. Lewis received raises in this position also, effective July 1, 1988, January 1, 1990, July 1, 1990, July 1, 1991 and July 1, 1992. The Human Resources Coordinator title under JTPA was the last temporary position Appellant held at Salem County. (Ra2). As of April 7, 1993, Mr. Lewis became a permanent employee of Salem County via resolution passed by the Salem County Board of Chosen Freeholders. (Pa37).

Mr. Lewis remained a permanent employee of the County until June 30, 2000. (Ra2). Soon after, Appellant sought to collect his retirement benefits and requested to purchase prior service time to augment his pension. Appellant contacted the Division of Pensions and Benefits ("DPB") and was informed that he was eligible to purchase 141 months of Temporary/Substitute service from December 23, 1974 through September 18, 1986 as well as 45

months of military time earned from March 14, 1967 through November 30, 1970 with the United States Navy. (Ra4; Ra5).

In correspondence dated February 16, 2001 from Sandra Horan, Chief of DPB's Enrollment and Purchase Bureau, Appellant was initially informed that his period of employment with Salem County from December 23, 1974 through April 7, 1993 was ineligible for purchase. (Pa1). However, in a follow-up letter dated February 28, 2001 from Ms. Horan, Appellant learned that he was, in fact, able to purchase a portion of this time that had been denied previously. (Pa2). DPB reconsidered Appellant's purchase request in light of employment information received from Salem County that clarified which positions held by Appellant were within CETA and JTPA. (Ra2). Consequently, Appellant was eligible to purchase all of his CETA service and that portion of JTPA service allowable under the law. (Pa2).

The PERS Board initially considered Mr. Lewis' purchase request at its meeting of March 21, 2001. (Pa8). The Board considered Appellant's submissions at this meeting and granted a one-month extension to give Appellant the opportunity to provide further documentation and argument. (Pa8).

One month later, the PERS Board reconsidered Mr. Lewis' purchase request at its meeting of April 18, 2001. (Pa6). At this meeting, Appellant appeared personally before the Board and clarified for the Board the designation of all the employment

positions he held at Salem County. The Board voted to approve the purchase of additional service time from December 23, 1974 to September 18, 1986, using a purchase request date of October 14, 1998. (Pa6). The only time that the Board could not approve for purchase was Appellant's JTPA service time from September 19, 1986 through April 1, 1993. (Pa8). The basis for the Board's denial was that N.J.S.A. 43:15A-7(h) specifically disallows membership in the PERS for any person employed under the JTPA and consequently, JTPA service time was not creditable and could not be purchased. (Pa8).

At this same meeting, the Board denied Appellant's request for a hearing in the Office of Administrative Law as the Board determined that the matter did not involve disputed factual issues. The Board then issued a Final Administrative Determination denying Appellant's purchase request in a letter to Appellant dated May 17, 2001. (Pa8). This appeal followed.

ARGUMENT

THE BOARD REASONABLY DETERMINED, BASED ON
SUBSTANTIAL CREDIBLE EVIDENCE, THAT A PORTION
OF APPELLANT'S JTPA SERVICE TIME COULD NOT BE
PURCHASED BY OPERATION OF N.J.S.A. 43:15A-7(h)
AND THUS THE BOARD'S DETERMINATION WAS CORRECT
AND SHOULD BE AFFIRMED

A. Introduction

Appellant G. Philip Lewis seeks to purchase a portion of service time earned with Salem County as part of its Job Training and Partnership Program (JTPA). The Board of Trustees of the Public Employees' Retirement System reasonably determined, based on substantial credible evidence, that it did not have the discretion to allow for such a purchase under the relevant pension law. The law at issue, N.J.S.A. 43:15A-7(h), specifically prohibits JTPA employees from membership in the PERS from September 19, 1986 forward. Since the law precludes PERS membership for JTPA employees, it is evident that JTPA time is not creditable PERS service time and thus cannot be purchased to augment a pension. This conclusion is amply supported by the record and should be affirmed.

As a general matter, it is well settled that an administrative agency's determination carries the presumption of correctness and, on review of the facts, a court will not substitute its own judgment for that of an agency where the agency's findings are supported by substantial credible evidence.

Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174, 189 (1980); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Hillman v. Board of Trustees, Public Employees' Retirement System, 109 N.J. Super. 449, 461 (App. Div. 1970). Only where an agency's decision is arbitrary or capricious, or unsupported by substantial credible evidence in the record may it be reversed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); Atkinson v. Parsekian, supra, 37 N.J. at 149. Moreover, it is the party who challenges the validity of the decision who bears the burden of showing that it was arbitrary, unreasonable or capricious. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).

In this regard, pursuant to N.J.S.A. 43:15A-17, the Board of Trustees is vested with the general responsibility for the operation of the Public Employees' Retirement System. Its administrative interpretations of the statute are thus entitled to great weight. Cf. In Re Glen Rock, 25 N.J. 241, 246 (1957), overruled on other grounds, City of No. Wildwood v. Board of Comm'rs, 71 N.J. 354, 357 (1976). Moreover, the Board of Trustees acts in a fiduciary capacity and has a duty to the pension fund and the interests of all of its beneficiaries, not just to the member seeking a retirement allowance. Mount v. Board of Trustees, Public Employees' Retirement System, 133 N.J. Super. 72, 86 (App. Div. 1975). However, the Board is directed by the Legislature to interpret its statutes in the light most favorable to its members,

and, where possible, to administer its fund consistently with the other State-administered pension systems.

