



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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November 9, 2017

METS SCHIRO McGOVERN & PARIS, LLP
Matthew T. Clark, Esquire



RE: Thomas Swepson



FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Clark:

I am writing in reference to the denial by the Board of Trustees of the Public Employees' Retirement System ("PERS") of your client Thomas Swepson's request to change the option selection on his retirement allowance after his January 1, 2017 retirement became due and payable.

The PERS Board reviewed and denied this request at its July 19, 2017 meeting¹. By letter dated September 1, 2017 you appealed the Board's decision, thereby requesting a hearing in the Office of Administrative Law, which was denied at the Board's October 18, 2017 meeting. Findings of Fact and Conclusions of Law, as outlined below, were presented to and approved by the PERS Board at its meeting on November 8, 2017.

The PERS Board has reviewed the written submissions and the documentation accompanying your appeal and finds that based upon the facts presented in those documents,

¹ The Board was prepared to review the appeal at its meeting on June 21, 2017; however, the Board approved your request for a postponement until the July 19, 2017 meeting.

the statutes and regulations governing the PERS do not permit the PERS Board to change the option on Mr. Swepson's retirement allowance.

FINDINGS OF FACT

Thomas Swepson was enrolled in the PERS effective December 1, 1999 as a result of his permanent appointment with the New Jersey Turnpike Authority (formerly known as New Jersey Highway Authority). His PERS membership continued based on his employment at New Jersey Turnpike Authority through December 31, 2016.

Mr. Swepson submitted an *Application for Retirement Allowance* electronically via the Member Benefit Online System (MBOS) on October 15, 2015 for a Service retirement effective November 1, 2016 requesting Option A. The home address he provided on the application was 69 W 44th Street, Bayonne, NJ 07002. By letter dated October 15, 2015, the Division of Pensions and Benefits (Division) acknowledged the application and requested documentation necessary to continue with its processing.

On June 7, 2016, Mr. Swepson submitted a change to his *Application for Retirement Allowance* online through MBOS, wherein he amended his retirement date from November 1, 2016 to January 1, 2017. No other changes were made at this time. The Division acknowledged the amended application by letter dated June 8, 2016, the first sentence of which states:

We have received your amended retirement application with a retirement effective date of January 1, 2017 **under Option A**.
[Emphasis added].

The New Jersey Turnpike Authority's certifying officer completed an electronic *Certification of Service and Final Salary* on October 13, 2016 indicating that Mr. Swepson resigned effective December 31, 2016. A *Quotation of Retirement Benefits* dated October 14, 2016 was issued to Mr. Swepson which provided a summary of his retirement, indicating the retirement option he had selected in bold font, as Option A. The Quotation stated:

Once you retire, **you cannot change your payment method option**. If you choose payment method options A, B, C, D, 2, 3, or 4, **under no circumstances can you change your beneficiary selection** once you retire, even if your beneficiary dies before you. You have the right to withdraw, cancel, or change your application for retirement at any time before the later of 30 days after your retirement date or 30 days after the Board of Trustees approves your retirement. [Emphasis in the original].

At its meeting of October 19, 2016, the PERS Board approved Thomas Swepson's Service retirement effective January 1, 2017, under Option A, in accordance with the selection indicated on both of his *Applications for Retirement Allowance*. The following information was included in the letter:

"In accordance with law, you have until thirty days after (A) the effective date of your retirement, or (B) the date your retirement was approved by the Board of Trustees, whichever is the later date, to make any changes to your retirement."

On January 27, 2017, the Division sent Mr. Swepson a confirmation letter providing a summary of benefits payable under his Service retirement, effective January 1, 2017, under his selection of Option A. Mr. Swepson contacted the Division by phone on February 6, 2017, and spoke to a counselor who advised him that he had had only thirty days or until January 31, 2017 to make any changes to his retirement option. Thereafter, on February 21, 2017, the Division received a *Change of Retirement Option Only* form completed by Mr. Swepson on February 6, 2017 noting that he wanted to change his option selection from A to D. The form explicitly states, "I understand that once my retirement is due and payable, no further change in option will be permitted." Included with the form was a letter authored by Mr. Swepson dated February 10, 2017 in which he inquired whether anything could be done to change his retirement option. Further, he stated that:

"I received my first check and deposited it into my account but after calculating my bills, I noticed that this was the wrong option for me. I just need to change this option (A) to option (D). Having thousands of employees, I'm sure I am not the first or last to make this mistake."

