



State of New Jersey

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

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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

January 18, 2019

Sent via email to [REDACTED]

KATES NUSSMAN ELLIS FARHI & EARLE, LLP
Michael Farhi, Esquire

[REDACTED]
[REDACTED]

RE: Francis Valenzuela, Jr.
[REDACTED]

Dear Mr. Farhi:

FINAL ADMINISTRATIVE DETERMINATION

I am writing in reference to the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) regarding the Board's denial of your client, Francis Valenzuela's, request to file for Ordinary Disability retirement. At its meeting on August 20, 2018, the Board denied his request to file and relied upon the provisions in N.J.A.C. 17:1-6.4. On October 3, 2018, you appealed the Board's decision and requested a hearing in the Office of Administrative Law (OAL).

At its meeting on November 8, 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 January 16, 2019 meeting.

The PERS Board has reviewed your written submissions and the relevant documentation, and finds that the statutes, regulations and relevant case law governing the PERS do not permit the Board to grant Mr. Valenzuela's request to file for Ordinary Disability retirement.

FINDINGS OF FACT

Mr. Valenzuela established membership in the PERS on January 1, 1992, based upon his employment with the Palisades Park Borough as an Assistant Recreation Director. The record indicates that on September 1, 2004, Mr. Valenzuela became a multiple member¹ in the PERS as he accepted employment with a second employer, Closter Borough, as a part time Code Enforcement Official. On August 1, 2006, he accepted employment with a third public employer, Rochelle Park Township (Rochelle Park) as a Committeeman.

As of September 30, 2006, pension contributions were no longer remitted to his PERS account based upon his position with his second multiple employer, with Closter Borough. As of December 31, 2008, pension contributions were no longer remitted to his PERS account based upon his position with his first employer, the Palisades Park Borough, but his employment did continue with his third employer, Rochelle Park.

On May 22, 2010, L. 2010, c. 1, was passed, eliminating the creation of “multiple member” status for members hired on or after said date (Tier 4 members). For Tier 1 members such as Mr. Valenzuela (as well as Tier 2 and Tier 3 members), no new locations could be added even if salary earned at a new location was greater than salaries earned at current locations. Previously established “multiple members” could maintain “multiple member” status of existing locations as long as there was no break in service. Once a “multiple member” was down to one remitting location, a new higher salary employer could replace the remitting location. It is important to note that at the time of the law’s passage, Mr. Valenzuela was only employed with one PERS employer, Rochelle Park and contributing to the PERS based upon this employer.

¹ A PERS “multiple member” is someone who is employed by more than one PERS-participating employer and enrolled in the PERS through more than one employer — that is, more than one employer reports to the PERS for that employee concurrently.

In August 2013, Mr. Valenzuela accepted a full-time position with Bergen County as a Road Inspector and this employer was notified to begin pension contributions and back deductions effective November 1, 2013. However, because he was still employed with Rochelle Park Township they were notified to cease pension contributions as of October 31, 2013. This notice was as a result of Chapter 1, P.L. 2010 because pension was to be deducted at the location from which the member was receiving the highest salary or in Mr. Valenzuela's case, Bergen County.

On July 14, 2014, he accepted a position with a new employer, the Borough of Allendale as an Acting Municipal Clerk earning a higher salary than that which he received from Bergen County. Thus, the Borough of Allendale was notified to begin remitting contributions to his PERS membership account and Bergen County was instructed to cease remitting PERS contributions as of June 30, 2014.² His employment continued with the Borough of Allendale through July 2015. However, he was still employed with Rochelle Park and now he was eligible to participate with this employer in the PERS since his employment with the Borough of Allendale ended on July 18, 2015. Thus, he was eligible to now participate in the PERS based upon his employment with the Rochelle Park as a Committeeman effective August 1, 2015. However, at the Rochelle Park Reorganization meeting on January 7, 2017, Mr. Valenzuela was elected Mayor by vote of the Rochelle Park Committee to serve for a one-year term.

On November 8, 2017, Mr. Valenzuela submitted an application for Service retirement requesting an effective date of January 1, 2018. On November 16, 2017, Rochelle Park certified that his employment would terminate on December 31, 2017. Thereafter, on November 30, 2017, he cancelled his retirement application. On December 1, 2017, the Division received Mr. Valenzuela's retirement application requesting an Ordinary Disability retirement effective January

² The record indicates that Bergen County confirmed that Mr. Valenzuela's employment ended July 11, 2014.

1, 2018. Pension contributions were remitted by Rochelle Park through December 31, 2017, at which time his PERS membership reflected a total of 25 years and 10 months of PERS membership service. The Division requested that Rochelle Park provide clarification as to the reason for Mr. Valenzuela's termination from employment. By letter dated February 26, 2018, the Deputy Municipal Clerk, Joan Herve, RMC, confirmed that Mr. Valenzuela was not re-elected to serve on the Township Committee and provided the results of the November 7, 2017 election.