B. Only a portion of Appellant's purchase request is barred by operation of law

The applicable pension law barring Appellant's purchase request is N.J.S.A. 43:15A-7(h). The amended statute unambiguously states that:

A temporary employee who is employed under the Federal Job Training Partnership Act, Pub.L. 97-300 (29 U.S.C. § 1501) shall not be eligible for membership in the system. Membership for temporary employees employed under the Federal Job Training Partnership Act, Pub.L. 97-300 (29 U.S.C. § 1501) who are in the system on September 19, 1986 shall be terminated, and affected employees shall receive a refund of their accumulated deductions as of the date of commencement of employment in a federal Job Training Partnership Act program. Such refund of contributions shall serve as a waiver of all benefits payable to the employee, to his dependent or dependents, or to any of his beneficiaries under the retirement system.

N.J.S.A. 43:15A-7(h) establishes that all JTPA employees are ineligible for membership in the PERS. The law specifically states that the PERS membership for any JTPA employee be terminated effective September 19, 1986. Upon termination of membership, the law provides for a return of pension contributions to the affected employee.

The legislative intent of the law is evident from its clear statutory construction. The legislative history behind

N.J.S.A. 43:15A-7(h), namely the Governor's Reconsideration and Recommendation Statement which accompanied Senate bill No. 1471 in 1986, indicates that JTPA employees were excluded from the class of temporary employees who were eligible for membership in the PERS.

This statement reads as follows:

I support the purpose for which Senate Bill No. 1471 (2nd OCR) was introduced. This bill is designed to ensure that JTPA employees will not be terminated because employers must use their limited financial resources for pension contributions, rather than salaries.

Job Training Partnership Act programs have limited financial resources for two reasons. The programs are limited in the amount that they may spend on administration. Administrative expenses include pension contributions and salaries. Additionally, JTPA programs are being affected by budget reductions in domestic programs at the federal level. The combination of a limitation on administrative expenses and a decline in federal funding means that if administrators of JTPA programs must spend administrative dollars on pension contributions, less will remain for employee salaries. The result will be immediate layoffs.

While I support the purpose for which Senate Bill No. 1471 (2nd OCR) was introduced, I must return the bill so that it may be amended in two areas.

Senate Bill No. 1471 (2nd OCR) must be amended to broaden its scope. In its current form, Senate Bill No. 1471 (2nd OCR) would apply only to JTPA employees not currently enrolled in the PERS. I am advised that this will not assist the majority of service delivery areas in the State because many of their employees are already in the system. Accordingly, I recommend that Senate Bill No. 1471 (2nd OCR) be amended to make its provisions apply to all

JTPA employees, regardless of whether they are currently enrolled in the PERS.

I also recommend that Senate Bill No. 1471 (2nd OCR) be amended to delete the provision making membership in the PERS optional for JTPA employees. The Division of Pensions advises that making pension membership optional for any group of employees would set an undesirable precedent that could affect the actuarial stability of the State-administered pension systems.

The effect of these amendments will be to exempt all JTPA employees from membership in the PERS. This is a necessary step if we wish to keep JTPA employment at current levels. [Senate, No. 1471--L.1986, c. 109, Governor's Reconsideration and Recommendation Statement (emphasis supplied)].

The intent of the Governor's suggested amendments, which were subsequently adopted by the Legislature, to bar all JTPA employees from membership in the PERS are unequivocal. Thus, if JTPA employees are ineligible for PERS membership, then any service time the employees earn cannot be purchased as the service cannot be considered creditable in the PERS.

In keeping with its legislative mandate, the Board construed the pension laws most favorably to Appellant and approved almost all of Appellant's purchase request. The Board allowed the purchase of all of Appellant's CETA time, from December 23, 1974 through September 30, 1983, pursuant to N.J.S.A. 43:15A-11. (Ra2). This statute enables members to purchase temporary service time so long as the service was uninterrupted and resulted in a permanent appointment with the same employer. In addition, the Board

approved the purchase of all JTPA service earned prior to the 1986 amendment to N.J.S.A. 43:15A-7(h). (Pa8). The Board's reasoning for allowing this purchase was that JTPA service was just another type of temporary service and therefore could be legitimately purchased up until the enactment of N.J.S.A. 43:15A-7(h) in 1986. Thus, Appellant was permitted to purchase PERS credit for his JTPA service from the first day he worked in a JTPA position, October 1, 1983, through the last possible day allowable under the statute, September 18, 1986.

