

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5660-00T3

IN THE MATTER OF
G. PHILIP LEWIS

G. PHILIP LEWIS,
Appellant,

v.

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,
Respondent.

FILING DATE
APPELLATE DIVISION

JUN 24 2002

Jon Flynn
CLERK

Submitted June 4, 2002 - Decided **JUN 24 2002**

Before Judges Eichen and Parker.

On appeal from the Board of Trustees, Public
Employees' Retirement System, 1065648.

John G. DeSimone, attorney for appellant.

David Samson, Attorney General, attorney for
respondent (Patrick DeAlmeida, Deputy Attorney
General, of counsel; Debra A. Allen, Deputy
Attorney General, on the brief).

PER CURIAM

Appellant G. Philip Lewis appeals from the final determination of the Board of Trustees (Board) of the Public Employees Retirement System (PERS), dated May 17, 2001, denying his request to purchase service credit. His ineligibility spans the period September 19, 1986, the effective date of N.J.S.A. 43:15A-7h, which disallowed

membership in PERS of "a temporary employee who is employed under the federal Job Training Partnership Act [JTPA], Pub. L. 97-300 (29 U.S.C. § 1501)," until April 7, 1993, the date the Salem County Board of Chosen Freeholders passed a resolution establishing the JTPA as a department of the County (the Resolution). The Resolution also consolidated "the employees serving in the JTPA Office" "into the civil service system," rendering appellant a permanent employee as of that date. We reverse and remand for further proceedings.

These are the relevant facts. Appellant served in the United States Navy from March 14, 1967 to November 30, 1970. Beginning in 1974, he worked in various capacities in Salem County first under the Comprehensive Employment and Training Act Program (CETA), 29 U.S.C. §§ 801 - 999 (2001) and then for the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501 - 1792b (2001).¹

Appellant's first County job was in 1974 as a teacher's aide working for CETA. He remained working for CETA earning promotions and raises until October 1, 1983, when he became the JTPA Administrator. On July 1, 1988, appellant became the Human Resource Coordinator for JTPA. Apparently, throughout this period, appellant was not a civil service employee but was considered a temporary employee of the County. However, on April, 7, 1993, by

¹ The CETA and JTPA were federal programs enacted by Congress during the period in question to provide job training, services and employment opportunities to the economically disadvantaged. The acts authorizing the programs have been repealed.

virtue of the Resolution adopted by the Board of Chosen Freeholders, appellant's status was converted to that of a permanent employee. Appellant remained a permanent employee of the County through June 30, 2000 when he retired. Appellant worked for the County for twenty-six years without interruption in his employment.

Initially, by letter dated December 21, 1998, the Board granted appellant's request to enroll in PERS, indicating that the Board had "also voted to allow Salem County JTPA employees the ability to purchase temporary service under the provisions of N.J.S.A. 43:15A-11 if the temporary service resulted, without interruption, in a permanent appointment with the same employer."² However, in a subsequent letter dated February 16, 2001, PERS reversed its position, advising appellant that he was not eligible to purchase service credit for any of the time he worked for the County, but only for the time he served in the United States Navy, i.e., from March 1967 to November 1970.

On April 3, 2001, appellant's attorney wrote to PERS on behalf of appellant requesting to purchase additional service credit.³ A meeting of the Board followed on April 18, 2001 at which appellant and his counsel were present. Two days later, by letter dated

² N.J.S.A. 43:15A-11 permits "any person employed temporarily by an employer whose temporary employment resulted, without interruption, in permanent employment ... [to] purchase credit for that temporary service."

³ Because that letter is not in the record, we do not know the reasons given for the request to purchase additional credit.

April 20, 2001, the Board approved appellant's request to purchase additional service credit from December 23, 1974 to September 18, 1986, and from April 2, 1993 until his retirement; however, it denied his request "to purchase the JTPA service from September 19, 1986 to April 1, 1993,"⁴ because the Board concluded he was ineligible for membership under N.J.S.A. 43:15A-7h.

