SHU ZHANG,	
Appellant,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
vs.	**DKT. NO. A-001000-24**
BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,	**ON APPEAL FROM THE DETERMINATION OF THE BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND**
Respondent.	**AGENCY REF. NO. 1-632674**

BRIEF ON BEHALF OF THE APPELLANT, SHU ZHANG

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PRELIMINARY STATEMENT

The instant appeal arises from Ms. Shu Zhang's efforts to purchase State pension credits from the Teachers' Pension and Annuity Fund ("TPAF") from her employment with the Hillsborough Board of Education ("Board"). The TPAF denied Ms. Zhang the opportunity to purchase pension credits from her employment with Hillsborough during the 2012-2013 and 2013-2014 schools years, when her employer accidentally failed to enroll her into Social Security. As Social Security does not allow individuals to purchase credits after the fact, even if the person was initially eligible, the TPAF's position is that Ms. Zhang cannot meet one of the elements to permit purchasing pension credits for her work during either of these two school years. These are the only two years at issue in the instant appeal since Ms. Zhang has received TPAF credits for the approximately ten years she has since continued serving as a teacher in Hillsborough.

Originally immigrating to America to study at Rutgers University, Ms. Zhang began working for Hillsborough upon grading Rutgers in 2012. Teaching at Hillsborough under a student visa during the 2012-2013 school year, Hillsborough helped Ms. Zhang obtain an employment visa ("H-1B") effective October 1, 2013. From that date until Ms. Zhang received a green card in 2020, she maintained both the same employment and immigration statuses.

It is incontrovertible that teachers in New Jersey are eligible to enroll into Social Security, as evidenced by Ms. Zhang's enrollment in the system for nearly a decade now. It is also undeniable that individuals working under an H-1B visa are also eligible to enroll into Social Security. Accordingly, Ms. Zhang was eligible to enroll into Social Security starting in October 2013. Hillsborough, however, dropped the ball in handling Ms. Zhang's matter. Even though it was well aware of Ms. Zhang's immigration status throughout, Hillsborough failed to enroll Ms. Zhang into Social Security during either the 2013-2014 or 2014-2015 school years. Hillsborough admitted that this inaction was an administrative error, that Ms. Zhang was not at all at fault. Once Hillsborough realized its mistake in 2015, it immediately enrolled Ms. Zhang into Social Security. Ms. Zhang has been enrolled into Social Security since without incident.

Despite the fact that Ms. Zhang's non-enrollment was solely because of Hillsborough's administrative mistake, the TPAF issued the Final Administrative Determination ("FAD"), denying Ms. Zhang the opportunity to purchase State pension credits for her employment with Hillsborough during the 2013-2014 and 2014-2015 schools years. In this decision, the TPAF relied upon an interpretation of a regulation which was both unsupported by any other legal authority and contrary to its obligation to benefit its pension members. In the FAD, the TPAF for the first time brought up an agreement with the Social Security Administration as a

basis of its refusal to Ms. Zhang. The FAD, though, was silent on recent Supreme Court precedent which requires the TPAF to demonstrate flexibility and compassion in the treatment of its members, especially in situations like this when everyone agrees that the member is not at fault. The TPAF also interpreted its regulations contrary to law, and in doing so, impermissibly narrowed eligibility for its members to purchase service credit. Accordingly, the TPAF was arbitrary, capricious and unreasonable in denying Ms. Zhang's request to purchase pension credits. Thus, for the reasons provided below, the Appellant respectfully asks the Appellate Division to conclude that it is necessary and proper to reverse the FAD and direct the FAD to provide Ms. Zhang with the opportunity to purchase pension credits for the 2013-2014 and 2014-2015 school years.

PROCEDURAL HISTORY

In spring 2021, Ms. Zhang, through Hillsborough submitted an application with the Division of Pensions to purchase pension credits for the period between September 1, 2012 to August 31, 2015. The application was documented as a purchase for "TEMPORARY/SUBSTITUTE" service. (95a – 97a). However, the Division of Pensions in a June 21, 2021 letter informed Ms. Zhang that it did not consider her eligible to purchase those years of service. (93a).

On April 9, 2024, Ms. Zhang filed an appeal to the TPAF as to its earlier denial of Ms. Zhang's request to purchase pension credits for the period from October 2013 to September 2015.[1] (27a-67a). With the appeal, Ms. Zhang submitted a certification which included documentation of her immigration status throughout the years and a letter from Hillsborough's superintendent in which he admitted that Hillsborough erred in not enrolling Ms. Zhang into the pension system between 2013 and 2015. (68a-92a).

In a letter dated April 17, 2024, the Supervising Pensions Benefits Specialist informed Ms. Zhang that it was denying her appeal. (26a). On April 23, 2024, Ms. Zhang confirmed receipt of the State's April 17, 2024 letter and requested that the

[1] As noted throughout Ms. Zhang's 2024 communications with the TPAF, she is no longer seeking pension credit for her Hillsborough employment during the 2012-2013 school year. The instant appeal concerns only the pension eligibility of Ms. Zhang's employment during the 2013-2014 and 2014-2015 school years.

matter be considered by the full TPAF Board. (24a-25a). Ms. Zhang's attorney then appeared before the TPAF Board at its July 11, 2024 meeting to orally address the merits of Ms. Zhang's appeal. However, in a July 19, 2024 writing, the TPAF Board upheld the Division of Pensions' prior determination. The TPAF afforded Ms. Zhang the opportunity to file a written statement in appeal of this outcome. (21a-23a).

On August 22, 2024, Ms. Zhang submitted another written appeal to the TPAF. (8a-20a). In furtherance of this appeal, Ms. Zhang's attorney appeared before the TPAF Board at its October 10, 2024 meeting. (1a). The TPAF, however, issued another letter dated October 10, 2024, denying Ms. Zhang's request for an administrative hearing[2] and setting forth its intention to issue a Final Administrative Determination ("FAD"). (146a).

At the TPAF's November 14, 2024 meeting, Ms. Zhang's attorney made a third appearance in support of Ms. Zhang's appeal. The TPAF, though, voted to approve the FAD. The FAD, dated November 15, 2024, noted that this was the TPAF's final administrative action on the issue, and that Ms. Zhang had the right to file an appeal to the Superior Court of New Jersey, Appellate Division. (1a-7a). On December 9, 2024, Zhang filed the instant appeal. (147a-149a).

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[2] Appellant is not appealing the TPAF's refusal to transmit the matter to the Office of Administrative Law for an evidentiary hearing.

STATEMENT OF FACTS

Zhang's employment & immigration status history

Ms. Zhang emigrated from China to the United States of America in 2010 to attend graduate school at Rutgers University ("Rutgers"). Ms. Zhang arrived in the U.S. on an F1 student visa. (68a). When she first arrived in the U.S., Ms. Zhang received a Social Security number ("SSN") and a Social Security card. She used the Social Security card to apply for a driver's license and other supporting documents. Ms. Zhang has maintained an SSN since 2010. (68a).

Ms. Zhang attended Rutgers University for two years, graduating in 2012 with a master's degree. In or around April 2012, Ms. Zhang applied for a teaching position with Hillsborough. During the application process, Hillsborough told Ms. Zhang that it would help her obtain an H-1B visa. Hillsborough hired Ms. Zhang, effective the 2012-2013 school year. Hillsborough was Ms. Zhang's first, and to date her only full-time employment in the U.S. Throughout, Ms. Zhang has worked for Hillsborough as a Chinese language teacher. (68a).

During the 2012-2013 school year, Ms. Zhang worked for Hillsborough under a temporary work permit under the F1 visa called "Optional Practice Training" ("OPT"). (68a-69a). In or around December 2012, Ms. Zhang began applying for an H-1B visa. Hillsborough, though, handled most of the application paperwork. Hillsborough employee Guy Whitlock filled out paperwork for the

Department of Homeland Security ("DHS"), the federal agency in charge of issuing H-1B visas. (69a); (75a-85a). In April 2013, Ms. Zhang was approved for an H-1B visa, effective October 1, 2013. The approval notice was sent directly to Hillsborough. Ms. Zhang physically picked up the approval notice from Hillsborough in a meeting with either Guy Whitlock and/or JoAnn DeLeone on May 1, 2013. (69a); (87a).

At no point during the 2013-2014 school year did Hillsborough talk to Ms. Ms. Zhang about the payroll implications of the change in her immigration status. No one explained to Ms. Zhang how being on an H-1B visa rather than the OPT now made her eligible to enroll into Social Security or into the State's pension system. As Hillsborough was Ms. Zhang's first full-time employment in the U.S., she had no working knowledge of either Social Security or the State's pension enrollment. (69a-70a). With the spring 2013 approval of her H-1B visa for the following school year and Hillsborough's knowledge of the same, Ms. Zhang reasonably assumed that starting October 1, 2013, all aspects of her employment would accurately reflect her H-1B status. (70a).

In spring 2014, Ms. Zhang applied for a new H-1B visa, to cover her employment starting the 2014-2015 school year. Hillsborough again handled the visa application paperwork. (70a). Later in spring 2014, Ms. Zhang was approved

for another H-1B visa, effective July 1, 2014 to June 30, 2017.[3] Like with the 2013 visa approval, the documentation was addressed to Guy Whitlock. Accordingly, Ms. Zhang once again picked up the written notice of the H-1B approval from Hillsborough. (70a); (89a-90a). Consequently, from 2013 through 2019, Ms. Zhang continuously worked for Hillsborough under an H-1B visa.[4] Since January 1, 2020, Ms. Zhang has worked for Hillsborough under a green card status. (70a).

Zhang's pension status

In or around September 2015, two years after Ms. Zhang began working under an H-1B visa, Hillsborough's payroll office informed her that it had been inaccurately still documenting her visa status as OPT and that it was changing its documentation to accurately reflect Ms. Zhang's H-1B status. (70a). No explanation has been provided to Ms. Zhang as to why Hillsborough only started enrolling her into Social Security in September 2015. There was no change in Ms. Zhang's immigration or employment status in or around September 2015. (71a). In fact, Ms. Zhang only became aware in July 2021 that she had not been enrolled in Social Security during either the 2013-2014 or 2014-2015 school years. (71a).

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[3] At the end of this visa, Ms. Zhang was approved for further H-1B visas until she was approved for a green card status, effective January 1, 2020.

[4] As a reminder, Ms. Zhang has already received pension credits from the TPAF for her service between September 2015 and December 2019, the entirety of that period working under the same H-1B visa which is at issue in the instant appeal.

Hillsborough's Superintendent in March 2024 confirmed in writing that Hillsborough's failure to enroll Ms. Zhang into the pension systems between 2013-2015 had been inadvertent. (71a-72a); (92).

In or around February 2024, Ms. Zhang contacted Social Security about whether she could purchase Social Security credits for her Hillsborough employment during the 2013-2014 and 2014-2015 school. Social Security, however, informed Ms. Zhang (through the IRS) that there was no mechanism for her to purchase those years after the fact, even if she should have been eligible for Social Security credits at the time. (71a).

Ms. Zhang, however, has met the requirements for State pension eligibility since at least 2013. Since that time, Ms. Zhang has worked as a teacher for Hillsborough under either an H-1B visa or a green card. She was eligible for enrollment into Social Security for the entire period between October 2013 and August 2015. (72a).

Appeal to the TPAF

On April 9, 2024, Ms. Zhang filed an appeal with the TPAF to find her eligible to purchase pension credits for her employment with Hillsborough during the 2013-2014 and 2014-2015 school years. (27a-67a). In the appeal, Ms. Zhang provided the TPAF with her full factual backstory, demonstrating that her H-1B

status during the 2013-2014 and 2014-2015 school years had in fact made her eligible to enroll into Social Security. (28a-32a). In the appeal Ms. Zhang explained her eligibility for pension credits under N.J.A.C. 17:3-2.1. Ms. Zhang described how because the IRS recognized employment under H-1B visa as subject to Social Security she had been eligible for Social Security since October 2013. (36a-38a). Ms. Zhang also reiterated that even Hillsborough admitted that it was the party responsible for her non-enrollment into Social Security during her first two years working under a H-1B visa. (41a-42a).

