



State of New Jersey

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

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State Treasurer

JOHN D. MEGARIOTIS
Acting Director

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

November 16, 2023

Sent via email to: [REDACTED]

GOLD, ALBANESE, BARLETTI, L.L.C
Walter P. Laufenberg, Esq.

[REDACTED]

Re: John Malecki
PERS [REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Laufenberg,

I am writing in reference to the decision of the Board of Trustees ("Board") of the Public Employees' Retirement System (PERS) denying the application for Deferred retirement benefits filed by your client, John Malecki. At its meeting on August 16, 2023, the Board found that Mr. Malecki was ineligible for Deferred retirement benefits because of his removal from employment on charges of misconduct or delinquency directly related to his employment in accordance with N.J.S.A. 43:15A-38. You filed a timely appeal on behalf of Mr. Malecki, by way of letter dated August 24, 2023, and submitted an additional letter, dated October 17, 2023. At its meeting of October 18, 2023, the Board considered your written submissions, along with the relevant case law governing the PERS and denied Mr. Malecki's request for Deferred retirement benefits. Finding no genuine issue of material fact in dispute, the Board also denied your request for an administrative hearing. The Findings of Fact and Conclusions of Law, as outlined below, were presented to and approved by the Board at its November 15, 2023, meeting.

FINDINGS OF FACT

The Board made the following factual findings.

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The record before the Board establishes that Mr. Malecki was enrolled in the PERS on May 1, 1980, as a result of his employment as a Traffic Analyst with the Somerset County - Finance Office (Somerset). Mr. Malecki remained with Somerset, holding various titles, the last of which was supervisor of Traffic Safety until his resignation on September 8, 1999.

In Mr. Malecki's supervisory position, he ordered items intended for his personal use from a vendor conducting business with Somerset. Mr. Malecki also created false invoices intended to hide the nature of his purchases and Somerset unknowingly paid for these personal items. Somerset revealed the total amount of the fraudulent procurement was \$7,720.72. On July 15, 1999, Mr. Malecki was indicted on the following charges:

- Count 1 - Official Misconduct - Second Degree
- Count 2 - Theft - Third Degree

Mr. Malecki resigned from his position with Somerset on September 8, 1999. On the following day, September 9, 1999, Mr. Malecki pleaded guilty to Theft in the Third degree, and a February 4, 2000, plea agreement resulted in the following sentence:

- Two years of probation;
- Restitution of \$7,720.72;
- \$1,755.00 in penalties and fines;
- 100 hours of Community Service; and,
- Forfeiture of public employment.

On May 17, 2013, Mr. Malecki's criminal record was expunged. However, on May 5, 2023, at the request of the Attorney General's Office, the Superior Court of New Jersey, Law Division-Criminal Part, Somerset County ordered the expunged record unsealed for the purpose of having the Board review the records to determine whether Mr. Malecki was entitled to Deferred retirement benefits.

At the time of Mr. Malecki's removal from employment, he was 43 years of age and his membership account reflected a total of 19 years and 1 month of PERS service credit. Therefore, at that time, the only benefit for which Mr. Malecki could apply was a Deferred retirement. Mr.

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Malecki filed a retirement application on August 14, 2021, requesting Deferred retirement benefits effective September 1, 2021.

At its meeting on August 16, 2023, the Board considered Mr. Malecki's eligibility for Deferred retirement benefits. After careful review of the record, the Board determined that Mr. Malecki's resignation, as part of an agreed plea agreement requiring him to forfeit public employment was a forced resignation, and thus a removal from employment, on charges of misconduct or delinquency. See Widdis v. Public Employee [sic] Retirement System, 384 N.J. Super. 70, 80 (App. Div. 1990). Thus, the Board found that because Mr. Malecki was removed for cause on charges of misconduct or delinquency directly related to his employment, he is not eligible for a Deferred retirement, and denied his retirement application under the provisions of N.J.S.A. 43:15A-38. See also In re Hess, 422 N.J. Super. 27 (App. Div. 2011).

You filed a timely appeal of that decision on Mr. Malecki's behalf. At its October 18, 2023 meeting, the Board considered your written submissions. After careful consideration, the Board affirmed its previous decision, finding Mr. Malecki ineligible for Deferred retirement benefits. Further, finding no genuine issue of material fact in dispute, the Board denied an administrative hearing and directed the undersigned to draft detailed Findings of Fact and Conclusions of Law for review at its November 15, 2023 meeting.

CONCLUSIONS OF LAW

The Board made the following conclusions of law.

PERS members with 10 or more years of service are eligible to file for Deferred retirement benefits upon reaching service retirement age. However, N.J.S.A. 43:15A-38 states, in pertinent part:

Should a member of the Public Employees' Retirement System, after having completed 10 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement

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age, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive:

- (a) The payments provided for in section 41b of this act,¹ if he so qualifies under said section, or;
- (b) A deferred retirement allowance, beginning at the retirement age...

[(Emphasis added).]

Based on the plain language of the statute as applied to the facts in the record, the Board determined that Mr. Malecki was removed for cause on grounds of misconduct or delinquency directly related to his employment and is not eligible for Deferred retirement benefits. See In re Hess, 422 N.J. Super. 27 (App. Div. 2011) (holding that ineligibility for Deferred retirement occurs when a member is terminated for misconduct or delinquency related to the employment). The Board determined that Mr. Malecki's resignation, as part of an agreed plea agreement requiring him to forfeit public employment was a forced resignation, and thus a removal from employment, on charges of misconduct or delinquency. See Widdis, 384 N.J. Super. at 80.

As noted above, at the time of Mr. Malecki's dismissal from employment, he was 43 years of age and his membership account reflected a total of 19 years and 1 month of PERS service credit. Therefore, at that time, the only benefit he could file for was a Deferred retirement. Consequently, the Board found that because Mr. Malecki was removed for cause on charges of misconduct or delinquency directly related to his employment, he is not eligible for a Deferred retirement, and the Board denied his retirement application under the provisions of N.J.S.A. 43:15A-38.

In your appeal, you assert that Mr. Malecki did not apply for pretrial intervention; pleaded guilty to one count of third-degree theft on September 9, 1999; paid the entire amount of restitution

¹ N.J.S.A. 43:15A-41

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calculated at \$7,720.22, it was his first offense and Mr. Malecki has remained crime-free since; and that Mr. Malecki was sufficiently punished via restitution and probation. Nevertheless, none of those representations reverses Mr. Malecki's removal from employment on charges of misconduct or delinquency, which were clearly related to his employment. You further propose the Board consider applying N.J.S.A. 43:1-3, rather than the Deferred statute, in regard to Mr. Malecki's application for Deferred retirement benefits. However, based on the facts herein, N.J.S.A. 43:1-3 is not the controlling statute and thus, the statutory balancing test is not applicable here.

As noted above, the Board has reviewed all relevant documentation and written submissions, critically the February 4, 2000 plea agreement which included a forfeiture of public employment provides the necessary factual foundation for the Board's determination. The Board was able to reach its findings of fact and conclusions of law on the basis of the PERS enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the PERS.

Mr. Malecki is eligible to withdraw his accumulated pension contributions remitted during active membership, and may request an *Application for Withdrawal* by writing to Robin Willever, Supervisor, Loan/Withdrawal Section at the Division, at the address above. **Nonetheless, Mr. Malecki is cautioned against filing the *Application for Withdrawal* if he intends to appeal the Board's determination. Withdrawal terminates all rights and privileges of membership.**

You have the right, if you wish, to appeal this final administrative determination 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

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Attention: 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 S. Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-3/JSI
C: J. Ehrmann (ET) R. Willever (ET)