

The Westfield Leader THE SCOTCH PLAINS-FANWOOD
 — Established 1890 —
 Legal Newspaper for the Town of Westfield,
 Boroughs of Mountainside and Garwood
 And the County of Union, N.J.
 Members of:
 New Jersey Press Association • National Newspaper Association • Westfield Area Chamber of Commerce
 Scotch Plains Business & Professional Association • Fanwood Business & Professional Association
 Periodicals - Postage Paid at Rahway, New Jersey
 P.O. Box 250 • 251 North Avenue, West
 Westfield, N.J. 07091
 Tele: (908) 232-4407 • E-mail: editor@goleader.com • Web: www.goleader.com • Fax: (908) 232-0473
 POSTMASTER: Send address changes to the offices of the newspapers at
 P. O. Box 250, Westfield, New Jersey 07091
 Published every Thursday by Watchung Communications, Inc.
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 SUBSCRIPTION PRICE One-year - \$33 • Two-year - \$62 • Three-year - \$90
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To: Chris Christie, Governor From: A. Matthew Boxer, State Comptroller; July 17, 2012

Investigation Identifies Widespread Improper Participation In State Pension Local Governments Failing To Comply With State Law on Pension Credits

An Office of the State Comptroller (OSC) investigation has uncovered widespread improper participation in the state pension system among attorneys and other professionals working as independent contractors for local governments.

OSC reviewed 58 municipalities and school districts and found that an overwhelming majority of those local governments failed to comply with a 2007 state law that required all public entities to determine whether their professional service providers were bona fide employees as opposed to independent contractors.

In total, following its review OSC has referred 202 pension enrollees to the state Division of Pensions and Benefits for review and removal of improper pension credits. The 2007 law made clear that individuals are ineligible for state pension credits if they were retained through a public contracting process or if they otherwise meet the Internal Revenue Service's multi-factor definition of an independent contractor. Individuals ineligible for pension credits were to be removed from the system once their existing contract or annual appointment expired in 2008.

The failure of local governments to properly implement the 2007 law occurred despite guidance letters issued both by the Division of Pensions and Benefits and by the Department of Community Affairs, directing local officials to review and document the status of all local professional service providers.

OSC's investigation nonetheless found, for example, that 34 professional service vendors continued to be enrolled in the state pension system even though they were retained through a contract awarded under New Jersey's public contracting laws, an unequivocal violation of the 2007 statute.

As to those part-time service providers not retained through public contracting, OSC's investigation revealed that none of the surveyed local governments had properly performed and documented the required analysis to support each professional's continued enrollment in the pension system.

The 202 enrollees being referred to the Division of Pensions and Benefits consist of 176 attorneys, 21 engineers, four health care professionals and one auditor. The pension credits of six of those individuals already have been voluntarily removed by local governments based on OSC's inquiries. The 202 enrollees have accrued pension credits that could result in the state paying them a total of approximately \$1.9 million per year in pension benefits. OSC conservatively estimates that a review of the remaining 515 municipalities and 597 school districts not included in its survey could uncover hundreds of other inappropriately enrolled individuals and millions of additional dollars in pension savings each year.

State Comptroller Matthew Boxer said OSC decided to conduct its investigation after previous OSC reports had uncovered individual instances of improper pension participation.

"We decided to investigate just how widespread the problem of improper participation in the state pension system is, and what we learned is that the problem is extensive," Mr. Boxer said. "Despite the requirements of state law and the guidance issued by state agencies, local governments across the state have not done nearly enough to ensure that only eligible employees receive pension benefits."

The specific reasons underlying the failure to properly implement the 2007 law varied, the OSC report found. Some local governments, without justification, simply failed to perform the required analysis to determine if their professional service providers qualified for pension credits. Other local officials said they kept these individuals in the pension system because they thought they were "grandfathered" in because of their long-standing membership in the system. However, the law contains no grandfathering exception. Other local governments used a skewed analysis that weighed only those factors consistent with employee status while ignoring more significant factors that pointed to independent contractor status.

Perhaps most prominent was these local governments' failure to give appropriate weight to individuals' separate employment in a private professional firm. Guidance from the Internal Revenue Service makes clear that it is unlikely that a professional service provider is a bona fide government employee if that professional simultaneously is engaged in business through a private firm and offers his or her services to the public. Each of the 202 enrollees referred to the Division of Pensions and Benefits appears to be employed at or operating such a private firm.

In some cases, local governments opted to keep their attorney enrolled in the pension system based on the legal advice of the same attorney whose pension eligibility was in question.

