



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295

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ELIZABETH MAHER MUOIO
State Treasurer

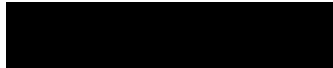
JOHN D. MEGARIOTIS
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

July 12, 2019

Zazzali, Fagella, Nowak, Kleinbaum & Friedman
Kaitlyn E. Dunphy, Esq.



RE: Carol Flynn



Dear Ms. Dunphy:

FINAL ADMINISTRATIVE DETERMINATION

I am writing in reference to the denial by the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) of your client, Carol Flynn's request to waive the amount of accrued interest on the outstanding balance of her pension loan as determined by the Division of Pensions and Benefits (Division). The TPAF Board initially reviewed and denied Ms. Flynn's request to waive the accrued interest assessed on her outstanding loan obligation at its March 7, 2019 meeting. On April 29, 2019, you appealed the Board's decision. You did not dispute that Ms. Flynn took the loan or that she owed interest as originally calculated on the loan. However, you dispute the accrued interest owed on the outstanding loan obligation. On June 6, 2019, the Board considered your appeal and determined that no material facts are in dispute 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 TPAF Board at July 11, 2019 meeting.

The TPAF Board has reviewed your correspondence and the relevant documentation and finds that the laws governing the TPAF do not permit the Board to grant Ms. Flynn's request to

waive the accrued interest charged by the Division on the outstanding balance of her loan obligation.

FINDINGS OF FACT

Ms. Flynn was enrolled in the Teachers' Pensions and Annuity Fund (TPAF) on September 1, 1974 as a result of her employment as a Teacher with the Burlington City Board of Education. Ms. Flynn applied for a pension loan in 2006 and was issued a check¹ on November 8, 2006 in the amount of \$23,620.00. A Certification of Payroll Deductions (Certification) was issued to her employer², implementing the loan repayment schedule to begin December 1, 2006 for 49 monthly payments of \$533.39 per month for a total of \$26,136.11. Interest was calculated at 4.00% per year, based on a decreasing balance each month.

Ms. Flynn filed an application for Early retirement requesting a January 1, 2007 retirement date. The Burlington City Board of Education certified that Ms. Flynn's last date of employment would be December 31, 2006. As such, the Division only received one payment for the month of December 2006. Once Ms. Flynn retired and began receiving a pension, loan deductions were not taken from her pension check. There is no record Ms. Flynn inquired about the status of her loan repayment obligation between 2007 and September 2017.

On October 10, 2017, the Division notified Ms. Flynn that a review of her TPAF membership account revealed that she had an existing loan balance in the amount of \$23,256.20 that was not carried into retirement and thus, no loan payments were deducted from her pension checks. In that letter, Ms. Flynn was informed that the Division would begin deducting monthly loan payments in the amount of \$944.97, beginning with her pension check dated November 1, 2017, to satisfy the outstanding obligation including accrued interest. On December 8, 2017, Gregg A. Shivers, Esq. filed a letter or representation with the Division explaining that he was

¹ The check number was 322298.

² Ms. Flynn's employer should have provided her with a copy of the certification.

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retained to represent Ms. Flynn in her appeal and requested a copy of the closing papers from the loan and any other pertinent documents that supports the Division's conclusion that there is an outstanding loan balance.

In a letter dated December 19, 2017, Michael Kusmierczyk, Supervising Accountant with the Division, informed Mr. Shivers that the approximate amount of the interest that will be charged for the duration of the loan is \$14,992.65. Additionally, Mr. Kusmierczyk provided Mr. Shivers with copies of screen prints and the *Certification of Payroll Deductions* regarding the outstanding loan balance. According to federal guidelines, pension loans must be paid within a limited period of time; and therefore, the Division was not able to reduce Ms. Flynn's monthly payments. Mr. Kusmierczyk explained that it was the Division's review that revealed Ms. Flynn had an outstanding loan obligation and that interest accrues on the obligation until the loan is fully repaid in accordance with the Correction of Errors N.J.S.A. 18A:66-63. Further, Mr. Kusmierczyk indicated that the Division is unable to waive the accrued interest. Lastly, Ms. Flynn was provided with appeal rights to the TPAF Board.

By letter dated December 26, 2017, Mr. Shivers' once again requested documentation regarding Ms. Flynn's pension loan. However, the Division was unable to provide Mr. Shivers with copies of the loan applications or cancelled checks because the Division is only required to retain those documents for a period of seven years.

On April 2, 2018, Mr. Shivers notified the Board office of Ms. Flynn's appeal of the Division's decision. Mr. Shivers appealed to the TPAF Board claiming that Ms. Flynn is being penalized for the failure of the State of New Jersey to collect the loan obligation and that as a consequence she is being charged approximately ten years of accrued interest which is significantly more than the amount of interest assessed on the original term of the loan.

