DORIS T. FREW, WIDOW OF
ARTHUR J. FREW, DECEASED,
Petitioner,

v.
BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM,
Respondent.

Initial Decision: March 2, 1984 Final Agency Decision: March 21, 1984

Approved for Publication by the Director of the Division Of Pensions,
Douglas Forrester: March 6, 1985

SYNOPSIS

Petitioner appealed from a determination of the Board of Trustees of the Public Employees' Retirement System denying petitioner's request for death benefits resulting from her husband's death on the basis that he was not a member of the retirement system at the time of his death.

The administrative law judge assigned to the case found that petitioner's husband had as part of the application process clearly elected to delay his enrollment in the system until four months after his appointment and that he had died before the end of that four month period.

The judge rejected petitioner's argument that N.J.A.C. 17:2-2.4, which provides for the four-month delay in enrollment, was an illegal exercise in rule making in violation of N.J.S.A. 43:15A-7. The judge noted that the statute merely defines the composition of the membership of the retirement system and omits any provisions dealing with time or method of becoming a member. In addition, the regulation was determined to be consistent with the statute and merely providing a method for the orderly enrollment of members.

In addition, neither the decedent or his employer made any contribution to the retirement system before his death and thus payment of death benefits was expressly prohibited.

Upon review of this initial decision, the Board of Trustees adopted its findings and conclusions.

Roger W. Breslin, Jr., Esq., for petitioner (Goodman, Stoldt, Breslin & Horan, attorneys)
Ellis I. Medoway, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

MONYEK, ALJ:

Doris T. Frew, widow of Arthur J. Frew, appealed from a determination of the Board of Trustees of the Public Employees' Retirement System (respondent), wherein it denied petitioner's request for death benefits on the basis that "Mr. Frew was not a member of the Public Employees' Retirement System at the time of his death." Accordingly, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The hearing of the appeal was conducted on December 7, 1983, at the Office of Administrative Law, Trenton, New Jersey, at which time and place testimony was heard and proofs were proffered by and on behalf of both parties. At the conclusion of the hearing, on motion made and granted, counsel for the parties were given the opportunity to present memoranda of law in support of their respective positions by or before January 17, 1984, the date of the closing of the record.

Prior to the taking of testimony or the introduction of other proofs at the administrative judicial proceeding on December 7, 1983, the following stipulations were made by and between the respective parties:

1. On September 13, 1982, Arthur J. Frew commenced employment as chief fiscal officer with the Hackensack Meadowlands Development Commission, which is a political subdivision of the State of New Jersey established by N.J.S.A. 13:17-5(A).
2. The above date (September 13, 1982) also fixes the date of Mr. Frew's permanent appointment to that position.
3. In his position as chief fiscal officer, Mr. Frew received a base salary of $38,000 per year.
5. On that enrollment application, Mr. Frew designated his wife, Doris T. Frew, as his primary beneficiary, and further indicated his status as a veteran of the Armed Forces of the United States.
6. In paragraph 8 of part one of the PERS enrollment application, which reads, "Date of Enrollment-You must enroll four months after your permanent or regular appointment. You will be so enrolled unless you elect to enroll as of your permanent or regular
appointment. If you wish to purchase the four-month period on a retroactive basis requiring additional deductions, please check below," decedent checked the "No" box.


8. By letter dated March 15, 1983, a representative of decedent's estate wrote to the Division of Pensions requesting appropriate forms in order that his beneficiary could apply for death benefits.

9. By letter dated May 5, 1983, decedent's widow, Doris T. Frew, was advised by the Division of Pensions that no death benefits would be forthcoming.

10. In response to this letter, petitioner's counsel, by letter dated June 2, 1983, wrote to the Director of the Division of Pensions, William J. Joseph, requesting that a hearing be granted concerning the denial of contributory and noncontributory death benefits.

11. By letter dated June 3, 1983, Director Joseph informed petitioner's counsel that the matter was being referred to the PERS Board of Trustees for its consideration.

12. At its meeting of July 20, 1983, the PERS Board of Trustees denied the payment of death benefits to Arthur J. Frew's widow. The Board's determination was based upon the premise that Mr. Frew was not a member of PERS at the time of his death, since he had indicated on his enrollment application that he did not wish to be enrolled until four months after his permanent appointment date, and thus, he would not have become a member of PERS until February 1, 1983.

