



PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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Acting Director

January 16, 2020

[REDACTED]

DONNELLY, MINTER & KELLY, LLC
Patrick J. Galligan, Esq.

[REDACTED]

[REDACTED]

RE: Richard Bizzari
PERS Eligibility

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Galligan:

I am writing in reference to the decision of the Board of Trustees of the Public Employees' Retirement System (PERS) regarding the appeal of your client, Richard Bizzari, challenging the Board's decision of August 21, 2019. In that decision, the Board denied Mr. Bizzari's request for PERS membership retroactive to 2004, as a result of his employment with the Morris County Public Safety Training Academy (Academy) as a Fire Instructor (Instructor). At its meeting on December 11, 2019, the Board determined that there are no material facts in dispute and directed the Board Secretary, in consultation with the Attorney General's Office, to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the Board at its January 15, 2019, meeting.

FINDINGS OF FACT

The record before the Board establishes that Mr. Bizzari commenced employment as an Academy Instructor in 1997. The earnings history you provided to the Board indicates that Mr. Bizzari exceeded the \$1,500 salary threshold for PERS eligibility for the first time in 2002. However he did not meet the earnings threshold in either 2003 or 2004, and therefore, even if his

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service prior to that time were eligible, a break in service of two years or more would preclude his purchase of that prior service. In any event, you have requested that Mr. Bizzari be enrolled in the first year he reached the \$1,500 threshold, which would have been in 2002, or in light of the above preclusion, in 2005 when he met the threshold.¹

The inquiry into whether part-time “on-call” Academy Instructors were PERS-eligible was first posed to the Division of Pensions and Benefits in July 2001. At that time, Gayle Jones, a Morris County Benefits Specialist, wrote to the Division requesting whether “permanent ‘on-call’ employees,” including Mr. Bizzari, were eligible for PERS membership. Ms. Jones advised that because the Instructors were “on-call,” Morris County could not estimate what their annual salary would be “from year to year.” The Division advised Morris County that “on-call” employees are eligible for PERS enrollment if they meet the criteria as outlined in the regulations. For example, a 12-month employee would be eligible if they worked 120 days per year (10 days per month).

On July 6, 2009, the Division wrote to Morris County and requested information concerning Mr. Bizzari’s employment. Specifically, the Division requested payroll input sheets for each pay period for each year of employment as an Instructor, including a monthly breakdown reflecting the exact dates worked.

On November 5, 2009, the Division completed its review of the PERS eligibility for Academy Instructors and denied their request for PERS enrollment based upon that service. The Division found that the Instructors were employed on an “as needed” basis and their employment does not follow a regular predictable work schedule. The Division also denied PERS enrollment based on the Instructor service because the Instructors under review did not meet the 120 day requirement as per the regulation. Mr. Bizzari also did not meet the minimum salary requirement

¹ Mr. Bizzari also failed to meet the earnings threshold in 2008.

from 1997 through 2001, and 2003-2004. The records provided by Morris County note the following number of days and salary earned from 1997 through 2010:

<u>YEAR</u>	<u># Days Worked</u>	<u>Salary</u>
1997	14 days	\$749.84
1998	23 days	\$1,263.00
1999	29 days	\$1,375.00
2000	15 days	\$880.23
2001	16 days	\$984.00
2002	20 days	\$1,638.00
2003	10 days	\$937.00
2004	13 days	\$1,062
2005	18 days	\$1,703.00
2006	38 days	\$4,253.00
2007	29 days	\$3,497.00
2008	11 days	\$1,014.00
2009	12 days	\$1,578.00
2010	(not available)	\$7,025.39

Your firm contacted the Division on Mr. Bizzari's behalf in July 2017, seeking a reconsideration of the Division's previous decision(s). The Division again requested employment documentation from Morris County. Specifically, the Division requested payroll input sheets for each pay period for each year of employment as an Instructor, including a monthly breakdown reflecting the exact dates worked. Morris County filed an Employment Verification Form with the Division, indicating that Mr. Bizzari was an "on-call" part time Instructor, beginning in 1997. Morris County also provided payroll and attendance records. On or about October 11, 2018, the Division advised that Mr. Bizzari's service prior to 2010 was not eligible for PERS service credit as he did not work for at least 10 days per month in any year. After 2010, Mr. Barella's service was not eligible for purchase because he was employed less than 32 hours per week.²

