

To: New Jersey Law Revision Commission
From: Chris Mrakovcic
Re: Re-Enrollment in PERS as a Critical Need Employee
(*Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*, 2019 WL 2289209 (App. Div. 2019))
Date: March 08, 2021

MEMORANDUM

Executive Summary

In New Jersey, most State employees are eligible for membership in the Public Employees' Retirement System (PERS), which provides pension benefits. N.J.S. 43:15A-57.2(a) states that if a former member of PERS – who is retired for any reason except disability – is rehired in a PERS-covered role, the rehired employee's pension payments must be canceled until the employee again retires.¹ The statute sets forth several exceptions, including an exclusion for employees rehired by the State Department of Education or a board of education in a position of "critical need" as determined by either the State Commissioner of Education or the superintendent of the school district.²

In *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*, the Appellate Division considered whether a retired individual who begins receiving pension benefits may continue receiving those benefits while continuing in the same position or in any other position requiring PERS membership.³

Statute Considered

N.J.S. 43:15A-57.2 subsection a. provides, in pertinent part, that

if a former member of the State Employees' Retirement System or the retirement system, who has been granted a retirement allowance for any cause other than disability, becomes employed again in a position which makes him eligible to be a member of the retirement system, his retirement allowance and the right to any death benefit as a result of his former membership, shall be canceled until he again retires.⁴

N.J.S. 43:15A-57.2 subsection c. provides:

The cancellation, reenrollment, and additional retirement allowance provisions of subsection a. and the compensation limitations of subsection b. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed **by the State Department of Education in a position of critical need as determined by the State Commissioner of Education**, or becomes employed **by a board of education in a position of critical need as determined by the superintendent of the district**

¹ N.J.S. 43:15A-57.2 subsection a.

² N.J.S. 43:15A-57.2 subsection c.

³ *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*, 2019 WL 2289209 (App. Div. 2019).

⁴ N.J.S. 43:15A-57.2 subsection a.

on a contractual basis for a term of not more than one year; except that the cancellation, reenrollment, and additional retirement allowance provisions and the compensation limitations shall apply if the former member becomes employed within 120 days of retirement in a position with the employer from which the member retired. Nothing herein shall preclude a former member so reemployed by a board of education from renewing a contract for one additional year, provided that the total period of employment with any individual board of education does not exceed a two-year period. [emphasis added]⁵

Background

Zachary Yamba, the Plaintiff in *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*, retired as President of Essex County College (ECC) in April 2010 and began collecting a pension of \$16,459.80 per month.⁶

In April 2016, the Plaintiff was rehired by ECC as its Acting President.⁷ As part of his re-employment, the Division of Pension and Benefits notified him that he must re-enroll in PERS pursuant to N.J.S. 43:15A-57.2(c).⁸ The plaintiff argued that he was statutorily exempt from doing so since his rehiring filled a critical need position.⁹ The Board of Trustees rejected Plaintiff's argument, and the plaintiff appealed.¹⁰

Analysis

The Plaintiff argued before the Appellate Division that he was statutorily exempt from re-enrollment.¹¹ He contended that "only ECC can determine his salary and that the Board's decision penalizes him because he is a qualified and experienced retiree."¹² In addition, he maintained that his return to employment as a non-teacher filled a "critical need" position at ECC that exempted him from re-enrolling in PERS.¹³

The Appellate Division disagreed, explaining that in

2001, the Legislature amended the PERS re-enrollment statute "to encourage PERS retirees to reenter public service **as teaching staff members in public institutions of higher education in this State.**" Sponsor's Statement to A. 988 (L. 2001, c. 253). Non-teacher staff members at colleges are not exempt from PERS re-enrollment. The purpose of the Legislative amendments was to "provide significant contributions to higher education" by incentivizing retired teachers to return to teaching positions. Ibid. Moreover, the amendment to N.J.S.A. 43:15A-57.2(c)

⁵ N.J.S. 43:15A-57.2 subsection c.

⁶ *Yamba*, 2019 WL 2289209 at *1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Yamba*, 2019 WL 2289209 at *1.

¹³ *Id.*

“allows the Department of Education and school districts to address shortages of certain qualified professional personnel through employment of [Teachers' Pension and Annuity Fund (TPAF)] and PERS retirees without re-enrollment in their retirement systems.” Sponsor's Statement to A. 3848 (L. 2001, c. 355).¹⁴

The Court found that neither of the “critical need” exceptions contained in N.J.S. 43:15A-57.2 subsection c. applied to Yamba.¹⁵ He was not “employed by the State Department of Education in a position of critical need as determined by the State Commissioner of Education” nor was he “employed by a board of education in a position of critical need as determined by the superintendent of the district on a contractual basis for a term of not more than one year.” The Court added that “his position as Acting President of ECC had not been determined to be one of ‘critical need’ as that term is used in the PERS re-enrollment statute.”¹⁶

The term “critical need” is not defined in N.J.S. 43:15A-57.2 or elsewhere in Title 43.

The Court concluded that “once an individual begins receiving pension benefits...that person may not continue to receive those benefits ‘while continuing in employment’ in the same position or in any other position requiring PERS membership.”¹⁷ It added that the purpose of the statute is to “prevent professionals from manipulating the pension system by working part-time for governmental agencies while receiving a public pension.”¹⁸

Conclusion

As written, the PERS re-enrollment statute makes no distinction between teaching and non-teaching roles. Nevertheless, the holding in *Yamba v. Bd. of Tr., Pub. Emp. 's Ret. Sys.* creates ambiguity over what constitutes a position of “critical need” for purposes of being exempt from the statutory requirements set forth in the PERS statutes.

Staff seeks authorization to conduct additional research and outreach to determine if it would be useful to amend N.J.S. 43:15A-57.2(c) to clarify whether or not the critical need exception is limited to teaching roles as held by the Appellate Division in *Yamba v. Bd. of Tr., Pub. Emp. 's Ret. Sys.*

¹⁴ *Id.* at *2

¹⁵ *Id.*

¹⁶ *Id.* at *1.

¹⁷ *Id.* (citing *Stevens v. Bd. of Trs., Pub. Emps. ' Ret. Sys.*, 309 N.J. Super 300, 303 (App. Div. 1998) (quoting *Vliet v. Bd. of Trs., Pub. Emps. ' Ret. Sys.*, 156 N.J. Super. 83, 89 (App. Div. 1978)).

¹⁸ *Id.*