13. This adverse determination was timely appealed by letter of petitioner's counsel dated September 8, 1983.

14. By transmittal letter of September 22, 1983, this matter was referred to the Office of Administrative Law as a contested case.

The facts are uncontroverted. The aforementioned stipulations together with the material in evidence clearly, categorically and unequivocally indicate that decedent chose not to be enrolled in the retirement system as of the date of his permanent or regular appointment, September 13, 1982, but rather chose to be enrolled four months thereafter; that neither he nor his employer made any contributions to the retirement system prior to his death; and that based upon decedent's selection of enrollment date he was not scheduled to be enrolled in the retirement system until February 1, 1983 and that contributions to the retirement system would not commence until that date. It is likewise uncontroverted that decedent was not a member of the retirement system at the time of his death on January 6, 1983, by virtue of his
expressed desire not to be enrolled in the retirement system until four months after his regular appointment. Furthermore, it is uncontroversial that in order to qualify for death benefits pursuant to N.J.S.A. 43:15A-41 and N.J.S.A. 43:15A-57, one must have been a member of the retirement system at the time of death. Although conceding all of the aforementioned uncontroversial facts, petitioner nevertheless contends that decedent should have been considered a member of the retirement system as of the date of his regular appointment, September 13, 1982, because, petitioner claims, that “under N.J.S.A. 43:15A-6 et seq. enrollment of decedent Arthur J. Frew in the Public Employees’ Retirement System was mandatory and immediate as of the date of permanent appointment,” and further that N.J.A.C. 17:2-2.4 is unauthorized, ultra vires and void because the statutory provisions mandating membership upon permanent appointment are clear.

N.J.S.A. 43:15A-7 provides:

There is hereby established the Public Employees’ Retirement System of New Jersey in the Division of Pensions of the Department of the Treasury. The membership of the retirement system shall include:

b. Any person becoming an employee of the State or other employer after January 2, 1955 and every veteran, other than those whose appointments are temporary or seasonal, becoming an employee of the State or other employer after such date;

It is this provision which petitioner claims, “clearly mandates PERS membership for every veteran as of the date such veteran becomes an employee of the State after January 2, 1955.”

As a corollary of this hypothesis, petitioner further claims that N.J.A.C. 17:2-2.4 is unauthorized, ultra vires, arbitrary, capricious, unreasonable and invalid.

N.J.A.C. 17:2-2.4 provides:

(a) A new appointee in the classified service shall be considered as beginning his service on the date of his regular appointment, and the compulsory enrollment date shall be fixed as the first month following the completion of the equivalent of a working test period of four months. If an applicant, an optional enrollee, fails to give the date on his enrollment application that he desires to enroll in the system, the applicant shall be enrolled as of the first of the month following the receipt of the enrollment application.

(b) An employee in the unclassified service or an elected position shall be considered as beginning service on the date of his original appointment, or the date when he assumed duties of the elective office, as the case may be.

1. For local employers not covered by Civil Service a regular appointment shall constitute the date the employee originally accepted employment in a regular budgeted position.
2. The date of compulsory enrollment shall be the first of the month following the completion of the equivalent of a working test period of four months.

(c) An employee of a Civil Service Employer who is not in a classified or unclassified position or an employee of a non-Civil Service employer who is not in a regular budgeted position may be considered a temporary employee by his employer for a one-year period following the employee's date of hire, but if his employment continues into his second year, he will be required to enroll immediately; his compulsory enrollment date will be the first of the month following the end of the one-year (12-month) period. [emphasis added]

It is undisputed that decedent was a mandatory, rather than an elective or optional enrollee. In short, it is petitioner's position that the statute in question, N.J.S.A. 43:15A-7(b), mandated immediate enrollment and membership in the retirement system simultaneously with decedent's initial employment date of September 13, 1982, and therefore, the administrative regulation of the Board of Trustees of the Public Employees' Retirement System, N.J.A.C. 17:2-2.4, governing the determination of enrollment date for public employees is contrary to the statute, unauthorized, illegal and void, in spite of the fact that said regulation and the enrollment application permit an employee to become enrolled as a member of the retirement system on the date of his regular appointment, should he so choose and agree to make contributions to the system.