On June 18, 2018, the Division notified Mr. Valenzuela that he was ineligible to file for Ordinary Disability retirement because a member of the PERS must demonstrate that he or she left employment due to a total and permanent disability in accordance with N.J.A.C. 17:1-6.4. However, the record confirmed that his employment with Rochelle Park as a Committee member ended on December 31, 2017 because he was not re-elected. Mr. Valenzuela was provided with appeal rights to the PERS Board of Trustees.

On July 10, 2018, you appealed the Division's administrative determination. Thereafter, you were notified that the appeal would be considered by the PERS Board at its meeting on August 15, 2018. Also, you assert that although Mr. Valenzuela continued working for an additional two and a half years after leaving his Annendale employment that the Board should not consider that he left employment due to not being re-elected to the Rochelle Park Committee, as it is unrelated to his application for Ordinary Disability. You also provided information regarding Mr. Valenzuela's application for Social Security Disability³.

At its meeting of August 15, 2018, the Board considered your personal statements, the statements of Mr. Valenzuela as well as all submissions and relevant documentation in the record. Thereafter, the Board denied his request to file for Ordinary Disability retirement benefits and relied upon the provisions in N.J.A.C. 17:1-6.4. On October 3, 2018, you appealed the Board's

³ Social Security Disability Retirement Benefits differ from those governing Ordinary Disability Retirement Benefits under the PERS statutes.

denial and requested a hearing in the OAL. On October 22, 2018, Mr. Valenzuela requested to collect an Early retirement benefit while his appeal of the Board's denial of his filing an application for Ordinary Disability was pending. At its meeting of November 7, 2018, the Board approved Mr. Valenzuela's Early retirement effective January 1, 2018. In a separate motion, the Board considered his appeal of the denial to file for Ordinary Disability and determined there are no factual issues to be adduced at a hearing and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law that will formally outline the Board's decision and become the Board's Final Administrative Determination.

Conclusions of Law

After careful consideration, the Board adopted the Division's administrative determination and denied Mr. Valenzuela's request to file for Ordinary Disability retirement benefits. In making its decision, the Board relied on N.J.A.C.17:1-6.4, which states in pertinent part:

(a) Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment.

(b) Members who have involuntarily or voluntarily terminated service for any of the reasons listed below will not be permitted to apply for a disability retirement:

...

4. Voluntary separation from service for reasons other than a disability; and
5. Job abolishment or reduction in force.

(c) The Division will review all disability retirement applications submitted after a member has terminated service to determine whether the member's application is eligible for processing, pursuant to (a) above.

[Emphasis added.]

The record confirms that Mr. Valenzuela separated from employment with Rochelle Park because he was not re-elected for a new term as an Elected Official. You represent that it was Mr. Valenzuela's incapacity to perform his duties in his position as Municipal Clerk at Allendale Borough that compelled him to apply for Ordinary Disability retirement benefits. You also argue that the Board erred in considering Mr. Valenzuela's separation from Rochelle Park, his final PERS employer, rather than Allendale Borough. However, it is clear upon his resignation from Allendale Borough on July 18, 2015, Mr. Valenzuela decided to remain in his position with Rochelle Park as a Committee member, rather than resign from that position due to any disability. Thus, he was able to continue PERS-covered employment and earn additional PERS service credit toward the requisite 25 years of service, which he would not have attained without remaining in a PERS-covered position. In fact, he chose to remain employed in a PERS-covered position for two and a half years after leaving his Allendale Borough position and only filed his application for Ordinary Disability retirement benefits after he lost his election bid in November 2017. Moreover, the fact that Mr. Valenzuela sought re-election to his seat demonstrates that he had no intention of terminating PERS-covered employment until it became clear that he would no longer hold his position after December 31, 2017.

Alternatively, in your letter dated October 3, 2018, you argue that the Board failed to consider whether Mr. Valenzuela's position as Committee member/Mayor of Rochelle Park "constituted an 'employment'" governed by the regulation. You further assert that "the contested issue here is whether or not [Valenzuela] was an 'employee'" under the regulation. The Board disagrees.

PERS membership is governed by statute, which clearly limits membership to "employees." N.J.S.A. 43:15A-7(e). Mr. Valenzuela earned PERS service credit through this employment, and the case law that you cite has no relevance to whether a position is PERS-

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Michael Farhi, Esq.
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covered or constitutes pensionable employment. For pension purposes, Mr. Valenzuela was only eligible for PERS membership and entitled to earn PERS service credit for his time with Rochelle Park because he qualified as an employee under the PERS statute.

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,



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

G-11

C: V. McManus (ET); L. Milton (ET); M. Munko (ET); P. Sarti (ET)