"Government officials should not be relying on pension eligibility advice from the very attorney whose eligibility is at issue," Mr. Boxer said. "That just flies in the face of common sense."

Pension system participation also has implications for state health care expenses. For example, 16 of the enrollees referred to the Division of Pensions and Benefits have either accrued the 25 years of pension credits needed to receive lifetime state-funded health benefits or are within five years of qualifying. OSC conservatively estimates that the potential cost of health benefits for these 16 professionals alone is \$307,111 annually.

Many of the enrollees referred by OSC had multiple questionable enrollments, further boosting their ultimate pension payouts through the "tacking" of multiple pension credits. For example, one attorney is receiving pension credits for two part-time positions: a \$191,654-a-year position as borough attorney and a \$50,000-a-year position as legal counsel for a school board. The same attorney told OSC that he devotes approximately 50 percent of his work time to his private law practice. A second attorney interviewed by OSC is enrolled in the pension system for his work as public defender in six separate municipalities, despite substantial evidence of independent contractor status in all six of these towns and his operation of a private law practice.

Even those local governments that removed enrollees from the pension system following the 2007 law often failed to carry out the removals retroactive to the proper cut-off date, OSC found. In fact, two employees incorrectly remained in the system long enough after the cut-off to be able to reach the 10 years of credits required to vest in the pension system and become eligible to receive payments upon retirement.

The OSC report recommends that the Division of Pensions and Benefits develop a comprehensive checklist for local governments to use to certify the pension eligibility of each of their professional service providers. The report also recommends that additional state resources be allocated to address questionable pension enrollments.

"We need to work aggressively to ensure that pension credits are received only by those government employees who have earned them," Mr. Boxer said. A 2010 law tightened future entry into the state pension system by requiring all individuals hired after May 21, 2010 to work for the public entity a minimum of 32 hours per week in order to qualify for pension credits. Individuals enrolled prior to that date, however, are not subject to that 32-hour work week requirement. The report released today finds that there are potentially hundreds of such pre-May 2010 enrollees still accruing pension credits improperly.

Mr. Boxer thanked the Division of Pensions and Benefits and the Department of Community Affairs for their assistance with the OSC investigation. ***** The full report is available at www.nj.gov/comptroller/ Matthew Boxer was sworn in as New Jersey's first independent state comptroller on January 17, 2008.

Editor's note: For Pension and Employee Data for all towns, see www.app.com/section/DATA/DataUniverse

Letters to the Editor
57 of 58 Entities Apparently Interpreted the Law Similarly

I was extremely disappointed in *The Westfield Leader's* inexplicable rush to judgment in its editorial last week under the headline, "Some Might Call This Theft." Such a hurried and inflammatory intimation ("theft?") may serve to sell newspapers, but it does little to inform the public.

The *Leader* would have better served its readership if it explained that the Office of the State Comptroller (OSC) surveyed 58 of 1,162 municipalities and school districts regarding the pension reform law passed by the state in 2007 and put into effect in 2008. On July 17, 2012 the OSC issued a report entitled "Improper Participation by Professional Service Providers in the State Pension System" ("Report"). In simplest terms, the specific issue at hand is who is an employee and who is an independent contractor, using IRS rulings as the guideline. According to the IRS, "In each case, it is very important to consider all the facts - no single fact provides the answer." It should be noted that while Westfield did respond to the OSC's survey, Westfield was not specifically mentioned in the Report.

Let me assure the public that the town was well aware of the 2007 pension reform law. (Had the *Leader* checked its own archives, it perhaps would have discovered that I had written about the change in the law in a previous letter to the editor.) Upon the law's passage, the Town Council's Finance and Personnel Policy Committee examined the 46-page law and, rest assured, the new enrollment criteria has been applied since the new law went into effect and all new hires and appointees are properly enrolled in the pension plan prescribed by the state.

I have said this many times before. In any discussion about public pensions, keep in mind that it is the State of New Jersey, not the Town of Westfield, that mandates who must enroll in the state pension system and in what plan. Prior to the enactment of the 2007 law, the state required all non-seasonal, non-police and fire employees earning over \$1,500 per year and not collecting another government pension to enroll in the state's

Public Employees Retirement System ("PERS") as a condition of employment. (In fact, any governmental entity that did not comply was assessed "delinquent enrollment charges.") The 2007 reforms established new enrollment thresholds for PERS and also created a new pension plan, the Defined Contribution Retirement Program ("DCRP"), for local appointees and new employees who do not meet the new PERS thresholds. The Town of Westfield followed in good faith the instructions included in a notice issued by the state, "An individual who was a member of PERS prior to July 1, 2007 may continue their PERS membership when appointed to a DCRP position, if the person has 'continuously' been a member since that time."