The TPAF quickly tried to dismiss Ms. Zhang's appeal. In a one page letter, the Division of Pensions and Benefits asserted that "with N.J.A.C. 17:3-2.1(a)(2), Social Security coverage is a perquisite to participate in the Teachers' Pension and Annuity Fund." (26a). In the response just a few days later to request an appearance before the TPAF Board, Ms. Zhang stated that the State's letter relied upon an inaccurate interpretation of N.J.A.C 17:3-2.1(a)(2) and had failed to consider the particular circumstances (wholly outside of her control) of why Ms. Zhang had not been enrolled in Social Security between 2013 and 2015. (24a-25a).

After an in-person appearance by Ms. Zhang's attorney during the TPAF's July 11, 2024 meeting, the TPAF issued another writing to explain why it continued to refuse to allow Ms. Zhang the opportunity to purchase pension credits for her Hillsborough employment during the 2013-2014 and 2014-2015 school

years. This time, the TPAF cited to both N.J.A.C. 17:3-2.1(a)(2) and N.J.A.C. 17:3-5.8(a)(6).[5] The TPAF's writing accurately summarized Ms. Zhang's immigration statuses between 2012 and 2017 and acknowledged that Ms. Zhang "held a TPAF-eligible position from October 1, 2013 through June 30, 2015…" However, the TPAF still found Ms. Zhang ineligible to purchase State pension credits for the 2013-2014 and 2014-2015 school years (despite noting in the decision this work was performed under the H-1B visa) because Hillsborough had failed to withhold Social Security deductions during that time. (21a-23a).

On August 22, 2024, Ms. Zhang submitted a rebuttal to the TPAF's letter. (8a-20a). In addition to the arguments raised in the prior writings and at the July 11, 2024 meeting, Ms. Zhang focused on the key provision of N.J.A.C. 17:3-2.1(a)(2), which reads: "The position is covered by Social Security". Ms. Zhang explained that everyone agreed that her position during the 2013-2014 and 2014-2015 school years were covered by Social Security, as demonstrated by the fact that she was enrolled in Social Security starting in 2015 despite no change in her H-1B visa or employment position at that time. Accordingly, Ms. Zhang addressed that TPAF misconstrued N.J.A.C. 17:3-2.1(a)(2) when it read Hillsborough's

[5] N.J.A.C. 17:3-5.8(a)(6) states that a person cannot purchase pension credits for a period in which the person was not eligible to enroll into at the time.

failure to enroll her into Social security to mean that she was not "covered by Social Security" for the purposes of the regulation. (14a-16a).

In this submission, Ms. Zhang also brought Seago v. Board of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381 (2024) to the TPAF's attention. As the New Jersey Supreme Court had just issued the decision on May 22, 2024, this was Ms. Zhang's first writing since the case had been decided. Ms. Zhang described how the Supreme Court obligated the TPAF to apply equitable principles and consider why a member may be non-compliant with its regulations. As applied here, Ms. Zhang reasoned that her supposed noncompliance with N.J.A.C. 17:3-2.1(a)(2)[6] was solely the result of Hillsborough's internal paperwork issues, that no one blamed her for her non-enrollment into Social Security during her first two years under the H-1B visa. Accordingly, Ms. Zhang informed the TPAF of its new obligation under Seago to relax its application of its own regulations and thus allow Ms. Zhang to purchase pension credits for her service during the 2013-2014 and 2014-2015 school years. (17a-19a).

Final administrative determination

After providing a brief procedural history of Ms. Zhang's appeal to the TPAF, the TPAF prepared a "FINDINGS OF FACT" for the FAD. (1a-4a). In this

[6] And consequently, why she was currently ineligible under N.J.A.C. 17:3-5.8.

section, the TPAF correctly documented Ms. Zhang's status as an F-1 employee (working under an OPT) during the 2012-2013 school year and that F-1 visa holders are exempt from Social Security. (1a-2a). The TPAF then continued by correctly noting that H-1B visa holders are required to pay into Social Security. (2a). The TPAF properly noted that Ms. Zhang was approved for and worked for Hillsborough under a H-1B for both the 2013-2014 and 2014-2015 school years. (2a).

The FINDINGS OF FACT carried on with a more detailed history of Ms. Zhang's efforts to purchase both Social Security and State pension credits, including an explanation from Social Security that there is no mechanism to purchase credits after the fact, even if a person was eligible at the time. (2a-3a). In completing its summary, the TPAF explained:

> The Board found that because there is no mechanism for Ms. Zhang to retroactively pay into Social Security for the 2013-2014 and 2014-2015 school years she is not eligible to receive credit for, or purchase that period.

(3a). Significantly, the TPAF did not assert that Ms. Zhang was ineligible for Social Security during the 2013-2014 and 2014-2015 school years, just that she had not been enrolled into the system at that time.

The FAD continued into the CONCLUSIONS OF LAW. (4a-6a). This section again with the TPAF referencing the significant language from N.J.A.C. 17:3-2.1(a)(2) and 17:3-5.8(a)(6). The TPAF then for the first time cited to

N.J.S.A. 43:22-3 and the State's "Section 218" agreement with the Social Security Administration ("SSA"). In citing to Section 218 Agreement, the TPAF identified that there are various categories of work which cannot receive Social Security, putting in bold reference to subparagraphs (F), (J), (M) and (Q) of section 1101(a)(15) of the Immigration and Nationality Act.[7] The TPAF then explained how a person working under an F-1 visa is not covered under Section 218 Agreements. In trying to apply its Section 218 Agreement to the instant situation, the TPAF declared:

> Here, Ms. Zhang's employment with Hillsborough from ***October 1, 2013 through June 30, 2015 was through an F-1 visa***. As a result, her employment was not covered by the State's Section 218 Agreement with SSA. Because the position was not covered by the State's Section 218 Agreement, the position was not covered under Social Security as required by N.J.A.C. 17:3-2.1(a)(2). Accordingly, Ms. Zhang is not eligible for service credit or the purchase of service credit from October 1, 2013 through June 30, 2015.

(6a) (emphasis added).

According to the plain language of the FAD, the TPAF's basis for denying Ms. Zhang the opportunity to purchase TPAF pension credits was that her F-1 status during the 2013-2014 and 2014-2015 school years was not covered under Section 218 Agreements, and thus unable to meet the elements of N.J.A.C. 17:3-2.1(a)(2). However, this factual summary of Ms. Zhang's immigration status

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[7] See 8 USC 1101(a)(15)(F), (J), (M), and (Q)

during these school years was inconsistent with the TPAF's summary just pages earlier in the FAD:

> In April 2013, ***Ms. Zhang and Hillsborough were notified of her status change from OPT to H-1B, effective October 1, 2013 through June 30, 2014***. Ms. Zhang continued to work at Hillsborough as a Chinese language teacher for the 2013-2014 school year. Prior to the expiration of her H-1B visa, Hillsborough assisted Ms. Zhang with filing an extension. On or about May 15, 2014, Hillsborough notified Ms. Zhang that the ***extension of her H1B visa was approved for the period covering July 1, 2014 through June 30, 2017.***

(2a) (emphasis added).

The two quotes show the TPAF's contradiction in the analysis of Ms. Zhang's appeal. At the beginning of the FAD, the TPAF acknowledged that Ms. Zhang worked under an H-1B visa during the 2013-2014 and 2014-2015 school years, which is required to pay into Social Security. Yet, the TPAF then asserted that she worked under a different visa during the 2013-2014 and 2014-2015 school years in order to conclude that she was not eligible for State pension credits during that time.

LEGAL ARGUMENT:

THE APPELLATE DIVISION MUST REJECT AND REVERSE THE TPAF'S DENIAL OF ZHANG'S REQUEST TO PURCHASE PENSION CREDITS. (1a-20a).

A. Standard of review

The Appellate Division may overturn an administrative agency's decision if the agency's determination is arbitrary, capricious, or unreasonable. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). When examining whether a final agency decision was arbitrary, capricious, or unreasonable, the court considers:

1) Whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

2) Whether the record contains substantial evidence to support the findings on which the agency based its action; and

3) Whether in applying the legislative policies to the facts, the agency erred in reaching a conclusion that could not reasonable have been made on a showing of the relevant factors.

In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 482-83 (2007)). Because the interpretation of statutes is a judicial rather than administrative function, a reviewing court is in no way bound by the administrative agency's interpretation or application of a statute. Mayflower Securities Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

The Appellate Division will need to address whether the TPAF was arbitrary, capricious or unreasonable in its denial of Ms. Zhang's request to

purchase pension credits. In the process, the Appellate Division needs to review the TPAF's interpretation of N.J.A.C. 17:3-2.1(a)(2) and 17:3-5.8(a)(6), as well as the TPAF's application of those regulations. When this Court conducts a *de novo* analysis of the legal issues, this Court will find that the TPAF clearly misapplied N.J.A.C. 17:3-2.1(a)(2) and 17:3-5.8(a)(6), which resulted in impermissibly narrowing N.J.S.A. 18A:66-2. Accordingly, Appellant submits that the Appellate Division will conclude that the TPAF's denial of Ms. Zhang's request to purchase pension credits for her employment with Hillsborough during the 2013-2014 and 2014-2015 school years was arbitrary, capricious and unreasonable.

B. The TPAF's application of N.J.A.C. 17:3-2.1(a)(2) and 17:3-5.8(a)(6) to deny Appellant the right to purchase pension credit for time she worked in a pension eligible position is an impermissible narrowing of pension eligibility, unsupported by the language of the regulation, and contrary to both the stated purpose of the law and public policy. (1a-7a).

The Appellate Division must find that the TPAF failed to provide an acceptable legal basis for denying Ms. Zhang the opportunity to purchase pension credit for her public sector work during the 2013-2014 and 2014-2015 school years. The backbone of the TPAF's legal analysis in the FAD was its interpretation

and application of N.J.A.C. 17:3-2.1(a)(2) and N.J.A.C. 17:3-5.8(a)(6). N.J.A.C. 17:3-2.1(a)(2)[8] states:

> (a) Any person appointed by the State, local board of education or charter school to a position listed in the definition of "teacher" found at N.J.S.A. 18A:66-2.p or as a regular, full-time employee in a position that meets the following conditions shall be required to become a member of the Fund effective as of the date of their employment:
> …
> 2. The position is covered by Social Security…

N.J.A.C. 17:3-5.8(a)(6) states:

> (a) A member will not be granted, nor may a member purchase, prior service or membership credit, including, but not limited to, the following situations:
> …
> 6. Any public service that was not eligible for either compulsory or optional enrollment in a State-administered system at the time the service was rendered.

As the application of N.J.A.C. 17:3-5.8(a)(6) depends on whether Ms. Zhang's employment during the 2013-2014 and 2014-2015 school years was eligible under N.J.A.C. 17:3-2.1(a)(2),[9] we will focus on the basis of the TPAF's claim that Ms. Zhang's employment was not "covered by Social Security" as required under N.J.A.C. 17:3-2.1(a)(2).

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[8] As there is no dispute as to Ms. Zhang's eligibility under the other provisions of N.J.A.C. 17:3-2.1, we are focusing herein exclusive on regulation subpart (a)(2).
[9] The TPAF has not asserted an independent or separate basis for applying N.J.A.C. 17:3-5.8.