On May 17, 2001, PERS issued a "Final Administrative Determination" formally denying appellant's request to purchase additional service credit and denying him a hearing in the Office of Administrative Law. In its final decision, PERS set forth its findings of fact and conclusions of law, relying on N.J.S.A. 43:15A-7h as the basis for its denial of appellant's request.

The letter from PERS reproduced subsection h of the statute as follows:

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 Job Training Partnership Act, Pub. L. 97-300 (29 U.S.C. § 1501) who are in the system on September 19, 1986 me [sic] 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

⁴ That is the period between the enactment of N.J.S.A. 43:15-7h and the adoption of the Resolution making him a permanent employee. A discrepancy in dates exists as reflected in the letter of April 20, 2001 (April 1, 1993) and the Resolution (April 7, 1993) which we need not resolve.

dependent or dependents, or to any of his beneficiaries under the retirement system.

After quoting the statute, the letter concluded:

N.J.S.A. 43:15A-7(h) provides that a temporary employee who was employed under the Federal Job Training Partnership Act is ineligible for membership in the PERS. The law also provided that employees who were enrolled in the PERS on or before September 19, 1986, would have their membership terminated and all contributions refunded. The refund served as a waiver of any future benefits payable to the employee or beneficiary.

Because this law specifically prohibits PERS membership to JTPA employees after September 18, 1986, the Division is without discretion to permit your request. Mr. Lewis' request to purchase his employment with the County of Salem pursuant to the CETA program was granted. Additionally, the request to purchase the JTPA employment from October 1, 1983, through September 18, 1986 was approved.

In its final decision, PERS did not mention any other subsections of the statute in denying appellant's request.

On appeal, appellant raises the following arguments:

POINT I

WHETHER OR NOT G. PHILIP LEWIS' JOB TRAINING PARTNERSHIP ACT (JTPA) TIME SHOULD NOT BE CONSIDERED UNDER THE PROVISIONS OF N.J.S.A. 43:15-7 ET SEQ.

POINT II

WHETHER OR NOT G. PHILIP LEWIS' EMPLOYMENT STATUS [SHOULD] BE CONSIDERED A PERMANENT EMPLOYEE MAKING HIM ELIGIBLE TO RECEIVE BENEFITS FROM THE STATE OF NEW JERSEY RETIREMENT FUND.

POINT III

THE STATE OF NEW JERSEY, DEPARTMENT OF

TREASURY, DIVISION OF PENSIONS AND BENEFITS
(PERS) ERRED IN THEIR INTERPRETATION OF SENATE
BILL NO. 1471 (2nd OCR) SUBMITTED BY GOVERNOR
THOMAS H. KEENE TO THE SENATE, APRIL 21, 1986.

Under these point headings, appellant urges us to reverse PERS's final decision. He contends he is eligible for membership in PERS as a "veteran" with more than "one years' continuous service" under subsection b of the statute, and maintains that he was a "permanent" employee. He further argues that, under subsection d, as a veteran, he is automatically a member of the retirement system because veterans are not permitted to opt out of the system irrespective of an employee's status under subsection h as "a temporary employee." He also cites two non-pension cases suggesting he is entitled to purchase service credit for this JTPA period because the County somehow deprived him of "the opportunity to become a permanent employee." See Kyer v. City of East Orange, 315 N.J. Super. 524 (App. Div. 1998); Kennedy v. Westinghouse Electric Corp., 29 N.J. Super. 68 (App. Div. 1953).

In his brief, the Attorney General counters that subsection h "carves out an exception" to membership eligibility in PERS for all temporary employees under the JTPA, and appellant was a temporary employee until the County adopted the Resolution on April 7, 1993, changing his status to a civil service employee. Relying on the legislative history of the subsection,⁵ the Attorney General argues

⁵ See Governor's Reconsideration and Recommendation Statement accompanying Senate Bill No. 1471 that resulted in the language of N.J.S.A. 43:15A-7h, which states:

that the exception eliminates any rights appellant may have had under b or d as a veteran. The Attorney General further asserts that subsection b requires a "veteran" to be a permanent employee to obtain retirement benefits, and appellant was not considered a permanent employee until the County passed its resolution, [t]hus, Appellant could not have been enrolled in the PERS." In addressing appellant's "continuous service" argument, the Attorney General also asserts that while his service with the County may have been "continuous," it was not "permanent."