Thereafter, on April 13, 2018, a letter of representation from Kaitlyn Dunphy, Esq. advising the Division that Ms. Flynn was no longer represented by Mr. Shivers. On April 16, 2018, you

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were advised that Ms. Flynn's appeal was being held in abeyance until finalization of discussions with the Internal Revenue Service (IRS).

On May 29, 2018, you requested a breakdown of the alleged balance between principal and interest as of July 1, 2018. By letter June 19, 2018, the Division provided you with a spreadsheet of the accumulated interest of \$12,469.01 which covers the interest that accrued with no payments received from the member's retirement date through the October 1, 2017 check date. The combination of the principal balance due plus the accumulated interest during non-payment equals the revised principal balance due as of October 1, 2017. Starting November 1, 2017, the principal portion of each payment reduces the total principal balance due.

On February 14, 2019, you were notified that the TPAF Board would consider your appeal at its meeting on March 7, 2019.

On February 26, 2019, you filed a letter and documentation in support of Ms. Flynn's appeal. In addition to previous submissions, including those made by Ms. Flynn's prior counsel, Gregg A. Shivers, Esq., specifically, that the Board is barred from requesting the recovery of Ms. Flynn's pension loan, plus approximately 10 years of interest. You argue that it was the Division's failure not to carry Ms. Flynn's loan into retirement and if the loan was carried into retirement she would have only been responsible for five years of interest. In support of your argument you state that the Board is precluded from seeking reimbursement of the original amount of the loan plus the accrued interest because the statute of limitations on such action has expired. Additionally, you argue that the doctrine of laches applied to this situation and the Board's delay has prejudiced Ms. Flynn as she is retired on a fixed income.

On March 7, 2019, the Board considered your submissions and all documentation; however, the Board denied your request to waive the accrued interest owed on the outstanding balance of your loan obligation. The basis of the Board's decision was set forth in its letter dated March 15, 2019.

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On March 12, 2019, you requested the current balance of the principal of the loan assuming the current repayment schedule continues. The principal balance due as of May 1, 2019 is \$5,301.77 and if you remit a check by April 17, 2019, the accumulated interest due would be \$14,251.84. The Division is in receipt of Ms. Flynn's check for \$5,301.77.

Thereafter, you appealed the Board's determination. In addition to your prior arguments, you claim that the Board failed to provide information regarding the closing agreement with the IRS or that the TPAF would be at risk of losing its tax qualified status and therefore Ms. Flynn is unable to challenge the Board's determination. You also argue that the Board failed to provide a basis for the Board's decision that it was not authorized to waive the accrued interest or how doing so would violate IRC Section 72(p). You further reiterate your request that Ms. Flynn only pay the original balance of the loan with interest limited to the original term of the loan. At its meeting on March 7, 2019, the Board determined that there were no material facts in dispute and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which constitutes the Board's Final Administrative Determination.

CONCLUSIONS OF LAW

The Board denied Ms. Flynn's request to waive the accrued interest owed on the outstanding loan balance due her TPAF account or reduce the amount of accrued interest to the original term of the loan (5 years). The Board relied upon N.J.S.A. 18A:66-35 and N.J.S.A. 18A:66-35.1.

N.J.S.A. 18A:66-35 states in pertinent part:

an amount equal to not more than 50% of the amount of his accumulated deductions, but not less than \$50.00; provided, that the amount so borrowed, together with interest thereon, can be repaid by additional deductions from compensation, not in excess of 25% of the member's compensation, made at the same time compensation is paid to the member. The amount so borrowed, together with interest on any unpaid balance thereof, shall be repaid to the retirement system in equal installments by deduction from the compensation of the member at the time the compensation is paid or in such lump sum amount to repay the balance of the loan but such installment shall be at least equal to the member's rate of contribution to the retirement system and at least sufficient to repay the amount borrowed with interest thereon.

...

Loans shall be made to a member from his accumulated deductions. The interest earned on such loans shall be treated in the same manner as interest earned from investments of the retirement system.

Further, “[t]he rate of interest for a loan requested by a member prior to the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall be 4% per annum on any unpaid balance thereof.” N.J.S.A. 18A:66-35.

After the enactment of Chapter 92, the State Treasurer sets “a commercially reasonable rate” on January 1 of each calendar year. Ibid. Additionally, N.J.S.A. 18A:66-35.1 states:

In the case of any member who retires without paying the full amount so borrowed, the Division of Pensions and Benefits shall deduct from the retirement benefit payments the same monthly amount which was deducted from the compensation of the member immediately preceding retirement until the balance of the amount borrowed together with the interest is repaid. In the case of a pensioner who dies before the outstanding balance of the loan and interest thereon has been recovered, the remaining balance shall be repaid from the proceeds of any other benefit payable on the account of the pensioner either in the form of monthly payments due to his beneficiaries or in the form of lump sum payments payable for pension or group life insurance.