1. Standard of review for administrative determinations of legal issues.

The Supreme Court has established that an appellate court does not give any deference to an administrative agency's interpretation of statutory language which undermines legislative intent. New Jersey Turnpike Authority v. American Federation of State, County Municipal Employees, 150 N.J. 331, 351-352 (1997); see also Rozenblit v. Lyles, 245 N.J. 105, 121 (2021) (review of statutory construction is *de novo*.). Here, we have a purely legal issue of whether Ms. Zhang's employment with Hillsborough during the 2013-2014 and 2014-2015 was "covered by Social Security" as required under N.J.A.C. 17:3-2.1(a)(2). That regulation interprets which teachers in New Jersey are required to become members of the TPAF and are thus eligible for TPAF pension credit. For this purely legal question, the Appellate Division has the right to review the TPAF's determination *de novo* to ensure that the TPAF's interpretation of N.J.A.C. 17:3-2.1(a)(2) does not undermine the drafters intent in defining which teachers and compensation to said teachers qualify for pension credits.

2. N.J.A.C. 17:3-2.1 requires a liberal construction in support of its members.

a. Requirements for interpretation of legislative text

To understand the meaning of legislative text, one must look for the drafter's intent. Applied Underwriters Captive Risk Assurance Company, Inc. v. New Jersey Department of Banking and Insurance, 472 N.J.Super. 26, 43 (App.Div.

2022) (citing Libertarians for Transparent Gov't v. Cumberland County, 250 N.J. 46, 54 (2022)). A person should first look at the text itself to determine intent. However, if the text is unclear upon plain reading, then extrinsic aids, such as legislative history, may aid. Id. at 43-44. Any one provision must be read *in pari materia* with the rest of the text so that the full text reads harmoniously. Id. at 125.

b. Liberal construction of pension laws

When reviewing legislative texts for State pensions, the Supreme Court has held:

> Pensions for public employees serve a public purpose…They are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service. Being remedial in character, statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited thereby. [citations omitted]

Geller v. Department of Treasury, Division of Pensions and Annuity Fund, 53 N.J. 591, 597-598 (1969). The Supreme Court more recently confirmed this liberal construction of pension statutes in Klumb v. Board of Educ. of Manalapan-Englishtown Regional High School Dist., 199 N.J. 14, 34 (2009). The Appellate Division has since further promoted the understanding that pension statutes should be interpreted in favor of public employees. See e.g., Francois v. Board of Trustees, 415 N.J.Super. 335, 349 (App.Div. 2010) (liberal construction remedies social problems); In re Hess, 422 N.J.Super. 27, 35 (App.Div. 2011) (because of

liberal construction of pension statutes, forfeiture provisions must be strictly construed).

As applied here, pension statutes and regulations, such as N.J.S.A. 18A:66-2 and N.J.A.C. 17:3-2.1, are to be liberally interpreted in favor of public employees. Doing so serves the public purposes of compensating public employees such as Ms. Zhang for services previously rendered and to act as an inducement to continued and faithful service. Here, the services previously rendered is Ms. Zhang's employment with Hillsborough during the 2013-2014 and 2014-2015 school years. Denying her ability to purchase service credit for those years means that she may need to work longer before she is eligible to retire, and that when Ms. Zhang does retire, her pension benefit will be less than what it would be if allowed to purchase her time for the 2013-2014 and 2014-2015 school years.

c. N.J.A.C. 17:3-2.1 cannot be used to restrict income which is otherwise recognized as pensionable under State statutes.

As the controlling statute for determining pension eligibility of teaching staff members, N.J.S.A. 18A:66-2 defines a teacher's compensation for pension eligibility and value purposes as:

> "Compensation" means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing

> temporary or extracurricular duties beyond the regular school day or the regular school year.

N.J.S.A 18A:66-2(d)(1). The Appellate courts have liberally interpreted this definition of "compensation". See e.g., Siri v. Board of Trustees of Teachers' Pension and Annuity Fund, 262 N.J.Super. 147 (App.Div. 1993) (a temporary service of a permanent duty is "compensation" for purposes of N.J.S.A. 18A:66-2(d)(1)).

The appellate courts have time and again held that a regulation cannot limit the scope of eligibility under N.J.S.A. 18A:66-2(d)(1). In Siri, the Appellate Division described the relationship between N.J.S.A. 18A:66-2 and regulations issued by the Division of Pensions:

> The statute prevails over the regulation. "[I]n the execution of its rule-making power a state agency may not go beyond declared statutory policy." *In re Increase in Fees by N.J. St. Bd. of Dentistry,* 166 *N.J.Super.* 219, 223, 399 *A.*2d 665 (App.Div. 1979). "Administrative regulations, of course, cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute. *N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm.*, 82 *N.J.* 57, 82, 411 *A.*2d 168 (1980).

Id. at 152. More recently in Morris Hills Regional Dist. Educ. Ass'n v. Board of Trustees of Teachers' Pension and Annuity Fund, 2012 WL 1722369 (App.Div., May 17, 2012),[10] the Appellate Division again found State statute to be controlling:

> Second, the language the Board cites is found not in the statute, but in *N.J.A.C.* 17:3-4.1(a). ***The regulatory language is an impermissible***

[10] This decision is included in the appendix, at 150a.

> ***narrowing of the statute***. *Siri v. Bd. of Trs.*, 262 *N.J.Super.* 147, 152, 630 A.2d 440 (App.Div 1993) ("[I]n the execution of its rule-making power a state agency may not go beyond declared statutory policy. Administrative regulations, of course, cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute.") (Citations omitted)

Id. at *5 (emphasis added) (153a).

Ms. Zhang's employment with Hillsborough during the 2013-2014 and 2014-2015 school years clearly qualified as compensation under N.J.S.A. 18A:66-2. Hillsborough paid Ms. Zhang a contractual salary as consistent with the CNA during the entirety of the 2013-2014 and 2014-2015 school years for her work as a Chinese language teacher. At no point has the TPAF asserted that Ms. Zhang's income during these two years fell outside the definition of "compensation" under the statute. As neither N.J.A.C. 17:3-2.1 nor any other regulation has the authority to supersede a state statute, the Appellate Division must reject any reading of a regulation such as N.J.A.C. 17:3-2.1 which impermissibly restricts Ms. Zhang's pension eligibility in conflict with N.J.S.A. 18A:66-2.

3. The TPAF's interpretation of 17:3-2.1(a)(2) was arbitrary, capricious and clearly erroneous.

In addition to the plain language of N.J.S.A. 18A:66-2 being controlling regarding the instant question of Ms. Zhang's eligibility for pension credit, this Court must conclude that Ms. Zhang also qualified for pension credits under N.J.A.C. 17:3-2.1 during the 2013-2014 and 2014-2015 school years. Even though

Hillsborough failed to make pension deductions from Ms. Zhang's paychecks during either the 2013-2014 or 2014-2015 school years, she still met all the elements under the regulation, and those years would have been included in her pension service but for Hillsborough's mistake.[11] It is indisputable that her position was "covered by Social Security" as the IRS recognizes that individuals employed under the H-1B visa are subject to FICA taxes, including social security.[12] Accordingly, Ms. Zhang has been "covered by Social Security" since she obtained her H-1B Visa in October 2013.

a. The TPAF's definition of "covered by Social Security" in the FAD is plainly incorrect.

In the FAD, the TPAF relies upon Hillsborough's failure to take Social Security deductions from Ms. Zhang's checks during the 2013-2014 and 2014-2015 school years to conclude that her pension credit requests cannot be compliant with N.J.A.C. 17:3-2.1. This determination, however, was incorrect since a person does not need to contribute into Social Security to qualify under the regulation, as long as the person is eligible to contribute into Social Security. The plain language of the regulation only requires that Ms. Zhang's job title be "covered" by social

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[11] The lack of pension deductions for the 2013-2014 and 2014-2015 school years would be remedied by Ms. Zhang's purchase of credits, should she be successful in the instant appeal.

[12] See IRS Section 3121(b)(19) (26 U.S.C. 3121(b)(19)), only nonresident aliens temporarily present in the United States as a nonimmigrant are excluded from FICA.

security; the regulation does not require actual contributions toward Social Security.

Ro Ane v. Mathews, 476 F.Supp. 1089 (N.D. Cal. 1977) exemplifies the error of the TPAF's misinterpretation of "covered by". In Ro Ane, there was a group of individuals who had previously been enrolled into and contributing to Social Security but whose positions no longer became eligible to prospectively join Social Security. Accordingly, this group argued that they should no longer be required to continue contributing into Social Security. The court acknowledged that the appellants' position was no longer covered by Section 218 of the Social Security Act. However, in finding that the people had to continue contributing into Social Security, the court turned to the Social Security Act's definition of "positions covered by a retirement system." Id. at 1098 (citing 42 U.S.C. 218(d)(3)). The court explained that the term "covered by" was meant to identify those who *should* be paying into Social Security. Id.

Ro Ane is instructive to the instant appeal in a few respects. For one, as the TPAF cites Section 218 of the Social Security Act in the FAD, a court analysis of the statute should hold significant sway in analyzing the FAD. Additionally, the court in Ro Ane did not consider whether an employee was contributing toward Social Security in determining whether the person was 'covered by' Social Security. To the contrary, the court analyzed whether the appellants were 'covered

by' Social Security to determine whether they should be contributing to Social Security.

Here, the TPAF applied backwards logic. The FAD addressed Ms. Zhang's (non) contributions into Social Security to determine whether she was 'covered by' Social Security when it should have instead defined 'covered by' under N.J.A.C. 17:3-2.1 to determine who should have been contributing towards Social Security. There is no dispute that Ms. Zhang should have contributed to Social Security during the 2013-2014 and 2014-2015 school years, but that it was Hillsborough's fault that she did not make said contributions. Ever since Hillsborough realized its administrative mistake, Ms. Zhang has been contributing towards Social Security, as she always should have been while working in a position "covered by Social Security." The TPAF erred in ruling contrary to the court's determination in Ro Ane that a determination of whether a person is "covered by" Social Security is distinct from whether the person has been contributing toward Social Security.

b. The TPAF's definition of "covered by Social Security" in the FAD conflicts with other TPAF regulations.

This Court must also find the TPAF's definition of "covered by" in N.J.A.C. 17:3-2.1 to be plainly incorrect because this definition conflicts with another of its regulations, N.J.A.C. 17:3-6.1. In this regulation, which primarily addresses retirement applications, the TPAF frequently refers to members who are "enrolled"

in pension systems. From the regulation, we can tell that the word "enrolled" means active participation, including contributions, to the pension system.

With its asserted definition of "covered by" in N.J.A.C 17:3-2.1, the TPAF is claiming that "covered by" and "enrolled" mean the same thing. This claim, however, comes without any support and renders the two terms duplicative. If the drafters of N.J.A.C. 17:3-2.1 wanted enrollment to Social Security to be a requirement, it would have just used that term here like it did elsewhere in its regulations. Rather, applying the concept of *in pari materia*, the term "covered by" must have a different meaning than simply a synonym of "enrolled". Accordingly, a more appropriate reading of N.J.A.C. 17:3-2.1 which gives meaning to both this regulation and N.J.A.C. 17:3-6.1 is to read "covered by" to mean that a position is eligible for enrollment into Social Security. Thus, the Appellate Division must conclude that the TPAF erred in asserting that Ms. Zhang needed to actually contribute toward Social Security between 2013 and 2015 to be treated as working in a position "covered by Social Security" for the purposes of N.J.A.C. 13:3-2.1.

4. The Section 218 Agreement does not impact Zhang's eligibility to enroll into the TPAF.

As the TPAF's previous explanations for denying Ms. Zhang the opportunity to purchase pension credits failed to pass muster, the TPAF for the first time in the FAD raised Section 218 agreements between the SSA and the State as a basis for denying Ms. Zhang's request to purchase State pension credits. The

TPAF now claims that allowing Ms. Zhang to purchase pension credits for her work between 2013 and 2015 would violate the State's Section 218 agreement. However, it is evident that there is no conflict here between Ms. Zhang's request to purchase pension credits and Section 218.

