

**To: New Jersey Law Revision Commission**  
**From: Whitney Schlimbach, Counsel**  
**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: January 10, 2021**

## MEMORANDUM

### Project Summary<sup>1</sup>

In New Jersey, the Public Employees' Retirement System Act (the PERS Act) governs enrollment, membership, termination, and disbursement of retirement pensions for eligible State employees.<sup>2</sup> Under N.J.S. 43:15A-57.2 (the Re-Enrollment Statute), if certain retired members are rehired in a PERS-eligible role, the member's pension payments must be canceled and the member re-enrolled in the PERS until the member again retires, with certain relevant exceptions.<sup>3</sup>

In *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*,<sup>4</sup> the Appellate Division determined that a retired county college president, who was rehired in the PERS-eligible position of "Acting President," was not permitted to continue receiving his pension payments under the "critical need" exception to the Re-Enrollment Statute.<sup>5</sup> The Commission, during its March 2021 meeting, authorized Staff to engage in additional research to determine whether non-teaching positions fell within the "critical need" exception to re-enrollment in the PERS.<sup>6</sup>

A further examination of the statute, its legislative history, administrative decisions, and the common law did not provide any indication that the Legislature intended the term "critical need" to be expanded beyond the categories articulated in the statute. Additionally, although the Court in *Yamba* analyzed the legislative history of the statute, it ultimately held that the appellant was not exempted from re-enrollment under the plain language of the "critical need" exception.<sup>7</sup>

During the course of this review, however, it became clear that the structure of the "teaching role" exception to re-enrollment, which provides a re-enrollment exception for teaching staff positions at public institutions of higher education, may benefit from modification.<sup>8</sup>

### Relevant Statute

The statute in issue is N.J.S. 43:15A-57.2, and it provides, in relevant part:

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<sup>1</sup> Preliminary work on this project was conducted by Christopher Mrakovic, former Legislative Law Clerk, during his tenure at the New Jersey Law Rev. Comm'n.

<sup>2</sup> N.J.S. 43:15A-6 through -161.

<sup>3</sup> N.J.S. 43:15A-57.2 ("Re-enrollment of former member employed after receiving retirement allowance").

<sup>4</sup> 2019 WL 2289209 (N.J. Super. Ct. App. Div. May 29, 2019).

<sup>5</sup> *Id.* at \*1 - \*2.

<sup>6</sup> N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at \*10 -\*11, Mar. 18, 2021, www.njlrc.org (last visited Jan. 7, 2022).

<sup>7</sup> *Id.* at \*1.

<sup>8</sup> N.J.S. 43:15A-57.2b.(2).

a. Except as provided in subsections b., c., and d. of this section, 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.

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b. The cancellation, re-enrollment, and additional retirement allowance provisions of subsection a. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed again by: (1) an employer or employers in a position or positions for which the aggregate compensation does not exceed \$15,000 per year; or (2) if the compensation exceeds \$10,000 per year, by an employer that is a public institution of higher education as defined in N.J.S.18A:62-1 in a teaching staff position.

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c. 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 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. . . .

## **Background**

In *Yamba v. Bd. of Tr., Pub. Emp.'s Ret. Sys.*,<sup>9</sup> the Appellate Division heard Dr. Zachary Yamba's appeal from the final decision of the Board of Trustees of the Public Employees' Retirement System (the PERS Board).<sup>10</sup> After retiring in 2010, the appellant began collecting pension payments and, in April 2016, he was rehired by Essex County College as its Acting President.<sup>11</sup>

As part of his re-employment, the Division of Pension and Benefits notified appellant that he must re-enroll in the PERS pursuant to N.J.S. 43:15A-57.2.<sup>12</sup> The appellant argued in front of

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<sup>9</sup> 2019 WL 2289209 (N.J. Super. Ct. App. Div. May 29, 2019).