The TPAF is a “qualified governmental defined benefit plan[] pursuant to sections 401(a) and 414(d) of the federal Internal Revenue Code of 1986, as amended, or such other provision of the federal Internal Revenue Code, as applicable, regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service.” N.J.S.A. 43:3C-18(a). The Director of the Division is “authorized to modify the provisions of the [TPAF], when a modification is required to maintain the qualified status of the [TPAF] under the Internal Revenue Code of 1986, applicable regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service (IRS).” N.J.S.A. 43:3C-18(c).

IRC Section 401(a) and federal tax law require that pension loans comply with IRC Section 72(p). Specifically, IRC Section 72(p)(2)(B) requires pension loans to be repaid within 5 years of issuance and IRC Section 72(p)(2)(A) prohibits total outstanding loan amounts from exceeding \$50,000. Ibid. If a member fails to repay the pension loan within the 5-year period or the amount

exceeds the IRS limit, then the loan becomes a “deemed distribution” taxable as income to the member and subject to additional penalties. IRC Section 72(p)(1). The deemed distribution does not cancel the loan obligation, which still must be repaid to the Plan, with applicable interest. See Rev. Proc. 2016-51, Section 6.02(1).

There is no dispute that Ms. Flynn took a loan from her TPAF account in 2006, and only 1 of 49 loan payments was made prior to retirement. The Board acknowledges that Ms. Flynn’s loan payments were not carried into retirement and automatically deducted from her pension checks by the Division. When the Division realized Ms. Flynn’s loan was not being repaid, she was informed by the Division of the outstanding loan obligation, and thereafter the Division implemented a modified repayment schedule to repay her loan.

The TPAF Board is also aware that the issue of the repayment of loans in retirement implicates more than just her loan. Because the TPAF is a federally tax-qualified plan, as required by N.J.S.A. 43:3C-18(a), the TPAF’s failure to comply with all the requirements of the IRC could result in the IRS determining that the TPAF would no longer be a tax-qualified plan under IRC Sections 401(a) and 414(d). To that end, the Board is aware that the State Treasurer and Director of the Division, in accordance with his authority and responsibility under N.J.S.A. 43:3C-18(c) to keep the TPAF tax-qualified, signed a Closing Agreement with the IRS. In addition to setting forth methods to repay certain loans, the Closing Agreement reiterates that the plan is subject to IRC Section 72(p). Even when a loan is not properly repaid under the provisions of IRC Section 72(p), and there is a reported deemed distribution, the deemed distribution would not relieve a member of the obligation to repay the loan, with interest.

Ms. Flynn asserts that she should only be required to repay the principal and interest as originally calculated when she took the loan in December 2006. Additionally, Ms. Flynn contends that the interest that accrued is not a result of her error. While the Board acknowledges that the Division did not withhold loan repayments from Ms. Flynn’s pension check, she took the loan prior

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to her retirement and never made an inquiry of the Division about the status of the loan. Per N.J.S.A. 18A:66-35 and -35.1, interest accrues on any unpaid loan balance. Because loan payments were not made or taken from Ms. Flynn's pension checks, the balance of her loan did not decrease as contemplated by the original loan term. Therefore, per the statutory requirements that govern the loan, N.J.S.A. 18A:66-35 and -35.1, there is additional interest that accrued on Ms. Flynn's loan that must be repaid.

The TPAF Board also relies on its ability to correct errors pursuant to N.J.S.A. 18A:66-63, which states, in pertinent part:

If any change or error in records results in a member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, then on discovery of the error, the board of trustees shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid

While the Board noted your original arguments, and those in your appeal letter, the Board has no authority to grant your request to waive the amount of accrued interest charged on Ms. Flynn's loan because doing so could harm the overall pension scheme. See Sellers v. Bd. of Trs., Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 62 (App. Div. 2008). Reducing interest on the outstanding loan balance would violate N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1, IRC Section 72(p), and the State's Closing Agreement with the IRS, which could result in the TPAF no longer being considered a tax-qualified plan, which would affect the entire State, all employers in the TPAF, and every member and retiree.

The Board notes that the statute of limitations you cited in your appeal letter, N.J.S.A. 2A:14-1, does not apply to this matter as it is not the filing of civil litigation, and, as noted above, the Board has the authority to correct errors pursuant to N.J.S.A. 18A:66-63.

As noted above, the TPAF Board has considered your personal statements and your written submissions and because this matter does not entail any disputed questions of fact, the

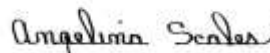
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TPAF Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Teachers' Pension and Annuity Fund.

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
Phone: (609) 292-4822

Sincerely,



Angelina Scales, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

G-3/as

c: DAG Amy Chung (ET)
C. Chianese/M. Kusmierczyk/D. Dinkler (ET)
Carol Flynn