
O'Neill v. Bd. of Trustees
Cite as 6 *N.J.A.R.* 181

EDWARD O'NEILL,
Petitioner,
v.
**BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,**
Respondent.

Decided December 11, 1979

Initial Decision

SYNOPSIS

Petitioner appealed from a decision of the Board of Trustees of the Public Employees' Retirement System cancelling his retirement allowance because he received retirement benefits from another State.

The administrative law judge found that the petitioner had been receiving retirement benefits from the New York City Police Department at the time of his enrollment in the New Jersey Pension System. The judge determined that under *N.J.S.A.* 43:3C-1 the petitioner was barred from enrolling in the New Jersey Pension System while he was collecting retirement benefits from another State.

In addition, the judge concluded that the Board was not barred from excluding petitioner on the basis of estoppel since the petitioner had not shown that he had relied on any information from the Division of Pensions in such a way as to justify the application of estoppel.

Accordingly, the administrative law judge affirmed the denial of pension benefits.

William F. Hartigan, Jr., Esq., for petitioner

Stacy L. Moore, Jr., Deputy Attorney General for respondent (John J. Degnan, Attorney General of New Jersey, attorney)

CLANCY, ALJ:

Petitioner has appealed from a decision of the Board of Trustees of the Public Employees' Retirement System which cancelled petitioner's retirement allowance because he receives retirement benefits from another state.

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Prior to the taking of testimony, certain stipulations were entered into between the parties; of significance were: (a) petitioner enrolled in the Public Employees' Retirement System (P.E.R.S.) effective August 11, 1968, when he became employed as an investigator for the State Commission of Investigation; (b) petitioner retired from this position effective September 1, 1977, and began receiving retirement benefits from P.E.R.S.; and, (c) the Board of Trustees subsequently advised petitioner (on or about October 18, 1977) that it was cancelling his retirement allowance because he was receiving retirement benefits from another state and this made him "ineligible for membership" in P.E.R.S. from the time he began his New Jersey employment. The record herein was finalized upon receipt of a letter-memorandum from petitioner's attorney on October 28, 1979.

Petitioner essentially testified that he is presently employed by the New Jersey State Commission of Investigation, that prior to beginning work with the SCI in 1969, he had worked almost 20 years with the New York City Police Department (N.Y.C.P.D.), that his annual salary with the N.Y.C.P.D was \$13,800 in 1969, and he was "covered" by its hospitalization, dental, optical and pharmaceutical plans; that in July 1969, he met with Andrew Phelan, Executive Director of the SCI about a job; that at that time, he and Phelan discussed salary arrangement, membership in a pension system and a contributory insurance plan; that shortly afterwards, he was interviewed by Commissioners Hyland, Miller and Berlini and the same matters were discussed; that while salary considerations were important to him in terms of deciding whether to take the job, even more important were his concerns about "pension eligibility" and the "contributory insurance program"; that he advised the SCI that he had to file his retirement papers with the N.Y.C.P.D before he could begin his new job; that it was *then* that he was told he could join the New Jersey pension system; that he then retired from the N.Y.C.P.D, receiving 50 percent of his last year's salary as his retirement allowance and being allowed limited access to a medical plan; that he started work with the SCI on August 4, 1969, at an annual salary of \$14,000; that when he filled out the application for enrollment in the Public Employees' Retirement System, no one assisted him; that he then worked for more than 8 years and next had "contact" with the Retirement System when he filed for retirement; that his retirement was approved effective September 1, 1977; that in October 1977, he was notified by letter that his retirement was going to be cancelled (this was subsequently done), and that he then went back to work with the SCI.

