



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
P. O. Box 295

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ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

June 10, 2019

Peter M. Jacques, Esq.

[REDACTED]  
[REDACTED]

Sent via email to [REDACTED]

RE: Timothy Hamway

[REDACTED]

Dear Mr. Jacques:

## **FINAL ADMINISTRATIVE DETERMINATION**

I am writing in reference to the denial by the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) of your client, Timothy Hamway's request to cancel the outstanding balance of his pension loan as determined by the Division of Pensions and Benefits (Division). The TPAF Board initially reviewed and denied Mr. Hamway's request to cancel the loan repayment schedule and refund any payments made for the outstanding balance at its November 1, 2018 meeting<sup>1</sup>. On December 27, 2018, you appealed the Board's decision. You contend Mr. Hamway denies taking a pension loan in the amount of \$29,000.00 immediately preceding his retirement and thus there is no obligation to be repaid. You assert that Mr. Hamway has no evidence of the loan and the Division's claims for repayment are time barred. On May 2, 2019, the Board considered your appeal and determined that no material facts are in dispute and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the TPAF Board at its June 6, 2019 meeting.

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<sup>1</sup> Subsequently, a corrected letter was issued to you dated January 24, 2019.

The TPAF Board has reviewed your correspondence and the relevant documentation and finds that the laws governing the TPAF do not permit the Board to grant Mr. Hamway's request to cancel the outstanding balance on his pension loan as determined by the Division.

### **FINDINGS OF FACT**

The record establishes that Mr. Hamway was enrolled in the TPAF in September 1978 as a result of his employment with Irvington Town. Mr. Hamway transferred numerous times to various locations, the last of which was New Providence Board of Education. According to the records posted to Mr. Hamway's pension account, a check was issued to him on August 4, 2004, in the amount of \$12,000.00<sup>2</sup> and another check was issued to Mr. Hamway on August 11, 2004, in the amount of \$17,000.00<sup>3</sup>. The loan repayments were to begin September 1, 2004, but Mr. Hamway retired prior to that date. The *Certification of Payroll Deductions* were returned by Mr. Hamway's former employer stating he terminated employment with them. This loan was not billed when Mr. Hamway's retirement benefit was calculated and payments were never carried into his retirement.

Mr. Hamway filed an application for Early retirement requesting an August 1, 2004 retirement date. The New Providence Board of Education certified that Mr. Hamway's employment terminated on July 31, 2004. On March 3, 2005, the TPAF Board approved Mr. Hamway's application for Early Retirement effective August 1, 2004. Once Mr. Hamway retired and began receiving a pension, loan deductions were not taken from his pension check.

On October 10, 2017, the Division notified Mr. Hamway that a review of his TPAF membership account revealed that he had an existing loan balance in the amount of \$29,000.00 that was not carried into retirement. No loan payments were deducted from his pension checks. In that letter, Mr. Hamway was informed that the Division would begin deducting monthly loan

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<sup>2</sup> The check number was 272054.

<sup>3</sup> The check number was 272567.

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payments in the amount of \$1,299.08, beginning with his pension check dated November 1, 2017, to satisfy the outstanding obligation including accrued interest. On October 16, 2017, Mr. Hamway wrote to the Division stating that he was not aware of this balance and requested a cancellation of any interest accrued in 14 years, a reduction in payment from \$1,229.08 to \$500.00 per month, and a copy of the loan request and calculation of charges.

On October 20, 2017, Michael Kusmierczyk, Supervising Accountant with the Division responded to Mr. Hamway's letter and provided Mr. Hamway with copies of the *Certification of Payroll Deductions* regarding the outstanding loan balance. Mr. Kusmierczyk explained that the Division is unable to reduce the monthly deduction or waive the interest assessed by the Division for the outstanding loan balance and that interest accrues until the loan is fully paid. Further, Mr. Hamway was informed that all pension loans must be repaid to the retirement system in accordance with the Correction of Errors N.J.S.A. 43:18A:66-63. Additionally, the Division relied upon N.J.S.A. 18A:66-35 and N.J.S.A. 18A:66-35.1, the Internal Revenue Code and application regulations which require that interest be paid on Mr. Hamway's loan balance. Lastly, Mr. Hamway was provided with appeal rights to the TPAF Board.

