



In re Martorana

2007 | Cited 0 times | New Jersey Superior Court | July 12, 2007

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued May 1, 2007

Before Judges Skillman and Grall.

John Martorana appeals from a final order of the Board of Trustees of the Public Employees' Retirement System (the Board) requiring him to repay disability retirement benefits for years 2001 through 2004 in the amount of \$62,591.25. Because the Board's findings are supported by substantial credible evidence in the record and its determination is neither arbitrary nor capricious, we affirm.

There is no dispute that Martorana received a disability retirement allowance to which he was not entitled during the relevant years. His disqualification is based on his acceptance of new employment in a position that made him eligible to participate in the Public Employees' Retirement System (PERS). The disqualification is statutory. In pertinent part N.J.S.A. 43:15A-44 provides:

b. If a disability beneficiary 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.

Pursuant to N.J.S.A. 43:15A-7d, an employee working in a position included in PERS is ineligible for enrollment only if his or her "annual salary or remuneration is fixed at less than \$1,500.00."

After retiring on ordinary disability, Martorana accepted a new job in a position that made him eligible to participate in PERS and received annual remuneration far in excess of the \$1500 limit. On that basis he was not entitled to his retirement allowance while so employed. Martorana does not dispute that point. He contends that the Board's decision to require him to repay what he earned over a four-year period is arbitrary and inequitable.

John Martorana was born on July 9, 1945, and enrolled in PERS on November 1, 1978, after accepting employment as a Code Enforcement Officer and Housing Inspector for Voorhees Township. He held several other positions over the course of his career as an employee of Voorhees before he was awarded an ordinary disability retirement allowance effective September 23, 1994.

He was earning between \$38,000 and \$40,000 per year when he retired. His retirement allowance was



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approximately \$1600 per month.

At the time of his retirement, Martorana did not receive information notifying him that employment in a position covered by PERS would result in a termination of his benefits. On January 12, 2001, Martorana accepted part-time employment with the Borough of Avalon as a Recreation Supervisor. His employer did not reenroll him in PERS. Martorana did not contact the Division of Pensions and Benefits (Division) to inquire about the impact of his employment on his retirement allowance or to report his employment. He thought he could earn up to \$17,000 per year. Martorana's post-retirement earnings were as follows: 2001, \$14,162.75; 2002, \$17,211.25; 2003, \$16,424.52; 2004, \$14,792. According to the Division, accurate information about restrictions on post-retirement earnings of retirees was available upon request and included in mailings sent to retirees.

In 2004 the Division undertook efforts to detect retirees whose reemployment or earnings disqualified them from receiving benefits. At that time, the Division gained access to records of earnings kept by the Department of Labor. The records permitted the Division to identify disability retirees who violated restrictions on earnings and public employment. Martorana was one.

By letter dated December 22, 2004, the Division informed Martorana that it had reviewed his "post-retirement earnings history through the Department of Labor and determined" that his employment in a position that made him "eligible for enrollment in the PERS" required termination of his retirement allowance and repayment of benefits he had received since his reemployment. Martorana was given a date by which he must resign to avoid termination of his benefits. He was also informed that the Division would notify him of the amount owed for benefits previously paid. Martorana immediately resigned from his position with the Borough. The Division required him to repay \$75,573.41, an amount equivalent to disability retirement benefits he received for the period from January 1, 2001 through December 31, 2004.

Martorana filed a challenge with the Board. He asserted that his employer erroneously advised him that his position was not covered by PERS. Noting the Division's delay and that the amount sought by exceeded his earnings during the relevant period, Martorana contended that repayment would be a severe hardship. In response, the Board reduced its demand to \$62,591.25, an amount equivalent to Martorana's earnings during the same period.

Martorana requested a hearing, and the Board referred the case to the Office of Administrative Law. The Administrative Law Judge (ALJ) heard testimony from Martorana and an employee of the Division. The ALJ found that although information about restrictions on reemployment was available to Martorana, he neither inquired of nor was misinformed by the Division or the Board. The ALJ determined that Martorana failed to establish actual financial hardship warranting equitable relief beyond the reduction of the repayment amount already awarded. Accordingly, the ALJ recommended that the Board require Martorana to repay \$62,591.25 over a ten-year period. The Board adopted the ALJ's factual findings and legal conclusions.



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Martorana raises two issues on appeal:

I. THE COURT SHOULD REVERSE THE DECISION OF THE [BOARD] BECAUSE IT WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND NOT SUPPORTED BY THE EVIDENCE IN THE RECORD.

II. IT IS INEQUITABLE TO REQUIRE PETITIONER TO REPAY FOUR YEARS OF EARNINGS TO THE DIVISION OF PENSIONS.

The Board's decision "is supported by substantial credible evidence on the record as a whole." R. 2:11-3(e)(1)(D). For that reason, we affirm and provide only the following comment on the equities. This is not a case in which a retiree diligently sought to comply with the law and received and reasonably relied upon erroneous advice from the agency charged with administration of the law. See *Hemsey v. Bd. of Trs. of Police & Firemen's Ret. Sys.*, ___ N.J. Super. ___ (App. Div. 2007) (slip op.); *Indursky v. Bd. of Trs. of Pub. Employees' Ret. Sys.*, 137 N.J. Super. 335 (App. Div. 1975). Martorana, unlike the retirees in *Indursky* and *Hemsey*, made no effort to learn about the restrictions on his reemployment. A reasonable person in his position would question whether it is permissible to accept a new job in the public sector while receiving a retirement allowance based on total, permanent disability.

The decision of the Board is affirmed.

