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MEMBER, NEW JERSEY AND PENNSYLVANIA BARS

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Dear John,

I would tell you what my initial reaction is, now that I have had some time to review what went on, but I think you can already guess - Is there anyone up there who even bothered to read the Opinion? (or the Administrative Code which applies to that agency?)

My thoughts:

1. Contrary to the DAG's assertion that the law regarding temporary employees was not enacted until 1985, I would point to the following case - VLIET v. BD. TRUSTEES PUB. EMP. RETIRE. SYST., 156 N.J. Super. 83 (1978) which, in footnote 1 explains:

[fn1] **Apparently, the regulation became effective on December 18, 1972.**

See **5 N.J.R. 23(a) (1973); 4 N.J.R. 283(a) (1972).**

The regulation fixes dates for compulsory enrollment in PERS.

The date for a new employee in a "local" government unit "not covered by civil service" is four months after the employee "originally accepted employment in a regular budgeted position."

The full text of **N.J.A.C. 17:2-2.4** is as follows:

**17:2-2.4 Enrollment date**

(a) A new appointee in the classified service shall be considered as beginning his service on the date of his regular appointment, and the compulsory enrollment date shall be fixed as the first of the month following the completion of the equivalent of a working test period of four months. If an applicant, an optional enrollee, fails to give the date on his enrollment application that he desires to enroll in the system, the applicant shall be enrolled as of the first of the month following the receipt of the enrollment application.

(b) An employee in the unclassified service or an elected position shall be considered as beginning service on the date of his original appointment, or the date when he assumed duties of the elective office, as the case may be.

1. For local employers not covered by civil service, a regular appointment shall constitute the date the employee originally accepted employment in a regular budgeted position.

2. The date of compulsory enrollment shall be the first of the month following the completion of the equivalent of a working test period of four months.

**(c) An employee who does not meet the requirement for enrollment cited in (a) and (b) of this section may be considered a temporary employee by his employer for as long as a one-year period following the employee's date of hire, but if his employment continues into his second year, his compulsory enrollment date will be the first of the month following the completion of the equivalent of a working test period of four months within the second year of employment.** [emphasis added]

While in this case, the plaintiff was trying to be kept temporary, the statute applied. In checking the current statute as to that citation, it has been amended several times since being enacted in 1972, but this *is* the state of the law at the time I was *hired in 1974* and there is nothing in the amendments which would change my position on this issue. Her “research” of this issue is sheer incompetence and her presenting this to the Board as fact is just incomprehensible.

2. If indeed the PERS Board wants to hang it's hat on the issue of a specific directive outweighs a general directive then their argument still fails because the statute, *N.J.S.A. 43:15A-7* which the DAG cites as being the more specific **specifically** states in (b)

b. 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 one year's continuous service**; and ... [emphasis added]

which in my book is pretty damn specific and, in (h)

h. A **temporary** employee who is employed under the federal Job Training Partnership Act, Pub.L. 97-300 (29 U.S.C. s.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. [emphasis added]

which is also pretty damn specific, even as affected by ***N.J.S.A. 17:2-2.3 Ineligible persons*** in paragraph 9

9. Any person hired under the Workforce Investment Act of 1998. **Temporary** employees hired under the Workforce Investment Act shall be deemed to be Job Training Partnership Act (JTPA) employees and therefore ineligible for PERS membership pursuant to N.J.S.A. 43:15A-7h.

Again, that word, **Temporary**, appears without definition.

**How many times do we have to ask them how they can claim that someone with 25½ years of continuous service is temporary?**

Following is a summary of the comments to the Board after they reconvened the open session

**Chairman** - What do you want us to do?

**G. Philip Lewis** - After reviewing the statutes I find no definition of Temporary in the subparagraph (h) although the statute refers to temporary JTPA employees. My review of the other parts of the statute shows the statute saying temporary employees at the time I was hired - it was with one year of service - must be put into the system. And there is the part of the statute which says veterans *shall* and it's not an option except for, I believe, elected officials and crossing guards - veterans *shall* be enrolled in the system. So, on the strength of those two pieces and the fact that I had 25½ years of continuous service with the same employer my position would be that:

- a. I should have been put into the system which I first started with the County in 1974 as a veteran.
- b. Alternatively, I should have been put in in 1975 as a temporary employee with one year of service or more.

And then, for the pension board in 1998 to say to me, "Okay, you and all of your staff can now be enrolled in the pension system now that you have been acknowledged to be permanent, and you can buy back all of your time to the first date of continuous employment with the employer" that gave me the ability, when the County said they no longer needed my services, the option to say,

"Okay, I have the 25½ years of service;  
I have the permission from the PERS Board to buy back my time;  
I am a veteran so I can buy back my military time,  
I am going to go ahead and retire, even though I am not yet age 55 and  
I will take the hit on the percentage reduction in my pension payments.  
I will go ahead and retire and get on with my life."