The preamble to N.J.S.A. 43:15A-7 sets forth those persons who are to be included in the retirement system. It states as follows:

There is hereby established the Public Employees' Retirement System of New Jersey in the Division of Pensions and Benefits of the Department of the Treasury. The membership of the retirement system shall include:

Subsection b then provides:

Any person becoming an employee of the State or other employer after January 2, 1955 and every veteran, other than a retired member who returns to service pursuant to subsection b. of section 27 of P.L. 1966, c. 217 (C.43:15A-57.2) and other than those whose appointments are seasonal, becoming an employee of the State or other employer after such date, including a temporary employee with at least

The effect of these amendments will be to exempt all JTPA employees in this State 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.]

one year's continuous service.

[N.J.S.A. 43:15A-7b (emphasis added).]

Subsection d of N.J.S.A. 43:15A-7 provides:

Membership in the retirement system shall be optional for elected officials other than veterans, and for school crossing guards, who having become eligible for benefits under other pension systems are so employed on a part-time basis.... No person in employment, office or position, for which the annual salary or remuneration is fixed at less than \$1,500.00 shall be eligible to become a member of the retirement system.

[N.J.S.A. 43:15A-7d.]

Contrary to the Attorney General's argument, subsection b expressly states that "a temporary employee with at least one year's continuous service" is included in PERS. Hence, its plain language contradicts the Attorney General's assertion that subsection b requires the employee to be "permanent." In addition, we note that N.J.S.A. 43:15A-7b states that "every veteran" "shall [be] includ[ed]" in PERS; yet subsection h states a temporary JTPA employee is ineligible for membership in PERS. Thus, N.J.S.A. 43:15A-7b appears to be in conflict with N.J.S.A. 43:15A-7h, as does N.J.S.A. 43:15A-11.

PERS did not discuss N.J.S.A. 43:15A-7b or 7d or N.J.S.A. 43:15A-11 in its final determination to declare appellant ineligible for membership, addressing only subsection h in denying his request to purchase additional credit for the period in question. We assume these were not raised by appellant at the hearing. Ordinarily, we would consider his arguments in respect of

these subsections to be waived; however, because the appeal implicates a statute bearing upon matters of public interest, Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973), we are reluctant to preclude appellant's arguments without some consideration of them by the agency. While we frequently defer to an agency's expertise when it is interpreting the statutes and regulations it is charged with enforcing, see Div. of Med. Assistance and Health Services, 350 N.J. Super. 175, 185 (App. Div. 2002), we need not show the same deference to the views of the Attorney General.

Because of the policy implications involved in interpreting the statute, especially where veterans' rights are implicated, we believe it is preferable to have the agency with the presumed expertise charged with its administration interpret the statute, rather than rely on the Attorney General's interpretation of the statutes in a brief. The Board itself should explain the rationale for concluding (if it does) that subsection h carves out an absolute exception that would deprive a JTPA employee, who is also a veteran "in continuous service," of membership in the retirement system the right to purchase service credit. This is especially so in light of PERS's initial decision that appellant was eligible, its subsequent decision that he was completely ineligible except for his military credits, and its final decision granting some credit, but not others.

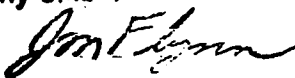
Accordingly, we remand to PERS for it to consider appellant's additional statutory arguments. However, we reject appellant's arguments grounded on unspecified allegations of wrongdoing by the County inasmuch as they are factual in nature and could have been made at the time of the meeting on April 18, 2001, when PERS made its decision. Therefore, they are considered waived. Nieder, supra, 62 N.J. at 234.⁶

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

⁶ Appellant's claims of negligence were not illuminated by any competent evidence below, such as an affidavit from appellant setting forth any facts to the effect he did not understand he was not civil service until the Resolution was passed, or that someone in the County breached a duty to him in not advising him of his status. We assume they were not asserted because they had no basis in fact.

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**I hereby certify that the foregoing
is a true copy of the original on
file in my office.**


CLERK OF THE APPELLATE DIVISION

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