By letter dated February 22, 2017, Mr. Swepson was informed by the Retirement Bureau that his February 6, 2017 request was denied in accordance with N.J.A.C. 17:3-6.2² because it was submitted beyond the requisite time frame to make a change. The letter also informed Mr. Swepson of his appeal rights. You notified the PERS Board Secretary by letter dated April 7, 2017, that you represented Thomas Swepson and that the letter served as an appeal of the Division's administrative determination of February 22, 2017 denying Mr. Swepson's request to change his retirement option.

On May 9, 2017, you were notified that the PERS Board would consider Mr. Swepson's request to change his retirement option from Option A to Option D at its meeting on June 21, 2017. The Board postponed the matter until the July 19, 2017 meeting at your request so that Mr. Swepson could be in attendance.

On July 19, 2017, the Board considered your April 7, 2017 letter as well as your statements and the statements of Mr. Swepson regarding his request to change from Option A to Option D. After careful consideration of the record, the Board denied Mr. Swepson's request to change his option selection. The Board relied upon N.J.A.C. 17:2-6.1(c), N.J.A.C. 17:2-6.2 and N.J.A.C. 17:2-6.3(a).

As mentioned above, five³ written notices were issued to Mr. Swepson which confirmed the retirement option (Option A) that he selected, two of which explicitly stated that he had only 30 days after his retirement date or the Board approval date (whichever is the later) to make any

² N.J.A.C. 17:2-6.2 states: A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later.

³ The five written notices include: October 15, 2015 letter confirming receipt of Thomas Swepson's retirement application; June 8, 2016 letter confirming receipt of Mr. Swepson's amended application; October 13, 2016 *Quotation of Retirement Benefits* for Thomas Swepson; October 19, 2016 Board Approval Letter and January 27, 2017 Summary of Retirement Benefits.

changes. All of these notices were mailed to 69 W 44th Street, Bayonne, NJ 07002, the address he provided on his original retirement application.

In your appeal, you contend that Mr. Swepson communicated his desire to select Option D and that he completed and received an Estimate of Retirement Benefits⁴ through the Division's Member Benefits Online System (MBOS). Estimates are generated for members' use in planning; the fact that a member may seek an estimate based on a particular option does not communicate to the Division that the member has chosen that option. The estimates that members prepare online through MBOS are not scanned into any member's permanent file nor are they submitted to the Division. You further claim that Mr. Swepson made his desire to select Option D known to the Division. However, prior to the date of his *Change of Retirement Option Only* form, the Division never received any type of communication indicating that he wished to select Option D. Lastly, you contend that Mr. Swepson received incorrect information, based on the fact that he received 2 retirement dates. As stated previously, Mr. Swepson changed his retirement date from November 1, 2016 to January 1, 2017. The Division simply confirmed that the change was made; it did not provide incorrect information.

On September 1, 2017 you appealed the Board's July 20, 2017 decision and requested a hearing in the Office of Administrative Law. You contend that the matter must proceed as a contested case under N.J.S.A. 53:14B-2 and N.J.A.C. 1:1-3.1(a). However, because the factual record in this matter is clear and a hearing therefore unnecessary, the Board denied your request for a hearing in the OAL and directed the Board Secretary to issue a Final Administrative Determination. This Final Administrative Determination serves as formal notice of the Board's denial.

⁴ March 18, 2014.

CONCLUSIONS OF LAW

The Board cannot grant Thomas Swepson's request to change the payment option on his retirement allowance from Option A to Option D because doing so would violate the provisions of N.J.A.C. 17:2-6.1(c), N.J.A.C. 17:2-6.2 and N.J.A.C. 17:2-6.3(a).

N.J.A.C. 17:2-6.1(c) states in pertinent part:

A member shall, on the retirement application, select one of nine ways (options) to receive retirement benefits. Each option provides the member with a lifetime monthly retirement benefit. Once a retirement benefit becomes due and payable as defined by N.J.A.C. 17:2-6.2, the option cannot be changed. Except under the Maximum Option and Option 1, once a member designates a beneficiary, that beneficiary cannot be changed. P.L. 2001, c.120 provides for additional payment options that allow the member to choose an actuarially reduced retirement allowance in order to provide a beneficiary with an allowance equivalent to the full amount, three-quarters, one-half or one-quarter of the reduced allowance. If the beneficiary dies before the retiree, the retiree's allowance will increase to the maximum amount. These additional payment options shall be known as Options A, B, C, and D as defined below. The options, as established by N.J.S.A. 43:15A-50, include the following:

(Emphasis added)

...