Respondent, on the other hand, argues that administrative regulations must be accorded a presumption of validity, and concomitantly that the party that challenges their validity must shoulder the heavy burden of demonstrating that the regulation is arbitrary, capricious, unduly onerous or otherwise unreasonable. Respondent further argues that administrative regulations enjoy a presumption of legality unless they are clearly ultra vires on their face, and further that a finding of ultra vires is generally disfavored. Respondent further alleges that nowhere in N.J.S.A. 43:15A-7 is it stated "when" a person shall become a member of the retirement system and therefore, N.J.A.C. 17:2-2.4 is not in conflict with the statute, but rather complements and effectuates the intention of the statute. This conclusion, respondent claims, is buttressed by the text of N.J.S.A. 43:15A-7.1 which specifically recognizes that "in the case of any person who was required to become a member of the retirement system as a condition of employment, and whose application for enrollment in the retirement system . . . was filed beyond the effective date for his compulsory enrollment in the system . . . .,"
indicates that enrollment, although mandatory, is neither immediate nor automatic (emphasis added).

Accordingly, the questions presented herein for resolution may be stated as follows:

1. Is N.J.A.C. 17:2-2.4 an illegal exercise of administrative rule making?
3. Is N.J.A.C. 17:2-2.4 reasonably related to the purpose of N.J.S.A. 43:15A-7?

Initially, it is noted that the Legislature specifically and expressly authorized respondent, by virtue of N.J.S.A. 43:15A-17, to “establish rules and regulations for the administration and transaction of its business and for the control of the funds created by this subtitle.” Since the Legislature in N.J.S.A. 43:15A-7 merely defined the composition of the membership of the retirement system and conspicuously omitted providing for the time when and the mechanics for becoming a member of the retirement system, it would appear that the regulation here in question, N.J.A.C. 17:2-2.4, is not in conflict with or a deviation from the policy of the statute. The regulation, as well as the enrollment application, permits a governmental employee to become a member of the retirement system immediately upon attaining a permanent appointment, if he so chooses, and makes mandatory his membership in the retirement system upon the completion of a working test period of four months. Therefore, if decedent so chose, he could have been enrolled immediately upon his commencement of employment, September 13, 1982, the date of his permanent appointment. For reasons unknown, decedent chose not to be so enrolled, but rather voluntarily waived his right of immediate membership to a point in time equivalent to the first day of the month following the four-month permissible waiting period prior to compulsory enrollment. Decedent was advised through his enrollment application that, “You must enroll four months after your permanent or regular appointment. You will be so enrolled unless you elect to enroll as of your permanent or regular appointment.” By checking the “No” box on his enrollment application, decedent waived his right to immediate enrollment and accordingly, made no contributions to the retirement system during the brief period of his employment, and had no deductions made on his behalf by his employer to the retirement system.

Since N.J.S.A. 43:15A-17 specifically authorizes respondent to establish rules and regulations for the administration of the retirement system, and since N.J.A.C. 17:2-2.4 appears to fill the void in the statute,
N.J.S.A. 43:15A-7, with regard to when and how a public employee becomes a member of the retirement system, respondent's authority to enact the regulation in question is beyond question; however, although authorized to enact the regulation, it must nevertheless be determined if the enactment was in conflict with or in derogation of N.J.S.A. 43:15A-7, or, on the other hand, consistent therewith.

In Abelson's, Inc. v. New Jersey State Board of Optometrists, 5 N.J. 412, 423-424 (1950), our Supreme Court held:

The authority to make rules and regulations for the effectuation of the statutory policy is administrative and not legislative, if its exercise is confined by certain and definite standards of action, even though the regulations be given the force and effect of law. It is a corollary of this principle that the rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or the rules and regulations therein set down. Administrative implementation cannot deviate from the principle and policy of the statute.

N.J.A.C. 17:2-2.4 appears to be perfectly consistent with and neither subverts from or enlarges upon the statutory policy. Rather, pursuant to the statute, it makes mandatory enrollment in the retirement system upon the completion of four months' active permanent service, and makes permissible membership in the retirement system immediately upon a permanent appointment, should the employee so desire to commence making contributions to the retirement system. In short, the statute mandates enrollment for certain governmental employees, and the regulation provides with specificity how and when the statutory directive be accomplished. The regulation appears to be a perfectly permissible administrative effectuation of legislative policy. Therefore, it would appear that the regulation is consistent with and evocative of the public policy declared by the statute, rather than an enlargement upon or a derogation of the statutory policy. The enactment of the regulation appears to have been clearly administrative and not legislative in that pursuant to the direction of the Legislature in N.J.S.A. 43:15A-17, the Board established regulations for the administration and transaction of its business with respect to compulsory enrollment in the retirement system.