<sup>10</sup> *Id.*, at \*1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

the PERS Board that he was statutorily exempt from doing so because his rehiring filled a “critical need” position.<sup>13</sup> The PERS Board rejected this argument, and he appealed.<sup>14</sup>

### Analysis

The Appellate Division in *Yamba* affirmed the final decision of the PERS Board, finding that the appellant did not qualify for an exception to re-enrollment under N.J.S. 43:15A-57.2.<sup>15</sup> The Court cited the language in the “critical need” exception and concluded that the appellant did not qualify because “[n]either the State Department of Education nor a board of education hired him; and 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.”<sup>16</sup>

Therefore, the Appellate Division held that the appellant was required to re-enroll in the PERS when he was re-hired in a PERS-covered position that did not qualify under the plain language of the “critical need” exception to re-enrollment in N.J.S. 43:15A-57.2c.<sup>17</sup>

### Legislative History and Intent

As originally enacted, the PERS Re-Enrollment Statute did not provide for any exception to re-enrollment for a retired member who resumed work in a PERS-eligible position.<sup>18</sup> The statute has been amended five times since its enactment in 1966 to expand the categories of retirees who are exempt from re-enrolling in the PERS system.<sup>19</sup>

- *N.J.S. 43:15A-57.2c.: The “Critical Need” Exception*

Near the end of 2001, the Legislature enacted the “critical need” exception, excluding positions with the Department of Education or a board of education that were deemed “critical need” by either the Commissioner of Education or a board of education superintendent.<sup>20</sup> At the same time that the “critical need” exception was added to the PERS, a similar provision was enacted in the Teachers’ Pension and Annuity Fund Law (TPAF).<sup>21</sup>

According to the bill’s sponsors, the “critical need” exception “allows the Department of Education and school districts to address shortages of **certain qualified professional personnel** through employment of TPAF and PERS retirees without reenrollment in their retirement systems.”<sup>22</sup> Unlike the PERS “critical need” exception, the TPAF exception specified which

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at \*1 - \*2.

<sup>16</sup> *Id.*, at \*1.

<sup>17</sup> *Yamba*, 2019 WL 2289209, at \*2.

<sup>18</sup> Section 27 of P.L. 1966, c.217.

<sup>19</sup> L.1971, c. 213, § 45, eff. June 17, 1971; L.1997, c. 23, eff. Feb. 27, 1997; L.2001, c. 253, eff. Nov. 15, 2001; L.2001, c. 278, eff. Dec. 27, 2001; L.2001, c. 355, eff. Jan. 6, 2002; L.2011, c. 78, eff. June 28, 2011.

<sup>20</sup> L. 2001, c.355, eff. Jan. 6, 2002.

<sup>21</sup> *Id.*

<sup>22</sup> Sponsor’s Statement to A.B. 3848 and S.B. 2718, later codified as L.2001, c.355 (emphasis added).

“qualified professional personnel” were exempted from re-enrollment by specifying that retirees must be “certificated superintendents [or] administrators” hired in those same positions or in positions of “critical need.”<sup>23</sup>

The limitations contained in the parallel TPAF “critical need” exception and the Sponsor’s Statement explain that the exception was motivated by a need to incentivize the re-hiring of “qualified professional personnel.” This indicates that the Legislature acted deliberately in drafting the requirements of the PERS “critical need” exception to include only the positions articulated in the statute.

In light of the legislative intent to limit the “critical need” exception to its language and the *Yamba* Court’s reliance on the plain language of the statute to reach its holding, Staff recommends the Commission conclude work on the “critical need” exception contained in N.J.S. 43:15A-57.2c.

- *N.J.S. 43:15A-57.2b.(2): The “Teaching Role” Exception*

While researching the “critical need” exception, Staff identified a drafting issue in the “teaching role” exception, which excludes retirees earning more than \$10,000 per year who are employed “by a public institution of higher education . . . in a teaching staff position.”<sup>24</sup> When this exception was enacted in 2001, the Legislature had already enacted the “salary cap” exception, which exempted retirees whose re-employment paid them up to \$10,000 annually.<sup>25</sup>

Rather than create an additional subsection, the sponsors of the bill proposed adding the “teaching role” exception to the same subsection as the existing “salary cap” exception as follows:

b. The cancellation, re-enrollment, and additional retirement allowance provisions of subsection a. of this section shall not apply to a former member of the retirement system who, after having been granted a retirement allowance, becomes employed again by: (1) an employer in a position for which the compensation does not exceed \$10,000 per year; or (2) if the compensation exceeds \$10,000 per year, by an employer that is a public institution of higher education as defined in N.J.S.18A:62-1 in a teaching staff position. . . .<sup>26</sup>

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<sup>23</sup> N.J.S. 18A:66-53.2b.