The *Leader* had already published its editorial opinion and its reprehensible reference to "theft" before it ever contacted the town or apparently read the report in its entirety. The report concludes with recommendations, not indictments. Those recommendations include referring the names of the service providers referenced in the report to the Division of Pension and Benefits for further review, and the implementation of a comprehensive checklist modeled after the certification form the State of New York (NYS) uses to determine who is an employee and who is an independent contractor. (To illustrate just how complex making the determination can be, the NYS form lists 21 factors to consider.) Perhaps such clarification from the state is long overdue, given the complexity of the issues at hand and that 57 of 58 entities apparently interpreted the law similarly.

Finally, regarding *The Westfield Leader's* quest for names of individuals, when contacted directly, the OSC would not reveal to the Town of Westfield the names of any service providers referred to the Division of Pension and Benefits for review, even when specifically asked by the town if any present or past Westfield Town employees are so named.

Andy Skibitsky
 Westfield Mayor

Pension Paperwork; Town Should Be Able to Depend On Their Appointees

Congratulations to *The Westfield Leader* concerning last week's editorial. The town's leaders, all of whom ran for office on openness and transparency, should make sure we all know the identity of the person(s) who has been declared to be improperly receiving a pension.

Since it is necessary that the town certify that the former employee qualifies for a pension, and that certification was incorrect, the town should tell us why the certification was made, by whom it was made, and his/her basis for the incorrect certification.

Was a legal opinion sought concerning the 2008 law that disqualified this individual? Did we pay for such an opinion? From whom was it obtained? Was there any conflict of interests on the part of the parties involved in the above?

A. John Blake
 Westfield

Pit Americans Against Americans? Live By Words Of President Kennedy

In response to Bruce Phillips' letter in last week's *Westfield Leader*, thank you for answering the question I had posed about what former House Speaker Nancy Pelosi might call the 48 percent who do not pay income taxes. If they indeed are "the poor," then the War on Poverty - which spawned the Medicaid and Welfare programs in the 1960's - can indeed be considered an abject failure, as there are far more poor today than when these taxpayer-funded programs were initiated. Perhaps the usefulness of these programs - which President Obama has expanded via PPACA and by executive fiat - should be questioned.

Mr. Phillips contends that I and my "conservative Christian" ilk seek to make things better for the rich at the expense of the poor. Speaking for myself, nothing could be further from the truth. But I don't need the government telling me how much I should give them to help the poor, I prefer helping those in need on my own terms, especially when the government uses the money they exact from me in support of initiatives with which I vehemently disagree and over any objections I might raise. I suspect that many (perhaps most) conservative Christians, and perhaps people from other groups upon which he might pin different labels, would concur.

Mr. Phillips also seems to have a

problem with conservative Christians in general. Interesting that I did not pin a "liberal," "leftist" or even "Democrat" label on the former Speaker of the House - my problem was not with the poor, nor with an ideology, nor with a party affiliation, but with the term "free-rider." I find it offensive, especially when liberally applied in a derogatory sense to all who do not have health insurance. And neither do I consider the poor and less fortunate to be "free-riders." We have worked hard to eliminate derogatory labels for so many groups, yet there is a faction that seems to delight in creating new ones with a sole purpose of demeaning or ridiculing those with differing opinions. (The vile term "tea-bagger" comes to mind.)

To paraphrase Mr. Phillips, it strikes me as sad that he and so many are so intent on the government improving things for the "poor" at the expense of the "rich" when they do not have any standards for defining either rich or poor.

Rather than pit Americans against Americans by stratifying them according to wealth, maybe we should try to live by the words uttered by President Kennedy at his 1961 inauguration: "Ask not what your country can do for you; ask what you can do for your country." Have we really changed that much in just 50 years?

Mickey O'Brien
 Westfield

ABCD EFGHIJKLMNOPQRSTUVWXYZ

Diction Deception

Below are four arcane words, each with four definitions - only one is correct. The others are made up. Are you sharp enough to discern this deception of diction?

If you can guess one correctly - good guess. If you get two - well-read individual. If you get three - word expert. If you get all four - You must have a lot of free time!

All words and correct definitions come from the board game **Diction Deception**.

Answers to last week's sarcane words.