The existence and validity of N.J.A.C. 17:2-2.4 has been heretofore both recognized and tacitly approved by both the Legislature and the courts. N.J.S.A. 43:15A-7.1, enacted by the Legislature in 1971, after the promulgation of N.J.A.C. 17:2-2.4, specifically provided:

In the case of any person who was required to become a member of the retirement system as a condition of employment, and whose application for enrollment in the retirement system or whose application for transfer from one employer to another within the system was filed beyond the effective
date of his compulsory enrollment in the system or his transfer within the system . . . . [emphasis added]

It can thus be seen that the Legislature was well aware of the fact that N.J.S.A. 43:15A-7 neither provided for nor intended that membership in the retirement system was immediate and automatic upon employment, but rather was controlled by N.J.A.C. 17:2-2.4 with regard to the time when enrollment became compulsory. The Legislature thus recognized that enrollment was dependent upon the filing of an application therefor, and further that there could be a period of time between permanent appointment and compulsory enrollment, as provided in N.J.A.C. 17:2-2.4. It is therefore concluded that it was the Legislature's intention when it enacted N.J.S.A. 43:15A-7 to permit the Board of Trustees of the retirement system to promulgate the mechanics of enrollment in the retirement system and provide for a suitable and reasonable time period during which the mechanics were to be effectuated prior to enrollment becoming compulsory. Furthermore, by enacting N.J.S.A. 43:15A-7.1, the Legislature apparently recognized the existence and validity of N.J.A.C. 17:2-2.4 and expressly approved of the Board's effectuation of a future compulsory enrollment date.

Likewise, the Appellate Division of the Superior Court in its decision in Burns v. Division of Pensions, Public Employees' Retirement System, 180 N.J. Super. 1 (App. Div. 1981) recognized the existence of and apparent validity of N.J.A.C. 17:2-2.4 by its holding that the effective date of the enrollment of the decedent therein and of her insurance coverage would have been the first day of the month four months after decedent's permanent appointment, where as here, decedent therein chose not to be enrolled in the retirement system until the ultimate compulsory date for enrollment. Although the Burns case dealt with the question of whether the decedent therein was "actively at work" on her compulsory enrollment date, and therefore did not resolve the exact question presented herein, the court nevertheless held that enrollment in the retirement system pursuant to N.J.S.A. 43:15A-7 is neither automatic nor immediate upon employment, and further recognized the existence and apparent validity of N.J.A.C. 17:2-2.4 by holding that the effective date of decedent's enrollment and the commencement of her insurance coverage would have been on the first day of the month following the four-month working test period.

Similarly, Administrative Law Judge M. Kathleen Duncan, in Dana Kent Smith v. Board of Trustees of the Public Employees' Retirement System, OAL DKT. TYP 602-82 (January 17, 1983), held that where decedent omitted indicating on her enrollment application when she
wished to be enrolled in the retirement system, that enrollment was neither immediate nor automatic, and further that the promulgation of the regulation here in question, *N.J.A.C.* 17:2-2.4, was within the scope and authority of respondent's rule-making power and was both reasonable and rational. Although *Smith, supra*, is neither binding by way of precedential directive nor dispositive of the matter here in issue, I totally concur with Judge Duncan's legal findings and conclusions with respect to the construction of *N.J.S.A.* 43:15A-7, the validity of *N.J.A.C.* 17:2-2.4 and the reasonableness and rationality of said regulation, and therefore, adopt both her conclusions and reasoning herein.

Additionally, it is noted that *N.J.S.A.* 43:15A-70, specifically provides:

Notwithstanding anything to the contrary, the retirement system shall not be liable for the payment of any pensions or other benefits on account of the employees or pensioners of any employer under this article, for which reserves have not been previously created from funds, contributed by such employer or its employees for such benefits.

As was stated in *Burns, supra*, at 5:

[T]he statute contemplates contributions by members and employers to fund the cost of insurance coverage for death benefits. . . . Membership in PERS is significant in terms of benefits payable upon retirement, withdrawal from employment or death. These benefits are based upon earnings and are funded through contributions from employees and employers. Since . . . no contributions to PERS were made on her behalf, she did not become a "member" of PERS for any practical purposes on November 1, 1978.

Likewise, neither decedent nor his employer made any contributions to the retirement system prior to decedent's death as a result of decedent's directive not to be enrolled in the retirement system until February 1, 1983, approximately one month after his death. Therefore, *N.J.S.A.* 43:15A-70 expressly, specifically and unequivocally precludes payment of death benefits herein.

