

G. PHILIP LEWIS, ESQ.
105 STOCKINGTON ROAD
WOODSTOWN, NJ 08098
(856) 769-3322 FAX: (856)769-3810
MEMBER, NEW JERSEY AND PENNSYLVANIA BARS

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Intake Mail Coordinator
ACLU-NJ
Post Office Box 750
Newark, NJ 07101

Dear ACLU-NJ;

I am writing to you with this request for assistance in resolving an issue which I believe has far-reaching impact and is a violation of my civil rights as well as the civil rights of hundreds of other New Jersey residents who are similarly situated. By way of background information and status of the situation, I present the following for your consideration.

In 1966 I joined the US Navy and left active duty in 1970, receiving an Honorable Discharge in 1972. I completed my undergraduate education in 1972 and on December 23, 1974 I was hired by the County of Salem, New Jersey, in a position funded under the Comprehensive Employment and Training Act Program (CETA) as a Teacher in the Salem County adolescent drug rehabilitation program. When the drug program closed, I continued my employment with Salem County in the administration of the CETA program, eventually becoming the Director of the Salem County Office of Employment and Training. With the phase out of CETA in 1983 and the implementation of the Job Training Partnership Act Program (JTPA) I continued in my position as Director of the Office of Employment and Training, administering the JTPA program. When the JTPA program was replaced with the Workforce Investment Act Program (WIA) in 2000, the County of Salem decided to restructure the administrative function and issued layoff notices to me and my remaining eight staff members. By that time, I had worked continuously for Salem County for more than 25 years.

On December 21, 1998, the Board of Trustees of the New Jersey Public Employees Retirement System (PERS) had sent a letter advising my Deputy Director that the Salem County JTPA staff would be allowed to purchase pension credit for all of their prior service to Salem County. Because of that letter, I opted to retire from the County, purchase all of my prior service (including my military service time), and take my pension early. Although retiring at age 53 with almost 30 years of government service credit in the PERS would mean a percentage reduction in my pension amount, I opted to take the penalty instead of taking the alternate employment offered (as an Assistant Prosecutor) at the time of my layoff.

In June 2000 I applied to PERS for early retirement on the basis of years of service and, in complete reliance on their December 21, 1998 letter, I also applied to purchase all of my prior service. I submitted my retirement to the County of Salem effective June 30, 2000 and left my employment. In August 2000 I received notification from the PERS that I could buy back some, but not all, of my service time with the County of Salem. After several months of communicating back and forth with the Secretary of the PERS Board of Trustees (the Board), I finally received approval to purchase all of my prior service time. In February 2001 I traveled to the PERS office in Trenton and presented them with a check for \$93,533.76, the figure they had quoted as my buy back amount. After about a ninety minute wait while they processed my purchase, the clerk came back with my check and advised me that I was ineligible for

any pension. I sought and received an appointment to appeal their staff determination to the Board and, with my then attorney, did so at their March 21, 2001 meeting. The Board requested that we file more information regarding my employment and circumstances which we did. We met with them again on April 18, 2001. The Board made an arbitrary decision at the April 2001 meeting and issued a Final Administrative Determination on May 17, 2001 that I was eligible to purchase approximately 19 years of my County Service and all of my military service but not six and one-half years of my County service. This loss of eligibility for those 6½ years of service meant that I was not eligible for retirement at age 53 on years of service retirement and would have to wait until I was age 60 to start collecting any pension.

We appealed that determination of the Board to the Superior Court of New Jersey, Appellate Division, and on June 24, 2002, in an unpublished opinion, the Appellate Division ordered the Board to explain how they determined that a veteran with 25½ years of continuous service was ineligible, especially in light of the fact that they had originally told me I was eligible to purchase the service. Upon receipt of this opinion, on August 21, 2002 we again met with the Board and rather than follow the order of the Appellate Division, the Board simply reaffirmed their earlier decision. We filed an interlocutory appeal which was denied and on September 19, 2002 the Board issued another Final Administrative Determination.

Another appeal to the Superior Court of New Jersey followed and this time, in a published opinion, on February 9, 2004 the Appellate Division affirmed the determination of the Board. I filed a petition for certification to the NJ Supreme Court and retained new counsel for the appeal. The Supreme Court declined to consider the appeal in May 2004.

The “legal” basis for the Board’s decision is based on a clause in NJSA 43:15A-7 Public Employees' Retirement System, established, membership, in subsection (h), which is in direct conflict with subsection (b). Subsection (h) states that “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...” (emphasis added) while section (b) mandates membership in PERS for “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...” (emphasis added). The problem arises in the conflicts of these two provisions and the varying interpretations given by the Attorney General’s staff in their capacity as counsel to the Board as well as the definitions of the Appellate Division in it’s second opinion on this matter.

There are two cases, which we cited in our first appeal, dealing directly with this issue - Vliet v. Bd. Trustees Pub. Emp. Retire. Syst., 156 N.J. Super. 83 (1978) and Gladden v. Pub. Emp. Ret. Sys., 171 N.J. Super. 363, 371 (App. Div. 1979).

In Vliet, John A. McGarrity, then Assistant Director of the Division of Pensions, testified that “... an employee in a non-Civil Service unit may be classified as a "temporary" for no more than one year for pension purposes. At the beginning of the second continuous year of employment he is deemed a permanent employee for pension purposes. See N.J.A.C. 17:2-2.4(c) which provides that an employee whose compulsory enrollment date is not fixed by sections (a) and (b) * * * 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 [Page 87] of the equivalent of a working test period of four months within the second year of employment.[fn1]” Vliet, p. 86,87.