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Petitioner also related that at no point in time had anyone ever indicated to him that he was ineligible to enroll in P.E.R.S. because he was receiving a pension allowance from the N.Y.C.P.D, that he had been told he could enroll in P.E.R.S. and this was a deciding factor in his taking the SCI job; that although he did not receive his first pension check from the N.Y.C.P.D until November, his pension rights in New York had "absolutely vested" prior to his retirement; that his N.Y.C.P.D pension allowance was \$8,300 per annum; that his 1969 annual "combined income" of \$22,300 was not a significant factor in his taking the SCI job; that at the time he tried to retire in New Jersey, his annual salary with the SCI was \$21,000; that he was aware in 1969 that *New York retirees* who became reemployed by the State of New York were required to waive their pensions during the period of such employment—but he did not think this applied to a New York-New Jersey type of situation; and that upon his employment by the State of New Jersey, the two most important factors which went into his decisions were: (a) the contributory insurance coverage available which would have paid two and one-half times his salary to his wife had he died while in active service, and (b) his future entitlement (after eight years of service) to a New Jersey pension in the approximate amount of \$2,700 per annum. Finally, petitioner advised that the N.Y.C.P.D pension fund was not a "State administered retirement system," and that had he stayed with the N.Y.C.P.D until 1977, he most likely would have retired with an annual allowance in excess of \$18,000, as opposed to the \$11,000 (\$8,300 from New York and \$2,700 from New Jersey), he might be entitled to today.

Another witness who testified was John P. Olender, Secretary of the Public Employees' Retirement System. He indicated that through September or October 1977, petitioner had paid pension contributions into the Retirement System totalling \$8,894.87; that an anonymous letter, dated October 4, 1977, had been sent to the Division of Pensions advising it that certain employees of the SCI (including petitioner) were retired from other pension funds and might not be eligible for membership in P.E.R.S.; that as a result of this letter, petitioner's retirement allowance was ultimately cancelled; that prior to 1968, the Division of Pensions' administrative practice was not to permit State employment where a person was already collecting public retirement benefits; that in 1968, a statute was enacted, *N.J.S.A.* 43:3C-1, which embodied this practice and applied it to the pension systems of other states and municipalities; that this statute did not apply to Federal

pensioners; that the "application for enrollment" form used in 1969 contained no information which would have indicated to petitioner that (if he was receiving benefits from another state) he was ineligible to enroll in P.E.R.S.; and that in 1972, a new application form was put into use.

The final witness to testify was William R. Murphy, Chief of the Bureau of Enrollments and Claims at the Division of Pensions. He revealed that the enrollment application used by petitioner did not specifically ask whether the applicant was ever a member of a *municipal* retirement system, although he interpreted this designation to be part of the "State administered retirement system" concept; that he acknowledged the existence of both "State administered systems" and "municipally administered systems"; that the enrollment application used by petitioner contains no information or instructions indicating to an applicant that he would not be permitted to enroll in P.E.R.S. if he was receiving benefits from any other public retirement system (whether State administered or otherwise); that when an enrollment application is submitted for processing, the Division of Pensions relies on the information in it to determine enrollment eligibility; that the 1972 edition of the enrollment application reflects nothing in its instructions to indicate to an employing agency that persons receiving public pension benefits are not eligible to enroll in P.E.R.S.; that the 1979 edition of the form does the same; that over the years, when changes in the law or the forms used occurred, the certifying agents for all State employers were advised; that had petitioner indicated that he was receiving N.Y.C.P.D pension benefits back in 1969, a follow-up investigation would have been conducted which would have resulted in earlier advice to petitioner about his "ineligibility," and that with reference to that part of the application which refers to "any other State administered Retirement System," this language could easily be construed as referring to: (a) the system of another state, or (b) a New Jersey State program other than "the one that we're talking about."

The remainder of the evidence submitted was documentary in nature. All exhibits were examined in detail and were of assistance in providing a fuller understanding of the positions advocated by counsel on behalf of their respective clients. Significant amongst such documentation were the following:

Petitioner's enrollment application dated August 4, 1969, which shows no response to the directive, "Enter the name

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of any/other State administered Retirement System in which you are or have ever been a member.”

1979 Edition of the enrollment application which contains the directive, “Enter name of any *public* retirement system in which you are or have been a member *in this or any other State*” (emphasis supplied).

The applicable statute herein is *N.J.S.A.* 43:3C-1. In pertinent part, it reads as follows:

... if a former member of any pension fund or retirement system ... established under any law of this or any other State, who has been granted a pension ... becomes employed again in a position which makes him eligible to be a member or another pension fund or retirement system established under any law of this State, such person shall not be enrolled in such other pension fund or retirement system if he is eligible to receive such pension or retirement allowance.