For the purposes of who and what types of work qualify for Social Security, 42 U.S.C. 410 identifies various categories of people and services which do not qualify as "employment." Under this section, certain types of immigrants and services performed by immigrants as defined under 8 U.S.C. 1101 are excluded from eligibility for Social Security. There is no dispute that to be eligible to enroll into the TPAF, both the person and the nature of the work must qualify to enroll into Social Security. The question here is whether any of the exclusions under 42 U.S.C. 410 disqualify Ms. Zhang from Social Security and thus TPAF enrollment for the period between October 1, 2013 and June 30, 2015.

a. Zhang was not "temporarily present".

In the FAD, the TPAF asserted that Ms. Zhang's employment between 2013 and 2015 conflicted with subparagraphs (F), (J), (M) and (Q) of the Immigration and Nationality Act ("INA") and thus granting her request to purchase pensions credits would violate the Section 218 agreement. However, the premise for this argument is incorrect. The relevant statute, as quoted in the FAD, reads: "a nonresident alien individual for the period [s]he is temporarily present in the

United States." The FAD then continued that individuals on F-1 visas are not covered under Section 218 agreements. (5a-6a).

At the beginning of the FAD, the TPAF acknowledged that Ms. Zhang began her employment with Hillsborough in 2012 under "a temporary work permit, which is the F-1 student visa called Optional practice Training (OPT)". The FAD then continued that that "In April 2013, Ms. Zhang and Hillsborough were notified of her status change from OPT to H-1B, effective October 1, 2013 through June 30, 2014" and then "On or about May 15, 2014, Hillsborough notified Ms. Zhang that the extension of her H-1B visa was approved for the period covering July 1, 2014 through June 30, 2017." (1a-2a). Based upon the TPAF's own writings and supported by Ms. Zhang's submissions to the State, Ms. Zhang worked under a H-1B for the entirety of October 1, 2023 through June 30, 2015. But yet, immediately after referencing the INA, the TPAF asserted: "Zhang's employment with Hillsborough from October 1, 2013 through June 30, 2015 was through an F-1 visa". (6a). If we consider the TPAF's writings altogether, we have the Schrodinger's Cat situation of Ms. Zhang simultaneously not being employed under an F-1 visa and also being ineligible for Social Security because of her working at the same time under an F-1 visa.

There are only two rational conclusions for the TPAF citing Ms. Zhang having an F-1 visa during the 2013-2014 and 2014-2015 school years while also

recognizing her having an H-1B visa, neither of which supports its conclusion. One deduction is that the TPAF does not understand the difference between an F-1 visa and an H-1B visa, that a person cannot maintain both at the same time. The other possibility is that the TPAF is aware of this distinction but is choosing to ignore it because it is the only way to claim that Ms. Zhang was "temporarily present" for the purposes of Section 218 agreements. But as we know that Ms. Zhang was not "temporarily present" in the United States during the 2013-2014 and 2014-2015 schools, its follows that the INA and by consequence Section 218 agreement do not impede Ms. Zhang's ability to apply for pension credits between 2013 and 2015. Accordingly, the TPAF's conclusion that Ms. Zhang was under an F-1 visa during those years was not supported by the record.

b. <u>There is no other aspect of Zhang's employment between 2013 and 2015 which conflicts with Section 218 Agreements.</u>

Even if this Appellate Court were to still consider the TPAF's arguments about Section 218 agreements despite the indisputable fact that Ms. Zhang was not "temporarily present" during the 2013-2014 and 2014-2015 school years, none of the specific provisions identified in the FAD support the TPAF's against Ms. Zhang. It is telling that although the TPAF highlighted references to subparagraphs (F), (J), (M) or (Q) of section 101(a)(15) of the INA, the TPAF did not explain how any of these provisions required it to deny Ms. Zhang's request to purchase pension credits. (5a). When we look at the subparagraphs, we can see that the

TPAF failed to provide an answer because none of the language actually supports the TPAF's determination.

Subparagraph (F) of Section 101(a)(15) of the INA is inapplicable to Ms. Zhang during the 2013-2014 and 2014-2015 school years. 8 U.S.C. 1101(a)(15)(F) states in relevant part:

> [A]n alien having a residence in a foreign country which [s]he has no intention of abandoning who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study…

There are numerous reasons why this subparagraph does not apply to Ms. Zhang. For one, Zhang completed her course of study at Rutgers in 2012. Her graduate school program did not overlap with her employment with Hillsborough. Additionally, once Ms. Zhang transitioned from an OPT (F-1) visa to an H-1B visa effective on October 1, 2013, she was no longer even on a student visa. Further, as evidenced by her employment in Hillsborough for over a decade now, Ms. Zhang clearly did not come to the United Sates either temporarily or solely for the purpose of pursuing a course of study. Thus, we can safely conclude that 8 U.S.C. 1101(a)(15)(F) does not disqualify Ms. Zhang's work during the 2013-2014 and 2014-2015 school years from Social Security eligibility.

Subparagraph (J) is also clearly inapplicable to Ms. Zhang during the 2013-2014 and 2014-2015 school year. 8 U.S.C. 1101(a)(15)(J) states in relevant part:

> An alien having a residence in a foreign county which [s]he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United State as a participant in a program designated by the Director of the United States Information Agency…

Much like with subparagraph (F), this subparagraph concerns people who come only temporarily to the United States. Further, this subparagraph concerns people who come to the country as part of a program designated by the Director of the United State Information Agency. The TPAF has not asserted that Ms. Zhang's employment with Hillsborough was ever part of such a program. Accordingly, 8 U.S.C. 1101(a)(15)(J) does not disqualify Ms. Zhang's work during the 2013-2014 and 2014-2015 school years from Social Security enrollment.

Subparagraph (M) is similarly inapplicable to Ms. Zhang during the 2013-2014 and 2014-2015 school years. 8 U.S.C. 1101(a)(15)(M) states in relevant part:

> [A]n alien having a residence in a foreign country which [s]he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States…

Here, in addition to the "temporary" length of time and "sole purpose" of study which we've already addressed, Ms. Zhang was never enrolled in a "vocational or other recognized nonacademic institution". Consequently, at no point during Ms.

Zhang's time in the United States, including when she was actually a student, would subparagraph (M) have barred her from enrolling into Social Security.

Finally, much like the other subparagraphs relied upon by the TPAF, subparagraph (Q) fails to support the TPAF's denials of Ms. Zhang's request to purchase pension credits. 8 U.S.C. 1101(a)(15)(Q) states in relevant part:

> [A]n alien having a residence in a foreign country which [s]he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months)[13] to the United States as a participant in an international cultural exchange program…

We can that this subparagraph indisputably does not apply to Ms. Zhang. For one, she did not come to the United States as part of a cultural exchange program. But even more obvious, Ms. Zhang has now been here for approximately 15 years, whereas the program described here only allows someone to be in the United States for just over 1 year. As there is no aspect of this subparagraph which applies to Ms. Zhang's employment during the 2013-2014 or 2014-2015 school years, it also does not provide a basis for excluding this work from Social Security eligibility.

We now see that the grounds for disqualification of enrollment into Social Security under the Section 218 agreement all concern either being a student or a visitor for a very short period of time. Clearly none of these grounds apply to

[13] This expressed length of time is included in the subparagraph.

individuals working in the United States under an H-1B visa. Rather, the federal government is very clear that employment under a H-1B is eligible for enrollment into Social Security:

> **B. Social Security and Medicare taxes on wages**
>
> An H1-B alien who is paid wages in exchange for personal services performed within the United States is liable for U.S. Social Security and Medicare taxes on such wages, regardless of whether he or she is a U.S. resident alien or nonresident alien, unless he or she is engaged in a type of employment that under U.S. law is not subject to U.S. Social Security and Medicare taxes. Please refer to Publication 15 [14]for more information.
>
> However, if an H-1B alien is from a country with which the United States has entered into a Totalization Agreement,[15] he or she may claim an exemption from U.S. Social Security taxes and Medicare taxes by securing a Certificate of Coverage from the social security agency of his or her home country…

(See https://www.irs.gov/individuals/taxation-of-alien-individuals-by-immigration-status-h-1b).

As Ms. Zhang was employed by Hillsborough between October 1, 2013 and June 30, 2015 through an H-1B visa rather than an OPT (F-1) visa, she was eligible

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[14] The TPAF has not alleged that Ms. Zhang's position as a teacher in Hillsborough is generally not subject to Social Security, as demonstrated by the fact that she has been enrolled in Social Security in this same position since 2015. Her title is not identified as an exception to the requirement. See https://www.irs.gov/pub/irs-pdf/p15.pdf.

[15] The United States has not entered into a Totalization Agreement with China. See https://www.irs.gov/individuals/international-taxpayers/totalization-agreements and https://www.ssa.gov/international/agreements_overview.html?

to enroll into Social Security during this entire time period. This is consistent with the fact that Ms. Zhang was enrolled and contributing to Social Security during the rest of the time she worked through an H-1B visa. As there was no difference in Ms. Zhang's employer, job title or immigration status, there would be no basis to assert that only part of this time would be covered by a Section 218 agreement. Accordingly, the TPAF would not be in danger of violating the Section 218 agreement by permitting Ms. Zhang to purchase pension credit as requested.

Neither the plan language of N.J.A.C. 17:3-2.1 nor the Section 218 agreement warranted the TPAF's denial of Ms. Zhang's request to purchase pension credits, and the FAD does not identify any other grounds for refusing Ms. Zhang's request. It is thus undeniable that the TPAF acted arbitrary, capricious, and unreasonably in finding that Ms. Zhang did not qualify for TPAF credits under N.J.A.C. 17:3-2.1 and N.J.A.C. 17:3-5.8. Rather, the Appellate Division must conclude that Ms. Zhang's employment with Hillsborough between October 1, 2013 and June 30, 2015 while working under a H-1B visa is eligible for purchase of pension service credit.

C. Equitable principles otherwise requires the TPAF to grant Zhang's request to purchase pension credits. (1a-20a).

Additionally, the concept of equitable principles requires the TPAF to provide Ms. Zhang with the opportunity to purchase pension credits for her work

during the 2013-2014 and 2014-2015 school years. Just within the last few months, the New Jersey Supreme Court in Seago v. Board of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381 (2024) applied equitable principles in support of a pension member even when it found that the TPAF reasonably interpreted the underlying regulation. Such a similar outcome would also be warranted here. In Seago, the Supreme Court addressed whether the TPAF needed to allow an individual to transfer her pension tier from a different State pension system even though the deadline for submitting the interfund transfer request under TPAF regulation N.J.A.C. 17:3-7.1 had already passed. Ms. Seago had timely completed her part of the paperwork to complete an interfund transfer application, but her employer had failed to complete and submit the paperwork to the State. There was no dispute that the school district was at fault for Seago's paperwork to the State not being timely.

In addressing whether the deadlines under N.J.A.C. 17:3-7.1 should bar Ms. Seago from completing an interfund transfer, the Supreme Court considered equitable principles as addressed in Sellers v. Board of Trustees, PFRS, 399 N.J.Super. 51 (App. Div. 2008). The Supreme Court then noted that equitable principles permit relaxing pension enrollment requirements when the affected member acted reasonably. The Supreme Court added that this was especially true when the equitable remedy would involve the pension board relaxing the

application of its own regulation. Seago, 257 N.J. at 395-96. Applying those principles, the Supreme Court found it significant that Ms. Seago had acted in good faith in timely completing the form and that she would suffer significant harm by the TPAF's strict application of N.J.A.C. 17:3-7.1(b)(1). Accordingly, the Supreme Court held that it was necessary and proper for the TPAF to approve Ms. Seago's interfund transfer application even though it was technically received by the TPAF after the regulatory deadline.