On November 30, 2017, you filed a letter of representation, explaining that you were retained to represent Mr. Hamway in his appeal. In your appeal to the TPAF Board, you claim that Mr. Hamway is being penalized for the failure of the Division to collect the loan obligation and that as a consequence Mr. Hamway was in default on the subject loans commencing with the September 2004 payment. In support of your argument, you cited the NJ statute of limitations, N.J.S.A. 2A:14-1.2(a), concerning debt collection. You argue that applying this statute of limitations to the facts as alleged by the Division, the time period for the State to pursue its claims for repayment of the subject loans expired in or about September 2014 and therefore any attempt by the Division to pursue repayment of the subject loans at this juncture is time barred.

On January 19, 2018, Mr. Hamway was notified that his appeal was being held in abeyance until finalization of discussions with the Internal Revenue Service (IRS).

The TPAF Board notes that after the January 19, 2018 letter to Mr. Hamway, the State of New Jersey entered into a Closing Agreement with the IRS that identifies problems with pension loans and a method to correct the identified errors, while maintaining the tax-qualified status of the TPAF.

On October 11, 2018, both you and Mr. Hamway were notified that the TPAF Board would consider his appeal at its meeting on November 1, 2018. On October 22, 2018, the Division reconsidered Mr. Hamway's loan deduction hardship request and agreed to reduce the monthly loan deduction to \$543.65. The reduced amount is the same monthly amount Mr. Hamway would have carried into retirement had the deduction been taken on a timely basis. The reduced monthly loan deduction commenced with the November 1, 2018 retirement check and will continue until Mr. Hamway's outstanding loan balance plus interest is satisfied. The total estimated interest on Mr. Hamway's outstanding loan from his retirement date until completion based on the revised payment schedule is \$26,285.48. The anticipated completion date is December 1, 2024.

On November 1, 2018, the Board considered your submissions and all of the documentation; however, the Board denied your request to cancel the loan repayment schedule and refund any payments made for the outstanding balance of Mr. Hamway's pension loan obligation owed as determined by the Division. The basis of the Board's decision was set forth in its letter dated November 13, 2018<sup>4</sup>.

Thereafter, you appealed the Board's determination. In your appeal, you reiterated your prior arguments stating the Division's claims would be dismissed as barred by the time limitations set forth in N.J.S.A. 2A:14-1.2(a). Finally, you asserted the loans allegedly provided to your client

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<sup>4</sup> A corrected TPAF determination letter was sent January 24, 2019 and an additional 45 day period was granted to appeal the decision.

in 2004 were not pursued by the Division for a period of over thirteen years which is well beyond the 10 year limitation period. At its meeting on May 2, 2019, the Board determined that there were no material facts in dispute and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which constitutes the Board's Final Administrative Determination.

### **CONCLUSIONS OF LAW**

The Board denied your request to cancel the outstanding loan obligation assessed by the Division of Pensions and Benefits. The Board relied upon N.J.S.A. 18A:66-35 and N.J.S.A. 18A:66-35.1.

N.J.S.A. 18A:66-35 states in pertinent part:

an amount equal to not more than 50% of the amount of his accumulated deductions, but not less than \$50.00; provided, that the amount so borrowed, together with interest thereon, can be repaid by additional deductions from compensation, not in excess of 25% of the member's compensation, made at the same time compensation is paid to the member. The amount so borrowed, together with interest on any unpaid balance thereof, shall be repaid to the retirement system in equal installments by deduction from the compensation of the member at the time the compensation is paid or in such lump sum amount to repay the balance of the loan but such installment shall be at least equal to the member's rate of contribution to the retirement system and at least sufficient to repay the amount borrowed with interest thereon.

...

Loans shall be made to a member from his accumulated deductions. The interest earned on such loans shall be treated in the same manner as interest earned from investments of the retirement system.

Further, "[t]he rate of interest for a loan requested by a member prior to the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall be 4% per annum on any unpaid balance thereof. N.J.S.A. 18A:66-35. After the enactment of Chapter 92, the State Treasurer sets "a commercially reasonable rate" on January 1 of each calendar year. Ibid. Additionally, N.J.S.A. 18A:66-35.1 states:

In the case of any member who retires without paying the full amount so borrowed, the Division of Pensions and Benefits shall deduct from the retirement benefit payments the same monthly amount which was deducted from the compensation of the member immediately preceding retirement until the balance of the amount borrowed together with the interest is repaid. In the

case of a pensioner who dies before the outstanding balance of the loan and interest thereon has been recovered, the remaining balance shall be repaid from the proceeds of any other benefit payable on the account of the pensioner either in the form of monthly payments due to his beneficiaries or in the form of lump sum payments payable for pension or group life insurance.