You filed an appeal on Mr. Bizzari's behalf, requesting that the Board reverse the Division's determination. You asserted that, notwithstanding the employer's classification of Mr. Bizzari as an "on-call" employee, the regulations promulgated by the Board impermissibly expand upon the exceptions to PERS eligibility, such as the preclusion for seasonal or temporary employees, as

² This requirement only applies for service after May 21, 2010. See L. 2010, c. 1.

outlined in N.J.S.A. 43:15A-7(b). You also assert that because the Instructors are authorized to select the day(s) they are to teach each month, are guaranteed a minimum number of hours per month³ and the longevity of their Academy employment, that Mr. Bizzari has a regular, consistent part-time work schedule and his service cannot be classified as temporary and thus he is eligible for PERS enrollment retroactive to his start date in 2002 or 2005. See n. 1.

CONCLUSIONS OF LAW

N.J.S.A. 43:15A-7(b) generally provides that employees of the State or other participating employers who meet the statutory and regulatory eligibility criteria are required to be enrolled in the PERS. Prior to 2008, employees were required to earn \$1,500 and the position had to be covered by Social Security.

“On-call” employees, such as Mr. Bizzari, are also not eligible for PERS enrollment unless the employee meets the minimum number of days worked as required under N.J.A.C. 17:2-2.3(a)(6), which states:

Any person not in the career, senior executive, and unclassified service, or a regular budgeted position, who is employed on an “on-call” basis and works on average less than 10 days a month throughout the regular work year of the employer. This type of employment is temporary employment that is not continuous.

N.J.A.C. 17:2-2.10(a)(1) outlines the PERS eligibility of “on-call” employees, and states, in pertinent part:

An individual who assumes a position as an “on-call” employee, such as a substitute teacher, or bedside or home instructor, is eligible to enroll in the PERS at the beginning of the 13th month of continuous employment, provided all other eligibility requirements are met... pursuant to the provisions of N.J.S.A. 43:15A-7. “On-call” employees have unpredictable work schedules and their employment is usually temporary in nature.

³ There is no documentation concerning a minimum number of hours per month. In fact, the record belies this statement as there are a number of months in which Mr. Bizzari did not work at all.

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The Board considered the employer's "on-call" classification of Mr. Bizzari's employment (and all of its Fire Instructors), as well as his unpredictable work schedule, and the limited number of days worked per year, and determined that he does not meet the eligibility criteria for PERS enrollment, both prior to and after May 21, 2010.

Mr. Bizzari's employment history reveals that he did not have continuous regularly scheduled part-time employment, but rather, was employed on an as needed basis, as established by the attendance sheets and payroll records. The records provided confirm that Mr. Bizzari averaged, at best, 3 days per month in one year, and from 1997 through 2009 he averaged less than 1.5 days per month. Moreover, Mr. Bizzari did not work for several weeks or, on some occasions, for several months at a time. The salaries from year to year varied, in some instances increasing as much as 300-400% in one year, while decreasing 50-75% in other years. While Mr. Bizzari has been employed as an Instructor for many years consecutively, the Division considers such a sporadic work schedule to be temporary in nature. N.J.A.C. 17:2-2.3(a) (6). Thus, not only did Mr. Bizzari not average the required number of days worked per month, he failed to meet the salary threshold, and his employment was not consistent of that of regular part-time employee with a continuous regular work schedule. After May 21, 2010, Mr. Bizzari did not work the required number of hours for PERS enrollment.

While the Board recognizes Mr. Bizzari's many years of public service, his employment as an Academy Instructor is not eligible for PERS enrollment.

You also asserted that other Instructors were enrolled in PERS on the basis of their Morris County service. Please be advised that all of these cases are fact-sensitive, and the Division is reviewing the names you provided to determine whether they were enrolled on the basis of their Instructor service.

As noted above, the PERS Board has considered your written submissions and all documentation in the record. Because this matter does not entail any disputed questions of fact,

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the PERS Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and regulations 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.

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. All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowitz". The signature is fluid and cursive, with a large loop at the end.

Jeff Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-121/JSI
cc: L. Barnett (ET); N. Munko (ET)

Richard Bizzari