Akin to how equitable principles prompted the Supreme Court to support Ms. Seago, the same principes require this Appellate Division to similarly protect Ms. Zhang. Like Ms. Seago, Ms. Zhang is a TPAF member who timely and in good faith worked with her employer to provide accurate information to the State. Also similar to Seago, the reason for the TPAF's rejection of Ms. Zhang's request was entirely due to her employer's admitted failures in documenting and paperwork. In both situations, the pension member was not at fault but was the sole party at risk of punishment. Further, both here and with Ms. Seago, the TPAF's denial is based upon the application of its own regulations.

With the material facts here so neatly lining up with the Supreme Court's concerns in Seago, the courts should once again direct the TPAF to relax the application of its own regulations. There is no greater interest furthered by the TPAF depriving Ms. Zhang of the opportunity to purchase pension credits. As Ms.

Zhang undisputably acted in good faith, we are not worried about the TPAF here rewarding bad behavior. Further, given the unique circumstances of this appeal, there should be no concern about this decision having broader implications. To even get to this point we needed 1) Ms. Zhang to start her employment on a student visa; 2) later get approved for an H-1B visa while with the same employer; and 3) the employer failing to update some of its internal paperwork regarding the payroll implications of Ms. Zhang's visa status. It is evident then that the only lasting effect of the FAD would be the TPAF's punishment against Ms. Zhang despite the member not committing any offense.

To exemplify the inherent unfairness of the TPAF's determination against Ms. Zhang, let's imagine if Hillsborough had instead for some reason failed to make several months' worth of Social Security payments for its entire staff. As we have seen with Ms. Zhang, none of these employees would be able to make up the Social Security contributions after this fact. What would happen then? If the TPAF similarly applied N.J.A.C. 17:3-2.1 in this scenario, then invariably every single Hillsborough employee would lose out on months' worth of State pension credits. When considered over the retirements of all these employees, the resulting damages could be well north of $1 million, all because of the school district's mistake. This would cause a public uproar, and the TPAF would be forced to do right for the members it is meant to protect and benefit.

If the employer's mistake would surely not be held against its employees in the above situation, it is repugnant then to treat Ms. Zhang's situation differently only because she is a class of one. She should not be punished as to her pension credits because Hillsborough fumbled only her Social Security enrollment. But at the end of the day this is the only justification the TPAF has against Ms. Zhang, that it could treat her worse off than if 100 people were in the same position as her.

Ms. Zhang brought Seago to the TPAF's attention both in writing and during the scheduled meetings. (8a-20a). The FAD, however, did not make any mention of this Supreme Court decision, which is so clearly pivotal to the consideration of Ms. Zhang's situation. (1a-7a). If such an analysis of Seago had been included in the FAD, the TPAF would have inevitably found that a showing of even a modicum of flexibility or compassion in the application of its own regulation would have required granting Ms. Zhang's request. Accordingly, the Appellate Division must find that even if N.J.A.C. 17:3-2.1 and N.J.A.C. 17:3-5.8 could be applicable to this situation, that the TPAF needs to demonstrate flexibility in the application of its own regulations and allow Ms. Zhang the opportunity to purchase pension credits for her employment with Hillsborough during the 2013-2014 and 2014-2015 school years.

D. The TPAF's determination in the FAD violated legislative policies, relied upon inaccurate evidentiary findings, and reached an unreasonable conclusion. (1a-7a).

In ultimately deciding whether the TPAF's determination was arbitrary, capricious or unreasonable, we see that the FAD fails all three variables.[16] The TPAF's determination flunked the first variable by violating both express and implied legislative policies. The TPAF did not meet the second variable because it indisputably applied incorrect material facts. Consequently, its FAD does not pass muster with the third variable since it did not reach a reasonable conclusion when applying the legislative policies to an accurate factual summary of the case.

As the first variable, the TPAF in the FAD violated the express legislative policy to broadly interpret its own statutes and regulations to benefit the members it is meant to serve and promote. Instead, by applying the strictest interpretation of N.J.A.C. 17:3-2.1(a)(2), the TPAF unnecessarily and inappropriately limited who can qualify for State pension credits.

Still with the first element on the analysis of whether the administrative agency's decision was arbitrary, capricious or unreasonable, the FAD also violated numerous implied legislative priorities. It impermissibly narrowed the application of N.J.S.A. 18A:66-2. Additionally, as we see elsewhere within the TPAF's own regulations, there is a difference between the term "covered by" as used in

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[16] See Section A of the legal argument, *supra*.

N.J.A.C. 17:3-2.1 and "enrolled" as used in N.J.A.C. 17:3-6.1. Yet, to affirm the FAD, this Court would instead need to find no distinction between these clearly different terms. The FAD also defied implied legislative priorities in the TPAF's refusal to apply Seago. The Supreme Court directed the very same TPAF just a few months ago to demonstrate flexibility and compassion in the application of its own regulations. The Appellant here reminded the TPAF of this obligation in the filings below. Yet, the TPAF disregarded Seago in the FAD because it could not provide a coherent explanation as to how its handling of Ms. Zhang demonstrated any flexibility or compassion in the analysis and application of its own regulations for a member who everyone acknowledges did nothing wrong.

The second variable also requires this Court to find that the TPAF's decision was arbitrary, capricious and unreasonable because the FAD was not supported by the substantial evidence before it. The FAD's "CONCLUSIONS OF LAW" relied upon the clearly erroneous factual claim that Ms. Zhang worked through an F-1 visa during the 2013-2014 and 2014-2015 school years. The TPAF relied upon this incorrect assertion even though earlier in the FAD the TPAF admitted and the only evidence before it was that Ms. Zhang had worked through an H-1B visa during the at-issue school years. It was only through this misrepresentation of the fact that the TPAF was able to claim that the Section 218 Agreement prevent Ms. Zhang from getting pension credits for the 2013-2014 and 2014-2015 school years.

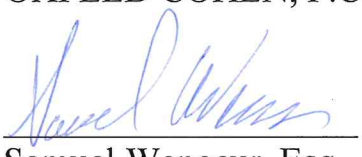
However, we know that Ms. Zhang taught during both schools years under an H-1B visa, which even the TPAF acknowledges is eligible for enrollment with both Social Security and the State pension system. Once we correct this one irrefutable fact, the FAD has no legs to stand on.

Finally, as neither the legislative policies nor the substantial evidence supported the TPAF's conclusions, it must follow that the TPAF did not reach a reasonable conclusion in applying the policies to the facts of the case. There is no justification under N.J.A.C. 17:3-2.1 for the TPAF to exclude a teacher working under an H-1B visa from enrolling into the State's pension system. Accordingly, the TPAF had to create a new interpretation of its own regulation which conflicts with its other regulations, assert an inaccurate summary of the facts, and neglect to show either any flexibility or compassion for a person who everyone recognizes did nothing wrong. Each of these issues would be sufficient for the Appellate Division to reverse the FAD. But when considered together, the scale of the TPAF's mishandling of Ms. Zhang's request to purchase pension credits for her employment with Hillsborough during the 2013-2014 and 2014-2015 school years become impossible to ignore. Thus, the Appellate Division must correct the obvious wrongs and harms caused by the TPAF, find that the FAD was arbitrary, capricious and unreasonable, and consequently overturn the agency's decision.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to reverse the New Jersey Division of Pensions and Benefits, Teachers' Pension and Annuity Fund's November 15, 2024 Final Administrative Determination to deny Shu Zhang's request to purchase pension credits for her employment with the Hillsborough Board of Education during the 2013-2014 and 2014-2015 school years. Instead, Appellant respectfully requests the Court to find that Ms. Zhang is eligible to purchase pension credits with the Teachers' Pension and Annuity Fund for those years of employment.

Respectfully submitted,
OXFELD COHEN, P.C.



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Re: Zhu Zhang v. Board of Trustees, Teachers' Pension and Annuity Fund
Docket No. A-1000-24T2

On Appeal from a Final Administrative Determination of the Board of Trustees, Teachers' Pension and Annuity Fund

Letter Brief of Respondent, Board of Trustees, Teachers' Pension and Annuity Fund on the Merits of the Appeal

Dear Ms. Hanley:

Please accept this letter brief on behalf of Respondent, the Board of Trustees, Teachers' Pension and Annuity Fund ("Board") on the merits of the appeal.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant Shu Zhang appeals the Board's November 15, 2024 Final Administrative Decision denying her request to purchase service credit based on her employment with Hillsborough Township for the period covering October 1, 2013, to June 20, 2015. (Pa1-7; Pa147-49).[2]

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[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Pa" refers to Zhang's appendix; "Pb" refers to her brief.

During the 2012-2013 school year, Zhang worked for Hillsborough as a Chinese language teacher under a F-1 student visa called Optional Practice Training (OPT). (Pa1; Pa68). F-1 visas are for international students pursing academic studies that will result in a degree, diploma, or certificate. (Pa1-2).

In or around December 2012, Zhang applied for an H-1B visa with Hillsborough's assistance. (Pa2; Pa69; Pa75-85). In April 2013, Hillsborough received notification Zhang's H-1B visa was approved effective October 1, 2013, through June 30, 2014. (Pa2; Pa69; Pa87). On May 1, 2013, Hillsborough notified Zhang about her H-1B visa approval and provided her with a copy of the 2013 DHS Notice of Action. (Pa69).

In Spring 2014, Hillsborough assisted Zhang with an extension of her H-1B visa. (Pa2; Pa70). In May 2014, Hillsborough received notification Zhang's H-1B visa was extended effective July 1, 2014, through June 30, 2017. (Pa70; Pa89). Soon after, Hillsborough notified Zhang about her H-1B visa extension and provided her with the Notice of Action. (Pa2; Pa70).

In or around September 2015, Hillsborough's payroll department notified Zhang her visa status was incorrectly listed as OPT rather than H-1B. (Pa70). On September 8, 2015, Hillsborough submitted an application to enroll Zhang in the Teachers' Pension and Annuity Fund (TPAF), effective September 1,

2015. (Pa2-3). After being enrolled, Zhang did not make any attempts to identify or address any issues with her TPAF account. (Pa71).

On May 17, 2021, nearly six years after Zhang learned about the visa error that affected her TPAF enrollment, Zhang submitted an application to purchase service credit from September 1, 2012 to August 31, 2015. (Pa97). On June 21, 2021, the Division denied Zhang's request to purchase service credit from July 1, 2012, to June 30, 2015[3] because her employment during the requested period was not covered by Social Security. (Pa3; Pa93).

In February 2024, Zhang contacted the Social Security Administration (SSA) regarding her ability to purchase Social Security credits for her employment during the 2013-2014 and 2014-2015 school years. (Pa71). The SSA told her "there was no basis for [her] to purchase those years even if [she] should have been eligible for Social Security credits." Ibid.

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[3] Ten-month employees receive credit for the July and August that preceded September if they make a full month's contribution for September. New Jersey Division of Pensions and Benefits, Teachers' Pension and Annuity Fund (TPAF) Member Guidebook, 12 (May 2025), https://www.nj.gov/treasury/pensions/documents/guidebooks/tpafbook.pdf. Because Zhang was requesting to purchase September 2012, if eligible, she should would have been able purchase July 2012 and August 2012. Further, because Zhang was enrolled in the TPAF effective September 1, 2015, she already received credit for July 2015 and August 2015. Accordingly, the Division adjusted and denied the request for the purchase of service credit from July 1, 2012 to June 30, 2015. (Pa93).

Nearly three years after the Division denied Zhang's request to purchase service credit, Zhang appealed the Division's denial of her request to purchase service credit on April 9, 2024. (Pa3; Pa27). On April 17, 2024, the Division again denied Zhang's request pursuant to N.J.A.C. 17:3-2.1(a)(2), which states Social Security coverage is a perquisite to participate in the TPAF. (Pa3; Pa26). Because Social Security contributions were not remitted, the Division determined that she was not eligible to enroll in the TPAF. (Pa4; Pa26).