1. Guttate - Spotted, as with drops
2. Sepelition - Burial; interment
3. Thill - A shaft to which a horse is hitched to a wagon
4. Dirdum - A loud outcry of blame or rebuke

UBERTY

1. Abundance
2. Pure; fresh
3. Balance; stability
4. Pride; haughtiness

DEPILATION

1. Grief; misery
2. A beating or whipping with a stick or club
3. The act of or process of removing hair from the body
4. A condition of progressive emaciation

TZIGANE

1. A Hungarian gypsy
2. Mentally ill; insane
3. In South Africa, an outsider; a foreigner
4. A laborer; member of the working class

KATABASIS

1. The cessation of natural selection in generation
2. Hibernating or burrowing
3. A sudden pulling back or retreating
4. A retreat to the sea

See more letters, pages 5, 13

Letters to the Editor

Civil Suits, Lawyer Is Not Always Paid

In your July 19 editorial, you write: "In civil suits, regardless of the outcome or how frivolous, the judge always rules that the lawyers from both sides get paid (and this comes from you, the taxpayer)."

In fact, in some civil suits, the plaintiff's lawyer is paid only if his or her client wins the case and receives damages. In other cases, the lawyer is paid by his or her client, not the taxpayers. It is only in a small category of cases that, if the government is found to have acted illegally, it is required to pay the other party's attorneys fees.

David Harris
 Fanwood

Officials Not Shamed, Taxpayer is an ATM

To say that I am outraged would be an understatement. How could New Jersey local governments fail to remove hundreds of independent contractors - such as lawyers and engineers - from pension rolls, costing N.J. taxpayers millions of dollars a year in improper payouts. These individuals are vendors, not public employees, and giving them pension credits is illegal and a taxpayer swindle.

New Jersey's pension system has an unfunded \$151-billion pension liability, which the N.J. taxpayers are on the hook for. The system is broke and broken. And there appears to be no will to fix it or to hold our public officials accountable for operating ethically within it.

I vote for dismissing the public employees who enabled the municipalities and school districts to enroll local contractors and part-time employees into the state's pension system. The people who processed the paperwork should be fired. They broke the law. And for the egregious violators, their own pensions should be taken away as punishment.

Municipalities and school districts must have their pension rolls audited annually by an independent party to check for abuse. Apparently, our local and state officials are unable to operate in an ethical and principled manner. I would prohibit grandfathering anyone. If you are ineligible (or were ineligible) for a state pension, off the rolls you go.

Our local governments are filled with cronyism and malfeasance. Our public officials feel no shame in treating the N.J. taxpayer as a human ATM - automatic teller machine. Not only is the taxpayer being fleeced, we are the subject of derision.

The mockery in the current situation is that several governments opted to keep their attorney enrolled in the pension system based on his/her legal advice from that person - relying on pension eligibility advice from the very attorney whose eligibility is at issue and manipulating the system to his/her advantage. How preposterous is this and how low have we sunk in our standards and code of conduct?

DJ Kurz
 Lambertville

HAMMER TIME

NJ TAXPAYERS

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Your State Legislators

<p>---LD-21---</p> <p>Sen. Thomas Kean, Jr. (R) 425 North Ave. E. Westfield, N.J. 07090 (908) 232-3673</p> <p>Asm. Jon Bramnick (R) 251 North Ave. West Westfield, N.J. 07090 (908) 232-2073</p> <p>Asm. Nancy Munoz (R) 57 Union Place, Suite 310 Summit, N.J. 07901 (908) 918-0414</p>	<p>---LD-22---</p> <p>Sen. Nicholas Scutari (D) 1514 E. Saint Georges Ave. Linden, N.J. 07036 (908) 587-0404</p> <p>Asw. Linda Stender (D) 1801 East Second St. Scotch Plains, N.J. 07076 (908) 668-1900</p> <p>Asm. Jerry Green (D) 17 Watchung Ave. Plainfield, N.J. 07060 (908) 561-5757</p>	<p>LD-21 includes Westfield, Mountainside, Garwood, Summit and Cranford.</p> <p>LD-22 includes Scotch Plains, Fanwood, Plainfield, Clark and Linden.</p> <p>E-mail</p> <p>senkean@njleg.org senscutari@njleg.org asmbarnick@njleg.org aswmunoz@njleg.org aswstender@njleg.org asmgreen@njleg.org</p> <p>7th Congressional District Representative Leonard Lance, 425 North Avenue E., Westfield, NJ 07090 (908) 518-7733</p>
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