



PHILIP D. MURPHY  
*Governor*

State of New Jersey  
DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
P. O. Box 295

ELIZABETH MAHER MUOIO  
*State Treasurer*

SHEILA Y. OLIVER  
*Lt. Governor*

TRENTON, NEW JERSEY 08625-0295  
Telephone (609) 292-7524 / Facsimile (609) 777-1779  
TRS 711 (609) 292-6683  
[WWW.NJ.GOV/TREASURY/PENSIONS](http://WWW.NJ.GOV/TREASURY/PENSIONS)

JOHN D. MEGARIOTIS  
*Acting Director*

February 26, 2019

[REDACTED]  
Mary D'Arcy Bittner, Esq.

RE: [REDACTED]

Dear Ms. Bittner:

I am writing in reference to the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) regarding your appeal of the Board's September 19, 2018, decision, denying your request to enroll in the PERS in accord with N.J.S.A. 43:15A-7.2 and N.J.S.A. 43:15C-1 et seq. At its meeting on December 12, 2018, the Board determined that there are no material facts in dispute, denied your request for a hearing 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 PERS Board at its February 26, 2019 meeting.

The Board has reviewed your written submissions, considered your testimony, the testimony of your witness, Mr. Christopher Fox, and all relevant documentation, and finds that the statutes, regulations and relevant case law governing the PERS do not permit your participation in the PERS as of September 2013.

#### **FINDINGS OF FACT**

The facts in this matter are essentially undisputed. In July 2007, the New Jersey Legislature passed L. 2007, c. 92 (Chapter 92), implementing the recommendations of the Joint Legislative Committee on Public Employee Benefits Reform. These reforms included removing

professional service providers from the PERS, and enrolling newly elected or appointed officials in the Defined Contribution Retirement Program (DCRP). N.J.S.A. 43:15C-1 et seq.

The Board found that after a two-year lapse in service in which your PERS membership expired, you were appointed by the Wildwood governing body to the position of Municipal Court Judge on or about January 1, 2013. Wildwood identified the position of Municipal Court Judge as DCRP eligible, and as a result, you were enrolled in that system rather than PERS. See Wildwood Ordinance §2-47.1(f). While in that position, you asserted City officials approached you and sought to retain your legal services as Wildwood Municipal Attorney. In May 2013, Wildwood's governing body approved Resolution #199-5-13, awarding you a professional services contract, and appointed you as Municipal Attorney. A contract for your legal services was approved by the governing body and executed on or about May 22, 2013. The contract was for a term of one year, automatically renewing each year.

In September 2013, Wildwood issued a "Payroll Status Change Report," effective September 3, 2013, designating you as Municipal Attorney. The Board noted that, prior to your appointment as Municipal Attorney, Wildwood had designated this position as DCRP. Wildwood's ordinance specifically states that "[P]ursuant to N.J.S. 43:15C-2, the following positions (City Solicitor) are deemed to be eligible for and shall participate in the Defined Contribution Retirement Program...." Wildwood Ordinance §2-47.1. The Board also noted that Wildwood Ordinance §1A-7.4 sets forth that the Municipal Attorney "shall be appointed by the board of commissioners...."

In December 2015, Wildwood's governing body approved Resolution #458-12-15, authorizing a four-year employment agreement with you. As a result, both you and Wildwood began contributing to your DCRP account and have done so through the present.

#### **CONCLUSIONS OF LAW**

This Board found that this matter is controlled by Chapter 92, specifically, N.J.S.A. 43:15C-2(3) which states, in pertinent part:

A person who commences service on or after the effective date [July 1, 2007] of this section in an employment, office or position in a political subdivision of the State...pursuant to an appointment by an elected public official or elected governing body, that requires the specific consent or approval of the elected governing body of the political subdivision that is substantially similar in nature to the advice and consent of the Senate for appointments by the Governor of the State as that similarity is determined by the elected governing body and set forth in an adopted ordinance or resolution, pursuant to guidelines or policy that shall be established by the Local Finance Board in the Department of Community Affairs or the Department of Education, as appropriate to the elected governing body.

The Board also noted that, in enacting Chapter 92, the Legislature delegated authority to the Local Finance Board to establish “guidelines or policy” to determine the types of appointment requiring DCRP enrollment. Toward that end, the Division of Local Government Services issued Local Finance Notice 2008-10 (the “LFN”), entitled “Guidance Concerning the ‘Substantially Similar’ Requirement of the Defined Contribution Program (N.J.S.A. 43:15C-2).” The LFN provides local governments with guidance on identifying positions that qualify as DCRP. The LFN states that “positions that involve executive decision-making or are senior management of the organization whose hiring or appointment requires approval of a governing body are DCRP positions.” The LFN also notes that, in order to

“ensure consistency in general treatment of individuals, appointments of this nature made by municipal managers under the council-manager form of the Optional Municipal Charter Law (N.J.S.A. 40:69A-98) (regardless of title), the municipal manager form of government at N.J.S.A. 40:79-1 et seq. (1923 Manager Act), and the county manager form of county government at N.J.S.A. 40:41A-45 et seq. are deemed to be those of the elected governing body. Variations on these themes must be treated similarly.

The LFN also provides guidance on the types of positions requiring DCRP membership. They include:

Positions with principal operating responsibility of a government function(s), commonly called “department heads” or similar title, that are filled by action of the governing body and who directly report to an elected official(s) or chief administrative officer.

Legal counsel to the organization regardless of title, i.e. municipal attorney, counsel, director of law, corporation counsel, solicitor, county counsel, etc., (N.J.S.A. 40A:9-139, and 40A:9-43 or similar).

The Board noted your arguments that Wildwood's organization of government controls whether individuals who serve it are eligible for PERS, rather than DCRP. Specifically, you assert that the LFN incorrectly interprets Chapter 92, because it does not carve out an exception for Municipal Attorneys retained or employed by Walsh Act communities. The Board finds no such legislative intention to treat Municipal Attorneys differently, and neither did the LFN guidance. You also maintain that you were hired by Wildwood Commissioner Anthony Leonetti in September 2013, rather than by the governing body as required by Wildwood ordinance, and therefore your service is covered under the PERS. However, the Board finds that Chapter 92, the LFN guidance, and the Wildwood Ordinance address these arguments in full, and therefore you are not eligible for PERS enrollment effective September 2013.

After careful consideration of your presentation, the documentation in the record, and the statutes and regulations governing the PERS, the Board denied your request to retroactively enroll in the PERS as of September 2013, finding that you are not eligible for PERS enrollment while serving as Municipal Attorney.

As noted above, the Board has determined that this matter does not entail any disputed questions of fact, and the Board was able to reach its findings of fact and conclusions of law 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. Ignatowicz". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Jeff S. Ignatowicz, Secretary  
Board of Trustees  
Public Employees' Retirement System

G-10/JSI

c: L. Barnett (ET); E. Wade(ET)

Susan Plaza, Wildwood City  
[REDACTED]