On April 23, 2024, Zhang appealed the Division's denial to the Board, arguing the Board incorrectly interpreted N.J.A.C. 17:3-2.1(a)(2) and failed to consider her particular circumstances. (Pa3; Pa24-25).[4] On July 19, 2024, the Board denied Zhang's request to purchase service credit from July 1, 2012, through June 30, 2015, pursuant to N.J.A.C. 17:3-2.1(a)(2) and N.J.A.C. 17:3-5.8(a)(6). (Pa3; Pa21-23). The Board determined that because Hillsborough did not withhold Social Security deductions for the requested period, Zhang was not eligible for service credit for that period. (Pa22).

[4] Zhang narrowed the scope of her request to the purchase of pension credit from October 1, 2013 to August 30, 2015. (Pa25).

On August 22, 2024, Zhang appealed the Board's denial of her request to purchase service credit for just the 2013-2014 and 2014-2015 school years. (Pa3-4).

On October 10, 2024, the Board affirmed its prior decision. (Pa1). On November 15, 2024, the Board issued its Final Administrative Determination. (Pa1-7). The Board determined that pursuant to N.J.A.C. 17:3-2.1(a)(2), Zhang's employment from July 1, 2012, through June 30, 2015, was not covered by Social Security due to the exceptions in the Section 218 agreement with the SSA. (Pa4-6). As more fully explained next, under the Section 218 agreement, certain services, such as those performed by individuals with F-1 visas are excluded from coverage under the Section 218 Agreement. 42 U.S.C. 418(c)(6)(D)[5]; 42 U.S.C. 410(a)(19). (Pa5). Because Zhang's employment status with Hillsborough during the period of October 1, 2013, through June 30, 2015, was through an F-1 visa, her employment was not covered by the State's Section 2018 Agreement with the SSA. (Pa6). Accordingly, the position was not covered by Social Security as required by N.J.A.C. 17:3-2.1(a)(2), she was

[5] There is a typographical error with the Board's citation of this statute. The Board incorrectly cites to 42 U.S.C. 418 (a)(6)(D), when it should be 42 U.S.C. 418(c)(6)(D). (Pa5).

not entitled to be enrolled in TPAF at that time, and therefore she was not eligible to purchase service credit for that time period. Ibid.

This appeal followed.

ARGUMENT

THE BOARD'S DETERMINATION THAT ZHANG WAS NOT ELIGIBLE TO PURCHASE SERVICE CREDIT FROM OCTOBER 1, 2013, TO JUNE 30, 2015, IS REASONABLE AND SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE ON THE RECORD.

In this appeal from a final agency decision, this court has "a limited role to perform." Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980). The Board's "decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). "When an error in the factfinding of an administrative agency is alleged," this court's "review is limited to assessing whether sufficient credible evidence exists in the record below from which the findings made could reasonably have been drawn." City of Plainfield v. N.J. Dep't of Health & Senior Servs., 412 N.J. Super. 466, 484 (App. Div. 2010).

This court is "obliged to accept" factual findings that "are supported by sufficient credible evidence." Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997) (quotation omitted). "[T]he test is not whether [this] court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Ibid. (quotation omitted).

As will be explained, the Board's determination that Zhang is ineligible to purchase service credit from October 1, 2013, to June 30, 2015, is supported by the evidence and the law. Thus, the Board's final administrative determination should be affirmed.

A. The Board reasonably determined that Zhang was not eligible to purchase service credit pursuant to N.J.A.C. 17:3-2.1(a)(2).

The pension statutory and regulatory framework outlines the requirements for eligibility to enroll in the TPAF. N.J.A.C. 17:3-2.1(a) states, in pertinent part:

> (a) Any person appointed by the State, local board of education, or charter school to a position listed in the definition of "teacher" found at [N.J.S.A. 18A:66-2(p)] or as a regular, full-time employee in a position that meets the following conditions shall be required to become a member of the Fund effective as of the date of their employment:

> 1. The position requires a valid certificate issued by the State Board of Examiners, pursuant to N.J.S.A. 18A:6-34 et seq. and N.J.A.C. 6A:9, and the person employed holds this valid certificate;
>
> 2. The position is covered by Social Security; and
>
> 3. Salary requirements and full-time weekly work hours to qualify for enrollment are met, based on the date of eligibility for enrollment . . . .

[Ibid. (emphasis added).]

Additionally, a TPAF member may not purchase TPAF service credit for service that was not eligible for "enrollment in a State-administered retirement system at the time the service was rendered." N.J.A.C. 17:3-5.8(a)(6). Thus, for Zhang to purchase credit for service from October 1, 2013, to June 30, 2015, she must have been eligible for enrollment in the TPAF at the time the service was rendered. Ibid. She was not eligible to enroll at the time service was rendered because the position was not covered under Social Security for her, specifically, it was not covered by the State's Section 218 Agreement with the State. (Pa93).

State and local government public employees are not automatically covered by Social Security. 42 U.S.C. 418(a)(1). For State and local government public employees to be covered by Social Security, the State must enter into a Section 218 Agreement with the SSA. Ibid. In other words, a Section 218 Agreement is an agreement between the SSA and the State to extend

the Social Security system to "services performed by individuals as employees of such State or political subdivision thereof." Ibid.

Pursuant to N.J.S.A. 43:22-3, the State entered into a Section 218 Agreement with the SSA so TPAF members would be covered by Social Security and receive Social Security benefits to supplement their pension in retirement. See also N.J.S.A. 18A:66-65 ("Agreement on social security"); N.J.S.A. 18A:66-73 ("Adoption of social security act etc., continued"). However, certain services for employment are expressly excluded from coverage under Section 218 agreements. 42 U.S.C. 418(c)(2). Specifically, a Section 218 Agreement with the SSA shall not include service excluded from Social Security coverage by 42 U.S.C. 410(a). 42 U.S.C. 418(c)(6)(D). Pursuant to 42 U.S.C. 410(a)(19), "[s]ervice which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under [8 U.S.C. 1101(a)(15)(F), (J), (M), or (Q)]" is excluded from Social Security coverage.

Here, for the period of October 1, 2013, to June 30, 2015, for the purposes of Social Security coverage, it is undisputed Zhang was employed by Hillsborough under a J-1 visa pursuant to 8 U.S.C. 1101(a)(15)(F). (Pa69-71). Although Zhang had H-1B status with the Department of Homeland Security,

that, unfortunately, was not her employment status with the SSA and the State. (Pa71). As Zhang acknowledges, Hillsborough "inaccurately document[ed] her visa status as OPT." (Pb8). Because her status was as a J-1 visa holder, the service she provided Hillsborough was employment that is specifically excluded under the State's Section 218 Agreement with the SSA. 42 U.S.C. 418(c)(2); 42 U.S.C. 418(c)(6)(D); 42 U.S.C. 410(a)(19); 8 U.S.C. 1101(a)(15)(F). By extension, that means that the position she was employed in was not covered by Social Security (through the Section 218 Agreement). N.J.A.C. 17:3-2.1(a)(2). Therefore, the Board reasonably determined that Zhang is not eligible to purchase service credit for the period of October 1, 2013, to June 30, 2015. (Pa1-7).

Zhang's arguments on appeal that N.J.A.C. 17:3-2.1(a)(2) impermissible restricts or narrows the effect of N.J.S.A. 18A:66-2(d)(1) are without merit. (Pb21-23). N.J.A.C. 17:3-2.1(a)(2)'s requirement for the position to be "covered by Social Security" to enroll in the TPAF is a requirement made in order to comply with the State's agreement with a federal agency. 42 U.S.C. 418(c)(2); 42 U.S.C. 418(c)(6)(D). Zhang cites to the unpublished decision in Morris Hills Regional District Education Association v. Board of Trustees of the Teachers' Pension and Annuity Fund, No. A-3474-10 (App. Div. May 17,

2012) (Pa150), in support of her position that regulations cannot impermissibly narrow enabling statutes. (Pb22-23). Contrary to Zhang's arguments, Morris Hills is distinguishable from Zhang's case because the regulation in Morris Hills narrowed a statutory exception for what is considered creditable compensation, whereas here, the regulation here does not does not even relate to the statute.

The regulation, N.J.A.C. 17:3-2.1(a)(2), sets the requirements to be eligible to enroll in the TPAF. Whereas, the statute, N.J.S.A. 18A:66-2(d)(1), defines what compensation is creditable for pension purposes for members already enrolled in the TPAF; it does not say anything about eligibility to enroll in the TPAF. In fact, an individual can be a member of the TPAF, but have compensation that is not creditable pursuant to N.J.S.A. 18A:66-2(d)(1). That does not affect that individual's eligibility to be a member of the TPAF. With her argument, Zhang is confusing eligibility for enrollment in the TPAF, generally, with eligibility for pension credit.

Next, Zhang's arguments that she was covered by Social Security because H-1B visa holders are subject to FICA taxes, including Social Security, misunderstand the issue. (Pa23-24). The Board does not dispute that H-IB visa holders are covered by Social Security. However, the Board reasonably determined that during the relevant period, Zhang was not employed under an

H-1B visa, even if it was due to her employer's mistake. (Pa4-6). The Board's position is supported by the SSA's refusal of Zhang's request to purchase Social Security credit, even if she were eligible for credit at the time. (Pa71). If the SSA cannot deem Zhang's employment from October 1, 2013, to June 30, 2015, eligible for Social Security credit and to be covered by Social Security, the Board cannot, in good faith, relax its regulations requiring coverage by the SSA. Otherwise, the Board would not be in compliance with the its Section 218 Agreement with the SSA. 42 U.S.C. 418(c)(2); 42 U.S.C. 418(c)(6)(D); 42 U.S.C. 410(a)(19).

Zhang's reliance on Ro Ane v. Matthews, 476 F. Supp. 1089 (N.D. Cal. 1997) is misplaced. (Pb25-26). First, Ro Ane, as an out-of-state case, is only persuasive authority. Second, the Ro Ane court specifically found that while states must agree to coverage for all services performed by individuals as members of a coverage group, "[c]ertain services . . . are expressly excluded under the Act." Ro Ane, 476 F. Supp. at 1094 n.7 (citing 42 U.S.C. 418(c)(2)). The exclusions in 42 U.S.C. 418(c)(2) are the basis for the Board's decision here. (Pa4-6).

Zhang's arguments that the Board interprets "covered by" in N.J.A.C. 17:3-2.1(a)(2) to mean "enrolled in" misunderstands the Board's position. (Pb26-27).

The Board's interprets "covered by Social Security" to mean covered by the State's Section 218 Agreement with the SSA. N.J.A.C. 17:3-2.1(a)(2). The Section 218 Agreement does not cover services for employment provided by those with F-1 visas. 42 U.S.C. 418(c)(2); 42 U.S.C. 418(c)(6)(D); 42 U.S.C. 410(a)(19). From October 1, 2013, to June 30, 2015, Zhang's status with the SSA and the State was as a F-1 visa holder. (Pa71). Because N.J.A.C. 17:3-2.1(a)(2) requires that the individual be eligible to enroll in the TPAF at the time service was rendered, Zhang's status as a F-1 visa holder for the relevant period prevents the Board from allowing her to purchase that time. The Board considers the SSA's refusal to grant her retroactive Social Security credit as support for the position that during the relevant period, her status with Social Security was an F-1 visa holder. And even if the SSA retroactively granted Zhang the Social Security credits, Zhang was still not eligible to enroll in the system at the time service was rendered pursuant to N.J.A.C. 17:3-2.1(a)(2).

B. Equitable Principles Are Not Applicable.

The Board is vested with "the general responsibility for the proper operation of the retirement system." N.J.S.A. 43:16A-13(a)(1). To this end, the Legislature authorized the Board to correct errors in the retirement system if an individual receives a retirement benefit he or she is not legally entitled to receive. N.J.S.A.