On its face, the statute is unequivocal. Similarly, the operating facts are not in dispute. The crux of petitioner’s case is in the contention that the Board of Trustees of the Public Employees’ Retirement System and the Division of Pensions are estopped from cancelling petitioner’s retirement allowance.

The reasons advanced for the application of the estoppel doctrine (as revealed in petitioner’s letter-memorandum) are the following:

1. The Division of Pensions had an affirmative duty to make known to prospective applicants what the eligibility requirements were for receiving a pension.
2. There was no evidence to indicate that the Division of Pensions had advised certifying agents throughout the State of the contents of *N.J.S.A.* 43:3C-1.
3. Petitioner relied on advice given by the SCI to the effect that he would be eligible to enroll in P.E.R.S. and this was a major factor in his decision to accept employment with the SCI.

In addition, petitioner urges that *N.J.S.A.* 43:3C-1 is unconstitutional “as a denial of his equal rights,” because: (a) “private” and “federal” retirees are not excluded from membership in P.E.R.S., while “public pensioners” are; and (b) public employees whose pensions are “vested” or “deferred” are eligible for membership in P.E.R.S.

Regarding the application of the estoppel doctrine, it is initially noted that “the applicability of the doctrine of estoppel against public

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agencies and officials is quite limited, to guard against use thereof to injure public interest." *Tubridy v. Consolidated Police and Firemen's Pension Fund Commission*, 84 N.J. Super. 257, 264 (App. Div. 1964). See also, *Summer Cottagers' Association of Cape May v. City of Cape May*, 19 N.J. 493, 503 (1955): "The principle of estoppel *in pais* is not, for obvious reasons, given the same freedom of application against the public as against private persons." In order for petitioner to succeed on the basis of estoppel, it must minimally be demonstrated that:

- a. The Division of Pensions (or Board of Trustees) misrepresented or concealed a material fact or facts;
- b. the Division of Pensions (or Board of Trustees) did this with an expectation that petitioner would rely on same; and
- c. the petitioner justifiably relied on the misrepresentation or concealment to his detriment.

Bowler v. Fidelity and Casualty Co. of New York, 99 N.J. Super. 84 (App. Div. 1968).

On the basis of the evidence adduced, I **FIND** that:

1. Petitioner had no contact with the Division of Pensions at the time of his "enrollment" in 1969.
2. The Division of Pensions (or Board of Trustees) neither misrepresented to, nor concealed from the petitioner any material fact or facts.
3. Petitioner relied on certain advice given to him by the SCI concerning his eligibility for enrollment in P.E.R.S.
4. The advice so given to petitioner by the SCI is not "attributable" to either the Division of Pensions or the Board of Trustees of the Public Employees' Retirement System.
5. Over the years, the Division of Pensions regularly notified the certifying agents for all State employers of "changes in the law" and the use of revised forms.
6. While petitioner may have justifiably relied on the advice received from the SCI, in no way was this advice binding upon the Division of Pensions (or the Board of Trustees).
7. The Division of Pensions fulfilled its affirmative duty to petitioner through regular circularization of pension information to the certifying agents throughout the State (see, *Bahrle v. MiraBelli*, 107 N.J. Super. 361, Law Div. 1969, and *Krah v. State, et al*, 130 N.J. Super. 366 (1974)).

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Accordingly, I **CONCLUDE** that petitioner has not shown that he relied on any advice or information received from the Division of Pensions (or the Board of Trustees) in such a way as to justify the application of estoppel principles.

With respect to the "constitutionality" of *N.J.S.A.* 43:3C-1, I **FIND** that the resolution of such a challenge is best left for another court of the appropriate jurisdiction. Hence, I **CONCLUDE** that I must apply the statute as written until such time as it is declared to be invalid.

Thus, I finally **CONCLUDE**, despite petitioner's somewhat compelling predicament, that the Board of Trustees of the Public Employees' Retirement System acted properly in cancelling petitioner's retirement allowance. To have done otherwise would have violated the express terms of the statute and would have resulted in the performance of an *ultra vires* act.

**After reviewing this Initial Decision, the Board of Trustees
of the Public Employees' Retirement System on
January 6, 1980, issued the following Final Decision:**

Adopted by the Board of Trustees of the Public Employees' Retirement System.