The only time that Appellant was not permitted to purchase was his JTPA service time from September 19, 1986, the first day the amended N.J.S.A. 43:15A-7(h) took effect, until April 7, 1993, the first day Appellant was deemed a permanent member of the PERS. (Pa8). The Board did not have the discretion to permit the purchase of this period of service due to the clear language of N.J.S.A. 43:15A-7(h) and its definite and unambiguous legislative commentary that barred JTPA employees from the PERS. The Board, thus, was constrained by the four corners of the statute and could not approve that portion of Appellant's purchase request disallowed by law.

C. Appellant's Enrollment Arguments are Beyond the Scope of the Issue at Bar and Alternatively, Even if Applicable, the Board's Determination Stands Correct

The Board's decision was limited to addressing the issue of which service time, if any, could be purchased by Mr. Lewis upon retirement. However, Appellant mixes arguments for retroactive or delinquent enrollment in the PERS with arguments as to why he should be allowed to purchase all of his JTPA service time. While Appellant's enrollment arguments have some superficial appeal, they are not applicable, as the issue comprising the record below centers on whether the purchase of certain JTPA service time is allowable under the law. Moreover, Appellant's assertions misconstrue the applicable membership statutes and argue for a result that is incongruous with the current status of pension law.

Appellant first contends that he should have remained enrolled in the PERS pursuant to N.J.S.A. 43:15A-7(b) because of his veteran military status. (Ab3; Ab4). However, Appellant is not reading this statute in its entirety because the law also requires that a veteran must be a permanent employee of the State. Appellant was not deemed to be a permanent employee of the State, here Salem County, until the County passed its April 7, 1993 resolution converting JTPA employees to permanent County employees. (Pa37). Thus, Appellant could not have been enrolled in the PERS

back in 1974 solely due to his veteran status as this criterion was not sufficient for enrollment pursuant to N.J.S.A. 43:15A-7(b).

Appellant also argues that he should have remained enrolled in the PERS by operation of N.J.S.A. 43:15A-7(h) as he was not a "temporary employee" as described under the law. (Ab5). Nevertheless, as previously discussed, it is abundantly clear that the law, on its face and from its legislative history, classifies JTPA employees as "temporary employees" who can no longer be members of the PERS.

Alternatively, Appellant contends that his "continuous service" with Salem County qualifies him for PERS membership. (Ab6-Ab8). While Appellant is correct that his service with the County was "continuous," this service was still "temporary" as it was deemed to be within either CETA or JTPA. However, Appellant was enrolled as a temporary employee by Salem County in the PERS in 1985 as a Manpower Coordinator within JTPA. Yet, Appellant's PERS membership was discontinued one year later by operation of N.J.S.A. 43:15A-7(h). It was not until Salem County passed its resolution converting temporary employees of the JTPA to permanent County employees on April 7, 1993 that Appellant was eligible to become a member of the PERS again. (Pa37).

Appellant lastly argues that his continuous service as a temporary County employee satisfies the criteria of N.J.A.C. 17:2-

2.3(a)(4) and therefore should have been remained enrolled in the PERS. (Ab9). This regulation provides that:

Any employee who is provisionally appointed to a Civil Service position is considered as an employee with temporary employment status and is ineligible to establish membership until he or she receives a regular Civil Service appointment, or has one year of continuous service. [New Jersey Register, 21 N.J.R. 438 (February 21, 1989) (Underlined portion reflects change to amendment)].

A review of the legislative history of this regulation shows that the phrase "or has one year of continuous service" was added by way of legislative amendment in February 1989, more than fifteen years after Appellant held his first temporary position with Salem County. This regulation is concomitant to the membership statute at issue here, N.J.S.A. 43:15A-7(b), which was amended on April 9, 1985 to allow "temporary employees with at least one year's continuous service" to enroll in the PERS. [P.L.1985, c. 121].

However, the amended statute at bar, N.J.S.A. 43:15A-7(h) qualifies N.J.S.A. 43:15A-7(b) by carving out an exception for JTPA employees who cannot maintain membership in the PERS as temporary employees of the State. Thus, if Appellant were allowed to remain enrolled in the PERS by operation N.J.S.A. 43:15A-7(b), his membership would have been terminated simultaneously by operation of N.J.S.A. 43:15A-7(h). The effect of the laws was such that Appellant could only attain PERS membership if his employer converted his JTPA positions to permanent County positions by way

of an official governmental action. The official action came via resolution by Salem County in April 1993 to give Appellant the rights and privileges of a permanent County employee. (Pa37).

It is evident from the legislative analysis of N.J.A.C. 17:2-2.3(a)(4) and N.J.S.A. 43:15A-7 that Appellant could not have been a PERS member until Salem County passed its resolution on April 7, 1993. Thus, the JTPA time that Appellant wishes to purchase is not creditable service time as the time would have been earned in temporary positions that were outlawed by statute from the PERS. The PERS Board, therefore, was correct in denying this portion of Appellant's purchase request.


CONCLUSION

For the foregoing reasons, respondent Board of Trustees of the Public Employees' Retirement System respectfully requests that the Final Administrative Determination of the Board be affirmed as Appellant is precluded by State law from purchasing a portion of his JTPA service time.

Respectfully submitted,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By:


Debra A. Allen
Deputy Attorney General

Dated: December 14, 2001