43:16A-18. An individual who is "eligible for benefits" is entitled to a liberal interpretation of the pension statute, but "eligibility [itself] is not to be liberally permitted." Krayniak v. Bd. of Trs., Pub. Emps.' Ret. Sys., 412 N.J. Super. 232, 242 (App. Div. 2010). Allowing ineligible members to receive retirement benefits "place[s] a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for such benefits." Smith v. State, 390 N.J. Super. 209, 215 (App. Div. 2007).

"Generally, equitable principles are rarely applied against governmental entities." Seago v. Bd. of Trs., Tchrs. Pension & Annuity Fund, 257 N.J. 381, 394-95 (2024) (citing Middletown Twp. Policemen's Benevolent Ass'n Loc. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000)). In determining whether to apply equitable principles in general, the court should consider the following: "whether the government failed to 'turn square corners'"; "whether the pension member 'acted in good faith and reasonably'; the harm a member will suffer; the harm to the pension scheme; and any other relevant factors in the interest of fairness." Seago, 257 N.J. at 396-97 (citing Sellers v. Bd. of Trs., Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 62-63 (App. Div. 2008)). Equitable principles should only be used as a remedy "rarely and sparingly" and when it "does no harm to the pension overall pension scheme." Sellers, 399 N.J. Super. at 62.

Application of the factors outlined in Seago do not warrant the application of equitable considerations here. Starting with the first factor, whether the Board "turned square corners" in considering Zhang's request, the Board is acting according to the requirements of N.J.A.C. 17:3-2.1(a)(2), and according to the federal requirements for Section 218 Agreements with the SSA. The Board is not arbitrarily applying the rules, nor is the Board failing to consider any documents provided by the Division that provide any contrary information. See Seago, 257 N.J. at 398 (finding that the Board failed to consider that the Division's Guidebook provided contrary information and caused hardship to Seago").

For the next factor, Zhang did not act reasonably because she failed to exercise reasonable diligence. Hillsborough had informed Zhang about the error with her visa status for the 2013-2014 and 2014-2015 school years in September 2015, yet, Zhang made no attempt to correct the error for years afterward as could reasonably be expected from an educated professional. (Pa70-71). Zhang made no attempt to contact the SSA or the Division in 2015. (Pa70-71). Instead, Zhang waited nearly six years to submit a purchase application for the 2013-2014 and 2014-2015 to the Division in May 2021. (Pa97). After the Division denied Zhang's request in June 2021 because her employment during the request period was not covered by Social

Security she then waited approximately thirty-two months to contact the SSA. (Pa93; Pa71). In this context, Zhang's decision to sit on her rights distinguishes this matter from Seago.

With respect to the harm to Zhang, that harm is very little. While she does have two less years of pension credit in the TPAF, she was enrolled in the TPAF effective September 2015. (Pa2-3). She agrees that she has been receiving credit since then. (Pb1). Unlike Seago, who was facing the loss of the benefit of a Tier 1 membership status, which meant she would have a higher retirement age and lower monthly pension allowance, Zhang is not facing the loss of a higher tier status. Seago, 257 N.J. at 400. Zhang is a Tier 5 member (due to her enrollment date) and will remain a Tier 5 member regardless of whether she is able to purchase the service credit from October 1, 2013, to June 30, 2015. N.J.S.A. 18A:66-43; N.J.S.A. 18A:66-44.

With respect to the harm to the system, however, the risk of harm is significant. The Board acts in a fiduciary capacity and it has the duty to serve the best interests of the TPAF and all of its beneficiaries, not just a member seeking a specific benefit. Mount v. Bd. of Trs., Pub. Emps.' Ret. Sys., 133 N.J. Super. 72, 86 (App. Div. 1975). Allowing Zhang to purchase the service credit for October 1, 2013, to June 30, 2015, is not permitted by the State's Section 218

Agreement with the SSA. 42 U.S.C. 418(c)(2); 42 U.S.C. 418(c)(6)(D); 42 U.S.C. 410(a)(19). Section 218 Agreements allow Social Security and Medicare coverage to be extended to state and local employees. 42 U.S.C. 418(a)(1). Jeopardizing the agreement could have significant impacts to the TPAF system and its members.

Thus, consider these factors and the specific circumstances of Zhang's situation, equitable principles do not apply to allow Zhang to purchase service credit from October 1, 2013, to June 30, 2015.

CONCLUSION

Because the Board's decision here was not arbitrary, capricious or unreasonable, this court should affirm.

Respectfully submitted,

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SHU ZHANG,	
Appellant,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
vs.	**DKT. NO. A-001000-24**
BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,	**ON APPEAL FROM THE DETERMINATION OF THE BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND**
Respondent.	**AGENCY REF. NO. 1-632674**

REPLY BRIEF ON BEHALF OF APPELLANT SHU ZHANG IN REPLY TO RESPONDENT'S BRIEF

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PROCEDURAL HISTORY

Appellant relies upon the procedural history submitted with her initial Appellate Division brief.

SUPPLEMENTAL STATEMENT OF FACTS

In consideration of numerous new factual assertions raised in Respondent Teachers Pension and Annuity Fund's ("TPAF") brief, Appellant submits a supplemental statement of facts to consider together with Appellant's previously submitted Statement of Facts. (Ab2-Ab6).[1] To begin, Respondent's brief noted that in September 2015 Hillsborough "notified Zhang her visa status was incorrectly listed as OPT rather than H-1B." Respondent, however, did not elaborate as to where this was listed or the significance of the listing. (Rb3).[2] In supposed support, Respondent cited to Zhang's certification first submitted below to the TPAF.

When we review the certification directly, we see the true significance of Hillsborough's notification to Zhang:

> 16. In or around September 2015, Hillsborough's payroll office acknowledged to me that it had my visa status as OPT rather than H1B, and that it was changing its documentation to accurately reflect my H1B status.

[1] "Ab" refers to Appellant's initial brief in support of the instant appeal.
[2] "Rb" refers to Respondent's Appellate Division opposition brief.

(70a).[3] Contrary to what the TPAF suggests, there was no change in Zhang's visa status at this time. Rather, Hillsborough merely updated its own records. As previously presented to the TPAF, Hillsborough acknowledged that it had inadvertently not updated its records. (71a-72a; 92a). The succeeding paragraphs in Zhang's certification confirm that there were no changes in her visa status in 2015 and that she was not made aware in 2015 as to the pension ramifications of Hillsborough's documentation errors:

> 17. I am unaware as to why Hillsborough only started enrolling me with Social Security in September 2015. There was no change in my immigration or employment statuses immediately before that time.
>
> 18. It was only in or around July 2021 that I found out that I was not enrolled in Social Security during the 2013-2014 or 2014-2015 school years. I now understand that I have not received TPAF pension credits for those school years despite working for Hillsborough under a H1B visa during those years.

(71a).

The TPAF's fast and loose application of Zhang's certification continued a few paragraphs later in quoting one section of a paragraph. (Rb4). The full paragraph quoted by the TPAF reads:

> 19. In or around February 2024, I contacted Social Security about whether I would be able to purchase the Social Security credits for my employment during the 2013-2014 and 2014-2015 school years. Social Security informed me that Hillsborough had messed up by not

[3] "70a" refers to page 70 of Appellant's Appellate Division appendix, submitted as part of Appellant's initial brief. This brief does not include any supplementation of this appendix.

> enrolling me in the program during those school years. However, Social Security (through the IRS) explained that there was no basis for me to purchase those years even if I should have been eligible for Social Security credits.

(71a). Respondent's brief conveniently left out Zhang's explanation of Social Security's comments to her that Hillsborough should have enrolled her into Social Security during the 2013-2014 and 2014-2015 school years. Significantly, Social Security expressing to Zhang that Hillsborough should have enrolled her during that time would have required a judgment that she was eligible to have enrolled during the 2013-2014 and 2014-2015 school years.

LEGAL ARGUMENT:

THE TPAF'S OPPOSITION BRIEF DID NOT IDENTIFY ANY ACCEPTABLE BASIS TO AFFIRM ITS FINAL ADMINISTRATIVE DETERMINATION.

A. The Appellate Division must refuse to consider Respondent's argument that Social Security and the State considered Appellant as having an F-1 visa during the 2013-2014 and 2014-2015 school years for being beyond the scope of the appeal.

When an issue is neither raised nor argued below by an administrative agency or a party, it becomes outside the scope of an Appellate Division appeal. Matter of Closing of Jamesburg High School Closing, 83 N.J. 540, 549, fn. 4 (1980). If an issue is not identified as such in the notice of appeal, then it is improper to first present it in briefing. Iuppo v. Burke, 162 N.J.Super. 538, 552

(App.Div. 1978).Thus, a court should not even consider a new argument on the merits. See e.g., Matter of American Reliance Ins. Co., 251 N.J.Super. 541, 557 (App.Div. 1991) (argument rejected as beyond scope of the appeal); Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J.Super. 12, 28 (App.Div. 1977) (arguments beyond scope of appeal require no discussion by the court).

Here, the TPAF failed to raise the question of Appellant's visa status specifically with Social Security and the State (as compared to the Department of Homeland Security) during its numerous opportunities prior to and within the Final Administrative Determination ("FAD"). In the TPAF's initial response to Appellant's April 2024 appeal, the State agency's test for Appellant was whether she was actually enrolled into Social Security during the time at issue:

> In accordance with N.J.A.C. 17:3-2.1(a)2, Social Security coverage is a perquisite in the Teachers' Pension and Annuity Fund. *Since Social Security contributions were not remitted* while Ms. [Zh]ang was employed at the BOE for the period covering July 1, 2012 to June 30, 2015, she was not eligible to become a member of the Teachers' Pension and Annuity Fund nor is she permitted to purchase service credit for this time.

(26a) (emphasis added). This comment which are important for this Court to consider in multiple respects. One is that this is the first of several instances of the TPAF misidentifying the years at issue in the appeal. (27a-43a). This mistake is pertinent to the larger analysis since Appellant did in fact work under the F-1 visa during the 2012-2013 school year. It is feasible if not outright probable that the

TPAF's subsequent references to Zhang's F-1 status for also the 2013-2014 and 2014-2015 school years stem from this original sin. The other significant issue we can see in this excerpt is that as of April 2024, TPAF's only stated concern was whether Social Security contributions were actually remitted. The TPAF's communication neither references Section 218 nor Appellant's visa status. (26a).

The TPAF's next writing on this issue was its July 19, 2024 determination. In that communication, the TPAF maintained the same rationale:

> Although Ms. Zhang held a TPAF-eligible position from October 1, 2013 through June 30, 2015, because Hillsborough did not withhold Social Security deductions during that period, Ms. Zhang is not eligible to receive service credit for, or purchase, that period.

(22a). Again, the TPAF did not assert that Appellant had a F-1 visa status during either the 2013-2014 or 2014-2015 school year. Rather, the TPAF explicitly stated that she was in a TPAF eligible position. We know that this was in consideration of her H-1B visa status because earlier in the page the TPAF explained:

> The record establishes that Ms. Zhang began working for Hillsborough during the 2012-2013 school year as a Chinese language Teacher under a temporary work permit under the F-1 student visa called, Optional Practice Training (OPT). *F-1 visa holders are not eligible for membership in the TPAF*, as this visa type is not covered by Social Security.

(22a) (emphasis added). Takeaways from this writing include 1) F-1 visas are not eligible for TPAF membership; and 2) Zhang was in a TPAF eligible position during the 2013-2014 and 2014-2015 school year but could not receive service

credits now because she did not contribute to Social Security when she performed the work. The only way to reconcile these two conclusions is to find that the TPAF as of July 2024 did not disqualify Zhang from enrolling into the TPAF because of her visa status during the 2013-2014 and 2014-2015 school years.