9. Option D provides, upon the member's death, a lifetime monthly retirement allowance equal to 25 percent of the member's monthly retirement allowance to a beneficiary. If the member's beneficiary predeceases the member, the member's retirement allowance shall increase to the Maximum Option.

In addition, N.J.A.C. 17:2-6.2 states:

A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later.

N.J.A.C. 17:2-6.3 states in pertinent part:

- a) Except as provided by N.J.A.C. 17:2-6.7, a member shall have the right to withdraw, cancel or change an application for retirement at any time before the member's retirement allowance becomes due

and payable by sending a written request signed by the member.
Thereafter, the retirement shall stand as approved by the Board.
(Emphasis added)

At its meeting on October 19, 2016, the Board approved Mr. Swepson's January 1, 2017 Service retirement under Option A. Therefore, in accordance with N.J.A.C. 17:2-6.2, his retirement became due and payable on January 31, 2017. He had until January 31, 2017 to make any changes to his retirement option selection in accordance with N.J.A.C. 17:2-6.3(a). Thus, in accordance with N.J.A.C. 17:2-6.1(c) the Board denied his request for an option change from Option A to Option D. The record indicates that, unfortunately, Mr. Swepson's request to change his option was dated February 6, 2017 and was submitted along with a letter dated February 10, 2017, after the maximum time allowed for changes had passed, and was not received by the Division until 15 days later, on February 21, 2017.

The Board finds that the record does not support your allegation that Mr. Swepson received incomplete information as to which pension option he had selected. As previously noted, Mr. Swepson received 5 notifications, from October 15, 2015 through January 27, 2017, indicating his Option A selection and he was informed that any change had to be made within the thirty days from his retirement date or Board approval date, whichever is later.

Also, the Board finds that the record does not support your contention that Mr. Swepson communicated his desire to select option D and that the Division provided him with incorrect information. An e-mail exchange you reference in your April 7, 2017 correspondence was between two parties, neither of whom was a Division employee, regarding the date of Mr. Swepson's retirement. In addition, as previously stated, Mr. Swepson was not approved for two different retirement dates as you argue, but in fact received standard acknowledgment letters in response to his original and amended retirement applications; he was ultimately approved for Service retirement effective January 1, 2017. Further, prior to the receipt of his *Change of*

Retirement Option Only form, the Division never received notification from Mr. Swepson that he wished to select Option D. Option A was designated on his *Application for Retirement Allowance* and, as demonstrated above, he received several written notifications indicating his selection of Option A before he received his first retirement check. Additionally, in his letter dated February 10, 2017, Mr. Swepson stated that he had made a mistake in making his selection.

As set forth above, the Board rejects certain factual allegations made on Mr. Swepson's behalf. Given Mr. Swepson's written admission that he had not timely chosen Option D, as well as the five written notices that he had received before January 31, 2017, it is indisputable that Mr. Swepson received multiple notices that he had in fact chosen Option A, that he could change that option choice no later than 30 days after his January 1, 2017 retirement, and that his request to change to Option D was made more than 30 days past his retirement date.

As noted above, the PERS Board has reviewed all written submissions. However, the Board cannot grant the relief you seek. The statutory and regulatory provisions cited above are clear and unambiguous. The law mandates that changes to retirement applications must be made within 30 days of the retirement date or of the Board approval date, whichever is later, in this case, no later than January 31, 2017. Because Mr. Swepson's request was made later than the last permissible date, the Board is obligated to deny it.

Because the factual record in this matter has been clearly established by documents in the pension file, correspondence and your appearance before the PERS Board, the Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's regulations and 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.

Matthew T. Clark, Esq.
Re: Thomas Swepson
November 9, 2017
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You have the right 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.

Sincerely,

A handwritten signature in black ink that reads "Mary Ellen Rathbun". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees' Retirement System

G-4/MER

C: C. Chianese (ET); C. Law (ET)
Thomas Swepson
Robert Kelly, (DAG) (ET); Amy Chung, DAG (ET)