In Gladden, the Court stated that "... For all veteran employees appointed after January 2, 1955, enrollment is mandatory." p. 372 and "...Twenty years of service to the State Legislature is neither temporary nor seasonal." p. 374.

My case to the Board has always been that as a veteran, even if I was a temporary employee, I was required to be enrolled after one year of continuous service (which the County of Salem failed to do) since at that time I was "deemed permanent for pension purposes" (Vliet) and that after more than 25 years of continuous service it is hard to conceive of such employment as "temporary" (Gladden). The Board's position is that the statute dealing with the "temporary employees" under the JTPA section (h) trumps both the veteran status and the length of continuous employment status. Part of what is obfuscating the issue is the application of the term "temporary" by both the Attorney General and the Court.

Throughout the proceedings in this matter, the Attorney General and the Court have consistently used the terms "temporary" and "all" interchangeably in referring to JTPA funded positions as being ineligible for enrollment. The briefs of the Attorney General are full of instances where they have interchangeably used the two terms. In the published opinion on my case, Lewis v. Board of Trustees, 366 N.J. Super. 411 (2004), at the top of page 419 the Court states, "In this instance, we have the considerable benefit of the comments made by Governor Kean regarding the intent of subsection (h). In returning to the Senate a bill containing a narrower exclusion of JTPA temporary employees..." (emphasis added) and, one page later, at the top of 420 they state, "The product of Governor Kean's recommendation was the enactment of subsection (h), which imposes no limitations in its exclusion of all JTPA employees from PERS membership." (emphasis in original)

Where I believe my rights have been violated is in the inequitable application of the law by the PERS Board of Trustees. While I (and other members of my staff and many other JTPA staff members around the State) have been either refused membership entirely or in part, the State of New Jersey, Department of Labor, has allowed all of its staff paid with JTPA funds to be members. Also, several of the other County JTPA administrative entities have been allowed to enroll their staffs and some have actually retired and are drawing their pensions from PERS. Add to that the fact that all JTPA funded staff at the other departments of the State involved in administering portions of the program (Health, Education and Higher Education particularly) as well as all other JTPA funded staff at the local Welfare Boards, Vocational Schools and Community Colleges are permitted to enroll as members of PERS and you have an appalling misapplication of the law.

If I am correct in my interpretation of the statutory and case law scheme, then I must be allowed to purchase all of my service time to the County of Salem. By extension, all of the similarly situated JTPA funded employees in other County-based offices of Employment and Training must also be permitted to join PERS. If, on the other hand, the Appellate Division, Superior Court of New Jersey is correct in its interpretation, ie - "the exclusion of all JTPA employees from PERS membership" - then all of the other PERS members who were paid with JTPA funds and employed by the various governmental entities around the state, must be excluded from the system and either their contributions returned to the government entity or, for those who are now drawing pensions, the "member" must reimburse the pension fund for those retirement payments they have received illegally.

It should be noted, as I pointed out every time to the Board, every JTPA funded entity in New Jersey did have temporary employees. Each Summer, the JTPA program funded a Summer Youth Employment and Training Program (SYETP). The SYETP hired college students to be "counselors" to oversee a short term (eight weeks) program to employ disadvantaged youth. Many thousands of those participants were hired across the State to work in public and private nonprofit agencies for a period of eight weeks. The "counselors" usually worked from June through September to handle the ramping up and down of the intense SYETP activities. Those employees were truly "temporary JTPA employees."

Aside from just the disillusionment of being told initially that I would be permitted to purchase all of my time (and basing some profoundly life altering decisions on that commitment) and then, after the fact being told that I could variously purchase none of my service to the County and then some of my service, I have also experienced the following losses directly attributable to the actions of the State: I have been denied over four years of pension payments since I retired; I have expended close to \$30,000 in legal fees; I gave up the opportunity to take other employment within Salem County which would have kept me in the PERS system (and actually allowed me to retire with an extra three years of credit without cost during a voluntary separation program for state employees, which I would have been as an Assistant Prosecutor); I have been denied my supplemental compensation on retirement (SCOR) by the County since they claimed I must be in the pension system to receive that separation benefit (\$15,000 maximum, for which I am otherwise fully eligible), and I have lost my health insurance coverage (guaranteed by the County collective bargaining agreement on retirement at any age with 25 years of service) due to the County having switched, almost two years after my retirement, from a self-insured program to the NJ State Health Benefits Program which requires retirees to be members of the PERS.

I am seeking your assistance in resolving this matter since it affects not only me, but many hundreds, if not thousands, of other residents of New Jersey - career government employees, who either must be permitted membership if they are not presently members, or excluded from membership if they are presently members, if the law is to be equitably applied. It should be noted here that the inequity continues to the present time since the JTPA exclusion has been applied by regulation to the Workforce Investment Act (WIA) by reference. See N.J.A.C.17:2-2.3 Ineligible persons. The social implications include the areas of veterans' preference and benefits, employment security and the maintenance of committed, professional and loyal career employees in government service, the sanctity of the written word and the reliance on such commitments on the part of the government by citizens making decisions having a profound impact on their future.

I have copies of all pertinent documents, briefs, letters, etc., up to but excluding the final brief filed by the Attorney General in the Supreme Court appeal (which I can obtain from my prior counsel on that matter if needed.) I appreciate your time and attention and hope that I have been able to adequately convey the impact and implications which give this matter such importance in holding government accountable. Thank you for your consideration and I await your reply.

Sincerely,

G. Philip Lewis