On the reliance and strength of that, I submitted my retirement, the County accepted it and I left employment with the County on June 30, 2000.

It was only subsequent to that that I discovered that -

I could first buy back only some of my time, and then  
I couldn't buy back any of my time and then,  
when we were up here last April (2001) ,I could buy back all but 6 years.

That would be the 6 years between September 1986 when the statute took effect and April 1993 when the Board of chosen Freeholders for Salem County finally acknowledged, by resolution, that our positions were permanent because the regulations already defined us as other than temporary. However, as further indication of permanent employment, all of my employment with the County of Salem had all been done on Civil Service forms so Civil Service had always been notified that I was employed.

As far as I can see, there is a conflict going on here .

This is the conflict which throws me into a tough situation.

The statute N.J.S.A. 43:15A - 7(h) says:

***'temporary JTPA' but doesn't define 'temporary' in that subparagraph.***

However,

the regulations (N.J.A.C. 17:2-2.4)

***defines 'temporary' and***

the statute ( N.J.S.A. 43:15A-7 (b) says:

***'all veterans.'***

I believe the Pension Board can reach a decision in this matter by deciding on the veteran's issue without having to reach the JTPA issue. They can also decide on the basis of the temporary issue without reaching the JTPA issue.

**John DeSimone** - Thank you for taking the time. The Appellate Division reversed and remanded as to a single issue - they asked the Board to carve out a specific exception as to the veteran's status. We found no specific exception to paragraph b. We found none in Governor Keen's veto or the original statute. We believe there was never an intent to affect veterans as to their entitlement to these benefits. The plain language of the statute clearly reads that he should be entitled to it forgetting subparagraph h and specifically focusing on subparagraph b because of his veteran's status. Our briefs that we submitted to the Appellate Division and the arguments we presented before the Board are replete with that position, forgetting all the temporary issues and everything else that we already addressed by the Appellate Division in their reversal and their remand. Again, if we focus simply on what they had asked for the Board to decide upon **it is our position that because of his veteran's status he is entitled to it by statute.**

Then after having explained that the DAG litigator would not speak but the other DAG would speak, they had the DAG litigator speak anyway. She erroneously 'corrected' me regarding the 'temporary' statute situation (see #1 above)

Her next focus was on the legislative history of the veto. She then goes on to explain that the AG's position is the Governor wanted all JTPA staffers out regardless of their position, including administrators. (That is the same erroneous assumption she made in her brief to the Appellate Court - the legislature considered 'all' and decided on 'temporary' hence they were able to keep all the state employees in the system. If her position were valid then there would be NO state employees or Community College, Vocation School or Welfare Board employees paid by JTPA and/or WIA funds in the pension system, PERIOD.)

Then the arrogant Board member, Ned Thompson, asked her to address the issue where it states "notwithstanding any other law to the contrary" by which they intended to exclude veterans under JTPA

Then the DAG notes there is nothing in the legislative history speaking to veteran status or any other status. She then goes on with the statutory construction bit - there is a conflict so - should the veterans one prevail, or the temporary one prevail, or the JTPA one prevail?

“When there is a conflict between general and specific provisions of a statute then the specific provisions shall control.” (Correct me here if I am wrong, but doesn't the 'specific' provision relating to JTPA **specifically** use the term **temporary**?)

She then concludes (not the Board's conclusion, but hers) that (h) controls (overlooking the 'temporary' term.)

The other DAG then points out that the words “notwithstanding any other law to the contrary” do not appear in that subsection.

At the end of all this, they still simply 're-affirmed' their prior decision.

This easy way out, simply sweeping it aside so they don't have to make a decision, is unconscionable in my opinion and I find it incomprehensible that they take it so lightly.

John, this thing has to be 'fast tracked'. I am continuing to suffer damages as a result of their ineptitude and sheer laziness. I am due this money by law and relied on it in making my decision to retire from the County when I did.

Everyone on the Pension Board seems to sit around and 'wink' at the fact that this law is being so unfairly applied -

They all know that

**many other employees across the state are still in the pension system** and that **some have even retired from the pension system, even though they were paid or are still being paid with JTPA/WIA funds**, and **some were never made permanent Civil Service**

- although, I believe they don't need to be after one year of service.

There are numerous Community College, Vocational School, Welfare Board and Department of Labor employees who are paid with those funds and everyone is just closing their eyes to it.

It has to stop.