Finally, it is observed that administrative regulations enjoy the presumption of legality and validity unless they are clearly *ultra vires*. *Consolidation Coal Co. v. Candle*, 105 N.J. Super. 104 (App. Div. 1969), aff'd o.b., 54 N.J. 11 (1969); *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544 (1978); *In re Regulation F-22, Office of Milk Industry*, 32 N.J. 258 (1960); *In re Weston*, 36 N.J. 258 (1961). It has further been held that where the empowering provisions of a statute, here *N.J.S.A.* 43:15A-17, provide that the agency "may make such rules and regulations as may be necessary to carry out the provisions of the Act," the regulation promulgated will be sustained so long as it is "reasonably related to the purpose of the enabling legislation," *Mourning v. Family Publications Service*, 411 U.S. 356, 369 (1973), and
further, in determining the reasonableness of the regulation, "[i]f any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts . . . ." Consolidated Coal Co. v. Candle, supra.

William R. Murphy, Executive Assistant to the Director of the Division of Pensions, testified on behalf of respondent. It was his testimony that the promulgation of N.J.A.C. 17:2-2.4 was patterned in accordance with New Jersey Civil Service statute and regulations, N.J.S.A. 11:12-1, N.J.A.C. 4:1-2.1, pertaining to permanent appointments and working test periods. He pointed out the exigencies of the four-month working test period, during which period many new employees in governmental service, although having received a regular or permanent appointment, do not continue in government employment after the four-month period, and therefore to require mandatory immediate enrollment upon a regular appointment would result in chaos, confusion, inordinate unnecessary paper work, abortive commencement of contributions, return of contributions after a relatively brief working period, and general instability in the eventual membership of the retirement system. He further testified that the rule, nevertheless, permits any employee who so desires to become immediately enrolled in the retirement system provided he chooses to make the necessary pension contributions. The rationale of the regulation therefore seems to be reasonably related to the purpose of the enabling legislation.

In sum, petitioner has failed to carry her burden of showing that the regulation here in question is ultra vires, unreasonable and void. To the contrary, both the proofs and the applicable legal precedents demonstrate that it was not the Legislature's intention when it enacted N.J.S.A. 43:15A-7 for membership in the retirement system to be immediate and automatic, but rather that it delegated the promulgation of a regulation pertaining to the mechanics of enrollment to the Board of Trustees and that said Board in promulgating N.J.A.C. 17:2-2.4 did so properly, reasonably, and rationally.

Based upon the testimony heard and proofs adduced, I make the following:

FINDINGS OF FACT

1. Stipulations numbers 1 through 15, inclusive, are hereby adopted as findings of fact as though set forth at length herein.
2. Neither decedent nor his employer made any contributions to the retirement system prior to decedent's death.
3. Decedent voluntarily, intentionally and expressly opted not to be enrolled in the retirement system until February 1, 1983, as evidenced by his enrollment application.

CONCLUSIONS OF LAW
1. Decedent was not a "member" of the retirement system at the time of his death.
2. N.J.A.C. 17:2-2.4 is a valid exercise of administrative rule making, pursuant to N.J.S.A. 43:15A-17 and 43:15A-7.
4. N.J.S.A. 43:15A-70 precludes the payment of benefits herein to petitioner.
5. Since decedent was not a member of the retirement system at the time of his death, and since no contributions were made by decedent or by his employer to the retirement system prior to his death, petitioner is not entitled to any death benefits.

It is, therefore, ADJUDGED that the determination of the Board of Trustees of the Public Employees' Retirement System denying petitioner's application for death benefits be and is hereby in all respects AFFIRMED.

FINAL DECISION BY THE BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM:

The Board of Trustees of the Public Employees' Retirement System at its meeting on March 21, 1984 considered the following in Mrs. Doris T. Frew's appeal:

a. The transcript of the hearing conducted on December 7, 1983
b. All exhibits
c. The administrative law judge's report dated March 2, 1984
d. The exceptions of the administrative law judge dated March 19, 1984

and by majority vote accepted the recommendation of the administrative law judge and affirmed the denial of Mrs. Frew's application for death benefits.

The Board of Trustees of the Public Employees' Retirement System hereby adopts the findings of fact and conclusion of law of the administrative law judge's report consistent with its original determination and further adopts the recommendations contained in the administrative law judge's report and incorporates the same herein by reference.