



# State of New Jersey

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

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ELIZABETH MAHER MUOIO  
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*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

March 11, 2019

Detzky, Hunter, & DeFillippo, LLC  
Stephen B. Hunter, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

RE: Barbara Zilberberg

[REDACTED]

Dear Mr. Hunter:

## **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, Barbara Zilberberg'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. Zilberberg's request to waive the accrued interest assessed on her outstanding loan obligation at its November 1, 2018 meeting. On January 14, 2019, you appealed the Board's decision. You did not dispute that Ms. Zilberberg 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 February 7, 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 its March 7, 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. Zilberberg's request

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

### **FINDINGS OF FACT**

Ms. Zilberberg was enrolled in the Teachers' Pension and Annuity Fund on September 1, 1981 as a result of her employment as a School Psychologist with Sayreville Board of Education. Ms. Zilberberg applied for a pension loan in 2004 and was issued a check on March 31, 2004. Check number 261989 was issued to Ms. Zilberberg for \$26,860.00. A Certification of Payroll Deductions (Certification) was issued to her employer<sup>1</sup> implementing the loan repayment schedule for 49 payments of \$607.22 per month for a total of \$29,753.78. Interest was calculated at 4.00% per year, based on a decreasing balance each month.

Ms. Zilberberg filed an application for Service retirement requesting a July 1, 2004 retirement date. The Sayreville Board of Education certified that Ms. Zilberberg's last date of employment would be June 30, 2004. The record indicates that the loan deductions began May 1, 2004, and the Division received two payments for the month of May and June 2004 since her employment terminated on June 30, 2004. On May 6, 2004, the TPAF Board approved Ms. Zilberberg's application for Service Retirement effective July 1, 2004. Once Ms. Zilberberg retired and began receiving a pension, loan deductions were not taken from her pension check. There is no record Ms. Zilberberg inquired about the status of her loan repayment obligation between 2004 and August 2017.

On September 6, 2017, the Division notified Ms. Zilberberg that a review of her TPAF membership account revealed that she had an existing loan balance in the amount of \$25,973.82<sup>2</sup> that was not carried into retirement. No loan payments were deducted from her pension checks. In that letter, Ms. Zilberberg was informed that the Division would begin deducting monthly loan

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<sup>1</sup> Ms. Zilberberg's employer should have provided her with a copy of the certification.

<sup>2</sup> This amount only reflects the remaining principal of the loan.

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payments in the amount of \$1,164.12, beginning with her pension check dated October 1, 2017, to satisfy the outstanding obligation including accrued interest. On September 19, 2017 you filed a letter of representation with the Division explaining that you were retained to represent Ms. Zilberberg in her appeal and requested a copy of the post retirement audit of her account as referenced in the Division's September 6, 2017 letter, along with any other pertinent documents that supports the Division's conclusion that there is an outstanding loan balance. You also argue that it was the Division's failure not to carry Ms. Zilberberg's loan into retirement. Lastly, upon receipt of the requested documents, you state that Ms. Zilberberg would like to enter into a written agreement with the Division to satisfy the loan balance through a mutually agreeable repayment schedule, including the possibility of paying off the loan in a lump sum as of a specific date. On September 20, 2017, you sent a copy of the letter dated September 19, 2017 directly to Michael Kusmierczyk with the Division.

In a letter dated September 26, 2017, Ms. Zilberberg was informed that at the time of her retirement, the principal amount of her outstanding loan balance was \$25,973.83 and the approximate amount of the interest that will be charged for the duration of the loan is \$21,227.00. On September 30, 2017, Michael Kusmierczyk, Supervising Accountant with the Division responded to your letter and provided you with documentation regarding Ms. Zilberberg's loan obligation. Mr. Kusmierczyk explained that it was the Division's review that revealed Ms. Zilberberg had an outstanding loan obligation and that interest accrues on the obligation until the loan is fully repaid in accordance with N.J.S.A. 18A:66-35, N.J.S.A. 18A:66-35.1 and the Internal Revenue Code. Further, Mr. Kusmierczyk indicated that the Division is unable to waive the accrued interest. The interest was calculated at the same rate of 4.00% taking into account interest accrued from her retirement date of July 1, 2004 until the anticipated payoff of January 31, 2021. The approximate amount of accrued interest is \$21,067.58. Ms. Zilberberg was provided with appeal rights to the TPAF Board.

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On December 12, 2017, you filed an appeal on behalf of Ms. Zilberberg and submitted exhibits to the TPAF Board Secretary stating that Ms. Zilberberg is prepared to pay off the loan in a lump sum payment with the condition that she is relieved of any obligation to make any interest payments assessed because of the Division's error. On January 19, 2018, Ms. Zilberberg was notified that her appeal was being held in abeyance until finalization of discussions with the Internal Revenue Service (IRS).

On March 13, 2018, you filed a supplement to the factual and legal arguments of December 12, 2017. You state that Ms. Zilberberg would like to incorporate, as part of her appeal, the legal arguments made on behalf of another petitioner. Specifically, that the Board is barred from requesting the recovery of Ms. Zilberberg's pension loan, plus approximately 13 years of interest. You argue that it was the Division's failure not to carry Ms. Zilberberg'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 applies to this situation and the Board's delay has prejudiced Ms. Zilberberg as she is retired on a fixed income. Lastly, you offered to repay the remaining balance of the principal (minus any payments already made) and 5 years of interest at 4% per annum which was the original term of the loan.

The TPAF Board notes that after the January 19, 2018 letter to Ms. Zilberberg, the State of New Jersey entered into a Closing Agreement with the IRS that identifies problems with pension loans and a method to correct the identified errors, while maintaining the tax-qualified status of the TPAF.

On September 18, 2018, both you and Ms. Zilberberg were notified that the TPAF Board would consider her appeal at its meeting on October 4, 2018. However, based upon your request

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the Board granted your postponement and you were notified the matter would be considered by the Board at its November 1, 2018 meeting. On November 1, 2018, the Board considered your statements and all of the documentation; however, the Board denied your request to waive the accrued interest owed on the outstanding balance of Ms. Zilberberg's loan obligation. The basis of the Board's decision was set forth in its letter dated November 13, 2018.

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. Zilberberg 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. Zilberberg only pay the original balance of the loan with interest limited to the original term of the loan. Additionally, you requested a current accounting of Ms. Zilberberg's loan which was supplied to you in a letter dated January 18, 2019. At its meeting on February 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. Zilberberg'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,

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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. Zilberberg took a loan from her TPAF account on March 31, 2004, that she started repaying the loan through payroll deductions, and repayment ceased when she retired and deductions were not taken from her pension check. The Board acknowledges that Ms. Zilberberg’s loan payments were not carried into retirement and automatically deducted from her pension checks by the Division. When the Division realized Ms. Zilberberg’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

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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. Zilberberg asserts that she should only be required to repay the principal and interest as originally calculated when she took the loan in March 2004. Additionally, Ms. Zilberberg 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. Zilberberg's pension check, she took the loan prior 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. Zilberberg'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. Zilberberg'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. Zilberberg'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

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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 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

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c: DAG Amy Chung (ET)  
DAG Robert Garrison (ET)  
C. Chianese/M. Kusmierczyk/D. Dinkler (ET)  
Barbara Zilberberg