<sup>24</sup> N.J.S. 42:15A-57.2b.(2).

<sup>25</sup> Sponsors Statement to A.B. 1604 and S.B. 1152, later codified as L. 1997, c.23.

<sup>26</sup> Sponsor’s Statement to A.B. 988 and S.B. 2249, later codified as L. 2001, c.253 (underlined portion is proposed amendment).

The “teaching role” exception became effective November 15, 2001, a little more than a month before the Legislature amended the “salary cap” exception to permit retirees to earn up to \$15,000 annually without re-enrolling in PERS.<sup>27</sup>

The Sponsor’s Statement to the bill enacting the “teaching role” exception explained that it permitted retirees to accept a qualifying teaching role “if the compensation is in excess of \$10,000 per year.”<sup>28</sup> The Statement also clarified that “[u]nder current law, the retired member may already accept such employment if the compensation does not exceed \$10,000 per year.”<sup>29</sup>

Based on the Statement, the “teaching role” exception appears to have been drafted as a continuation of the “salary cap” exception: members qualifying under the new “teaching role” exception do not re-enroll *even if* their annual salary exceeds the \$10,000 limit set forth in the “salary cap” exception.

However, the subsequent amendment increasing the yearly compensation in the “salary cap” exception severed the connection between these two clauses. As a result, the phrase “if the compensation exceeds \$10,000 per year” at the beginning of the “teaching role” exception is untethered to anything else in the re-enrollment statute.

- *N.J.A.C. 17:2-2.3(a)10*

In addition to reviewing the legislative history of N.J.S. 43:15A-57.2, Staff also considered N.J.A.C. 17:2-2.3, which sets forth categories of individuals who are not eligible to (re-)enroll in the PERS. The rule, entitled “Ineligible persons,” contains subsections that parallel the three statutory exceptions discussed herein, at N.J.A.C. 17:2-2.3(a)7 (“salary cap”), (a)10 (“teaching role”), and (a)11 (“critical need”).

Subsection (a)10, which parallels the statutory “teaching role” exception, excludes from PERS enrollment “[a]ny retired member . . . who returns to employment with an institution of higher education in a teaching position covered by the PERS pursuant to” N.J.S. 43:15A:57.2.<sup>30</sup> Although the language of the rule tracks the language of the statutory exception closely, the rule does not reference an annual salary.

According to the Division of Pension and Benefits summary accompanying the rule’s proposal, the amendment to the rule was proposed because of the enactment of “P.L. 2001, c.253 [which] permits PERS retirees to take employment in teaching positions at institutions of higher education without having to reenroll in the PERS regardless of income.”<sup>31</sup>

Although the Division’s interpretation of the statutory language is only informational, its understanding of the “teaching role” exception aligns with the legislative history of N.J.S.

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<sup>27</sup> L. 2001, c.278, eff. Dec. 27, 2001.

<sup>28</sup> Sponsors Statement to A.B. 988 and S.B. 2249, later codified as L.2001, c.253.

<sup>29</sup> *Id.*

<sup>30</sup> N.J.A.C. 17:2-2.3(a)10.

<sup>31</sup> Proposed Feb. 2, 2004 at 36 N.J.R. 619(a); Adopted at 36 N.J.R. 3066(a), eff. Jun. 21, 2004.

43:15A-57.2b, which indicates that qualifying teaching positions are excluded from re-enrollment regardless of annual salary, despite the statute's reference to a yearly compensation amount.

### **Administrative Decisions**

Staff undertook a review of decisions issued by the Office of Administrative Law related to the statutory exceptions to re-enrollment in N.J.S. 43:15A-57.2, but did not find any cases specifically addressing either the “critical need” or “teaching role” exceptions.

### **Conclusion**

Based on additional research and review of the statute at issue in *Yamba v. Bd. of Tr., Pub. Emp. 's Ret. Sys.*,<sup>32</sup> Staff recommends the Commission conclude work related to the “critical need” exception in N.J.S. 43:15A-57.2(c).

Staff seeks authorization to conduct additional research and outreach to determine whether the “teaching role” exception in N.J.S. 43:15A-57.2b.(2), would benefit from a modification eliminating the reference to yearly compensation.

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<sup>32</sup> 2019 WL 2289209 (N.J. Super. Ct. App. Div. May 29, 2019).