Although the TPAF did bring up some concerns in the FAD regarding F-1 visas and Section 218 Agreements, this did not stray from the TPAF's legal analysis from the two prior communications. (1a-7a). In the FAD's "FINDINGS OF FACT" the TPAF documented as Ms. Zhang working under an F-1 (OPT) visa during the 2012-2013 school year, and then an H-1B visa in the following years. There is no indication in the FAD that the TPAF thought that other government agencies had different visa statuses for Appellant during the 2013-2014 and 2014-2015 school years. Rather, the TPAF continued to understand that Zhang worked only under an H-1B visa during the 2013-2014 and 2014-2015 school years. (1a-3a). The "CONCLUSIONS OF LAW" did raise some considerations about Section 218 Agreements and F-1 visas in general. However, the TPAF here did not suggest that either Social Security or the State considered Zhang as working under a different visa than did the DHS. (4a-6a).

The record below is clear that the TPAF's stated position up to and within the FAD was that Appellant worked under an H-1B visa during the 2013-2014 and 2014-2015 school years but that she could not purchase TPAF credits for this

service because she had not contributed to Social Security at the time. However, once Appellant comprehensively laid out to this Court that people under H-1B visas are permitted to contribute into Social Security under Section 218 Agreements and that none of the facts considered by the TPAF below suggested a violation of the Section 218 agreement, the TPAF felt it necessary to present a different narrative. It was only at this time that the TPAF first asserted that Social Security had documented Appellant as working under an F-1 visa and that she would not be suffering any harm by the TPAF's determination. Accordingly, since the TPAF did not assert this position before, the proper response for this Court is to not consider the TPAF's new argument on its merits.

B. The TPAF's claims regarding Zhang's immigration status are both factually incorrect and inconsistent with the law.

Even if this Court considers the TPAF's newfound arguments regarding Social Security and the State's supposed differences in their consideration of Zhang's immigration status, this Court must still conclude that it does not provide a persuasive basis for upholding the FAD on either legal or factual grounds. To start, Appellant presented without opposition before the TPAF that she studied at Rutgers under an F-1 visa from 2010-2012, worked under an OPT (obtained through her F-1 visa) for the 2012-2013 school year, and then worked under an H-1B working visa for both the 2013-2014 and 2014-2015 school years. In fact, the

TPAF recognized this timeline of facts in the FAD. (2a). Accordingly, the TPAF's current factual assertion conflicts with its prior recognition.

Additionally, the TPAF's current argument relies upon the claim that Appellant was somehow recognized as working under both an F-1 and an H-1B visa during the 2013-2014 and 2014-2015 school years.[4] Yet, the TPAF has not produced any record from Social Security in support of this claim. Rather, the only documentation before this Court addressing Zhang's visa status during the 2013-2014 and 2014-2015 school years is the Department of Homeland Security's ("DHS") approval of Appellant's application for the working visa. (87a, 89a-90a). Yet, the TPAF wants this Court to conclude, without any evidence, that another branch of the federal government contemporaneously considered her as working under a student visa..

Further casting doubt as to the veracity of the TPAF's claims of Zhang also having a student visa during the 2013-2014 and 2014-2015 school years is the TPAF's inability to explain how or why she became eligible for Social Security in September 2015. Zhang did not have any change in job status at that time, and her second H-1B visa was in effect from July 1, 2014 to June 30, 2017. (89a). Rather,

[4] In Respondent's opposition to Appellant's motion to supplement the record, Respondent admitted that its references to J-1 rather than F-1 visas in its opposition brief were in error. Relying upon this confession, Appellant will not address Respondent's references to J-1 visa on their merits.

the only event of note from around that time was Hillsborough realizing that it had inadvertently not enrolled Zhang into Social Security and correcting its mistake starting in September 2015. (92a). The TPAF has not pointed to any evidence to suggest that this enrollment required making Zhang eligible for Social Security, rather than Zhang finally taking advantage of her eligibility to enroll. Yet, the TPAF is directing this Court to reject all of these facts to instead believe that an undocumented "something else" was responsible for Zhang not being enrolled into Social Security.

This Court must reject the TPAF's claims additionally because the TPAF's position is also a legal impossibility. Although Ms. Zhang worked under an F-1 visa for the 2012-2013 school year through an OPT, she would not have been allowed to continue working under that visa for the 2013-2014 or 2014-2015 school years. Federal regulations and the U.S. Citizenship and Immigration Services are unambiguous that individuals who teach a subject matter such as a language can only utilize an OPT for up to twelve months of post-degree employment. See 8 C.F.R. 214.2F(10). The courts have consistently found that individuals like Zhang (who are not working in STEM) can utilize an OPT for only up to 12 months. See e.g., Smith v. United States Citizenship & Immigration Serv., 2021 WL 148741, at *1 (N.D. Ala. Jan. 15, 2021); Hossain v. Job Serv. N. Dakota, 2023 WL 2894349, at *1 (D.N.D. Apr. 11, 2023), aff'd sub nom. Hossain

v. Job Serv. of N. Dakota, 2023 WL 8232205 (8th Cir. Nov. 28, 2023); Wen v. SanQuest, Inc., 2025 WL 276750, at *1 (N.D. Tex. Jan. 23, 2025).

In asserting that Zhang was considered to also be under an F-1 status for Social Security or State purposes during the 2013-2014 and 2014-2015 school years, the TPAF is either misunderstanding immigration law or attempting a new form of alchemy to justify its determination. Either way, the TPAF's description of Zhang's immigration status does not pass muster. As this inaccurate description of Zhang's immigration status was the keystone to the TPAF's now stated rationale for denying Zhang's request to purchase pension credits for the 2013-2014 and 2014-2015 school years, this Court must find that the TPAF's FAD was arbitrary, capricious and unreasonable.

C. The TPAF failed to demonstrate how Zhang's employment is precluded from enrolling into Social Security by the Section 218 Agreement.

To reiterate Appellant's prior submission, Appellant does not contest that the State entered into a Section 218 agreement with Social Security and the TPAF needs to comply with it. (Ab 27-35). However, the TPAF failed to provide this Court with any persuasive evidence that recognizing Zhang's employment during the 2013-2014 and 2014-2015 school years as eligible for TPAF credits would conflict with Section 218. Although Respondent identified 8 U.S.C. 1101(a)(15)(F), (J), (M) and (Q) as grounds excluding a non-resident from Social

Security coverage, Respondent identified only 8 U.S.C. 1101(a)(15)(F) as a basis for excluding Zhang from Social Security coverage. (Rb 10-11). Appellant has already explained why the provision did not prohibit Zhang from enrolling into Social Security between 2013 and 2015. (Ab 31). But in the context specifically of Respondent's new assertion that Zhang was a F-1 visa holder[5] between 2013 and 2015, we again refer to the plain language of the provision:

> [A]n alien having a residence in a foreign country which [s]he has no intention of abandoning who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study…

8 U.S.C. 1101(a)(15)(F). As this provision applies only to a "bona fide student" and the TPAF has not contested that Zhang was last a student in 2012, this Court must find the provision to be irrelevant to the instant situation.

Respondent's brief is silent as to how 8 U.S.C. 1101(a)(15)(F) applied to Zhang since she was not in school between 2013 and 2015 and was clearly planning on being in America long term (not temporarily). Although F-1 visas do allow OPTs post-graduation, someone in Zhang's subject matter can work under

[5] In this part of its opposition brief Respondent referred to J-1 rather than F-1 visas. The irony is not lost on Appellant that the TPAF made this mistake while making an argument reliant on rejecting Hillsborough's admission that Zhang's non-enrollment into Social Security during the 2013-2014 and 2014-2015 school years was because of Hillsborough's mistake in forgetting to enroll her into the system.

an OPT for only one year. Accordingly, There is no way to stretch the definition of 8 U.S.C. 1101(a)(15)(F) to also cover Zhang's employment during those two school years. Accordingly, this Court must reject the TPAF's claim that Zhang was ineligible for Social Security benefits under 8 U.S.C. 1101(a)(15)(F) for either the 2013-2014 or 2014-2015 school years and thus find that allowing Zhang to purchase TPAF credits for those years does not conflict with Section 218 agreements.

D. The TPAF misapplies Seago

Appellant directs this Court to refer to its prior argument generally for why Seago v. Board of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381 (2024) supports reversing the TPAF's decision below. (Ab 36-39). However, Respondent's brief raises numerous points regarding Seago which requires addressing herein. For example, in applying the Seago elements, the TPAF summarily asserted that it "turned the corners" in applying N.J.A.C. 17:3-2.1. (Rb 16). However, the TPAF did not address how its interpretation of "covered by" under that regulation is consistent with N.J.A.C. 17:3-6.1's reference to being "enrolled" in Social Security, despite Appellant raising this issue in Appellant's initial brief. (Ab 26-27). That is because there is no justification for treating them to mean the same thing. It is clear that the TPAF's "interpretation" of N.J.A.C.

17:3-2.1 was an arbitrary decision meant to support its pre-determination against Zhang. Accordingly, the TPAF did not "turn the corners" in its consideration of N.J.A.C. 17:3-2.1.

The TPAF's attempt in its brief impose an additional test by asserting that Zhang did not act with "reasonable diligence" is improper in multiple respects. (Rb 16). For one, there were no deadlines for when Zhang needed to contact Social Security or file an appeal with the TPAF. Additionally, the standard imposed by the Supreme Court in Seago is not the "reasonable diligence" espoused here by the TPAF but rather "good faith and reasonably". If this Court were to instead apply the TPAF's proposed standard, then Ms. Seago herself would fail the test. The Supreme Court, though, did not punish Ms. Seago for waiting several years to see if the interfund transfer application went through, even after the Division of Pensions sent her a notice letter as to the closing of her PERS account. If the Supreme Court in Seago did not require "reasonable diligence", then it is inappropriate for the TPAF to impose this additional burden on Zhang.

The TPAF is also wholly inaccurate in its analysis of who would suffer harm from the instant appeal. The TPAF knows fully well from its own guidebook that the nearly two years of pension credits at issue here has a significant impact on the valuation of her retirement benefits. For the TPAF to claim that Zhang will suffer no harm despite understanding that the two years at issue here would change the

valuation of her pension benefits by nearly 4% is, at best, disingenuous. Accordingly, this Court must reject the TPAF's premise that Appellant would suffer no harm by this Court upholding the FAD.

Rather, it is the TPAF who would be unaffected if the Appellate Division reversed the FAD. The TPAF's argument claiming otherwise is based upon the fiction that reversing the FAD would conflict with its Section 218 agreement. (Rb 17-18). However, since Zhang worked the 2013-2014 and 2014-2015 school years solely on a working (H-1B) visa, we know that she was not disqualified under any provision of 8 U.S.C. 1101 from enrolling into Social Security and accordingly the TPAF. Accordingly, there is no conflict between granting Zhang pension credits and the Section 218 Agreement.

In review, this Court must conclude that the TPAF was arbitrary, capricious and unreasonable in denying Zhang the opportunity to purchase pension credits for her employment with Hillsborough for the 2013-2014 and 2014-2015 school years. As Zhang was employed only under a working (H-1B) visa, the TPAF did not identify any statute or provision which would have disqualified Zhang at the time from enrolling into Social Security. Further. when applying Seago, all the elements support Zhang over the TPAF. Accordingly, this Court must reverse the FAD and allow Zhang the opportunity to purchase pension credits for her work during the 2013-2014 and 2014-2015 school years.

CONCLUSION

For the reasons herein and in Appellant's initial brief, we respectfully ask the Court to reverse the New Jersey Division of Pensions and Benefits, Teachers' Pension and Annuity Fund's November 15, 2024, Final Administrative Determination to deny Shu Zhang's request to purchase pension credits for her employment with the Hillsborough Board of Education during the 2013-2014 and 2014-2015 school years. Instead, Appellant respectfully requests the Court to find that Ms. Zhang is eligible to purchase pension credits with the Teachers' Pension and Annuity Fund for those years of service.

Respectfully submitted,
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/s/ Samuel Wenocur

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