The TPAF is a “qualified governmental defined benefit plan[] pursuant to sections 401(a) and 414(d) of the federal Internal Revenue Code of 1986, as amended, or such other provision of the federal Internal Revenue Code, as applicable, regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service.” N.J.S.A. 43:3C-18(a). The Director of the Division is “authorized to modify the provisions of the [TPAF], when a modification is required to maintain the qualified status of the [TPAF] under the Internal Revenue Code of 1986, applicable regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service (IRS).” N.J.S.A. 43:3C-18(c).

IRC Section 401(a) and federal tax law require that pension loans comply with IRC Section 72(p). Specifically, IRC Section 72(p)(2)(B) requires pension loans to be repaid within 5 years of issuance and IRC Section 72(p)(2)(A) prohibits total outstanding loan amounts from exceeding \$50,000. Ibid. If a member fails to repay the pension loan within the 5-year period or the amount exceeds the IRS limit, then the loan becomes a “deemed distribution” taxable as income to the member and subject to additional penalties. IRC Section 72(p)(1). The deemed distribution does not cancel the loan obligation, which still must be repaid to the Plan, with applicable interest. See Rev. Proc. 2016-51, Section 6.02(1).

There is no dispute that Mr. Hamway took a loan from his TPAF account on August 4, 2004 and August 11, 2004. The TPAF Board acknowledges that Mr. Hamway’s loan payments were not carried into retirement and automatically deducted from his pension checks by the Division. When the Division realized Mr. Hamway’s loan was not being repaid, he was informed by the Division of the outstanding loan obligation, and thereafter the Division implemented a modified repayment schedule to repay his loan.

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The TPAF Board is also aware that the issue of the repayment of loans in retirement implicates more than just Mr. Hamway's loan. Because the TPAF is a federally tax-qualified plan, as required by N.J.S.A. 43:3C-18(a), the TPAF's failure to comply with all the requirements of the IRC could result in the IRS determining that the TPAF would no longer be a tax-qualified plan under IRC Sections 401(a) and 414(d). To that end, the Board is aware that the State Treasurer and Director of the Division, in accordance with his authority and responsibility under N.J.S.A. 43:3C-18(c) to keep the TPAF tax-qualified, signed a Closing Agreement with the IRS. In addition to setting forth methods to repay certain loans, the Closing Agreement reiterates that the plan is subject to IRC Section 72(p). Even when a loan is not properly repaid under the provisions of IRC Section 72(p), and there is a reported deemed distribution, the deemed distribution would not relieve a member of the obligation to repay the loan, with interest.

You contend that the interest that accrued is not a result of Mr. Hamway's error. Per N.J.S.A. 18A:66-35 and -35.1, interest accrues on any unpaid loan balance. Because loan payments were not made or taken from Mr. Hamway's pension checks, the balance of Mr. Hamway's loan did not decrease, and his loan was not fully repaid as contemplated by the loan repayment schedule. Therefore, per the statutory requirements that govern the loan, N.J.S.A. 18A:66-35 and -35.1, there is additional interest that accrued on Mr. Hamway's loan that must be repaid.

The TPAF Board also relies on its ability to correct errors pursuant to N.J.S.A. 18A:66-63, which states, in pertinent part:

If any change or error in records results in a member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, then on discovery of the error, the board of trustees shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid

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The Board notes that the statute of limitations you cited in your appeal letter, N.J.S.A. 2A:14-1.2, does not apply to this matter as it is not the filing of civil litigation, and, as noted above, the Board has the authority to correct errors pursuant to N.J.S.A. 18A:66-63.

While the Board noted your original arguments, and those in your appeal letter, the Board has no authority to grant your request to waive the amount of accrued interest charged on Mr. Hamway's loan because doing so could harm the overall pension scheme. See *Sellers v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 399 N.J. Super. 51, 62 (App. Div. 2008). Reducing interest on the outstanding loan balance would violate N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1, IRC Section 72(p), and the State's Closing Agreement with the IRS, which could result in the TPAF no longer being considered a tax-qualified plan, which would affect the entire State, all employers in the TPAF, and every member and retiree.

As noted above, the TPAF Board has considered your written submissions and because this matter does not entail any disputed questions of fact, the TPAF 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 without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Teachers' Pension and Annuity Fund.

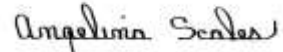
You have the right, if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey  
Appellate Division  
Attn: Court Clerk  
PO Box 006  
Trenton, NJ 08625  
Phone: (609) 292-4822



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Sincerely,



Angelina Scales, Secretary  
Board of Trustees  
Teachers' Pension and Annuity Fund

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c: DAG Amy Chung (ET)  
DAG Robert Garrison (ET)  
C. Chianese/M. Kusmierczyk/D. Dinkler (ET)  
Timothy Hamway |